



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. II

In the matter of

### Appeal No. 18, 19 and 21 of 2013

1. Dawood Capital Management Limited .....Appellant in appeal No. 19
2. Ms. Tara Uzra Dawood, CEO .....Appellant in appeal No. 18
3. Syed Kabiruddin, CFO .....Appellant in appeal No. 21

Versus

Executive Director (Specialized Companies Division) ...Respondent

### **ORDER**

Date of hearing 10/03/14

#### **Present:**

#### **For the Appellants:**

Mr. Sikandar Bashir, Advocate Supreme Court

Mr. Mustafa Sherpao, Advocate High Court

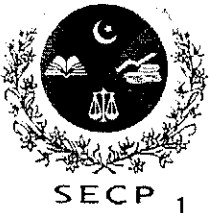
#### **Department representatives:**

Mr. Tariq Soomro, Director (SCD)

Mr. Javed Akhtar Malik, Deputy Director (SCD)

Mr. Asif Paryani, Deputy Director (SCD)

Mr. Kashif Ghani, Deputy Director (SCD)



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1. This order is in appeal No. 18, 19 and 21 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "SECP Act") against the order dated 22/03/13 (the "Impugned Order") passed by the Respondent.
2. The facts leading to this case are that Dawood Capital Management Limited ("DCML") is licensed by the Commission to undertake the businesses of asset management services and investment advisory services under the Non-Banking Finance Companies (Establishment and Regulation) Rules, 2003 ("NBFC Rules") and the Non-Banking Finance Companies and Notified Entities Regulations, 2008 ("NBFC Regulations") and is managing 03 Collective Investment Schemes ("CIS") namely, Dawood Income Fund ("DINF"), Dawood Islamic Fund ("DISF") and First Dawood Mutual Fund ("FDMF").
3. Show Cause Notice dated 08/11/12 ("SCN") was issued under section 282J(1), section 282J(2) read with section 282D and section 282M of the Companies Ordinance, 1984 (the "Ordinance") for violations of regulation 38(a) and regulation 38(n) of NBFC Regulations. The SCN encompassed the following facts pertaining to above referred CISs under management of DCML:
  - (a) On 28/4/12 the BOD of DCML in its 107<sup>th</sup> meeting approved full provisioning in the non-performing debt securities in the investment portfolios of DINF, DISF and FDMF and the impact of provisioning was reflected in the daily Net Assets Value ("NAV") of above referred respective CISs on 30/04/12.

CIS/ Fund	Non performing Debt securities	Provision approved by BOD on April 28, 2012 (Amount in Rs.)
DINF	ICIBL-TFC	22,500,000
DINF	Pace Pak-TFC	8,389,920



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	<b>Sub Total</b>	<b>30,889,920</b>
DISF	PEL – Sukuk	15,906,838
DISF	MLCF- Sukuk I	30,718,282
DISF	MLCF- Sukuk II	1,295,469
	<b>Sub Total</b>	<b>47,920,589</b>
FDMF	Pace Pak – TFC	5,992,800
FDMF	Telecard – TFC	3,413,156
FDMF	MLCF - Sukuk I	37,901,004
FDMF	MLCF - Sukuk II	1,598,214
	<b>Sub Total</b>	<b>48,905,174</b>
	<b>Total</b>	<b>127,715,683</b>

- (b) The impact on the NAV of DINF, DISF and FDMF before & after recording of full provisioning of non-performing assets approved by the BOD of DCML is as follows:

Date	DINF – NAV Amount (Rs.)	DISF – NAV Amount (Rs.)	FDMF – NAV Amount (Rs.)
April 27, 2012 (before full provision)	79.93	108.28	09.16
April 30, 2012 (after full provision)	74.04	90.117	08.34
<b>Increase / (Decrease) in NAV (Rs.)</b>	<b>(5.89)</b>	<b>(18.163)</b>	<b>(0.82)</b>
<b>Increase / (Decrease) in NAV in percentage</b>	<b>(7.36%)</b>	<b>(16.77%)</b>	<b>(8.95%)</b>

- c) Prior to making full provisions in the non performing debts securities of DINF and DISF, the DCML and its related parties including connected persons, its CEO and her close relatives managed to get their investments redeemed and by doing so avoided imminent loss of Rs. 18.224 million to be incurred due to provisioning approved by DCML BOD



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in its meeting held on 28/04/12. Since FDMF was a closed end scheme, therefore, no redemptions were possible. The redemptions made from DINF and DISF and loss avoided are as follows:

Date Of Redemptions	Fund Name	Unit Holder	Relationship with DCML or its CEO	No. of Units Redeemed	Applied NAV on Redemption per Unit (Rs.)	Total Amount Redeemed (Rs.)	Loss avoided if Redemptions were made after recording full provisions on April 30, 2012 (Rs.)
17-Apr-12	DINF	Tara Uzra Dawood	CEO of DCML	85,220	79.7837	6,799,167	489,214
26-Apr-12	DINF	Hamida Dawood	Close relative (mother) of CEO	94,795	79.9209	7,576,088	557,185
26-Apr-12	DINF	Ayaz Dawood	Close relative (brother) of CEO	14,230	79.9209	1,137,279	83,641
		<b>Sub Total</b>				<b>15,512,534</b>	<b>1,130,040</b>
6-Apr-12	DISF	First Dawood Invest. Bank Ltd Employees Contributor y Provident Fund	FDIBL owns 2.24 million shares of DCML (major shareholder) & DCML owns 2.38 million shares of FDIBL	79,977	108.33	8,663,675	1,456,510



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Date	Entity	Relationship	Shares	Value	Market Value	Net Value	
6-Apr-12	DISF	Hamida Dawood	Close relative (mother) of CEO	14,655	108.33	1,587,538	266,892
9-Apr-12	DISF	B.R.R. Guardian Modaraba –	Directorship on the BOD of DCML	276,778	108.49	30,028,564	5,085,149
9-Apr-12	DISF	Dawood Capital Management Ltd –	CISs Management Company	92,259	108.49	10,009,521	1,695,050
13-Apr-12	DISF	Dawood Family Takaful Ltd –DFTL	DCML owns 2.72 million shares in DFTL	470,423	108.38	50,982,120	8,590,520
		<b>Sub Total</b>				<b>101,271,418</b>	<b>17,094,120</b>
		<b>Total</b>				<b>116,783,952</b>	<b>18,224,160</b>

d) From the facts it appeared that the management of DCML has failed to safeguard the interest of the unit holders of DINF and DISF and has not discharged its fiduciary responsibility of managing assets of its CISs in good faith and gained undue advantage for itself, its related parties including connected persons and its officer by facilitating redemptions by using privileged information for the benefit of its own, its related parties including connected persons and its CEO in DINF and DISF before making full provisions in the debt securities of ICIBL, Pace Pak, MLCF and PEL, and thereby averting imminent loss of Rs. 18.224 million to such persons.

4. On 08/05/12 the trustee of DISF i.e. Central Depository Company of Pakistan (“CDC”) inquired from DCML on the provisioning made in the debt securities of DISF especially when group companies’ unit holders redeemed their investment during the month of April 2012 i.e. prior to recording provisions. The management of DCML vide letter dated 17/05/12 provided its justifications on this act. Thereafter, CDC vide letter dated 08/06/12 referred the matter to the Commission. The matter of provisioning and redemptions in DISF was referred to the onsite inspection team of



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the Commission which was already in process of conducting routine inspection of DCML. The inspection team not only highlighted the redemption and provisioning made in DISF but also presented details pertaining to provisioning in DINF and FDMF and redemptions in DINF. The inspection team issued its report on 19/09/12.

5. The SCD-Supervision Department of the Commission (the "Department") vide email dated 28/09/12, addressed to the CFO and Company Secretary of DCML, required providing copies of the minutes and notices containing the agenda items of BOD meetings held from 01/01/12 till 28/09/12. The CFO and Company Secretary of DCML provided copies of the minutes and notices containing agenda items of BOD meetings held from 01/01/12 till 28/09/12 through his letter dated 04/10/12. Further, the Department vide letter dated 25/10/12 requested the CEO of DCML to provide certified true copies of the minutes of BOD meetings held during July 2011 till October 2012. The CFO and Company Secretary of DCML vide letter dated 01/11/12 provided certified true copies of the required documents. Similarly on 21/01/13 after issuance of the SCN, the CEO of DCML was also asked to provide certified true copies of the draft minutes and notices containing agenda items of BOD meetings and Audit Committee meetings held during FY 2011-12 (i.e. from July 2011 till June 2012). DCML, its CEO, the CFO and Company Secretary initially submitted their response through their authorized representative on 17/12/12. Later on they disengaged their authorized representative and also withdrew their submitted response on the SCN and provided their new response vide letter dated 28/02/13 enlisting the following facts:

- (i) The Company and its officers have not acted in violation of any regulatory framework and had not extended any undue advantage to itself, its related parties, including connected persons and its officers and nothing was done intentionally.



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- (ii) Although provisioning of debt securities had been discussed by the BOD in its meeting held in February 2012 but it was never known to the management that decision would be taken in the next meeting as normally until all the directors give their full support no decision is taken and management had no idea on what scripts and how much further provision would be approved.
- (iii) If the management and its officers had the anticipation of provisioning in upcoming BOD meeting, then DCML would not have invested in DISF on 06/04/12 and DCML would have redeemed its entire investment from DINF which is still there as of the submission of this reply.
- (iv) If the management had the anticipation of provisioning the CEO would have redeemed all of her investment from the funds under management of DCML as more than fifty percent of her investment remained in the funds and other related/connected persons would have also redeemed their investment from the funds of DCML which was still there.
- (v) Most of the Unit holders/investors referred in the SCN historically retained their investments in the funds even in the timings when high fluctuations/variations occurred in the NAV.
- (vi) As far as redemptions of the corporate investors referred in the SCN are concerned they have their own BOD and Committees responsible for their own investments and disinvestments.
- (vii) All the referred redemptions were made under the relevant laws and passed through Registrar and Trustee and there is no question of any facilitation in redemption process.



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6. During the hearings, the CEO, CFO and Company Secretary admitted that the matter of provisioning was discussed in 39<sup>th</sup> Audit Committee (“AC”) meeting and 106<sup>th</sup> BOD meeting and the BOD advised the CFO to present details/workings of provisioning in the 107<sup>th</sup> BOD wherein the decision of provisioning on non-performing debt securities in the funds of DCML was to be taken. The CEO also stated that there was no mala-fide intention behind this event and whatever happened was merely a chance event or coincidence. The CFO and Company Secretary admitted providing tampered notice of 107<sup>th</sup> BOD meeting to the Commission and stated that it was just a mistake. He further added that the deletion of provisioning matter from the minutes of 39<sup>th</sup> AC meeting and 107<sup>th</sup> BOD meeting was not approved by the members of BOD and AC and the deletion in the final minutes was oversight on his part. The CEO also admitted that the deletion of provisioning from the minutes of 106<sup>th</sup> BOD minutes was not approved by BOD. Although as an acting Chairperson of the 106<sup>th</sup> and 107<sup>th</sup> BOD meeting, she signed the minutes of 106<sup>th</sup> BOD meeting in good faith but she did not know that the provisioning matter has been deleted as a mistake from the minutes. The CEO also confirmed that the CFO was not amongst the beneficiaries, who have redeemed their investment prior to the approval of provisioning. The CFO and Company Secretary have not availed the hearing opportunity on the date of last hearing. During the last hearing the CEO was not able to respond as to why the CFO and Company Secretary provided the forged notice to the Commission and deleted the matter of provisioning from the final minutes of 39<sup>th</sup> AC meeting and from the final minutes of 106<sup>th</sup> BOD meeting, despite the fact that he was not amongst the beneficiaries of the provisioning matter. The attention of CEO was also drawn to:

- (i) Copy of closed period notice annexed with the notice of 107<sup>th</sup> BOD meeting distributed to the directors of DCML informing about the “closed period” starting from 21/04/12 to 28/04/12 and requiring each director, CEO and





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other executives to restrain from dealing directly/indirectly in the units of the funds in any manner during the said period; and

- (ii) Redemptions made by the close relatives of the CEO on 26/04/12 during the said closed period.

In this context the CEO was asked as to how the redemptions of her close relatives were executed despite the fact that the closed period notice was served on her. In response she stated that she was unaware of such closed period.

7. Ms. Shafqat Rana's counsel during the hearing submitted that she cannot speak on part of DCML, its management and the unit holders who have redeemed their investments prior to provisioning was made and avoided losses but there was no malafide intentions behind the redemptions and "this entire event was timed carelessly incident". All the BOD members (excluding the CEO) admitted that they were unaware of the fact that the DCML, its connected parties, its CEO and their close relatives redeemed their investment prior to provisioning was decided and also admitted that the management was aware of the fact that the matter of provisioning was to be decided in the upcoming 107<sup>th</sup> BOD meeting. Further, Mr. Gul Nawaz, Mr. Masood Wahedna and Mr. Nazimuddin Feroz immediately resigned from the directorship of DCML as soon as they came across the sheer breach of fiduciary responsibility by the management of DCML.
8. The Respondent after reviewing the record available and the contentions of the CEO, CFO and Company Secretary, the Company, the chairperson of the Board of Directors (the "BOD") and the BOD held that it has been established that the management of DCML failed to safeguard the interest of the unit holders of DINF and DISF and have not discharged its fiduciary responsibility of managing assets of CISs under its management, in good faith and willfully gained undue advantage for



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itself, its related parties including connected persons and its officer by willfully authorizing and permitting the redemptions of such persons in DINF and DISF before making full provisions in the debt securities of ICIBL, Pace Pak, MLCF & PEL, thereby avoiding imminent loss of Rs.18.224 million to the connected persons. Additionally, the role of MCB Financial Services Limited (MCBFSL) as Trustee of DINF was found to be unsatisfactory, since it did not question the management of DCML for redemptions of the CEO and her close relatives in DINF before provisioning or highlight the matter to the regulator in order to safeguard the interest of DINF unit holders. MCBFSL was advised to perform its duties as stipulated in the NBFC Regulations. The role of M/s. Riaz Ahmed & Co. Chartered Accountants, as the Internal Auditor of DCML was also found to be unsatisfactory, since it did not report the matter of redemptions of DCML, its related parties including connected persons, its CEO and her close relatives prior to provisions made in the non-performing debt securities portfolio of DINF and DISF to the Audit Committee of DCML and hence failed to perform its due role. The Respondent, therefore, cancelled the licenses of DCML on the basis of above-stated facts, to undertake the businesses of asset management services and investment advisory services and imposed a penalty amounting to Rs. 20,000,000 (Twenty Million Rupees) on the CEO, due to the fact that DCML, its related parties including connected persons, its CEO and her close relatives had avoided imminent loss of Rs. 18.224 million and also imposed a penalty Rs. 1,000,000 (One Million Rupees) on the CFO & Company Secretary, for the willful contraventions of regulation 38(a) and regulation 38(n) of the NBFC Regulations 2008.

9. The Appellants have preferred to file the instant appeal against the Impugned Order. The Appellants' counsel on legal grounds argued that:

- a) the Respondent do not have lawful authority, jurisdiction and power to invoke and exercise the powers of the Commission under section 282J(1),



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282J(2) and 282(M) of the Ordinance for alleged violation of regulations 38(a) and 38(n) of the NBFC Regulations. The said powers under these provisions vest in the entire Commission constituted under section 5 of the SECP Act. It was argued that there is no valid written delegation of the powers of the Commission under the aforementioned provisions directly and specifically in favour of the Respondent;

- b) without prejudice to the foregoing, the aforementioned provisions of the Ordinance were introduced or amended through the Finance Act, 2008. Hence, these amendments are unlawful and *void ab initio* being in contravention of the requirements of articles 73 and 75 of the Constitution of Islamic Republic of Pakistan, 1973 (the "Constitution"). Reliance was placed on *Mir Muhammad Idris and others versus Federation of Pakistan* cited at [PLD 2011 Supreme Court 213. Reliance was also placed on the case of *Muhammad Ashraf Tiwana versus Pakistan etc* [Constitution Petition No. 59 of 2011 and CMAs Nos 326 and 633 of 2012 and Crl. O.P. 94 of 2012 in Const. P. 59/2011] where it was held that the insertion of section 5(5) in the SECP Act through the Finance Act, 2007 was violative of the article 73 of the Constitution. It was further argued that the amendments in section 282J(1), 282J(2) and 282(M) of the Ordinance introduced through the Finance Act, 2008, incorporated references therein to the NBFC Regulations for the first time, whereas, the NBFC Regulations were promulgated and notified originally on 21/11/08. Similarly, regulation 38(n) of the NBFC Regulations was promulgated and notified even later vide SRO No. 814(I)/2011 dated 05/09/11. It was argued that after the promulgation and notification of the NBFC Regulations 2008 and subsequent amendments in section 282J(1), 282J(2) and 282(M) of the Ordinance introduced through the Finance Act, 2008, a fresh formal delegation of the powers of the



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Commission was required. Hence, the entire proceedings are *corum non judice*, without lawful authority of no legal effect and *void ab initio*;

- c) based on explanations sought by the Chairperson of the BOD, the Impugned Order records that she was of the view that the “*redemptions made by such unit holders were justified*” and that these “*did not appear to be motivated by mala fide intentions*”. However, there is no further discussion of this crucial submission in the operative part of the Impugned Order nor any reason has been given for not accepting this submission. In para 26 of the Impugned Order, these submissions of the Chairperson are referred to as “*honest submissions made to the Commission*”. Accordingly, it follows that the submissions of the Chairperson have been adopted in a selective manner. It is a settled principle of law that in such circumstances and cases the investigating authority must accept or reject the statement obtained as a whole rather than pick and choose parts thereof in a bid to support a pre-determined conclusion which is what has evidently been done in the instant case. Further, the Respondent had obtained statements from three former directors of DCML, namely, Mr. Gul Nawaz, Mr. Masood Wahedna and Mr. Nazimuddin Feroz, behind the back of the Appellants and then relied on such statements to reach a finding against the Appellants who were never aware of these separate hearings. Consequently, the Appellants were condemned unheard contrary to principles of natural justice as well as fundamental rights under article 10A of the Constitution read with Articles 4, 5, 18, 24 and 25 thereof and section 24A of the General Clauses Act, 1897. Reliance was placed on the case of *Muhammad Rafiq versus The State* cited at [2009 TLR 1279] where it was held that the court should discuss the prosecution evidence in order to come to an independent finding;

The Appellants’ counsel on merits of case argued that:



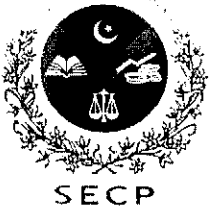
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- d) the finding contained in para 24 of the Impugned Order relating to closed end fund (i.e. FDMF) is not only unlawful but also beyond the jurisdiction of the Respondent and outside the remit of the SCN as this subject was not even alleged or raised in the SCN. It is understood that being a closed end fund, the question of redemptions does not and cannot even arise. The issue of conversion of the FDMF being a closed end scheme into an open ended scheme pursuant to regulation 65 of the NBFC Regulations 2008 is a totally separate and distinct matter falling wholly outside of the scope of the SCN. The finding in para 24 of the Impugned Order has evidently been given solely to provide cover for the Respondent's unlawful direction to cancel licenses of DCML to undertake the business of Asset Management Services and Investment Advisory Services, even though there is no allegation of impropriety or illegality in respect of the FDMF. It was argued that the Respondent was predisposed to cancel all licenses of DCML and the closed end fund in respect of which no allegations are made in the SCN was in the way of cancellation of these licenses, the Respondent has falsely alleged that the same stands converted into an open ended scheme. Further, the scope and effect of regulation 65 of NBFC Regulations 2008 and the issue of mandatory conversion of closed end funds is under consideration and sub judice before the Sindh High Court, Karachi, therefore, the contents of para 24 of the Impugned Order tantamount to contempt of court; and
- e) undue weight has been given to the discrepancies in the draft and final minutes of the Audit Committee and BOD. The Impugned Order ignores the crucial fact that the CFO is not the secretary to the Audit Committee. Not a single iota of direct and cogent evidence has been produced establishing in accordance with law that the discrepancies in the relevant minutes were made at the behest of and under the direction of any person alleged to have



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benefitted from the subject redemptions. In this context, it was argued that it is unlawful and unjust to hand down an adverse finding against the CFO. The Impugned Order fails to examine, address and adjudicate upon the crucial issue of the burden and quantum of proof as well as the probative value of the documents and alleged admissions relied upon by the Respondent to reach his conclusions and findings. In para 23 of the Impugned Order, the Respondent imposed penalty of one million Rupees on the CFO and Company Secretary of DCML for "*willful contraventions of regulation 38(a) and 38(n) of the NBFC Regulations 2008*". However, the provisions of regulations 38(a) and 38(n) of the NBFC Regulations cannot, under any cannon of construction, be stretched and extended to apply to an individual. Both regulations 38(a) and 38(n) of the NBFC Regulations are expressly and specifically directed towards the "Asset Management Company" rather than an individual holding position in a company. Further, regulation 38(a) of the NBFC Regulations may be construed to encompass, in addition to Asset Management Company, (i) related parties; (ii) connected persons and (iii) group companies, but only to the extent that such parties has obtained "*undue advantage*". In the instant case, in para 8 of the Impugned Order, the Respondent himself has accepted and confirmed that the CFO "*was not amongst the beneficiaries of the provisioning matter*". Further, regarding regulation 38(n) of the NBFC Regulations, first, there is no allegation in the SCN that the CEO, CFO and Company Secretary were responsible or liable under regulation 38(n) of the NBFC Regulations to manage the CISs. Second, even in the Impugned Order, there is no explanation or consideration of how the CFO and CEO have contravened regulation 38(n) of the NBFC Regulations 2008. Hence, neither regulation 38 (a) nor 38(n) of the NBFC Regulations can be applied or extended in the instant case.



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The Appellants' counsel gave an undertaking during the proceedings of the case that in the event the impugned order is set aside by the honorable Appellate Bench on the basis of grounds in the Appeal DCML shall not initiate or pursue any claim against the Commission, any official thereof or any third party for any loss or damages suffered or incurred as a consequence of implementation of the aforesaid impugned order. He stated on behalf of Appellant that DCML hereby waives any right it may have in this respect.

10. The department representatives argued that:

- a) the Respondent is fully empowered to invoke and exercise the powers of the Commission mentioned under section 282(I), 282J(1), 282J(2), 282M of the Ordinance as per powers delegated through Notification No. 862(I)/2000 dated 06/12/01 & Notification No.1061(I)/2005 dated 18/10/05. Further, the Appellants had not challenged the authority of the Respondent during the entire proceedings of SCN and such plea was not taken earlier while submitting replies or during hearings before the Respondent. Moreover, no reference of any law in effect was referred stating that the fresh delegation of power is required each time when amendments are made in the Ordinance;
- b) the NBFC Regulations 2008 were issued by the Commission under section 282B of the Ordinance, and the powers for issuance of the Regulations was inserted vide Finance Act 2007 and DCML license to carry out Asset Management Services was renewed on 27/10/11 w.e.f. 27/05/10 with a condition to comply with the Ordinance, the NBFC Rules and the NBFC Regulations. Moreover, DCML vide letters dated February, 13, 14 and 16, 2009 also applied for the registration of funds under its management as notified entity as required under regulation 44(2) of the NBFC Regulations.



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If the argument of the Appellant is considered appropriate for instance that the amendments in section 282I, 282J and 282M of the Ordinance as unlawful and void as introduced through the Finance Act 2008, then the license of the DCML and registration of funds as notified entity also becomes invalid and void as the power to issue NBFC Regulations 2008 was also inserted in section 282B of the Ordinance, via Finance Act 2007;

- c) contravention of regulations 38 (a) and 38 (n) of the NBFC Regulations 2008 by the Appellants and establishing the violation beyond reasonable doubt is evident from the facts of the case. The Appellants along with the related parties including connected persons averted imminent loss of Rs. 18.224 million by redeeming their investments from the funds under management of DCML prior to the provisions made in the nonperforming debt securities of DISF and DINF. The Appellants not only gained undue advantage by using privilege information, itself but also to its related parties including connected persons. The matter of provisioning and redemptions in DISF was referred to the onsite inspection team of Commission and the inspection team vide their report dated 19/09/12 not only highlighted the redemption and provisioning made in DISF but also presented details pertaining to provisioning in DINF and FDMF and redemptions of the related parties in DINF. Facts regarding evidence are already narrated at length in the SCN and in para 19 (iii) till (x) of the Impugned Order, therefore, require no further proof of evidence;
- d) the Chairperson of DCML in clear words stated that she could not speak on behalf of the DCML or its executive, therefore, on the basis of her clear disclaimer, the contents of her explanation were recorded to such extent affecting her interest only. It is further submitted that the SCN was issued to the Appellants and BOD of DCML. All the members of the BOD of DCML





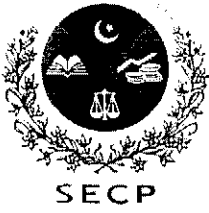
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preferred to submit separate explanations/responses on the SCN and also requested for separate hearing from the Appellants. Neither the responses/explanations of the Appellants were shared with the other parties to the SCN nor were their responses shared with the Appellants. Similarly, the responses/explanations along with hearing were made part of the Impugned Order; and

- e) the directions given to trustees for revocation of funds were issued in consequence of the cancellation of the Asset Management Services license of DCML. Further, the certificate holders of FDMF at their meeting held on 15/02/13, in compliance with the regulation 65 of the NBFC Regulations 2008 already opted in favor of conversion of FDMF into open ended scheme, the same status was confirmed in the Impugned Order and it was directed to the trustee to also extinguish/revoke FDMF in the interest of the unit / certificate holders. It is denied that the provisions of regulation 38 (a) and 38 (n) of the NBFC Regulations 2008 can only be applied to an Asset Management Company and not to an individual holding position in a company. It was argued that DCML being the artificial person could not manage its affairs independently. The affairs of the company are always managed by its board on broader aspects and by its management on day to day affairs basis. The Appellants being the CFO and CEO of DCML were managing the affairs of DCML and they were rightly charged for violation of regulation 38 of NBFC Regulations.

11. We have heard the parties. Regulations 38(a) and 38(n) of the NBFC Regulations are reproduced for ease of reference:

*Obligations of the Asset Management Company.- An Asset Management Company shall,*



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*(a) be obliged to manage the assets of the Collective Investment Scheme in the interest of the unit, certificate or share holders in good faith and to the best of its ability and without gaining any undue advantage for itself or any of its related parties including connected persons and group companies or its officers;*

*(n) manage the Collective Investment Scheme according to its Constitutive Documents, the rules, regulations, circular or directives issued by the Commission;*

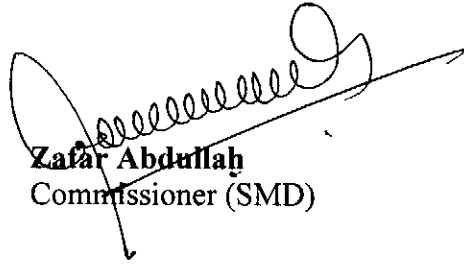
Notification No. 862(I)/2000 dated 06/12/01 and Notification No.1061(I)/2005 dated 18/10/05 are not applicable in respect of delegation of powers under rule 38(a) and 38(n) of the NBFC Regulations. The powers under 38(a) and 38(n) of the NBFC regulations has been delegated vide SRO 49(I)2009 dated 23/01/09 to Mr. Asif Jalal Bhatti and not to Shahid Nasim, Executive Director (NBFC D). Power to issue order under section 282J(1), 282J(2) and 282(M) of the Ordinance has not been delegated to Executive Director (NBFC D). The impugned order has been passed by Shahid Nasim, Executive Director (NBFC D). We, therefore, agree with the contention of the Appellants' counsel that the Respondent did not have the power to pass the Impugned Order.

Furthermore, DCML as a company did not gain as a result of redemption of investments and the violation of Regulations 38(a) and 38(n) of NBFC was not such that it should lead to cancellation of licenses. Regulations 38(a) and 38(n) apply to a Company and cannot apply to individuals such as the CEO and CFO in the instant case. Moreover, there is no substantial evidence to prove that the CEO, CFO and related parties actually gained from the redemption of their investments as they could have redeemed their entire investments had they known about provisioning prior to the BOD.

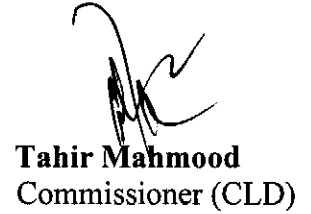


## Securities and Exchange Commission of Pakistan

In view of the above fact that Executive Director (NBFC) did not have the power to issue order under section 282J(1), 282J(2) and 282(M) of the Ordinance for alleged violation of regulations 38(a) and 38(n) of the NBFC Regulations and the regulations could not apply to individuals such as the CEO and the CFO, we set aside the Impugned Order.



**Zafar Abdullah**  
Commissioner (SMD)



**Tahir Mahmood**  
Commissioner (CLD)

Announced on: 22 JAN 2015