BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

(ADJUDICATION ORDER NO: Order/KS/VB/2019-20/4864)

UNDER SECTION 15-I OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995.

In respect of:

Corporate Professionals Capital Private Limited

(PAN AABCC7247B)

In the matter of

Medicamen Biotech Limited

FACTS OF THE CASE

1. While examining the draft Letter of Offer dated October 13, 2015 filed by Shivalik Rasayan Ltd for the acquisition of 26% of issued share capital of Medicamen Biotech Ltd (hereinafter referred to as "**MBL**" / "**Company**"), Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') observed certain instances of non-compliances of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as '**SAST, 2011**') and SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as '**MB Regulations**') alleged to be committed by Corporate Professionals Capital Private Limited (hereinafter referred to as '**Noticee**').

APPOINTMENT OF ADJUDICATING OFFICER

2. Shri Suresh Gupta was appointed as Adjudicating Officer (AO), vide Order dated November 10, 2017 under Section 15-I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as**'SEBI Act'**) read with Rule

3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as '**Adjudication Rules'**) to inquire into and adjudge under the provisions of Section 15HB of the SEBI Act for the alleged failure on the part of the noticee to comply with the provisions of Regulation 27(5) of SAST, 2011 and Regulation 13 read with point 3 and 4 of Schedule III of MB Regulations. Subsequently, I have been appointed as the Adjudicating Officer vide Communique dated April 26, 2018.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING:

3. A Show Cause Notice no. A&E/EAD/KS/VC/12417/2019 dated May 14, 2019 (hereinafter referred to as "**SCN**") was served on the noticee by Registered Post Acknowledgement Due (RPAD) and E-mail in terms of Rule 4 (1) of the Adjudication Rules, requiring the noticee to show cause as to why an inquiry should not be held against the noticee and why penalty, if any, should not be imposed on the notice under the provisions of Section 15HB of the SEBI Act for his alleged violation of the relevant provisions of the SAST,2011 and MB Regulations, as mentioned in the SCN.The SCN issued to the notice *inter alia* alleged the following :

   (a) *It was noted from the draft Letter of Offer that one of the erstwhile promoters of MBL, Mr. Bal Kishan Gupta (hereinafter referred to as 'Gupta'), had made delayed disclosure under Regulation 29(2) read with 29(3) of SAST Regulations. Upon further examination of the said transactions, it was submitted by the Noticee that Gupta had acquired 2.95% of the paid up share capital of MBL on September 15, 2012 by way of conversion of 2,50,000 warrants into equal number of fully paid-up equity shares and the same was disclosed under Regulation 29(2) of SAST Regulations but with a delay of 3 working days.*

   (b) *However, it was observed by SEBI that the shareholding of Gupta had increased from 24.71% to 26.92% of the total paid up share capital of the company as a result of the abovementioned transaction. It is noted that an acquirer has to make public announcement of an open offer for acquiring shares of a target company in terms of Regulation 3(1) of SAST Regulations if his shareholding along with the shareholding of the persons acting in concert crosses the threshold of 25% of total shareholding of the target company. Therefore, as a result of*

abovementioned conversion of warrants, the total shareholding of Gupta crossed the threshold of 25% of total shareholding of the company, thereby, triggering the requirement of open offer under Regulation 3(1) of SAST Regulations.

(c) *It is further observed that, while the Noticee mentioned the delay of 3 days in submission of the disclosure under Regulation 29(2) read with 29(3) of SAST Regulations, it did not mention anything with regards to the failure of Gupta to make open offer in terms of Regulation 3(1) of SAST Regulations. In this regard, the Noticee, vide Email dated April 22, 2016, has submitted that it missed to look further into the applicability of Regulations 3(1) read with 3(3) of SAST Regulations. Specifically the Noticee made the following submission:*

"With respect to the specific transaction of allotment to Mr. B K Gupta, in the Promoters Capital Build-up we found that during the Quarter July to September 2012 there was an increase of only 1.85% however, due to past quarters acquisitions the overall increase of Promoters from last disclosure made was more than 2% and hence we pointed out the applicability of Regulation 29(2) of SEBI (SAST) Regulations 2011. Corresponding disclosure was found from the Target Company which showed a delay of 3 days. These facts was duly reported to your good office. As the Promoters Capital Build-up was made based on Quarterly Shareholding Patterns and increase in promoters holding was a meager 1.85% during this quarter we missed to look further into the applicability of Regulation 3(1) read with regulation 3(3). Further, ***while preparing Annexure C our focus remained on compliance/non-compliance of Chapter II or Chapter V of SEBI (SAST) Regulations, 1997/2011. However, we accept our mistake and assure you that we will be more cautious specially towards Regulation 3(3) in future." (emphasis supplied)***

(d) *In light of this, it is alleged that the Noticee failed to exercise diligence, ensure proper care and professional judgment to ensure compliance with SAST Regulations. Therefore, it is alleged that the Noticee has violated the provisions of Regulation 27(5) of SAST Regulations and Regulation 13 read with point 3 and 4 of Schedule III of MB Regulations.* (Sic)

4. Vide letter dated The Noticee vide letter dated June 21, 2019 submitted its reply to the SCN and *inter-alia* made the following submissions:

4.1. *Takeover Regulations require appointment of a manager to open offer by an acquirer, for the purposes of achieving the following objectives—*

a. To protect the confidence and interests of investors.

b. To afford the investors, a fair and transparent exit opportunity form the Target Company.

c. To ensure full and truthful disclosure of all material information relating to the open offer so as to enable investors to take an informed decision.

d. To ensure that acquirer has sufficient financial resources for the payment of acquisition price to the investors.

e. To ensure that the process of acquisition is completed in a time bound manner.

4.2. In furtherance to foregoing, it may be noted that it is not the case of SCN that the any of the above-said objectives have not been fulfilled. Admittedly, absence of any such remark, corroborates that substantial compliance with Takeover Regulations have been achieved by the Noticee while acting as manager to the open offer of MBL. Because, given the time frame and responsibilities under Takeover Regulations, a person lacking diligence or promptness or due care or professional judgment would have not been able to achieve the objective of law, as have been achieved by the Noticee in the case of MBL.

4.3. The judicial precedents are clear on the point that due diligence is all about efforts made, bonafide conduct of the person concerned and the facts and circumstances amid which the person acts (all these elements taken together). The precedents also guide us that there cannot be any fixed benchmark of due diligence, it is so, because, after all the law requires only 'reasonable diligence' even from the experts including merchant bankers (Noticee in the present case). Further, there can be no doubt that reasonableness is a question of fact which has to be understood by taking all the above-said elements together. In the present case, facts demonstrating the conduct, efforts and bonafide of the Noticee are before your good self. Had the Noticee have been non-diligent or careless, there would have been plethora of material on record, showcasing such lacking on the part of Noticee.

4.4. That in the present case the charge of lack of diligence is based solely on a misunderstood excerpt of Noticee's email dated April 22, 2016 which was actually meant for assisting CFD and providing clarification w.r.t promoters' build up only.

Taking said letter of Noticee as an admission of lack of diligence would be a travesty of the sincere efforts, bonafide conduct and prompt assistance rendered by Noticee as an extended arm of CFD in MBL's open offers.

4.5. Apart from the above-said, it is pertinent to note that the following information such as—

a. details of the sale and purchase by promoters; and
b. disclosures made to stock exchanges.

which were essential for the preparation of promoters' buildup in terms of SEBI's administrative instructions dated November 22, 2011, were to be provided by the Target Company and its promoters. However, they failed to provide relevant information to the Noticee, despite several follow-ups and this fact was communicated to CFD by the Noticee vide letter dated October 21, 2015 during the offer process itself. However, the Target Company or said promoters were never questioned by SEBI for not providing such information to the Noticee.

4.6. Despite non-providing of the information by Target Company, its promoters and BSE, the Noticee made sincere and rigorous efforts and independently collected and analyzed the information pertaining to Target Company and its promoters for more than 15 years containing 60 quarters, hundreds of transactions by numerous promoters (which at one point of time were 31) within short time of 5 working days. Further, the Noticee also reported instances of promoters' non-compliances with Takeover Regulations to CFD. Please note that one of the non-compliance pointed out at S. No. 34 of the Annexure C submitted with SEBI (already enclosed as Annexure A3) pertained to the transaction dated September 15, 2012 of Mr. BK Gupta which triggered Regulation 3(1) r/w 3(3) of Takeover Regulations. This fact also corroborates that the Noticee had noted the transaction and non-compliances arising out of it, however, the same got skipped in bonafide on account of an inadvertent human error.

4.7. That in a total period of less than 10 days, the Noticee had to ensure the compliances which had direct bearing on open offer & interests of investors (detailed in foregoing Table A), and simultaneously the Noticee was working as an extended arm of CFD and collected, analyzed and provided the promoters' build up without cooperation from Target Company (even otherwise this information had no bearing on the open offer of MBL or the interest of investors). The Noticee humbly states that it acted in bonafide and made sincere efforts, it

is further submitted that had the Target Company cooperated with the Noticee in providing the relevant information, the above-said instance would not have occurred. In support to the above-said, kind attention of your good office is placed on the recent observations of Learned AO in respect of Mark Corporate Advisors Pvt Limited, a merchant banker, in the matter of Palred Technologies Limited, decided on June 24, 2019

"I also find it pertinent to mention that the target company, the acquirer and the merchant banker work together to ensure that the offer meets all regulatory compliances."

4.8. *It is a significant matter of record that the Noticee has diligently provided all the necessary support to CFD, even months after the closure of open offer of MBL, for verification of the non-compliances of promoters. And it is also a matter of record that all the non-compliances of outgoing promoters of MBL were indeed discussed and verified with the cooperation provided by Noticee. The correspondence between CFD and Noticee are evidence to this fact.*

4.9. *It is also significant to note that except for a single piece of information in the promoters' build up (i.e. not even an offer document which goes to investor), the Noticee had pointed out all other non-compliances of the outgoing promoters of the Target Company in accordance with the SEBI's administrative instructions dated Nov 22, 2011. This fact is not even disputed in the SCN.*

4.10. *Takeover Regulations were notified primarily with an objective to protect the interests of the investors in securities market and to provide each shareholder an opportunity to take informed decision to exit his investment in the Target Company when substantial acquisition of shares or control takes place. It is important to note that SEBI's instructions dated Nov 22, 2011 itself confirms the above-said objective. Relevant portion of the SEBI's general instructions are reiterated hereunder—*

> *"The purpose of this standard Letter of Offer (LoF) for an open offer made in accordance with Chapter II of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 is to provide the requisite information about the acquirer(s) / offer so as to enable the shareholders to make an informed decision of either continuing with the Target Company (TC) or to exit from the TC."*

Since, the information such as promoters' build up or any information pertaining to acquisitions or non-compliances by the outgoing promoters of MBL (who in fact were not even connected to the Acquirer) were not disseminated amongst investors, the same cannot be said to be a basis on which investors could have made their decision to participate into open offer. Therefore, even the essence of above-said SEBI instructions, has been fulfilled in the present case.

4.11. That the information which got inadvertently omitted from being mentioned in promoters' build up, was not even required by SEBI for the purposes of open offer of MBL. And in fact, the said information would have made no impact & indeed made no impact on the open offer process of MBL or the interest of shareholders or securities market, because—

a. Such information pertained to the outgoing promoters of the Target Company, who were unconnected to the Acquirer.
b. The open offer was given by the Acquirer. Therefore, the non-compliance by Mr. BK Gupta, by any reasonable analogy, had no impact on the open offer given by the Acquirer including pricing of said offer.
c. Such information does not form part of the offer documents in an open offer and is not even placed in public domain by CFD.
d. Such information is only asked for independent enquiry of SEBI on the possible non-compliances of the promoters for taking further action. And for such purposes, SEBI has its own internal processes and systems. To the best of the knowledge of Noticee, SEBI (being a quasi-judicial authority), does not initiate actions on persons/entities, solely on the information provided by the manager to the open offer.
e. Because based on such information SEBI does not stop an open offer from being processed or completed. To the best of the knowledge of Noticee, there had been no case in the history of open offers under Takeover Regulations, 2011, where SEBI stopped or rescinded an open offer given by an unconnected Acquirer merely because of the past violations of the promoters of Target Company.

4.12. Without prejudice to the aforesaid, it is relevant to note that in an open offer, SEBI reviews offer documents as well as the additional information and suggests observations and modifications thereto. Indian securities market has evidenced plethora of revisions and corrigendum(s) in documents pertaining to takeover

open offers on instructions of SEBI. It is also significant to note that such observations sometimes even relate to change in offer price. It is so, because the role of SEBI while corresponding with manager to an open offer, is to iron out the creases and ensure that true, fair and adequate information is going in public domain, which is not misleading and are in compliance with Takeover Regulations, and that the interest of investors are protected. In such process of issuing observations to edit/alter offer documents, SEBI does not adjudicate/ penalise manager to open offer for lack of diligence, unless the omission into offer documents, is untrue, unfair, inadequate, and misleading in material aspects. That penalty is also not warranted on Noticee because, above-stated is not even an allegation under the SCN.

4.13. Without prejudice to the foregoing submissions, it is also submitted that in the present case also, the offer documents as well as the additional formation was reviewed by SEBI. In this respect, following is important to be noted that—

a. Except for a few observations in DLOO which were duly incorporated in LOO and were approved by CFD, no observation pertained to any other offer document prepared by the Noticee and the open offer of MBL got completed without any delay, non-compliance or negative observation.

b. No negative observation were made in any of the various documents submitted as additional information at the stage of filing draft letter of offer, except for the promoters' build-up which was reviewed as well as queried by CFD, but, even CFD could not assess the inadvertent omission thereunder during the open offer process.

4.14. In furtherance to the preceding para(s), it is submitted that in the present case CFD made observations w.r.t to omission of the detail of acquisition dated Sep 15, 2012 by Mr. BK Gupta in the promoters' buildup after 4 months of completion of the open offer of MBL. Had the same been informed by SEBI during the offer process, when the Noticee was in engaged in making regular dialogue with SEBI and making compliances w.r.t open offer of MBL, the revised promoters' build up including such details would have been immediately sent to CFD. And on such happening, there would have been no SCN at all, because as already stated above, reviewing documents and suggesting changes is a trite practice of CFD in open offer cases, for which penalties are not levied.

4.15. At this juncture, it would be pertinent to mention that the Noticee had duly submitted a Due Diligence Certificate as per the requirements of Regulation 27(3) of the Takeover Regulations. In the said due diligence certificate (which was to be submitted along with the DLOO), the Noticee had duly confirmed the compliances made with the provisions of Takeover Regulations as well as the verity of PA, DPS and LOO. The Noticee had further given an undertaking related to all the information being true, fair and adequate for the investors to make a well informed decision. It is important to note that no negative observation is made in relation to the said due diligence certificate till date. That the SCN without even alleging or observing any deviation on the Noticee from the standard of due diligence in terms of Regulation 27(3) of Takeover Regulations, alleges the violation of Regulation 27(5) of the Takeover Regulations. That it is the case of Noticee that it exercised due diligence, promptness and professional judgment w.r.t open offer of MBL. In support, kind attention of your good office is placed on the following observations of Learned AO in respect of ***Mark Corporate Advisors Pvt Limited, a merchant banker, in the matter of Palred Technologies Limited, decided on June 24, 2019***

"In regard to the contention made by the Noticee with respect to PIT Regulations, wherein it has emphasized on the instruction issued to Merchant Banker by SEBI that Merchant Banker had to carry out the compliance related to SAST Regulations only and no other compliance therefore the diligence is limited to extent of open offer. I agree with the Noticee that SEBI had issued guidelines to Merchant Banker in respect to compliance with SAST Regulations."

4.16. In the present case having peculiar facts and circumstances, it is also emphatically submitted that there exists on record, plethora of spotless compliances made by the Noticee, which demonstrates its diligence, due care, promptness, professional judgment and ethical conduct in the entire open offer process, but the SCN ignores them all and proposes to impose penalty on the Noticee on account of misunderstanding of an excerpt of Noticee's reply dated April 22, 2016, without appreciating all the above-stated facts, which are already on record.

4.17. Moreover, a penalty is sought to be imposed on the Noticee when in fact, there is—

a. no single omission, whatsoever, in the offer documents;

b. *no single negative remark by CFD on the due diligence or due care exercised by the Noticee.*

4.18. *In furtherance to the foregoing submissions, Noticee also wishes to place on record that the instance of bonafide inadvertence, was recorded and correctly analyzed by the Noticee. Apart from above-said, such information was also available in the public domain since Sep 24, 2012 in form of the disclosure u/r 29(2) of Takeover Regulations filed by Mr. BK Gupta and the shareholding pattern later on filed by the Company with BSE. It would be worth noting here that the above-said disclosure under Regulation 29(2) was also submitted to CFD by the Noticee. All these instances would show that the information, which otherwise had no bearing on the open offer process and had no impact on the investors' decision or interest, was also well within the constructive notice of SEBI as well as BSE for more than 3 years, but it even skipped the scrutiny of CFD during the offer process and it was only after more than 4 months of completion of the open offer that any discussion on the above-said instance into promoters' build up was initiated by CFD.*

4.19. *In furtherance of the afore-said, it is also pertinent to bring into the kind attention of your good office that in the matter of* **Price Waterhouse Coopers Pvt. Ltd. v. Commissioner of Income Tax, Kolkata-I, (2012) 11 SCC 316,** the Hon'ble Supreme Court has opined that:

> *"…It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error.*
>
> *20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the Assessee is not justified. We are satisfied that the Assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars."*

4.20. *The case of the Noticee is on the similar lines to that of the case cited herein above. Also, the bona fide and human inadvertence in the present case, had no bearing on the open offer process of MBL or on the interest of shareholders.*

Hence, the principle laid down under the above-said case would squarely apply and would not warrant imposition of any penalty on the Noticee.

4.21. *Further, the principle discussed in preceding para has also been upheld by the Hon'ble Securities Appellate Tribunal in a very recent decision in matter of* ***Corporate Strategic Allianz Ltd. v. SEBI, Appeal no. 130 of 2017****, wherein it was opined that: "8. In our opinion, the imposition of penalty on this aspect is patently erroneous. The import of the Circular is that the track record of the performance of the public issue managed by the Merchant Banker should be disclosed not only in the prospectus but also on the website of the Merchant Banker. The Circular also provides that the web link also be indicated in the prospectus. All the three ingredients are present in the instant case. Merely because a reference of the track record to be linked to the website was not specifically written in the prospectus will not violate the Circular. What is required to be seen is whether there has been substantial compliance of the Circular which is the instant case. Consequently, the non-linking of the track record as shown in the offer document on the website could at best be an inadvertent error for which no penalty could be imposed. Thus, the imposition of penalty by the AO on this score is incorrect and not justifiable."*

4.22. *It is to be seen that the Noticee had substantially complied with the duties it was entrusted as the Manager to the Open Offer, and had successfully completed the open offer by achieving the objectives of Takeover Regulations, without any negative remark or observation. In these facts imposition of penalty would not only be harsh and unwarranted towards the Noticee but would also tarnish the image of Noticee (a registered merchant banker with SEBI and its extended arm) for all the time to come.*

4.23. *It is a matter of record that collection, audit and analysis of publically available information of Target Company and its promoters for more than 15 years containing 60 quarters, hundreds of transactions by numerous promoters (which at one point of time were 31) was done by the Noticee for the preparation of promoters' build up. However, later on, upon realizing that it becomes difficult for a merchant banker to audit and analyse information beyond 8 years, as the companies in terms of Indian company law maintain records of and only upto 8 years. SEBI vide circular dated March 15, 2017 bearing no. SEBI/HO/CFD/DCR1/CIR/P/2017/22, provided that the promoters' build up and*

status of compliance by promoters/Target Company with Takeover Regulations, would provide information for past 8 years and in case there had been an open offer in the Target company in past 8 years, then for the period after expiry of such offer period of such previous open offer. This circular implicitly confirms the stand point of Noticee that—

a. *The collection, audit and analysis of information for past 15 years, in the case of MBL, was herculean task for the Noticee given the strict timeline within which hundreds of activities including compliances has to be ensured by the manager to open offer.*
b. *Information for preparation of promoters' build up and their status of compliance with Takeover Regulations has to be provided by the Target Company and its promoters as they maintain such records; and*

4.24. *In furtherance to noting the objective of Takeover Regulations and that of SEBI's instructions dated November 22, 2011. A plain reading of Regulation 27(5) with the provisions of sub-regulation (1), (2), (3), (4) and (6) of the Takeover Regulations would also show that the obligation cast on the manager to open offer to ensure due diligence and compliance refers to the activities performed by the manager to open offer, having direct or indirect bearing on the open offer. However, in the present case, non-compliance by Mr. BK Gupta on account of transaction dated Sep 15, 2012 had no bearing, whatsoever, on the open offer of MBL. Therefore, Noticee may please not be seen as lacking diligence.*

4.25. *The present is not a case of providing untrue or misleading information by the Noticee to CFD. There is no charge of malafide in the SCN. In furtherance, it be noted that it is a settled rule of law that inadvertent bonafide mistakes, are not punished. Moreover, in present case, penalty also becomes unwarranted, because there is on record the conduct, efforts of Noticee demonstrating its diligence. It is an undisputed fact that substantial compliance as envisaged under takeover Regulations, particularly under Regulation 27(5) has been achieved.*

4.26. *That for ascertaining whether a person has exercised ''due diligence', the test of to be applied is the 'test of reasonable man'. It is significant to note that the Hon'ble Supreme Court in the case of* ***Chander Kanta Bansal Vs. Rajender Singh Anand reported in 2008 (5) SCC 117*** *held that due diligence in law means reasonable diligence and doing "everything reasonable, not everything possible". Further, in said case the meaning of expression due diligence has*

been analysed in the following manner—"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 (18 Edn), "Due Diligence" means the diligence reasonably expected from, and ordinarily expected 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…".

That the facts & circumstances of the present case (as above explained) would show that the Noticee had made sincere effort, exercised care under bonafide in the process of open offer of MBL. Therefore, any penalty in the present case would be unwarranted.

4.27. That the verity of diligence, due care and professional judgment of the Noticee is also clearly evident from the conduct of the Noticee in the open offers handled by it. It may please be considered that—

a. prior to the open offer of the MBL the Noticee has been a manager into 16 cases of open offers; and
b. after the case of MBL it has handled 22 open offers in capacity of manager to open offer.

but in none of the cases any negative remark has been made by CFD on the diligence exercised by the Noticee. Without prejudice to the foregoing submissions, it is humbly submitted that any penalty or regulatory intervention by your good office, in the facts or present case, would tarnish the blotless track record and reputation of the Noticee.

4.28. *In regard to the preceding para, the judgment of the Hon'ble Securities Appellate Tribunal in the case of* ***Piramal Industries Limited and Ors. v. SEBI, Appeal No. 466, 467 of 2016***, is important to be seen, where it has herein held that:*"We were also told that till date there has not been any violation of SEBI Laws. The imposition of penalty, even though meager will leave an indelible mark and leave a blot on their spotless image. Such blot may not be in the interest of the securities market especially in the international market. 24. Considering the aforesaid, we are of the opinion that the object of the Act is not only to protect the*

investors but also the securities market. The appellant is part of the securities market and its existence is required for the healthy growth of the securities market…..If there is an infraction of a rule, remedial measures should be taken in the first instance and not punitive measures.

4.29. In *addition* to *the* compliance made in pith and substance by the Noticee in the present matter, it is also a matter of record that the conduct of Noticee in open offer matters has been impeccable and blot-free and imposition of any amount of penalty, especially in the peculiar facts and circumstances of the present case would leave a permanent indelible mark and would tarnish the image of the Noticee. Therefore, considering the facts and circumstances of the present case, it is prayed before your good office that any penalty may please not be imposed. (Sic)

5. In the interest of natural justice and in order to conduct an inquiry in terms of Rule 4(3) of the Adjudication Rules, the Noticee was granted an opportunity of personal hearing in the matter vide letter dated June 27, 2019 The hearing on July 23, 2019 was attended by Mr. Sumit Agrawal, Mr. Ravi Prakash, Ms. Sreenidhi G. S., Mr. Mittu Krishnan Choudhary and Ms. Deepika Vijay, Advocates (hereinafter referred to as '**ARs**') on behalf of the Noticee. The ARs reiterated the submissions made by the Noticee in its reply to the SCN vide letter dated July 08, 2019. The ARs further requested time to make post-hearing submissions. Accordingly the ARs were granted time till July 30, 2019 to make additional submissions.

6. The Noticee made additional submissions vide its letter dated July 30, 2019 wherein, *inter alia*, it submitted the following:

6.1. The ambit of Regulation 27(5) of Takeover Regulations is limited to ensure the compliance by a manager during the period it acts as a 'manager'. Regulation 27(5) does not extend to ensuring compliance with Takeover Regulations for any other period.

6.2. It has been alleged that the Noticee failed to detect, by purported lack of diligence on its part, a previous violation committed in September 2012 by an individual ex-promoter of the Target Company (namely Mr B K Gupta) of Regulation 3(1) of Takeover Regulations. Admittedly, SEBI with its extensive investigative

powers, and stock exchanges with their wide repository of data/disclosures made to them could not identify the said violation until recently. Noticee as such has no coercive powers,

6.3. *During the-course of open offer / public offer itself, Noticee had specifically written to SEBI that in the matters of build-up of the promoter share capital, there is no response from the Target Company or BSE. Noticee in fact had duly sought the information from the Target Company and BSE vide letters/email dated September 17, 2015 and October 1, 2015, respectively regarding the promoter build up but none was provided to the Noticee.*

6.4. *It cannot also be ignored that the promoters' build up as prepared by the Noticee from the publicly available information was shared by the Noticee with Target Company and was duly Verified by the Target Company. Once the same was verified by the Target Company, there could not be said to be any lack of diligence on the part of the Noticee. However, no question has been asked in this regard from the Target Company. Moreover, even CFD could not point out any deficiency in the promoters' build up during the open offer process despite its independent examination.*

6.5. *Without prejudice to the foregoing, it is humbly submitted that in the present case, the build-up of outgoing promoters of MBL, had no bearing on the open offer process of MBL or interest of investors. Further it is pertinent to note that the erstwhile promoters of MBL have already settled their defaults, including above-said instance, with SEBI on November 26,2018.*

6.6. *Penalizing Noticee in an un-warranting case like the present one, would undermine the integrity and efforts of the Noticee and would send a message writ large, that despite achieving entire compliance with Takeover Regulations, demonstrating bonafide conduct and sincere efforts in open offer cases, and rendering extensive assistance to CFD, a manager to open offer will be hounded for smallest immaterial deficiency which is not even within its control.*

CONSIDERATION OF ISSUES AND FINDINGS:

7. I have carefully perused the written submissions of the noticee and the documents available on record. The issues that arise for consideration in the present case are :

a) Whether the noticee has violated the provisions of Regulation 27(5) of SAST, 2011 and Regulation 13 read with clause 3 and 4 of Schedule III of MB Regulations?

b) Does the violation, if any, attract monetary penalty under Section 15HB of the SEBI Act, 1992?

c) If yes, what should be the quantum of penalty?

8. Before moving forward, it is pertinent to refer to the relevant provisions which read as under:-

SAST, 2011

Obligations of the manager to the open offer.

27*.*

(5) *The manager to the open offer shall exercise diligence, care and professional judgment to ensure compliance with these regulations.*

MB Regulations

Code of conduct.

13.*Every merchant banker shall abide by the Code of Conduct as specified in Schedule III*

Schedule III

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."*

9. Before proceeding with my findings, I note that Regulation 27 of SAST, 2011 enumerates the obligations of the Merchant Banker appointed for the purpose. I note the reason for appointing a merchant banker as prescribed under SAST, 2011 for the purpose of public offer is that a merchant banker is an professional body and therefore it will ensure regulatory compliance with reference to the public offer and therefore, it is expected to carry out outmost care in complying with the Regulations applicable to public offer. In this regard, I note that Hon'ble Securities Appellate Tribunal (**SAT**), in its order dated February 15, 2012 in the

matter of Enam Securities Private Limited vs. SEBI had made the following observations regarding the role of Merchant Banker:

"*Before we deal with the specific issues, it is necessary to have a look at the obligations and responsibilities of a merchant banker under the merchant bankers regulations. Regulation 13 of the merchant bankers regulations provides that every merchant banker will abide by the code of conduct as specified in Schedule III thereof. It places an onerous duty on a merchant banker not only of protecting the interest of the investors but also of ensuring that adequate disclosures are made in a timely manner without making any misleading or exaggerated claims and to render best possible advise to the clients. A merchant banker is required to maintain high standards of integrity, dignity and fairness in the conduct of its business and is required to promptly inform the Board any violation or non compliance of the regulatory framework that come to its notice……In a way, a merchant banker is an expert body which is also a point of contact between the regulator i.e. the Board and the corporate entity on whose behalf it is working. Therefore, a merchant banker is the eyes and ears of the regulator whose responsibility is to ensure that the corporate entity utilizing its services is acting in accordance with the laid down norms and in case of violation, bring the violation to the notice of the regulator for appropriate action. It is in this context that the code of conduct for merchant bankers prescribes that a merchant banker shall, at all times, exercise due diligence, ensure proper care and exercise independent professional judgment.*"

I also note that the Merchant Banker submits a due diligence certificate to SEBI at the time of submitting Draft Letter of Offer confirming that it has examined various relevant documents and that contents of public announcement, detailed public statement as well as Draft Letter of Offer are true, fair and adequate and are based on reliable sources.

10. The only allegation against the Noticee was that Noticee, being the merchant banker for the said open offer of Shivalik Rasayan Limited (hereinafter referred to as '**SRL**') for the acquisition of MBL, failed to exercise due diligence, care

and professional judgment and, thereby, failed to disclose the violation of Regulation 3(1) of SAST, 2011 by Mr. Bal Kishan Gupta (hereinafter referred to as '**BKG**').

11. The facts of the matter as observed from the material available on record are that due to conversion of 2,50,000 warrants in equal number of shares by BKG, the shareholding of BKG in MBL increased from 24.71% to 26.92% on September 15, 2012. It is observed that, due to this acquisition of shares, BKG was required to disclose change in his shareholding to MBL and to BSE within 2 working days of acquisition , under Regulation 29(2) of SAST, 2011, as the change in his shareholding was more than 2% of the total shareholding of the company. It is observed that BKG made the said disclosure to BSE with a delay of 3 days. Further, as the shareholding of BKG crossed the threshold of 25% of total shareholding of MBL, he also became liable for open offer under Regulation 3(1) of SAST, 2011. The Noticee has also vide its email dated April 22, 2016, addresssed to SEBI, has admitted the violation.

12. In this regard, I note that the Noticee, while conducting/carrying out due diligence exercise for the purpose of open offer from SRL, was required to, *inter-alia*, check the violation(s), if any, of applicable laws for the last 15 years. However, I note from the Annexure C, as submitted by the Noticee to SEBI along with the Draft Letter of Offer, the Noticee had mentioned the delay of 3 days on part of BKG in making disclosure under Regulation 29(2) of SAST, 2011. However, the Noticee failed to mentioned the violation of Regulation 3(1) of SAST, 2011, committed by BKG for the same violation.

13. In this regard, I note that the Noticee has contended that the Target Company viz. MBL was not co-operating with it in doing the due diligence for the open offer. Further, the Noticee has also contended that it had also requested information from BSE and BSE also did not provide this information to the Noticee. The Noticee has also contended that neither MBL nor BSE supplied it the information regarding the violation of Regulation 3(1) read with 3(3) of SAST, 2011 even though MBL and BSE had knowledge on the issue. In this regard, I note that BKG had made the disclosure under Regulation 29(2) of

SAST, 2011 for the transaction of September 15, 2012. In the said disclosure, BKG had clearly mentioned that his shareholding had changed from 24.71% to 26.92% of total shareholding of Company, by virtue of conversion of 2,50,000 warrants into equal number of shares. The said disclosure was available on BSE website. Therefore, I am of the view that all the information required for the Noticee to identify that BKG had violated Regulation 3(1) read with 3(3) was already available in public domain on BSE Website. In fact, the Noticee itself had forwarded the said disclosure under Regulation 29(2) of SAST, 2011, made by BKG, to SEBI along with its Email dated January 27, 2016, on the basis of which SEBI had found out that BKG had violated the provisions of open offer under SAST, 2011. Therefore, the Noticee was well aware of the details of the impugned transaction along with change in shareholding of BKG as a result of such transaction. Further, I am of the view that due diligence is an independent duty of the Noticee.

14. The Noticee has further argued that the liability falls on MBL as MBL, at the time of allotment and listing of the shares, allotted to BKG, had wrongly declared that the allotment and listing was in accordance with provisions of SAST, 2011. Thereby, MBL has also made false declaration and failed to point out this violation of BKG. However, I am of the view that this is not an acceptable argument. The Merchant Banker has to carry out independent due diligence. In this regard, the role of Merchant Banker in respect to Open Offer has been already described elsewhere in this order.

15. The Noticee has also contended that disclosure regarding the said transaction dated September 15, 2012 had already been made under Annexure C to the Draft Letter of Offer submitted to SEBI. Further, the promoters' build up was reviewed by SEBI during open offer, including the transaction dated September 15, 2019. However, SEBI also did not raise any objection in this respect. In this regard, I note that Annexure C, to the Draft Letter of Offer of SRL, had mentioned only about the date, violation and delay in disclosure. In this regard, the information regarding the abovementioned disclosure, as submitted by Noticee to SEBI, is being reproduced below:

Status of Compliance with the Provisions of Chapter II of the Takeover Regulations 1997 and Chapter V of the Takeover Regulations 2011 (for last 10 years)

By Promoters/Promoter group/major shareholders

Sl. No.	*Regulations/ Sub-Regulations*	*Due Date for compliance as mentioned in the regulation*	*Actual Date of Compliance*	*Delay, if any (in no. of days) (Col.4-Col.3)*	*Status of Compliance with Takeover Regulations*	*Remarks*
34.	*29(2)*	*18.09.2012*	*21.09.2012*	*3*	*Complied*	*-*

In view of this, I note that the Noticee had submitted the abovementioned information citing only a violation in respect of Regulation 29(2) of SAST, 2011 without disclosing the transaction details. I note that the above submission is too meagre for anybody to deduce any violation of any other provision of law.I also not that there was apparent non-mention of violation in regard to Regulations 3(1) read with 3(3) of SAST, 2011 by BKG. In this regard, I also note that the gravity of violation of these provisions are completely different. In any situation, a disclosure violation under Regulation 29(2) and open offer violation under Regulation 3(1) of SAST, 2011 cannot be kept on the same pedestal. Therefore the law has purposefully laid two different compliance requirements.

Further, SEBI cannot be found fault with for not unearthing the impugned violation based on an incomplete data. At the same time, it is not the case that SEBI had ignored the said violations and the present adjudication proceeding was initiated in pursuance of the said violations only.

16. The Noticee, has further contended that it had substantially complied with the provisions of law and there was only one inadvertent error. The Noticee, in support to its contention, has also cited the decision of Hon'ble SAT in the matter of Corporate Strategic Allianz Ltd. vs. SEBI dated March 29, 2009. In this regard, I am of the view that the above order of Hon'ble SAT does not apply in present matter as the facts of the matters are different. In the said

matter, the Merchant Banker had disclosed its past track record in the IPO prospectus as well as on its website. At the same time, the Merchant Banker had also mentioned about its website in the IPO prospectus. Only a reference of the track record to be linked to the website was not specifically written in the prospectus. On the other hand, the Noticee, in the present matter had completely failed to disclose the violation of Regulation 3(1) read with 3(3) of SAST, 2011. Therfore, I find the the cited case law not relevant for the present matter.

17. I note that the Noticee has made several arguments in its defense including that it had made due diligence for 60 quarters comprising numerous transactions by the promoters. The Noticee has also mentioned details of all the compliances undertaken by it in respect to the abovementioned open offer of SRL first at pages 7-12 and then in Table A at pages 13-22 in its reply dated July 08, 2019. However, I am of the view that the compliance was done in pursuance to the applicable provisions of law and the allegations in the SCN are not connected with the said information. Therefore, the said details are irrelevant for the purpose of present proceedings and the same cannot serve as a defence for the alleged failure on the part of the Noticee.

18. The Noticee has also contended that the details given in Annexure C to Draft Letter of Offer did not form part of offer document. Further, there was no untrue, unfair, inadequate and misleading material in the draft letter of offer. In this regard, I note that the following has been mentioned on page 11 of Letter of Offer on behalf of SRL:

    3.4. During the present offer, it has come to the notice that there were a few instances of noncompliance of Chapter II of SEBI (SAST) Regulations, 1997, SEBI may initiate appropriate action against the entities belonging to the promoter group and the Target Company for violations of SEBI (SAST) Regulations, 1997/2011, if any.

    In this regard, I am of the view that the above statement clearly brings to light certain violations found by the Noticee. However, this statement did not mention anything about violations of SAST, 2011. In effect there were certain

violations pertaining to certain provision of SAST 2011 also and the same were not disclosed rendering the Letter of Offer untrue to that extent.

19. The Noticee has further contended that the above omission/failure on part of Noticee to detect violation of open offer had no impact on the Open Offer of SRL as the information was regarding non-compliance by the exiting promoter. In this regard, I am of the view that if the law requires an entity to perform a function in a particular manner then the same has to be done in that manner only. It is not open for the Noticee to contend at this stage that the violation of exiting promoter has no impact on the open offer.

20. Further the Noticee has also contended that Annexure C was not disclosed to public along with Letter of Offer. In this regard, I note that point 3.4 of Letter of Offer, quoted in the previous paragraph, mentions various violations of erstwhile promoter group. However, the same does not talk about the violation of Chapter II of SAST, 2011 by BKG. Therefore, I note that the information detailed in the Annexure C of Draft Letter of Offer was summarily mentioned in the Letter of Offer wherein the violation of open offer by BKG was not disclosed. Further, I note that Hon'ble SAT, in its order dated March 06, 2018 in the matter of M/s Shreeyash Industries Ltd. vs SEBI, had made the following observations:

> "*Argument that these announcements relating to bagging of 4 orders had no impact on the market or price of the scrip has no merit since disclosures have to be made as per rules irrespective of whether post facto such disclosures make any impact on the market or not. <u>This is particularly important as it is impossible to foresee the impact of such disclosures.</u>*" (emphasis supplied)

I am of the view that the abovementioned reasoning applies in the present matter also as it is not possible to see the impact of such disclosure of violation of open offer by exiting promoter on the present open offer by SRL.

21. The Noticee has further contended that the test to be applied in the case of 'due diligence' is the 'test of reasonable man'. The Noticee while citing judgment of Hon'ble Supreme Court of India in the matter of Chander Kanta

Bansal vs. Rajender Singh Anand [(2008)5 SCC 117] has contended that it had done everything expected under 'reasonable diligence'.

However, I am of the view that the case here is that the Noticee had failed to carefully examine the disclosure under Regulation 29(2) of SAST, 2011, submitted by BKG. The Noticee is being adjudged for not being diligent about a publically available information which is reasonably expected from a Merchant Banker to open offer. I expect all merchant bankers to carry out due diligence which is reasonable and I find no unreasonable expectation from the Noticee in the present matter.

22. I also note that the Noticee, in its Email dated April 22, 2016, had admitted that it had committed a mistake by overlooking the applicability of Regulation 3(1) read with 3(3) of SAST, 2011 regarding the abovementioned transactions. The Noticee made the following submission in this regard and an extract of which submission is mentioned below:-

"With respect to the specific transaction of allotment to Mr. B K Gupta, in the Promoters Capital Build-up we found that during the Quarter July to September 2012 there was an increase of only 1.85% however, due to past quarters acquisitions the overall increase of Promoters from last disclosure made was more than 2% and hence we pointed out the applicability of Regulation 29(2) of SEBI (SAST) Regulations 2011. Corresponding disclosure was found from the Target Company which showed a delay of 3 days. These facts was duly reported to your good office. As the Promoters Capital Build-up was made based on Quarterly Shareholding Patterns and increase in promoters holding was a meager 1.85% during this quarter we missed to look further into the applicability of Regulation 3(1) read with regulation 3(3). Further, while preparing Annexure C our focus remained on compliance/non-compliance of Chapter II or Chapter V of SEBI (SAST) Regulations, 1997/2011. However, we accept our mistake and assure you that we will be more cautious specially towards Regulation ***3(3)*** *in future.*" (sic)

23. In this regard, the Noticee has contended that the said excerpt was made in good faith and with bonafide intention and the same should not be taken as admission of guilt. However, I note that, even independent of the above statement of Noticee, it has already been established that the Noticee had admittedly failed to detect and disclose the violation of Regulation 3(1) read with 3(3) of SAST, 2011. Further, the statement of the Noticee in its Email dated April 22, 2016 merely confirms this finding. Further, regarding the admission of guilt by the Noticee vide Email dated April 22, 2016, I would like to rely on the Judgement of Hon'ble Supreme Court of India in the matter of Nagindas Ramdas v. Dalpatram Ichharam alias Brijram (AIR 1974 SC 471) wherein it observed that

"……. *Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the evidence act, made by the parties or their agent at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions is fully binding on the party that makes them and constitutes a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions, which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.*"

I am of the view that the *ratio* declared in the above matter fully applies in the present situation wherein the Noticee itself had admitted its 'mistake' and the same would amount to admission of guilt.

24. The Noticee has further contended that the non-compliace of Regulation 3(1) read with 3(3) of SAST, 2011 has already been settled by SEBI. In this regard, I am of the view that the said settlement order No. SO/EFD-2/CSD/251/NOV/2018 dated November 26, 2018, disposes of the violation committed by BKG. I am of the view that the same settlement order has no implication on present adjudication proceedings.

25. In light of this, I am of the view that the Noticee had admittedly failed to exercise due diligence and care on its part and failed to disclose the violation of

Regulation 3(1) of SAST, 2011 by BKG in the present matter. Therefore, I hold that the Noticee, by its failure to exercise due diligence, has violated the provisions of Regulation 27(5) of SAST, 2011 and Regulation 13 read with clause 3 and 4 of Schedule III of MB Regulations.

26. In this context, reliance is placed upon the order of the Hon'ble Supreme Court of India in the matter of *Chairman, SEBI Vs Shriram Mutual Fund {(2006)5 SCC 361}* – where the Hon'ble Supreme Court of India held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant……..."*

27. In view of the above, I am of the view that it is a fit case to impose monetary penalty on the Noticee in terms of Section 15HB of the SEBI Act, which reads as under:

SEBI Act

Penalty for contravention where no separate penalty has been provided.

15HB. *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.*

28. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Adjudication Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

29. With regard to the above factors, it may be noted that the investigation report has not quantified the profit/loss on account of the violations committed by the

Noticee. I further note that there is only one allegation against the Noticee that it had failed to detect the violation of Regulation 3(1) read with 3(3) of SAST, 2011 by BKG. Further, there is no allegation of collusion and wrongdoing on part of the Noticee. The Noticee has also mentioned about its past activities as a merchant banker.

30. At the same time, I am of the view that it is the duty as well as the statutory responsibility of the Merchant Banker, in light of Regulation 27(5) of SAST, 2011 and Regulation 13 read with clause 3 and 4 of Schedule III of MB Regulations, to exercise due skill, care and diligence while preparing Draft Letter of Offer and, subsequently, Letter of Offer in an open offer as the decision to tender shares or not on part of shareholders depend upon the disclosures and details mentioned in the said Letter of Offer. Therefore, the Merchant Bankeer is obliged to present completely true and correct picture regarding the various matters related to the company.

ORDER:

31. After taking into consideration the facts and circumstances of the case, material/facts on record, the replies submitted by the Noticee and also the factors mentioned in the preceding paragraphs, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose a penalty of Rs. 3,00,000/- (Rupees Three Lakh only) on the Noticee under Section 15HB of the SEBI Act for its failure to comply with the relevant provisions of SAST, 2011 and MB Regulations, as discussed in this order. I am of the view that the said penalty is commensurate with the lapse/omission on the part of the Noticee.

32. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order through online payment facility available on the website of SEBI, i.e., www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -> Orders of AO -> PAY NOW.

33. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under Section 28A of the SEBI Act for realization of the said amount of penalty along with interest

thereon, *inter alia*, by attachment and sale of movable and immovable properties.

34. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to the Noticee viz. Corporate Professionals Capital Private Limited and also to the Securities and Exchange Board of India.

Place: Mumbai
Date: 10.10.2019

K SARAVANAN
CHIEF GENERAL MANAGER
AND ADJUDICATING OFFICER