WTM/GM/EFD-1/DRA-III/04/2021-22

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

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

In the matter of BRD Securities Limited

In respect of:

Sl. No.	Noticee(s)	PAN
1.	BRD Securities Limited	AAACB9980B
2.	Surendran Thazhathpurakkal Krishnan	AKVPK2336A
3.	Chanayil Gopalan Surendran	AJEPS3796A
4.	William Verghese Chungath Cheru	ACKPV7803J
5.	Gigy Verghese Pulikkottil	ACTPP3500F
6.	Prasad Punnoose	AGBPP0338F
7.	Porathur Devassy Antony	AGJPD0248A
8.	Mary Williams	AAHPW7793F
9.	Cheruvathoor Kuriappan	ACFPA2131D
10.	Jojo Njezhuvinkel Joseph	AAXPN6645H
11.	Arimpilly Vishnu Bhattathirippad	ADAPB9983C
12.	Thomas Augustine	AEQPT2614H

Background

1. Securities and Exchange Board of India (SEBI), pursuant to receipt of information regarding issuance of equity shares by BRD Securities Limited (BRD / the Company), an RBI registered Non-banking Financial Company (NBFC), conducted examination in the matter to ascertain the possible

violations of various laws pertaining to public issue of securities. On examination of various documents including information from the Registrar of Companies (RoC) database and submissions made by the Company, it was *inter alia* observed that the Company had made equity allotments since Financial Year 2000-01 onwards on various occasions. The details of the said equity share allotments (excluding instances of bonus issue and rights issue and issues made to less than 49 persons) are as follows:

Date of board resolution*	**Date of allotment**	**No. of allottees**	**No. of shares**	**Share premium**	**Amount raised (nominal)**
6-10-2001	06-10-2001	246	196000	-	1960000
28-10-2004	28-10-2004	283	578700`	-	5787000
22-6-2005	22-6-2005	294	1119200	-	11192000
13-10-2005	13-10-2005	311	676100		6761000
23-8-2007	23-8-2007	425	1113500		11135000
25-9-2008	25-8-2008	487	1527600		15276000
14-1-2010	14-1-2010	579	1497795	29955900	14977950
25-11-2010	25-11-2010	909	3044423	1522221150	30444230
Total		**3534**		**182177050**	**97533180**

2. It was further observed that each of the Board Resolutions passed by BRD in respect of the abovementioned issues, as noted from the Annual Reports of BRD, contained a clause regarding allotment of *"equity shares to any person including existing members of the company, in any manner the board may deem fit."*

3. Section 67(3) of the Companies Act, 1956 provides that no offer or invitation for subscribing to shares shall be treated as made to the public if the offer or invitation can properly be regarded, in all the circumstances - (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming

available for subscription or purchase by persons other than those receiving the offer or invitation; or (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. However, the first proviso in Section 67(3) provides that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Even further, the second proviso in Section 67(3) provides that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956.

4. The Company in its submissions to SEBI had claimed *inter alia* that the second proviso to Section 67(3) of the Companies Act, 1956 exempts NBFCs from the first proviso, and therefore invitation to 50 or more persons by NBFC would not be deemed to be a public issue. However, it was noted by SEBI that the abovementioned second proviso of Section 67(3) was not a blanket rule and the Company still needed to prove that it had an intention to offer the securities only to those persons who received the offer or the issue was a domestic concern of the Company. The Company had allegedly failed to do so.

5. In view of the above, it was observed that since the Company made allotment of equity shares to a total of 3534 persons on 8 instances from October 06, 2001 to November 25, 2010, there was an obligation to file prospectus in connection with the issue of securities and comply with provisions of Sections 56(1), 56(3), 60(1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956 and Section 456(2) of the Companies Act, 2013; Clauses 2.1.4, 2.1.5, 5.3.1, 2.1.1, 5.6.2, 2.2, 4.14.11, 4.14, 8.8.1, 5.6A, 8.6.1, 6.0 to 6.33 and 5.12 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000; Regulation 4(2)(d) & (e), 5 (1), (2), (5) & (7), 6(1), 7, 26(1), (2) & (6), 32(1), 36, 37, 46(1), 47(1), 49(1), 57(1), 58(1) & (2) and 63 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR 2009) read with Regulation 301 of the SEBI (Issue of Capital and Disclosure Requirements)

Regulations, 2018 (ICDR 2018). It was alleged that the Company had failed to do so.

6. Accordingly, a Show Cause Notice dated April 05, 2019 read with Supplementary Show Cause Notice dated December 12, 2019 (together referred to as the 'SCN') was issued to the Company (Noticee no. 1) and 11 persons, named at serial nos. 2 to 12 in the Table on page 1 of this order (Noticee nos. 2 to 12), who were directors of BRD during the relevant time and as such were responsible for the affairs of the Company, for the abovementioned alleged violations, calling upon them to show cause as to why appropriate directions should not be issued against the Noticees, including but not limited to the following:

   (a) Directions against Noticee nos. 1 to 12 for refund of all subscription money in terms of Section 73 of the Companies Act, 1956.

   (b) To restrain Noticee no. 1 / BRD from issuing any further securities and from accessing the capital market for a period as deemed appropriate.

   (c) To restrain Noticee nos 2 to 12 from accessing the capital market for a period as deemed appropriate.

7. The Noticees replied to the SCN vide letters dated May 09, 2019 and October 26, 2010. Subsequently, an opportunity of personal hearing was granted to the Noticees by scheduling the same on February 26, 2020. In the meantime, BRD filed a writ petition before the Hon'ble High Court of Kerala, challenging the initiation of instant proceedings by SEBI against the Company and praying for a declaration that the SCN issued by SEBI was ultra vires the provisions of the Companies Act and the SEBI Act, 1992. Pursuant to the same, the Hon'ble High Court vide its order dated February 24, 2020 stayed the passing of final order by SEBI in the instant matter for a month. However, the Court directed that the scheduled hearing would go on.

8. Accordingly, the personal hearing took place on February 26, 2020 which was attended by the Noticees. In the meantime, various investor complaints were received by SEBI against BRD in respect of equity shares issued by it, about which the Company was informed during the personal hearing. Subsequently, vide various orders the Hon'ble High Court extended the bar on passing of final order by SEBI on several occasins. Finally, vide order dated February 25, 2021, the Hon'ble High Court dismissed the said writ petition by observing that the same lacked merit. The said order of the Hon'ble High Court was appealed against by the Company before a two-judge bench of the Hon'ble High Court. However, the said appeal was dismissed by the two-judge bench vide an order dated March 08, 2021 whereby the Hon'ble High Court directed SEBI to serve copies of all material, complaints, documents, etc. relied upon to the Company within two weeks from the date of receipt of the order copy. The Hon'ble High Court further directed that the appellant (BRD) would be at liberty to file its detailed objections, if any, within a week thereafter, and that the proceedings be finalised within a period of two months from the date of receipt of the order copy after providing hearing to the appellant. The Hon'ble Court made it clear that the findings against the appellant made in the order of the Learned Single Judge would stand vacated, and that the appellant would be at liberty to take out all material contentions in the proceedings.

9. Consequent to the above order of the Hon'ble High Court, the Noticees were provided with copies of all the relevant material vide email dated March 24, 2021. Subsequently, they were granted an opportunity of personal hearing on May 07, 2021 which was attended by Shri PR Ramesh, Advocate, on behalf of the Noticees. The Noticees were granted time till May 14, 2021 to file their written submissions, which they did vide email dated May 14, 2021.

10. The Noticees vide letters dated May 09, 2019; October 26, 2010 and May 14, 2021 have submitted *inter alia* the following:

(a) The Company denies the allegation that it has contravened Section 67 of the Companies Act, 1956. Merely because the allotment has been made to more than 49 persons, it does not mean there is a contravention of law.

(b) As per Section 67(3) of the Companies Act, 1956, an issue can be termed as an issue emanating from an offer made to members of public, only if the offer is not intended to be made to persons being the domestic concern of the Company that makes the offer. Secondly, every offer of shares to more than 49 persons, ipso facto, cannot be deemed to be a public issue falling outside the permitted circle of Section 67 of the Companies Act, 1956.

(c) The definition of public issue as per guideline no. 1.2.1 (xxii) of the SEBI DIP 2000 means an invitation by a company to public to subscribe to the securities offered through a prospectus. These guidelines did not refer to making an offer or invitation to persons more than 50 as provided in Section 67. Since the Company had never intended to invite public for subscription or issue a document in the form of a prospectus, these guidelines would not apply to the past issues of equity shares. Further, no amendment was brought to the definition of public issue until the year 2008, till when the guidelines were in force.

(d) Under Section 67 of the Companies Act, 1956, there is no provision which specifies a period of time within which a company cannot make a subsequent offer. In simple words, Section 67 does not introduce a minimum mandatory time gap between one issue and another.

(e) Decision of the Supreme Court cannot be applied to every case. Each case turns out on facts. There is nothing under Section 67(3) which suggests that every case where issue has been made to more than 49 persons would be ipso facto a public issue, especially because the company is an NBFC.

(f) The Company has provided applications for shares to only those to whom the offer or invitation was made and clause 14 of the application form specifies that the offer of that particular application form is to such persons

to whom that form is sent and not to any other person which would have resulted in a public offer. The application form issued by the Company also contained a printed text stating “private placement application form” and “form for private circulation only”.

(g) An offer or invitation can be said to have been made to members of the general public only if the offer or invitation lands in the hands of persons whose particulars are not known to the Company at all until the time when a subscription is made by that person. No such offer or invitation to public was made at any point by the Company and there was no intention to do so nor to get the shares listed in the stock exchanges in order to say that it is a company that intended to get its securities listed. No advertisement or paper notice or circulation of any form of notices or bills was made by the Company at any point of time.

(h) The Company is neither a listed company nor has intended or promised any of its investors on its intentions to get its securities listed and hence does not come under the ambit of companies administered by SEBI. Thus, SEBI has no jurisdiction to issue the SCN.

(i) The action by SEBI in this matter is time barred.

(j) In respect of each of the allotments referred to in the SCN, the Company had filed the requisite return of allotment, issued share certificates, made entries in register of members, called and held extra-ordinary general meetings and AGMs by issuing proper notices, paid dividends, corresponded with shareholders, carried out transfers and transmissions and other requirements of shareholders, transferred unclaimed dividend to IPEF and filed audited financial statements with RoC and RBI. In the public domain, all this information was residing ever since the return of allotment was filed under Section 75 of the Companies Act, 1956. Therefore, it is clear case of action barred by limitation, even assuming that SEBI has jurisdiction over the subject matter.

(k) The offer and allotment of shares is a contract between the parties, even if it is assumed that the contract is void ab initio, the provisions of the Indian Contract Act, 1872 will apply. All the shareholders have acted as shareholders for period of 10 to 20 years and they have received benefits of dividends declared and paid by the Company from time to time. Therefore, dehors the legal position, any direction to repay all the money with interest is wholly untenable.

(l) The company is calling and holding shareholders meeting properly and regularly, paying dividends to shareholders. There have been no investor complaints. There has been no fraud. All records, registers and returns are available for inspection. Whatever information has been called for has been provided. It is unreasonably disproportionate to require the Company to return all the monies raised through those allotments with interest.

(m) The RBI circular no. DNBD(PD)CC no. 330/03.10.001/2012-13 dated June 27, 2013 for the first time specified that an offer to more than 49 persons will be construed as a public issue. Therefore, all issuances of shares made until June 2013 are not covered by the 49 persons norms and hence there is no violation in the issue of equity shares.

(n) The Noticee submits a copy of the Application Form with proper printing, indicating that the issues were on private placement basis. Further, on point as to whether the issues were made only to persons who received the offer, the Company submits full list of share allottees and how they were already related to the Company, thereby satisfying that it was a domestic concern of the Company.

(o) Leaving aside the above contentions, the Company is ready to offer a scheme of arrangement by which an exit window could be granted to the existing shareholders through personalized communication to the respective shareholders in the manner in which notices of General Meetings are issued to shareholders and also by public advertisement whereby fair price for the shares arrived at by a registered valuer can be given to those

shareholders who come forward and surrender their shares within a specified period of time from the date of issuance of notice.

(p) BRD Securities Ltd. was incorporated on March 09, 1993 in the State of Kerala as a finance company and is based in Thrissur district of Kerala State. It obtained a Certificate of registration dated 28.11.1998, from the RBI to carry on business of NBFC and is a non-deposit taking NBFC. It is engaged in the business of lending to small business, giving loans etc. It has about 32000 customers and loan and advances of Rs. 141.10 crores as of date. The paid-up share capital as of date is Rs. 31.32 crores and borrowing by way of debentures, sub-ordinate debt etc. is about Rs. 104.62 crores.

(q) The Company is well known in the local financial markets and has been one of the stable small sized NBFC in the area. It raised share capital from time to time from promoters, directors and their friends and relatives. It has always approached current shareholders, friends and relatives of promoters / directors, for capital and has never approached the public or made a public issue of shares. That all the applicants are known to the promoters / directors / company is also evident from the postal addresses of the shareholders, as they are all based in Thrissur. It is also submitted that the SEBI DIP Guidelines treat contributions from promoters, directors, and their friends and relatives as part of promoters' contribution. Reliance is placed on clause 4.9.4 of the DIP Guidelines in this regard. By the year 2001, the company had about 240 shareholders who were all friends and relatives of the promoters and directors. The impugned SCN deals with the private placement issues made from October 2001 onwards till 2010 and not the capital raised prior to this period. Each of the private placement issues was approved by the shareholders at the relevant general body meeting pursuant to special resolution passed under Section 81(1A) of the Companies Act, 1956. Sub section (1) of Section 81 provides for issue of further share capital to the existing shareholders i.e a Rights Issue. This is the right of pre-emption in that the existing shareholders have a right to

subscribe to additional new shares. However, if three fourths of the existing shareholders agree by special resolution, this right of pre-emption is waived and the new shares can be issued to any other person. Sub Section (1A) of Section 81 provides for such further issue of shares to persons other than current shareholders if a special resolution is passed at the General meeting of the company.

(r) When a further issue of shares is made to 'any persons', it does not necessarily make it a public issue. It could be a public issue or a private placement because the shares are offered to persons other than the current shareholders. Therefore, even in the case of a private placement, since it involves further issue of shares to other than current shareholders, even if it may be a few new shareholders, the resolution has to refer to 'other persons' as required by law. Therefore, the issues referred to in the impugned SCN do not become public issues merely because the special resolution has been passed by the general body of the Noticee, under Section 81(1A) referring to 'any person'.

(s) The impugned SCN alleges that the Noticee had made equity share allotments since financial year 2000 on various occasions, as per the ROC records / company submissions. The Noticee submits that while each of the issues on private placement is distinct having different dates of allotments, the impugned SCN has attempted to portray an erroneous picture by alleging that "the company made allotment of equity shares to total of 3534 persons on 8 instances from October 6 2001 to November 23, 2010, hence there was an obligation to file prospectus in connection with the issue of securities…" The impugned SCN fails to state if each of the private placement issue is an alleged contravention and in the absence of such a charge, how the impugned SCN can propose to issue a direction to refund the proceeds pursuant to Section 73 of the Companies Act. The provisions of Section 73 of the Companies Act apply to each issue of shares separately and assuming there is a violation, the refund envisaged in Section 73(2) has

to be ordered for each issue separately and cannot be clubbed, as stated in the impugned SCN.

(t) The impugned SCN while listing out the various private placement issues has proposed action and directions against the 11 (eleven) Directors on the Board of directors of the Noticee. In this regard, it is submitted that one of the Directors, Mr. Arimpilly Vishnu Bhattathirippad (Noticee 11) has passed away on 20-1-2017 and another director, Mr.Jojo Njezhuvinkel Joseph (Noticee 10) was appointed as a Director on 23-6-2016, i.e. after the said issuances. Further, Mr. Surendran Thazhathpurakkal Krishnan (Noticee 2) was appointed as a director on 23-3-2006. It is submitted that the proposed directions, if any, against Mr. Arimpilly Vishnu Bhattathirippad (Noticee 11) may please be dropped. Further, since Mr. Jojo Njezhuvinkel Joseph (Noticee 10) was not on the Board of directors of the Company during the relevant period of alleged violations from 2001 to 2010, but was appointed on 23-6-2016, the directions contemplated against him may also be dropped. As regards Mr. Surendran T Krishnan (Noticee 2), since he was not on the Board of directors of Noticee during the issues made from 2001 to March 2006, and was appointed as a director on 23-3-2006, any actions contemplated against him for the prior period may be dropped. Sub section (2) of Section 73 casts an obligation on the company and every director of the company who is an officer in default to jointly and severally repay the money with interest as prescribed, and therefore such obligation is on the relevant directors who were responsible for the issue, if such issue was in contravention of Section 73. Therefore, the liability, if any, is on the relevant directors at that time and not the other directors.

(u) As regards the proposed action of restraint on the Company and the directors, as mentioned under para 15 (b) and (c) of the SCN, it is not stated therein as to the provisions of law under which the said directions are proposed to be issued. Further, the exact quantum of restraint from accessing the capital market is not indicated. In this respect, the SCN is vague. It is trite law that a show cause notice must tell the Noticee the legal

provisions under which the penalties / directions are proposed and the specific penalty / restraint must be indicated. In this regard, the Noticee refers to the judgment of the Hon'ble Supreme Court in the matter of Gorkha Security Services v. Govt of NCLT of Delhi & Ors [2014(9)SCC105].

(v) The impugned SCN has been issued belatedly, after almost 18 years after the first issue of private placement was made in 2001. Even the last issue of the private placement was made in 2010 i.e. about 9 years before the issue of the impugned SCN. The very fact that the impugned SCN was issued 19/10 years after the event has rendered it impossible to look for old registers sought by SEBI to defend the proceedings. The SEBI Act does not contain any provisions on the time within which SEBI is required to initiate any action for alleged contraventions of the provisions of the Act. However, the Hon'ble Supreme court in various cases has held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period.

(w) The Noticee submits that the substantial delay in starting an investigation and issuing the impugned SCN is prejudicial to the Noticee. During the last 20 years, the funds raised from the private placements have been utilized in the legitimate business of the company and the Noticee has scrupulously complied with all the compliances and rules under the Companies Act, 1956 as applicable then. The Noticee was inspected by its regulatory authority viz. RBI many times during the last 20 years. It has deployed the funds towards lending activities and currently there are about 32000 borrowers. The shares have been transferred amongst various persons, as permitted under the provisions of the Companies Act, and thus, third party rights have also been created. The proposed directions, including the direction to refund all the subscription money in terms of Section 73 of the Companies Act, 1956, are untenable merely on the ground of unreasonable delay and laches in initiating the inquiry and proceedings.

(x) The Companies Act prescribes various records and documents to be maintained, some of which are permanent records and some are to be

maintained for specific period of time of 5/8 years. The records sought by SEBI pertaining to the private placements which are in the nature of permanent and statutory records have been made available to the Regional office Kochi of SEBI and are available at any time. Such records that are available include the application forms, details of the applicants, the board minutes / resolutions for allotment, share transfer registers, the minutes of the general body meetings, allotment forms filed with the ROC, the annual returns etc. But the Noticee is unable to ascertain whether any other records which are registers and documents not prescribed under law, or required to be kept mandatorily are available due to lapse of time and shifting of offices during the last 20 years, change of personnel handling the records etc. However, some computer records were maintained based on which the submissions have been made. The unreasonable delay in initiating the proceedings deprives the Noticee of its right to defend adequately and actions if any, that SEBI may take on the grounds inter alia of non-production of records and/or, ignoring the unreasonable delay and laches in initiating the proceedings would be highly prejudicial to the Noticees.

(y) The Noticee submits that neither Section 67 of the Companies Act, 1956 nor the provisions of the SEBI DIP Guidelines or the SEBI (ICDR) Regulations stipulate any records to be maintained or procedure to be followed for private placements. The details of the records to be maintained for private placements have been introduced subsequently in Section 42(7) of the Companies Act, 2013. Therefore, any adverse finding that certain records are not made available will be highly erroneous particularly when no procedure is prescribed and there was no stipulation as to maintenance of records, during the period covered in the impugned SCN.

(z) The Noticee submits that each of the Issues referred in the impugned SCN is a legally made pure private placement issue. The Noticee is an NBFC registered with RBI. Therefore, by virtue of the second proviso to sub section (3) of Section 67, the stipulation that a private placement cannot exceed 49 persons does not apply to the issues that are the subject matter

of the impugned SCN. The impugned SCN itself states that in case of NBFCs, the second proviso to Section 67(3) of the Companies Act, is not a blanket rule and the Noticee needs to prove that it had an intention to offer the securities only to those persons who received the offer or that the issue was a domestic concern to the company. In this regard, the Noticee submits as follows:

- It has not issued any circular, advertisement, Information memorandum, offer letter or any prospectus or any material of any nature for any of the issues; nor is there any such allegation in the impugned SCN.

- During the relevant period i.e. 20 years ago to 10 years ago, there was no procedure prescribed or statutory record stipulated for private placement issues, either under Companies Act or the DIP Guidelines, except that the Noticee had to follow the provisions of Section 67 (3) and comply with the filing requirements under the Companies Act, 1956, such as Form 2 for allotments, Annual returns etc.

- It strictly adhered to the stipulation that no application was directly or indirectly available to any person other than to whom the application was given. Being a company based in a small local community, the promoters and directors knew every shareholder and his / her family. The company has maintained computer records for every issue, wherein each application was mapped with the promoter / director who knew the applicant and such promoter / director obtained the application from the applicant. At that time, the Noticee followed the process of giving the application with the name written to the person and obtained it back from him. It was thus ensured that the application was not circulated to others.

- The Noticee is able to map every applicant, his/her address and how the applicant is known to the company, even now after a gap of 20 years, from the above computer records.

- The addresses of applicants (except few who would have changed the address) are from Thrissur and every applicant is known to the company

(being already shareholder) / promoter / director. In fact, the DIP guidelines at clause 4.9.4 and the SEBI ICDR also allow the subscription by promoters, their friends and relatives as part of the promoter contribution, implying that applications from these persons are not public offers.

- No invitation or offer was made to a section /class of the public such as depositors, borrowers, bond holders etc.
- Every application indicates it is a private placement.
- All the applicants are genuine and have been receiving dividends over the last many years whenever declared by the company.
- There are no complaints from any applicant about the impugned issues and the complaints forwarded by SEBI do not pertain to the subject matter of the impugned SCN. The replies on the complaints are enclosed. The details of every applicant and how he/she is known to the company / promoter / director along with an Affidavit from the Managing Director of the Company confirming what is stated herein above are enclosed. It may be observed from the same that substantial applicants were already current shareholders.

(aa) Neither the Companies Act, 1956 nor the DIP Guidelines contained any provisions as to maintenance of records under Section 67 of the Companies Act for private placement issues. The provisions relating to the procedure for private placement and records to be maintained was first introduced in sub-section (7) to Section 42 of the Companies Act, 2013.

(bb) The Noticee would like to rely upon the observations made by the Hon'ble Supreme Court in its Judgment dated 31-8-2012, in civil appeal 9813 of 2011 (Sahara India Real Estate Corporation Ltd. V SEBI). Unlike the said case, the Noticee had not sought any declaration from the applicant about association and has not sought any introducer. Further, the Hon'ble Supreme Court in the said matter has provided the manner in which it could

be determined if the offer / invitation was a public offer or not. It has held that offers to existing members, their family, employees, debenture holders *inter alia* constitute 'connection' with the company and are not pubic offers. This is in addition to the friends and relatives of the promoters who are recognized as part of promoter group under the SEBI DIP Guidelines. Considering the same, the details submitted by the Company would establish that each of the issue referred in the impugned SCN was not a public offer but was private placement offer and thus, the charges of violation of the provisions of the Companies Act and other laws as alleged in the SCN do not sustain.

(cc) The Noticee further submits that even assuming (but not accepting) that provisions cited above were not complied with by the Noticees, the directions of restraint proposed under para 15 (b) and (c) of the impugned SCN will not be remedial but penal in nature, more particularly in view of the fact that Section 73(2) itself provides the remedy. In this regard, the Noticee submits that SEBI had passed certain directions in the Sahara matter which were modified by the Hon'ble Supreme Court. The Noticee refers to the relevant paragraphs from the Sahara Judgment (of Justice Kehar) for easy reference. Therefore, the said proposed directions should be dropped.

(dd) The Noticee has given detailed explanations for each of the complaints forwarded by SEBI. It submits that none of the complaints pertains to the subject matter mentioned in the impugned SCN. The complainants are transferees who purchased shares from other shareholders on different dates (many years after 2001 to 2010 – the impugned issues) and after receiving dividends, as and when declared by Noticee, have complained that the company could not pay dividends or could not give exit. The Noticee being in NBFC sector, faced lot of stress after 2015 in the light of various economic factors beyond the control of the company as explained in the replies to the complaints. In this regard, it is submitted that the Noticee, except registering the transfer of shares, is not involved with the

complainants. In this regard, the Noticee draws reference to Section 64 of the Companies Act, 1956.

Consideration:

11. I have examined the facts of the case, the allegations against the Noticee, the documents available on record and the reply of the Noticee in respect of the charges.

12. I note that the entire allegations against the Noticee revolve around the sole issue which is whether the 8 instances of issuance of equity shares, as referred to in the SCN, qualify as offer and invitation to public to subscribe to securities, as provided under Section 67 of the Companies Act, 1956. I note that the Noticees have not denied the fact of these issuances which were made to more than 49 persons in each of the seven instances. However, it has sought to portray these issues as having been made on private placement basis, in terms of Section 67(3) of the Companies Act, 1956.

13. Before proceeding any further, I deem it appropriate to look into the provisions of Section 67 of the Companies Act, 1956, which read as follows:

> *"67. CONSTRUCTION OF REFERENCES TO OFFERING SHARES OR DEBENTURES TO THE PUBLIC, ETC*
>
> *(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances –

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation:

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided further** that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).*

(3A) Notwithstanding anything contained in sub-section (3), the Securities and Exchange Board of India shall, in consultation with the Reserve Bank of India, by notification in the Official Gazette, specify the guidelines in respect of offer or invitation made to the public by a public financial institution specified under section 4A or non-banking financial company referred to in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934)."

14. As can be seen from the above, any offer and invitation to subscribe to securities of a company qualifies as a public issue, except in these circumstances where the offer or invitation can properly be regarded:

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

15. However, the first proviso to Section 67(3) provides that the above provision would not apply in case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Even further, the second proviso to Section 67(3) provides that nothing contained in the first proviso shall apply to the NBFCs or public financial institutions specified in Section 4A of the Companies Act, 1956. It is in light of these legal provisions that the issue at hand has to be decided.

16. I note that since the Noticee is an NBFC, by virtue of the second proviso to Section 67(3) of the Companies Act, 1956, it can make an offer and invitation to subscribe to shares to 49 persons or more, without the said offer or invitation being qualified as having been made to public ("public issue in short"). However, the said exemption is granted to an NBFC only in terms of number of persons to whom the offer / invitation can be made. If the Noticee, being an NBFC, makes the offer / invitation to more than 49 persons, it still has to comply with the requirements of private placement, as mentioned under Clause (3) of Section 67, quoted above. The above position of law has clearly been laid down in various orders of the Hon'ble Securities Appellate Tribunal, including in cases of *Alchemist Holdings Ltd. vs. SEBI (Misc. Application No. 292 of 2015 And Appeal No. 423 of 2015, Date of Decision: 29.06.2018)* and *Vistra ITCL*

(India) Ltd. vs. Adjudicating Officer, SEBI (Appeal No.484 of 2018, Date of Decision: 17.10.2019).

17. I note that the Noticee has not challenged the abovementioned interpretation of the then existing legal provisions. It has primarily contended that the issuances referred to in the SCN do not qualify as public issues since the offers for equity shares in respect of the abovementioned issuances were made only to persons known to the Company, which included existing shareholders, directors / promoters and their relatives, friends etc. It has also contended that it had not issued any advertisement, information memorandum, offer letter or any prospectus or any material of such nature for any of the issues. Further, it strictly adhered to the stipulation that no application was directly or indirectly available to any person other than to whom the application was given. The Noticee has also quoted paras 51 and 87 of the judgment dated 31-08-2012 of the Hon'ble Supreme Court in the matter of Sahara India Real Estate Corp. Ltd. V. SEBI (Civil Appeal No. 9813 of 2011) to contend that offer made to known persons already connected with the Company qualify as private placements.

18. As regards the above contention, the Noticee during the personal hearing held on February 26, 2020 as well as May 07, 2021 was asked to submit the records of individual persons who were approached by the Company with application forms for the issue of equity shares purportedly on private placement basis and also the records indicating whether the said application forms came back to the Company from the same person. In this regard, the Noticee has submitted a copy of a Table in excel sheet *inter alia* containing the names of the shareholders and the purported relationship of the shareholder with the company. From the details mentioned in the said Table, I note that the relationship details mentioned in the "Remarks" column are very short and cryptic. While most of the relationships are shown as *"Already a shareholder"*, there are other vague descriptions, like "*staff*", "*Relationship with Associated Firm*", "*Investment Customer …*". The abovementioned excel sheet only contains the details of the persons who were finally allotted shares. Beyond

that, the company has not submitted any records like the copies of registers showing the complete list of persons whom the Company had approached for subscription before each allotment, the records detailing method of such selection and the mode of communication of offer, the minutes of any meeting held in this regard etc. Thus, while it is true that the offer made by an NBFC to more than 49 persons who are associated with a company would qualify as private placement, the Noticee has failed to substantiate the claim in this case that the offer and invitation was made only to persons associated with the Company. The Noticee has further claimed that there was no procedure prescribed or statutory record stipulated for private placement issues under the Companies Act or the DIP Guidelines. However, I note that since it is the Company which has to prove that the said allotments were not public issues but private placements, it had a duty to document the entire process of private placement and preserve such records. The Noticee vide letter dated 26.10.2019 had forwarded a copy of "*Form of Application for Equity Shares*". On the said form, the words "*Private Placement Application Form*" and "*Form for Private Circulation Only*" are mentioned. However, in my opinion, mere mention of such phrases on a standard Application Form are not sufficient to prove that the form was indeed circulated privately and only to associated persons. The same needs to be backed by relevant registers, minutes of meetings and other records as discussed above. It is pertinent to note that the Hon'ble Supreme Court in the abovementioned judgment has itself held that *"Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have failed to discharge."* Thus, the onus of proving with sufficient evidences and records that the offer / invitation to subscribe to equity shares was not made to the public but was made to a few selected persons by private circulation rests entirely on the Noticee Company. However, the abovementioned documentary evidences produced by the Noticee Company in support of its contentions are not credible and adequate to disprove the allegations contained in the SCN.

19. The Noticee has contended that the instant proceedings by SEBI suffer from delay and laches and are barred by limitation since the allotments had taken place 10 to 20 years ago. As per the Noticee, there is substantial delay in starting an investigation and issuing the SCN by SEBI. In this regard, I note that no limitation period applies to enforcement actions under the SEBI Act.

20. The Noticee has contended that the complaints received by SEBI from the shareholders of the Company are from those shareholders who had purchased the shares of the company in the secondary market from the original allottees. It has also contended that such complaints are frivolous. However, in this regard I note that the presence or absence of any complaints is totally immaterial for deciding the question whether the offer / invitation was public issue or not and the same has no bearing on the issue. Even if there were no investor complaints, the said offers / invitations when made to more than 49 persons without fulfilling the requirements of private placements, would still, qualify as public issues.

21. The Noticee Company has also contended that in respect of the directions of prohibition, contemplated under para 15(b) & (c) of the SCN, SEBI has not specified under what provision of law, the said directions are proposed to be issued. It has also contended that the exact quantum of restraint from accessing the capital market is not indicated in the SCN. In this regard, I note that the SCN has been issued under Section 11, 11(4), 11A and 11B of the SEBI Act under which SEBI is empowered to pass various directions including restraint orders. Further, the exact quantum of restraint from accessing the capital market can be decided only after adjudication of violation against the Noticees is complete and the same cannot be mentioned beforehand. Thus, the abovementioned contentions of the Noticees are without merit and substance.

22. Once it is established that the issuances in question were public issues of securities, it automatically follows that the Noticee Company had to comply with the requirements of Section 56(1) & (3) and 60(1) of the Companies Act, 1956, which provide for matters to be stated and reports to be set out in prospectus and also registration of prospectus. There is nothing on record to show that the Company has complied with the said provisions. Further, as per Section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognised stock exchanges for permission for the shares to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. Admittedly, the Noticee Company has not applied to any exchange for listing of the equity shares. Thus, the Company had an obligation to refund the money to applicants, which it has not done. It had also not complied with the provisions of Section 73(3) of the Companies Act, 1956 since it had failed to repay the same in accordance with Section 73(2) of the Companies Act. Thus, the allegations of violation of Sections 56(1) & (3), 60(1) and 73(1), (2) & (3) read with Section 67 of the Companies Act, 1956 by the Noticees stand established.

23. Apart from the above, the Noticee is alleged to have violated the provisions of Clauses 2.1.4,2.1.5,5.3.1,2.1.1,5.6.2,2.2,4.14.11,4.14, 8.8.1,5.6A,8.6.1, 6.0 to 6.33 and 5.12 of the SEBI DIP Guidelines, 2000, *inter alia*, which specify various requirements pertaining to public issue of securities. The same are as follows:

a) Application for listing of specified securities on one or more recognized stock exchange {Clause 2.1.4},
b) Issue of securities in dematerialized form {Clause 2.1.5},
c) Memorandum of Understanding (MoU) and Appointment of merchant banker {Clauses 5.3.1 and 5.4.1},
d) Filing of draft offer document with SEBI and the designated stock exchange and RoC {Clause 2.1.1},

e) Obtaining in-principle approval from the recognized stock exchanges in which the specified securities are to be listed {Clause 5.6.2},
f) Satisfy the conditions of initial public offer {Clause 2.2},
g) Lock-in of specified securities held by promoters and persons other than promoters {Clause 4.11 and 4.14}
h) Keeping the public issue open for the specified period {Clause 8.8.1},
i) Minimum Application value {Clause 8.6.1}
j) Pre issue advertisement for public issue {Clause 5.6A}
k) Appointment of Compliance Officer {Clause 5.12}
l) Manner of disclosures in the offer documents {Clauses 6.0 to 6.33}

24. Similarly, the Noticee is alleged to have violated the provisions of Regulations 4(2)(d), 4(2)(e), 5 (1), (2), (5), & (7), 6 (1), 7, 26 (1), (2) & (6), 32 (1), 36, 37, 46 (1), 47 (1), 49 (1), 57 (1), 58 (1) & (2) and 63 of the ICDR Regulations 2009, read with ICDR Regulations, 2018, which lay down requirements pertain to the following:

a) Regulation 4(2)(d): Application for listing of specified securities on one or more recognized stock exchange
b) Regulation 4(2)(e): Agreement with a depository for dematerialization of securities
c) Regulation 5: Appointment of Merchant Banker and other intermediaries
d) Regulation 6: Filing of draft offer document with SEBI, designated stock exchange and RoC
e) Regulation 7: Obtaining in-principle approval from recognized stock exchange in which the specified securities are to be listed
f) Regulations 25&26: Satisfy the conditions of initial public offer
g) Regulation 32: Minimum promoters' contribution
h) Regulations 36 & 37: Lock-in of specified securities held by promoters and persons other than promoters
i) Regulation 46: Keeping the public issue open for the specified period
j) Regulations 47: Pre issue advertisement for public issue
k) Regulation 49: Minimum application value
l) Regulation 57: Manner of disclosures in the offer documents
m) Regulation 58: Abridged prospectus, abridged letter of offer and ASBA
n) Regulation 63: Appointment of Compliance Officer

25. There is nothing on record to show that the Noticee has complied with the abovementioned provisions of SEBI DIP Guidelines, 2000 and SEBI ICDR Regulations, 2009 & 2018. Accordingly, the alleged violations against the Noticee Company stand established.

26. Considering all the above factors in totality, I find that the allegations of offering securities to public without complying with the various legal provisions, as alleged in the SCN against the Noticee Company stand established.

27. I note that Noticee nos. 2 to 10 are the present directors of the Company and William Verghese Chungath Cheru (Noticee no. 4) is the Managing Director. Further, Noticee nos. 11 & 12 were directors of the Company during the period of violations by the Company and currently do not hold the post of director. The Company has informed that the Noticee no. 11, Shri Arimpilly Vishnu Bhattathirippad has expired. It has also submitted a copy of the death certificate of the said Noticee. Considering the same, the proceedings against the Noticee no. 11 stand abated.

28. Further, the Company has submitted that Mr. Jojo Njezhuvinkel Joseph (Noticee no. 10) was not on the Board of directors of the Company during the relevant period of alleged violations from 2001 to 2010, but was appointed on 23-6-2016. The Company has requested that the directions contemplated against him may also be dropped. Considering the fact that the Noticee no. 10 was appointed as a director after the alleged violations, I am inclined to drop the proceedings against him.

29. Having decided as above, I now proceed to decide the next issue which pertains to refund of the money mobilized by the Noticee from persons who were allotted equity shares. I observe that as per the provisions of Section 73 (2) of the Companies Act, in case of company not having applied for permission for listing of shares on a stock exchange, the amount mobilized from the applicants for issuance of such shares has to be refunded to the applicants within eight days. Further, the said clause provides that in case of any delay in

refund beyond eight days, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

30. I note that there have been 8 public issues of equity shares by the Company which have taken place 10 to 20 years ago. Thus, a long time has elapsed beyond the limit of 8 days provided under Section 73(2) of the Companies Act, in refund of money illegally mobilized from investors through issuance of equity shares. Accordingly, I am inclined to direct that the investors be provided with interest at the rate of 15% per annum on the amount received by the Company against allotment of equity shares. However, since the Company appears to have paid dividend to the shareholders from time to time, it would be justified to adjust the same from the refund amount. Further, I hold that in terms of the provisions of Section 73(2), the Company (Noticee no. 1) and its directors (Noticee nos. 2 to 9 & 12) are jointly and severally liable to refund the share application money along with 15% interest per annum after adjusting the dividends paid, as stated above.

Order:

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

(a) The Noticee nos. 1 to 9 & 12 shall jointly and severally refund the money collected through the offer and allotment of equity shares by BRD, with an interest of 15% per annum [the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment], after adjusting the dividends paid, if any, within a period of 180 days from the date of receipt of this Order.

(b) The refund as directed above shall be made through banking channels such as demand draft or electronic mode of transfer and a trail of such refunds shall be maintained by the Noticees for verification, if necessitated at a later date.

(c) Within seven days of completion of refund as directed above, the Noticee nos. 1 to 9 & 12 shall file a certificate of such completion with SEBI from two independent Chartered Accountants upon proper verification of the details of all such refunds from records including bank accounts of the Noticee Company after being satisfied that the refund to the all the equity shareholders has actually been made.

(d) The Noticee no. 1 is hereby restrained from issuing any further securities and from accessing the securities market till the completion of refunds as directed above.

(e) The Noticee nos. 2 to 9 & 12 are restrained from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities market, in any manner whatsoever, for a period of two years from the date of this order. However, in case the refund as directed above remains incomplete, the abovementioned restraint and prohibition shall extend beyond the two years' period till the completion of the refund process.

32. A copy of this order shall be served on the stock exchanges, depositories and RTAs and the RBI.

DATE: MAY 25, 2021 **G. MAHALINGAM**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA