BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO.: Order/VV/NK/2022-23/15943-15946]

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

In respect of:

Noticee No.	Name of Noticee	PAN of Noticee
1	**Mr. Dhananjay Somani**	**BFXPS6582H**
2	**Ms. Aradhana Somani**	**AAEPS3387A**
3	**Shree Consultations and Services Pvt. Limited**	**AACCS25494**
4	**Chemo Pharma Laboratories Limited**	**AAACC2056K**

In the matter of Indian Infotech & Software Limited

BACKGROUND

1. A letter of offer in compliance with Regulation 10 and 12 of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as **'Takeover Regulations, 1997/Takeover Regulations'**) was made by Jayanti Prime Software Advisory Pvt. Ltd.(**Acquirer**) to acquire 8,65,661 fully paid equity shares of Rs. 10/- each (representing 20% of the paid up and voting equity share capital) of Indian Infotech & Software Ltd. (hereinafter referred to as the **'Company'**) at an offer price of Rs. 18.50. The Public Announcement of the same was made on May 24, 2011 and the shares of the

company were listed on Bombay Stock Exchange Ltd (hereinafter referred to as '**BSE'**) and Ahmedabad Stock Exchange Ltd. (hereinafter referred to as '**ASE'**).

2. While examining the letter of offer document, Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) observed that the Company and the erstwhile promoters of the company, viz. Mr. Dhananjay Somani (hereinafter referred to as **'Dhananjay Somani'**), Ms. Aradhana Somani (hereinafter referred to as **'Aradhana Somani'**), Chemo Pharma Laboratories Ltd. (hereinafter referred to as '**Chemo Pharma**'), Ravindra Trading & Agencies Ltd. (hereinafter referred to as '**Ravindra Trading'**) (Now known as Ravindra Energy Ltd.), Tecil Chemicals & Hydro Power Ltd. (hereinafter referred to as '**Tecil Chemicals'**), Shree Consultations and Services Pvt. Ltd. (hereinafter referred to as **'Shree Consultations'**), India Ener-gen Ltd., (hereinafter referred to as '**India Ener-gen**'), Joshi Finance Ltd. (hereinafter referred to as '**Joshi Finance'**) and Tecil Finance Ltd. (hereinafter referred to as **'Tecil Finance'**) (Now known as India Ener-gen Ltd.) (hereinafter referred to as **'the Promoter Group')** had violated certain provisions of Takeover Regulations, 1997.

3. Adjudicating Officer of SEBI (hereinafter referred to as **'erstwhile AO'**) had passed an Adjudication Order No. AK/AO-05-14/2018 dated August 09, 2018 (hereinafter be referred to as "**Then Adjudication Order/AO order**") inter-alia against Mr. Dhananjay Somani (hereinafter referred to as **'Dhananjay Somani/Noticee no. 1'**), Ms. Aradhana Somani (hereinafter referred to as **'Aradhana Somani Noticee no. 2'**), Chemo Pharma Laboratories Ltd. (hereinafter referred to as '**Chemo Pharma Noticee no. 3**')and Shree Consultations and Services Pvt. Ltd. (hereinafter referred to as **'Shree Consultations/ Noticee no. 4'**) (hereinafter collectively referred to as **'the Noticees')** wherein, a penalty of Rs. 3,00,00,000/- (Rupees Three Crore only) for violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations, 1997 was imposed on the Noticees. Aggrieved by the said Adjudication Order, the Noticees filed an Appeal No. 403 of 2018 before the Hon'ble Securities Appellate Tribunal (hereinafter be referred to as, the "**Hon'ble SAT**").

4. The Hon'ble SAT vide Order dated October 20, 2021 (hereinafter referred to as **'SAT Order'**) remanded the matter back to SEBI for the limited purpose of determining the quantum of the penalty for the alleged violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations. The relevant extract of the said order of SAT is as under: -

"14. In the circumstances while upholding the finding of the Learned AO that the appellants have violated the provisions of Regulation 11 (1) read with 14 of the Takeover Regulations to make public announcement of open offer and therefore are liable to pay penalty, the issue of quantum is required to be remanded to the Learned AO. In this regard, the appellants are directed to appear before the Learned AO on November 08, 2021 whereupon the Learned AO shall provide the copies of the documents on which reliance is placed in the impugned order for quantifying the penalty. The concerned appellants would be at liberty to place their views/ explanation regarding the quantum of the penalty upon which the AO shall pass a fresh order as regard the quantum of penalty for the violation of regulation 11(1) read with regulation 14 of the Takeover Regulations, 1997 within the period of four months from the date of the receipt of the views/ explanation from the appellants.

Hence, the following order:

ORDER

The appeals are partly allowed, the directions of the AO to pay penalty for violations of regulation 8(1) and 8(2) as well as regulation 3(3) and 3(4) of the Takeover Regulations is hereby set aside.

The order of the AO declaring that the appellants have committed violation of regulation 11(1) read with 14 of the Takeover Regulations is hereby affirmed. The matter however is remitted to the AO for again determining the quantum of the penalty for violation of Regulation 11(1) read with 14 of the Takeover Regulations as per the directions made in paragraph no. 14 above."

APPOINTMENT OF ADJUDICATING OFFICER

5. Upon remanding of the said matter, the undersigned was appointed as Adjudicating Officer, vide communiqué dated November 11, 2021 under section 15-I of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “SEBI Act”) and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as “Rules”) to enquire into and adjudge under section 15H(ii) of the SEBI Act 1992 for the alleged violations.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

6. With respect to violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations, 1997, I note that A Show Cause Notice bearing reference No. EAD-6/AK/RSL/3388/2015/1, EAD-6/AK/RSL/3388/2015/2, EAD-6/AK/RSL/3388/2015/3 and EAD-6/AK/RSL/3388/2015/4 dated January 30, 2015 issued by erstwhile AO to Dhananjay Somani, Aradhana Somani, Shree Consultations and Chemo Pharma respectively (hereinafter referred to as **“SCN”**) was served upon the Noticees under rule 4 of the Adjudication Rules to show cause as to why an inquiry should not be held and penalty be not imposed against them under section 15H (ii) of the SEBI Act, for the alleged violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations, 1997 at the relevant point of time.

7. It was alleged in the SCN that, Chemo Pharma acting in concert with the other promoters of the Company at the relevant point of time viz. Dhananjay Somani, Aradhana Somani and Shree Consultations had acquired 1,00,000 equity shares of the Company through off market transaction on October 04, 2010, and as a result of such acquisition, the shareholding of the Noticees had increased from 53.17% to 55.28%. Post the acquisition of shares, Noticees were required to make a public announcement under the Takeover Regulations, 1997 to acquire additional shares or voting rights within four working days from the date of acquisition in term of Regulation 11(1) read with 14(1) of the Takeover Regulation 1997. However, they had *inter alia* failed to comply with Regulation 11(1) read with Regulation 14 of the Takeover Regulations, 1997 at the relevant point of time.

8. It may be noted that, as per Regulation 11(1) of Takeover Regulations, 1997, as at the relevant point of time, no acquirer who, together with persons acting in concert with him held 15 per cent or more but less than 55 per cent of the shares or voting rights in a company, could acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, in any financial year ending on 31st March, unless such acquirer made a public announcement to acquire shares in accordance with the Regulations. As per Regulation 14(1) of the Takeover Regulations, 1997, the open offer under Regulation 11(1) should be made within four working days of entering into the agreement for acquisition of such shares.

9. Pursuant to the order dated October 20, 2021 of the Hon'ble SAT to provide the copies of the documents to Noticees on which reliance is placed in the impugned order for quantifying the penalty imposed on Noticees in the AO order and thereafter passing fresh order on merits as regard the quantum of penalty for the violation of regulation 11(1) read with regulation 14 of the Takeover Regulations, 1997 within the period of four months from the date of the receipt of the views/ explanation from the appellants, the Noticees were provided a CD containing Trade log From BSE and Pricing certificate from chartered accountant provided to the Manager to the Offer, Microsec Capital Limited on November 23, 2021.

10. Thereafter, in the interest of natural justice and in order to conduct inquiry as per Rule 4 of the Adjudication Rules, Noticees were provided with an opportunity for submitting replies on the basis of requisite documents provided to them in compliance with Hon'ble SAT order and an opportunity of personal hearing through WEBEX considering the ongoing COVID-19 Pandemic. In this regard, Hearing Notice dated December 20, 2021 was sent to Noticee through SPAD and email, which was duly delivered to Noticees to appear for hearing on January 04, 2022. The Noticees, vide email dated December 22, 2021, authorized their representatives to attend the personal hearing on January 04,

2022. Thereafter vide email dated December 29, 2021 Noticees requested for revised time of Appearance through Virtual Mode on 4th January, 2022.

11. In this regard, Noticees were informed that, *due to unavailability of requested time, Adjudicating Officer has rescheduled the hearing to January 18, 2022 at 11:30 pm.* Vide email dated January 03, 2022, Noticees again requested to reschedule the time of hearing to 2:30 pm. Noticees request was acceded to by undersigned.

12. Vide email dated January 17, 2022, Noticees made the written submissions after perusing the documents on which reliance was placed by erstwhile AO in imposition of penalties on Noticees for the violation of Regulation 11 read with 14 of the Takeover regulations, 1997.

13. The Authorized Representatives ("ARs") of the Noticees appeared before the undersigned on scheduled date and time of hearing i.e., on January 18, 2022 at 02:30 pm and reiterated the written submission made in their letter dated January 17, 2022 on behalf of the Noticees and also undertook to submit additional submission within one week's time i.e., by January 25, 2022.

14. Thereafter, the Noticees vide email dated January 25, 2022 made additional submission. I note that letter dated January 24, 2022 by Noticees contains wrong mention of name of Noticees. however, the same is being considered as Typographical error by the undersigned and is considered to be submissions made by Noticees.

15. Following are the replies made by Noticees:

<u>Letter dated January 17, 2022:</u>

1) *The present representation is being made pursuant to the directions in the Order dated 20.10.2021 passed by the Hon'ble Securities Tribunal ("**SAT**") in Appeal No. 403 of 2018 remanding the matter for the limited purpose of determining the quantum of the penalty for the alleged violation of*

Regulation 11(1) read with Regulation 14 of the Takeover Regulations ("SAST"). The relevant extract of the said order of SAT is as under: -

"14. In the circumstances while upholding the finding of the Learned AO that the appellants have violated the provisions of Regulation 11 (1) read with 14 of the Takeover Regulations to make public announcement of open offer and therefore are liable to pay penalty, the issue of quantum is required to be remanded to the Learned AO. In this regard, the appellants are directed to appear before the Learned AO on November 08, 2021 whereupon the Learned AO shall provide the copies of the documents on which reliance is placed in the impugned order for quantifying the penalty. The concerned appellants would be at liberty to place their views/ explanation regarding the quantum of the penalty upon which the AO shall pass a fresh order as regard the quantum of penalty for the violation of regulation 11(1) read with regulation 14 of the Takeover Regulations, 1997 within the period of four months from the date of the receipt of the views/ explanation from the appellants.

Hence, the following order:

ORDER

The appeals are partly allowed, the directions of the AO to pay penalty for violations of regulation 8(1) and 8(2) as well as regulation 3(3) and 3(4) of the Takeover Regulations is hereby set aside.

The order of the AO declaring that the appellants have committed violation of regulation 11(1) read with 14 of the Takeover Regulations is hereby affirmed. The matter however is remitted to the AO for again determining the quantum of the penalty for violation of Regulation 11(1) read with 14 of the Takeover Regulations as per the directions made in paragraph no. 14 above.

2) *Some of the relevant facts of the matter are as follows :-*

2.1 *Indian Infotech and Software Ltd. is the concerned Target Company. The Noticees along with certain other entities were the erstwhile promoter group of the Target Company from the 1997 till 2011. The said company was taken over by a new set of Promoters in 2011 and they had made an open offer also.*

2.2 *In 2013, SEBI had issued SCN inter alia alleging default in filing certain disclosures and that the Noticee No 4 had acquired 1 lac shares on 4th October 2010 in an off market transaction resulting in the increase of Promoter Group's shareholding from 53.17% to 55.28% , which allegedly triggered an Open Offer obligation under Regulation 11(1) of SAST 1997. In 2015, SEBI issued an additional Supplementary SCN alleging that Noticee 1 -3 could be held liable as PAC's in the said acquisition of by Noticee No. 4.*

2.3 *The Noticees filed their replies / submissions to the various SCN's, and for the sake of brevity, the contents thereof may be deemed to be incorporated herein.*

2.4 *On 9.8.2018, the Ld. Adjudicating officer ("AO") of SEBI passed an order imposing various penalties, including a Penalty of Rs 3(Three) crores payable jointly and severally by the Noticees , for alleged violation of Regulations 11(1) r/w Regulation 14 of SAST Regulations 1997 for failure to make to a Public Announcement of an Open Offer. This purported Penalty of Rs. 3(Three) crores was allegedly based on purported computations of alleged loss caused to the investors who had allegedly sold off their shares on market and off market between the alleged trigger date of 8-10-2010 and 24-05-2011, being the date of the open offer by the said new promoters.*

2.5 *Being aggrieved by the said Order dated 9.8.2018 of the Ld. AO, the Noticees had preferred Appeal No. 403 of 2018 before the Hon'ble SAT, which heard and disposed off the said appeal vide its aforesaid Judgment dated 20.10.2021, by which inter alia, the Hon'ble SAT upheld the finding of violation of Regulations 11(1) r/w Regulation 14 of SAST Regulations 1997, but set aside the quantification of the Penalty and remanded the matter for reconsideration of the quantum of Penalty after full disclosure of the evidence / documents being relied on for such quantification, if any. For the sake of brevity, all the submissions of the Noticees in the said Appeal, may be deemed to be incorporated herein.*

3) *Consequently, Authorised Representatives of the Notices by letter dated 23-11-2021 deputed one of his Officer Assistant to attend SEBI's office and collect copies of the documents which were proposed to be relied on by the Ld. Adjudicating Officer. Without any covering or recording letter, only the following documents were handed over in an envelope to our said authorized representative :-*

a) Letter dated 11.8.2011 sent by JAY and Co. Chartered Accountants addressed to Mr. E. Balasubramaniam, Corporation Finance Department, SEBI, containing an alleged calculation of the price at which an Open Offer ought to have been made, and

b) One CD containing EQT TRADE LOG PAN for the period 08/10/2010 to 24/05/2011 in respect of Scrip Code No. 509051 Srip Name IND INFO & SOF

The Authorisedd Representative of the Noticees by letter dated 30-11-2021 Confirmed n writing that he had received only the documents mentioned in (a) & (b) above

*Copies of letters dated 23-11-2021 and 30-11-2021 are annexed hereto and marked as **"Annexure A"***

***No other document has been provided by SEBI till date**.*

<u>Noticees submissions: -</u>

4) *While considering whether and if so how much to penalize the Noticees, it is most pertinent to note the facts and circumstances of the acquisition and the intention and consequences thereof.*

5) *Noticee No 4 had acquired 1,00,000 (2.11%) Partly Paid-up Equity shares of the Target Company from one Mr. Indrachand Surana on humanitarian ground as he was in acute financial distress and was in desperate need of money. The shares were Paid up to the extent of Rs. 2.50 per share against the face value of Rs. 10/- each, due to which Mr. Inder Chand Surana was not able to sell the same in the open market. As a consequence of the said acquisition, the share-holding of the Promoter group - i.e. - the Noticees herein, increased from 53.17% to 55.28% and thus was only 0.28% above the prescribed limit in the Regulations.*

6) *It is pertinent to note that :-*

a) The said acquisition did not affect the control over the Target company at all;

b) No investors or shareholders made any complaint in respect of the said acquisition ;

c) The said acquisition caused no loss to anyone nor any gains to the Noticees;

d) The said acquisition was merely a goodwill gesture to help out a public shareholder in need;

e) The said acquisition was also within the creeping acquisition limit of 5 % as the said 1 lac Equity shares amounted only to 2.11% ;

f) Even the 2nd proviso to Reg. 11 (2) permits creeping acquisition so long as the post-acquisition limit does not increase beyond 75%. Admittedly after acquisition the shareholding increased only to 55.28%;

g) The failure to make an Open Offer at Rs. 16.39, had not prejudiced or jeopardized the interest of the Shareholders as the share price between 26.7.2010 till at least 16.8.2010 was much higher than Rs. 16.39 and the shareholders who had sold their shares had chosen to do so at the then prevailing market prices;

h) If some shareholders chose to sell their shares during the period 08/10/2010 to 24/05/2011, it cannot be assumed that they would have sold their shares previously if an open offer had been made by the Noticees, nor can it be inferred that by their said sales, they had incurred any losses, more so when there was no enquiry as to why they sold, when they had acquired, at what price they had acquired etc..

i) In fact, Noticee No 4 had acted alone in this acquisition and that the other Noticees were not even aware of the same and can never be alleged to have acted as PACs for this acquisition. There was no meeting of minds or shared a common objective of acquisition of the said shares. In this context the Noticees rely on the Judgments in the matter of Modipon Ltd vs SEBI reported in 2001 SCC Online SAT 23 and Daikchi Sankyo reported in (2010) 7 SCC 449

7) *The Noticees further say and submit that in Para 73 of the Order dated 9.8.2018, the Ld. AO had stated that :-*

QUOTE

I further find that Chemo Pharma on behalf of Promoter Group-2 has stated that taking the price volume data on BSE as per the provisions of Takeover Regulations, 1997, the price at which the open offer should have been made would have been Rs. 16.13. However, the Manager to the Offer, Microsec Capital Ltd. has issued a pricing certificate from a Chartered Accountant with detailed working, according to which the Offer Price at which the Open Offer was required to be made by the Promoter Group – 2 was Rs. 16.39 i.e. the 26 weeks average price and volume data prior to the last date of the Public Announcement i.e. October 08, 2010, as per the following:

Price paid by the Promoter Group-2 for acquisition of 1,00,000 equity shares	*Rs.10.00*
Price calculated as per Regulation 20(4) of the Takeover Regulations, 1997	*Rs.16.39*
Price calculated as per Regulation 20(5) of the Takeover Regulations, 1997	*Rs.10.44*
Offer Price at which the Open Offer should have been made (being the highest of the above three prices)	***Rs.16.39***

UNQUOTE

8) *It is an admitted fact that the new promoter / acquirer - M/s Jayanti Prime Software Advisory Private Limited - acquired 8,65,661 shares of the Target Company and made an Open Offer at the rate of **Rs. 18.50** per share for which Public Announcement was made on 24/05/2011. Admittedly then existing Shareholders of the Target Company were benefitted as the Open Offer price of Rs.18.50 was higher than the price of Rs. 16.39 at which the Noticees were allegedly required to make an Open Offer which was allegedly triggered by the said acquisition on 08/10/2010. Hence, no loss was caused to the shareholders of the Target Company and they in fact got an exit option at a higher price. In fact, if the Noticees had made the open offer, they would have acquired at Rs. 16.39 and would have been able to sell off to the new promoter at Rs. 18.50, making a substantial profit in just a few months.*

9) *While the said trigger was alleged to be in October 2010, in fact admittedly an open offer was made to the shareholders by the new promoters in May 2011. The new acquirers made the open offer at Rs. 18.50. As per the pricing certificate of Microsec Capital Ltd., if the Noticees had made an open offer in October 2010 , then the same would have been at Rs. 16.39. No loss is caused to the investors/shareholders if the Noticees did not make any open offer in October 2010. In fact, the* *shareholders got better exit option and the same ought to be considered by SEBI whilst determining the quantum of penalty, if any.*

10) *The threshold limit of 55% was exceeded by a venial 0.28% - i.e. - 13,255 shares which if calculated even at the rate of Rs 16.39 per share, comes to only Rs. 2,17,250/. It is submitted that at the highest the Noticees can be required to pay over the said amount of Rs. 2,17,250/- (Rupees Two Lakh Seventeen Thousand Two Hundred and Fifty Only) to the Investor Protection Fund or as a penalty.*

11) *While considering whether to levy any penalty and the quantum if any thereof, it ought to be borne in mind that there has been a gross delay in the matter. The said impugned acquisition was in the year 2010 and the requisite disclosures were made to the Stock exchange. The said information was always in public domain.*

12) ***<u>Other Applicable Precedents on Quantum of Penalty :</u>***

a) *Order dated 08-06-2021 passed in the matter of Vakrangee Holding Private Limited vs SEBI in Appeal No 353 of 2018 (Order dated 08-06-2021) wherein the Hon'ble Tribunal inter alia held that**:***

"15. ….. in considering the facts of the present case as detailed supra, in our view, the respondent SEBI instead of directing to make public announcement, ought to have directed the appellant to transfer the proceeds of the sale of the shares acquired in violation of the regulations to the Investor Protection and Education Fund established by SEBI as provided in sub-regulation (b) of Regulation 32 of the Takeover Regulations, 2011. In the circumstance the following order.

16. …..

17. Instead the appellants are directed to transfer the proceeds of the sale of the shares in question disposed after acquisition by it in violation of the regulation with interest at the rate of 8% p.a. from the date of acquisition of the shares to the extent acquired in violation of the regulations, within in a period of six weeks from the date of the order."

b) *In the matter of M/s. Ushdev Trade Limited v/s SEBI, the Hon'ble Tribunal vide its Order 14-09-2010 (Appeal No. 106 of 2010) inter alia held that :-*

"3. ………………….. After considering the show cause notice and the submissions made by the appellant, the adjudicating officer by his order of April 29, 2010 levied a monetary penalty of Rs. 72,14,000 on the appellant under Section 15H (ii) of the Act for the violation of Regulation 10 read with Regulation 14(1) of the takeover code. It is this order which is now under challenge in this appeal.

4 ……………………… *We are satisfied that even though the appellant violated the provisions of Regulation 10 of the takeover code, this violation, in the circumstances of the case, has not prejudiced or jeopardized the interest of the shareholders of the target company and cannot be said to be serious enough calling for an exorbitant penalty as imposed by the adjudicating officer. This is not a case where a non-promoter has acquired a substantial chunk of shares in the target company changing its shareholding pattern and has gone away without making a public announcement. The acquisition by the appellant is within the promoter group which has not led to any change in control of the target company nor has its management changed. However Regulation 10 having been violated, penalty must follow as observed by the Supreme Court in Chairman, SEBI vs. Shriram Mutual Fund AIR 2006 SC 2287. Having regard to the overall facts and circumstances of this case and the provisions of Section 15 J of the Act, we are of the view that the ends of justice would be adequately met if the amount of penalty is reduced to* ***Rs. 5 lacs.*** *We order accordingly."*

13) *We respectfully submit that even SEBI itself has imposed relatively nominal penalties in similar cases, inter alia as follows :-*

Date of the Adjudication Order	***Names of the Noticee/Entities***	***In the Matter of***	***Alleged violation***	***Penalty Imposed (Rs.)***
13-08-2021	*Shri Anand Kumar Chaurasia*	*Nikki Global Finance Limited*	*Regulations 10 and SAST Regulations, regulation 35(2) Regulations, 2011*	*1,00,000/- 11 (1) of 1997 r/w of SAST*
13-08-2021	*Shri Kamal Kishore Chaurasia*	*Nikki Global Finance Limited*	*Regulations 10 and 11 (1) of SAST Regulations, 1997 r/w regulation 35(2) of SAST Regulations, 2011*	*1,00,000/-*
23-05-2018	*Shri Fateh Lal Shah, Shri Jitendra Yadav, Shri Alop Chatruvedi, Shri Anil Tiwari, Shri Anil Gagrani, Shri Pushpendra Patel, Shri Shivram Sharma, Shri Govardhan Lal Prajapat, Shri Arjun Geel, Shri Rajesh Mantri and Shri Puppy Chatruvedi*	*Shreenath Industrial Investment Company Limited*	*Regulation 3(1) and Regulation 4 of SAST Regulations, 2011*	*6,00,000/- (penalty shall be paid jointly and severally by the Noticees)*
23-05-2019	*Ms. Aruna Manchanda, Kamal Manchanda, Mr. Jagdish Chander*	*Brand Realty services*	*Regulations 11(1) and 11(2) of SAST*	*10,00,000/- (penalty*

	Manchanda, Mr. Gurucharan Singh, Sahil Securities Limited, Kamal Manchanda HUF and Era Resorts Private Limited	*Limited*	*Regulations, 1997*	*shall be paid jointly and severally by the 7 Noticees)*

14) *It is further submitted that while determining the quantum of penalty (if any), it is important to consider the factors stipulated in section 15J of SEBI Act, 1992 r/w rule 5 (2) of the Adjudication Rules, 1995 which provide as under: -*

"Factors to be taken into account by the adjudicating officer.
Section 15J - While adjudging quantum of penalty under section 15-I, 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.
Explanation. —For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section."

Admittedly, in the present matter by the said acquisition, the Noticees have not made any amount of disproportionate gain or unfair advantage nor caused any loss to any investor or to the market, nor was there any repetitive default. Therefore, all the said criteria indicate that no penalty or very nominal penalty be levied in the facts of this case.

Consequently for the reasons as aforesaid, It is humbly prayed that no penalty be levied on the Noticees for such a venial breach, or at the highest, only a token penalty be levied as inter alia indicated herein above.
Copies of following Orders passed by Ld. Adjudicating Officers in the following matter are also being sent.

Date of the Adjudication Order	***Names of the Noticee/Entities***	***In the Matter of***	***Alleged violation***	***Penalty Imposed (Rs.)***

13-08-2021	*Shri Anand Kumar Chaurasia*	*Nikki Global Finance Limited*	*Regulations 10 and 11 (1) of SAST Regulations, 1997 r/w regulation 35(2) of SAST Regulations, 2011*	*1,00,000/-*
13-08-2021	*Shri Kamal Kishore Chaurasia*	*Nikki Global Finance Limited*	*Regulations 10 and 11 (1) of SAST Regulations, 1997 r/w regulation 35(2) of SAST Regulations, 2011*	*1,00,000/-*
23-05-2018	*Shri Fateh Lal Shah, Shri Jitendra Yadav, Shri Alop Chatruvedi, Shri Anil Tiwari, Shri Anil Gagrani, Shri Pushpendra Patel, Shri Shivram Sharma, Shri Govardhan Lal Prajapat, Shri Arjun Geel, Shri Rajesh Mantri and Shri Puppy Chatruvedi*	*Shreenath Industrial Investment Company Limited*	*Regulation 3(1) and Regulation 4 of SAST Regulations, 2011*	*6,00,000/- (penalty shall be paid jointly and severally by the Noticees)*
23-05-2019	*Ms. Aruna Manchanda, Kamal Manchanda, Mr. Jagdish Chander Manchanda, Mr. Gurucharan Singh, Sahil Securities Limited, Kamal Manchanda HUF and Era Resorts Private Limited*	*Brand Realty services Limited*	*Regulations 11(1) and 11(2) of SAST Regulations, 1997*	*10,00,000/- (penalty shall be paid jointly and severally by the 7 Noticees)*

Letter dated January 24, 2022:

Brief Submission on behalf of the Noticees:

1) *By an order dated 20.10.2021 of the Hon'ble Securities Appellate Tribunal ("SAT"), in Appeal No. 403 of 2018, the matter has been remanded to the Ld. Adjudicating Officer for reconsidering the limited issue of the alleged violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations ("SAST").*

2) *The very brief relevant facts of the case are as set out herein below: -*

2.1) <u>Indian Infotech and Software Ltd</u>. is the concerned Target Company.

2.2) <u>From 1997 till 2011</u>, the Noticees along with certain other entities were the erstwhile promoter group of the Target Company.

2.3) <u>On 4.10.2010</u>, <u>Noticee No 4</u> (Chemo Pharma) had acquired 1,00,000 (2.11%) shares of the target Company from one Mr. Indrachand Surana. The said shares were partly paid-up shares and Mr. Surana claimed that he was in severe financial distress and was in desperate need of money. Further, since the shares were partly paid up to the extent of Rs. 2.50 per share against the face value of Rs. 10/- each and since he did not have the funds to pay the balance amount to the company, he could not have sold the same on the stock exchange and the shares were also open to forfeiture by the company. It was therefore only to help out a desperate shareholder, that Noticee No. 4 agreed to buy the said shares.

<u>{ Note :</u> At the hearing the Ld. Adjudicating Officer had asked for particulars of the price etc. at which the shares were acquired by Noticee No. 4. In this regard it is submitted that :-

a) Noticee No. 4 purchased the shares @ Rs. 10 per share, of which Rs. 2.50 was paid to the seller and Rs. 7.50 was paid to the company to avoid forfeiture of the shares.

b) In fact, the company had forfeited various other shareholders shares for non-payment of the calls / balance face value of the shares and the same is also recorded in the SEBI vetted Letter of Open Offer ['note' to para 6.5] { Annexure A hereto } as well as in the said previous Ld. Adjudicating Officers Order dated 9.8.2018 (para 79 & 80). Therefore the said gesture of Noticee No. 4 saved Mr. Surana from losing his entire investment.

c) Further, the Noticees had sold all their shares to the new acquirer / new promoters at the rate of Rs. 10 per share as recorded in the said Letter of Offer of the Open Offer as vetted by SEBI [pg. 5, para 3.1.3] . Therefore, Noticee No. 4 made no profit at all from the said sale of the said 1 lac shares. }

2.4) As a consequence of the said acquisition, the share-holding of the Promoter group - i.e. - the Noticees herein, increased from <u>53.17% to 55.28%</u> and thus was alleged to be <u>0.28%</u> above the limit in the Regulations.

2.5) However, it is pertinent to note that Noticee 4 admittedly acted on its own in this acquisition. The other Noticees were not aware of the same nor PACs in this acquisition. SEBI has not even alleged that the Noticees 1, 2 & 3 were in any manner involved in this acquisition. It is therefore submitted that only the holding of Noticee No. 4 can be considered and there is no basis or justification to club the holdings of the other Noticees as PAC's. In this regard, it is most pertinent to note the ratio of the following judgements of the Hon'ble Supreme Court and the Hon'ble SAT :-

(a) In its judgment in the case of <u>Daiichi Sankyo vs. Jayram Chigurupati & ors</u>. {reported in 2010 (7) SCC 449 – Annexure B hereto} the Hon'ble Supreme Court inter alia held as follows: -

"48. To begin with, the concept of "person acting in concert" under Regulation 2 (1) (e) (1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common objective or purpose of substantial acquisition of shares, etc. of the target company. Unless there is a target company, substantial acquisition of whose shares, etc. is the common objective or purpose of two or more person coming together there can be no "person acting in concert". For, dehors the target company the idea of "person acting in concert" is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise "person acting in concert".

"49. The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares, etc. of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares, etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of "persons acting in concert" is as meaningless as a criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, be meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition or substantial

acquisition of shares, etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares, etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares, etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "person acting in concert" to come into being."

(Emphasis supplied)

(b) In its judgment in the case of <u>MODIPON Vs. SEBI</u> {reported in MANU/SB/0074/2001 - Annexure C hereto} the Hon'ble SAT inter alia held as follows :-

"33. It may be noted that the promoter as such need not be an acquirer automatically. Any person, and shareholder including the promoter will become an acquirer or a person acting in concert with the acquirer only if he falls within the definition of these expressions provided in regulations 2(b) and 2(e). It is the conduct of the party that decides the identity. A dormant promoter or a promoter simpliciter who neither acquires or agrees to acquire shares or voting rights or control over the target company is not an acquirer and his shareholding in the target company cannot be considered as the shareholding of the acquirer warranting exclusion from the public shareholding. Similarly, if the characteristics of a person acting in concert stated in the definition are found missing in the case of a person, it may not be proper to consider him as a person acting in concert with the acquirer."

(c) The aforesaid Judgement of the Hon'ble SAT in Modipon, was carried in appeal before the Hon'ble Bombay High Court, and a division bench of the Hon'ble Bombay High Court in its judgment in the case of <u>K.K. Modi Vs Securities Appellate Tribunal & Ors.</u> {reported in 2001 SCC Online Bom 969 – Annexure D hereto} inter alia held as follows: -

"32. As the Appellate Tribunal has rightly pointed out, there is no hard and fast rule that a promoter must always be deemed to be an acquirer or a person action in concert with the acquirer. On the facts, it may be held that a promoter shares the common objective or purpose of substantial acquisition of shares with the acquirer. It may well be that he may not share the said common objective or purpose. If he does, he shall be deemed to be a person acting in concert with the acquirer, but if he does not, he cannot be deemed to be an acquirer merely because he happens to be a promoter. Regulation 2(1)(e)(2) also makes this clear. The persons named therein are deemed to be persons acting in concert with other persons in the same category, unless the contrary is established. It, therefore, follows that even though there is a presumption that the persons described therein may be deemed to be persons acting in concert with the acquirer, the presumption is rebuttable, and therefore, in each case, the facts have to be examined to reach a conclusion as to whether a person is or

is not acting in concert with the acquirer for the purpose of substantial acquisition of shares or voting rights or gaining control over the target company. He may do so by an express agreement or understanding, and the agreement or understanding may be proved by evidence on record. Similarly, he may co-operate with the acquirer directly or indirectly. What is important is that it must be shown that he is acting in concert with the acquirer. A company may have several promoters, but only one of them may decide to increase his shareholding in the company by substantial acquisition of shares or voting rights in the company. The mere fact that one of the promoters of the company wishes to do so, is no reason to hold that the other promoters also necessarily share his objective or purpose. The other promoters may, in fact, be opposed to the acquirer acquiring further shares in the target company, and if they fail to prevent the acquirer from doing so, they may be inclined to dispose of the shares held by them. In such a situation, it cannot be said that the other promoters share the common objective or purpose of the acquirer."

33. Several promoters may co-operate in promoting a company, and when the company is incorporated, they may be considered as promoters of the company. The SEBI Regulations of 1997 is not concerned with the promotion of a company. The promoters may have acted in concert for the purpose of promoting the company, but for the purpose of the SEBI Regulations of 1997, it has to be seen as to whether they are acting in concert for a common objective or purpose of substantial acquisition of shares in the company…………………"

(emphasis supplied)

2.6) It is therefore settled law, that in the absence of any shared common objective of acquisition of the concerned shares of the target company, it cannot be alleged that the other parties are "persons acting in concert". It is not even alleged that Noticee Nos 1, 2 & 3 were in any manner even involved in the acquisition of the said 1 lac shares by Noticee No. 4.

2.7) Further, merely because all the Noticees were part of the erstwhile promoter group of the said company, is not enough to allege that Noticee Nos. 1, 2 and 3 were all PAC's with Noticee No. 4 in the said acquisition of the said shares 1 lac shares.

2.8) Therefore one can only consider the shareholding of Noticee No. 4 alone, which went from <u>40.04% to 42.15%,</u> which is less than the 55% barrier and hence there was no trigger of any open offer / public announcement and no violation at all.

3) *Vide a Share Purchase Agreement dated 20.5.2011, the Noticees sold off their shareholding in the Target company to a new set of promoters, who then made a public announcement of an open offer on 24.5.2011 @ Rs.<u>18.50 per share</u>.*

4) *In 2013, SEBI had issued show cause notices inter alia alleging that there was default in filing certain disclosures and that Noticee No 4 acquiring the said 1 lac shares on 4.10.2010 in an off-market transaction resulting in triggering an open offer obligation under Regulation 11(1) of the SAST Regulations, 1997.*

5) *On 9.8.2018, the erstwhile Ld. Adjudicating Officer passed an order imposing various penalties, including a penalty of Rs 3 crores payable jointly and severally by the Noticees, for alleged violation of Regulations 11(1) r/w Regulation 14, for alleged failure to make a Public Announcement of an Open Offer. The said order inter alia held that as per the pricing certificate of a CA, the open offer ought to have been made by the Noticees at the rate of Rs. 16.39 per share and that from 8.10.2010 to 24.5.2011 (i.e. – the date the public announcement allegedly ought to have been made and the date the public announcement was made by new promoters), shares of the Target company had been sold at prices below Rs. 16.39 and therefore such sellers could have made more profit if the open offer had been made by the Noticees, and this was considered as the alleged loss suffered by the shareholders and formed the basis for the computation of penalty.*

6) *The Noticees challenged the said previous order dated 9.8.2018 before the Hon'ble SAT vide Appeal No. 403 of 2018. By an order dated 20.10.2021, the Hon'ble SAT inter alia set aside the other findings in the Order dated 9.8.2018 were set aside and the matter was remanded to the Ld. Adjudicating Officer in respect of the alleged violation of Regulation 11(1) and the quantum of penalty if any to be imposed.*

7) *Pursuant to the order of the Hon'ble SAT, SEBI has now disclosed and furnished (i) a copy of a letter dated 11.8.2011 of one JAY and Co. – Chartered Accountants , containing the calculation of the open offer price of Rs. 16.39 and (ii) a C.D. containing the Trade log of the target company for the said period 8.10.2010 till 24.5.2011 . No other document has been provided by SEBI and it has been clarified that no other document is being relied on by SEBI.*

8) *Without prejudice to the aforesaid submission that there is in fact no violation / trigger at all, as regards the issue of quantum of penalty, it is submitted as follows :-*

8.1) *The said acquisition by Noticee No. 4 did not affect the control over the Target company or the management of the target company;*

8.2) *The said acquisition was merely a goodwill gesture of Noticee No. 4 to help out a public shareholder in need who had no other alternative. It was never even realised that the acquisition would be considered with the total of the promoter group, or that the total would go over the 55% mark;*

8.3) *Even as per SEBI's allegations, the total promoter group holding went over the 55% barrier by a mere 0.28% , which is a very miniscule amount and does not merit any penalty;*

8.4) *No investors or shareholders made any complaint in respect of the said acquisition;*

8.5) *In fact, the parties who acquired the company and became the new promoters, admittedly made open offer at the rate of Rs. 18.50, which is higher than the said rate of Rs. 16.39 at which it is alleged that the Noticees ought to have made the open offer. Therefore the shareholders benefitted by not selling shares to the Noticees and instead taking advantage of the new promoters open offer;*

8.6) *In fact, if the Noticees had made the open offer Rs. 16.39 and acquired shares, they could have greatly benefitted by selling the shares in the open offer of the new promoters at the rate of Rs. 18.50.*

8.7) *The said acquisition was also within the creeping acquisition limit of 5 % as the said 1 lac shares amounted only to 2.11%. Even the 2nd proviso to Regulation 11 (2) of the SAST Regulations as then applicable, creeping acquisition upto 5% per annum was permitted, so long as the post-acquisition limit does not increase beyond 75%. However, the acquisition should be on market, whereas in the present case the acquisition by Noticee No. 4 was off market, since the shares were partly paid and subject to forfeiture. Therefore, it was only the unfortunate confluence of events and the said goodwill gesture of Noticee No. 4 to agree to help the said Mr. Surana which has given rise to the present proceedings and allegations.*

8.8) *The calculations of alleged loss to the shareholders as made in the previous Order dated 9.8.2018, based on market sales at less than Rs. 16.39 is an incorrect approach / methodology, inter alia because :-*

a) *It cannot be assumed that the shareholders who sold on market during the said time period of 8.10.2010 till 24.5.2011, would necessarily have sold on an open offer if it had been made by the Noticees in October / November 2010;*

b) *Most pertinently - the share price between 26.7.2010 till at least 16.8.2010 was higher than Rs. 16.39. The shareholders could have sold at those prices but chose not to. { See price/volume data Annexure E hereto}*

c) *While looking at only the sale data, it has not been identified whether the same selling shareholders were holding the same shares on 4.10.2010. obviously there may have been many traders in the market who may have bought and sold off shares between 8.10.2010 and 24.5.2011, which obviously cannot be considered in any computation.*

8.9) *Even as per SEBI's own previous calculation (which is incomprehensible and flawed), the so-called notional loss by shareholders selling on market from 8.10.2010 to 24.5.2011, as further increased by adding interest at the rate of 10%, was Rs. 15.68 lacs. {Please see page 94 of order dated 9.8.2018 }*

9) *Precedents / Orders of the Hon'ble SAT and of Ld. Adjudicating Officers of SEBI*

Without prejudice to any of the other submissions on the merits as set out herein above, it is most pertinent to note the judicial precedents on quantification of penalty in similar cases as set out herein below.

9.1) *In the matter of Vakrangee Holding Private Limited vs SEBI { SAT Order dated 08-06-2021 in Appeal No 353 of 2018 } – {Annexure F hereto }*

In this case, the holding company acquired shares of the subsidiary target company, which went over the then prescribed limit by 1% and triggered the public announcement / open offer requirement.

The Hon'ble SAT by its said Order held that the appropriate penalty was to direct the Appellants to transfer the sale proceeds of the shares in question which were acquired in violation of the regulations, with interest at the rate of 8% p.a. from the date of acquisition of the shares.

If the same ratio is applied to the present matter, the threshold limit of 55% was allegedly exceeded by just 0.28% - i.e. - 13,255 shares. The Noticees had sold their shares to the new Acquirer @ Rs. 10 per share as recorded in the Letter of Offer as vetted and approved by SEBI [pg. 5, para 3.1.3] { Annexure G hereto }. The same therefore works out to Rs. 1,32,550.

9.2) *In the matter of M/s. Ushdev Trade Limited v/s SEBI*

{ SAT Order dated. 14-09-2010 in Appeal No. 106 of 2010}

{Annexure H hereto }

In this case there was transfer of shares between promoters which was 3.74% over the 15% threshold as then applicable.

The Hon'ble SAT in its said order (page 4) held that the transfer of shares inter se between the promoters would have been exempted if held for 3 years as per the provisions then applicable and that the acquisition could have been exempted by SEBI if exemption had been applied for. It was held that though there was a technical violation, no prejudice had been caused to shareholders and therefore the exorbitant penalty of Rs. 72 lacs imposed by SEBI was unjustified and excessive and therefore the penalty was reduced to Rs. 5 lacs by the Hon'ble SAT.

9.3) *In the matter of Shri Anand Chaurasia & Kamal Chaurasia {Adjudicating Officers Order dated 13-08-2021}*

{Annexure I hereto}

In this case, 2 brothers had acquired 21.26% of the shares of the target Company, which was 6.26% over the 15% limit as applicable therein (pg. 8). The Order imposed a penalty of Rs. 1 Lac each (pg. 13).

9.4) *In the matter of Shri Fateh Lal Shah and others*

{Adjudicating Officers Order dated 23.5.2018}

{Annexure J hereto }

In this case, 11 Promoters had acquired 27.5 % of the shares of the target company, which was 2.5% over the then applicable trigger of 25% (Pg. 8).

It was however recorded that there was no change in management or control over the target company (Pg. 3 para 6); that new promoters had taken over the target company and had made an open offer (Pg. 10 para 19) and that in fact the Noticees therein had not even filed any reply to the show cause notice.

The Ld. AO imposed a penalty of Rs. 6 Lacs on all 11 promoters jointly & severally.

9.5) *In the matter of Ms. Aruna Manchanda, Kamal Manchanda, and others {Adjudicating Officers Order dated 23.5.2019}*

{Annexure K hereto }

In this case, 7 parties formed the promoter group. There were multiple triggers / violations spread over 15 years wherein the promoter holding went from 46% to over 70% .

when the numerous violations came to light, after 15 years, an open offer was made and shareholders got an exit opportunity.

The Ld. AO levied a penalty of Rs. 10 Lacs on the 7 Noticees, jointly & severally.

{ NOTE : In the present case the open offer / exit opportunity at a higher price was within 7 months (8.10.2010 to 24.5.2011) }

10) *The Section 15 J – factors :-*

It is submitted that :-

a) *The Noticees have not made any disproportionate gain or unfair advantage from the said acquisition of the said 1 lac shares by Noticee No. 4. Further, the Noticees have not made any disproportionate gain or unfair advantage even from the fact that no open offer was made by them. As aforesaid, in fact, the shareholders benefitted from the better price / opportunity in the open offer at the rate of Rs. 18.50 by the new promoters / acquirers.*

b) *No loss was caused to any investor or to the market, nor was the alleged default repetitive in nature.*

c) *In fact, the present case is a very old and stale matter and there has been a long delay. The matter relates to acquisition of the said 1 lac shares by Noticee No. 4 in the year 2010. At the relevant time, requisite disclosures were made to the Stock exchange. There was no change in the management or control by the impugned acquisition. Moreover the breach is very venial and is of just 0. 28%. The Noticees have all exited the Target company since 2011 and the new promoters took over.*

d) *In para 11 of the judgment of the Hon'ble Supreme Court in the case of Siddharth Chaturvedi Vs SEBI (with connected appeals) {reported in 2016 (12) SCC 119 – Annexure L hereto } the Hon'ble Supreme Court inter alia held that :-*

"11. ……………………………….. In fact, the facts of the present case would go to show that where there is allegedly only a technical default, and the three parameters of Section 15-J would allegedly be satisfied by the appellants, namely, that no disproportionate gain or unfair advantage has been made as a result of default; no loss has been caused to an investor or group of investors as a result of default; and there is in fact, no repetitive nature of default, no penalty at all ought to be imposed……………..". (emphasis supplied)

It is respectfully submitted that the same principle in fact would apply to the facts of the present case also, and no penalty at all ought to be imposed on the Noticees.

11) *<u>CONCLUSION :</u> it is respectfully submitted that no penalty or only a very nominal penalty be levied on the Noticees in the facts of this case.*

16. Since, documents relied upon for calculation of penalty on Noticees in the impugned AO order dated August 09, 2018 has been provided to Noticees and hearing / inquiry in this matter is concluded, therefore, after taking into account the allegations, submissions of the Noticees and evidences / material available on record, I hereby proceed to decide the case on merit.

<u>ISSUES FOR CONSIDERATION AND FINDINGS</u>

17. Hon'ble SAT vide its order dated October 20, 2021 against the appeal to AO order dated August 09, 2018 in the captioned matter held that:

> *"14. In the circumstances while upholding the finding of the Learned AO that the appellants have violated the provisions of Regulation 11 (1) read with 14 of the Takeover Regulations to make public announcement of open offer and therefore are liable to pay penalty, the issue of quantum is required to be remanded to the Learned AO. In this regard, the appellants are directed to appear before the Learned AO on November 08, 2021 whereupon the Learned AO shall provide the copies of the documents on which reliance is placed in the impugned order for quantifying the penalty. The concerned appellants would be at liberty to place their views/ explanation regarding the quantum of the penalty upon which the AO shall pass a fresh order as regard the quantum of penalty for the violation the of regulation 11(1) read with regulation 14 of the Takeover Regulations, 1997 within the period of four months from the date of the receipt of the views/ explanation from the appellants."*

18. Hon'ble SAT vide its order in the captioned matter has also held that:

"………The order of the AO declaring that the appellants have committed violation of regulation 11(1) read with 14 of the Takeover Regulations is hereby affirmed. The matter however is remitted to the AO for again determining the quantum of the penalty for violation of Regulation 11(1) read with 14 of the Takeover Regulations as per the directions made in paragraph no. 14 above."

19. Noticees in their replies have contended the allegation of violation of Regulation 11 (1) read with 14 of the Takeover Regulations, 1997 against them and cited carious judgments in this regard. I note that, Hon'ble SAT in its order dated October 20, 2021 has affirmed that the Noticees have violated Regulation 11 (1) read with 14 of the Takeover Regulations, 1997.Thus, In view of the same, the limited issue before me is to only reconsider the penalty imposed on the Noticees in light of views/ explanations by Noticees regarding the quantum of the penalty made after the copies of the documents on which reliance is placed in the impugned AO order for quantifying the penalty have been provided to Noticees.

20. Hence, in the instant order, I will only be dealing with the reconsideration of quantum of penalty, taking into account views/explanations made by Noticees regarding the quantum of the penalty made after the copies of the documents on which reliance is placed in the impugned AO order for quantifying the penalty have been provided to Noticees

21. Before proceeding further, I note that, Noticees have raised the contention of delay in the matter. In this regard, I note that, Hon'ble SAT has held the following in its order:
"11*. The order of the Learned AO would show that the delay in launching the proceedings has occurred since the information reached to the respondent SEBI only at the time of receiving letter of offer by Jayanti Prime Software Advisory Pvt. Ltd. Further the delay has not caused any prejudice to theses appellant in defending the case. In our view therefore the order of the AO holing that the violation has occurred can not be faulted with.*

22. Further, it may be noted that, the instant Adjudication order is passed well within the timelines granted by Hon'ble SAT to SEBI.

23. I note that erstwhile AO has imposed a Penalty of Rs. 3 (Three) crores on the basis of computations of loss caused to the investors who had sold off their shares in the market on stock exchange and off market below the Offer Price of Rs. 16.39/- per share at which the Open Offer should have been made between the trigger date of open offer viz. 8-10-2010 and 24-05-2011, being the date of the open offer by the new promoters of company.

24. I Note that requisite documents, which were relied by erstwhile AO for the computation of loss caused to the investors were handed over to Noticees and Noticees had *inter-alia* made the following submissions regarding calculation of loss caused to investors after perusal of documents provided to Noticees:

8.8) The calculations of alleged loss to the shareholders as made in the previous Order dated 9.8.2018, based on market sales at less than Rs. 16.39 is an incorrect approach / methodology, inter alia because :-

a) *It cannot be assumed that the shareholders who sold on market during the said time period of 8.10.2010 till 24.5.2011, would necessarily have sold on an open offer if it had been made by the Noticees in October / November 2010;*

b) *Most pertinently - the share price between **26.7.2010 till at least 16.8.2010 was higher than Rs. 16.39.** The shareholders could have sold at those prices but chose not to. **{ See price/volume data Annexure E hereto}***

c) *While looking at only the sale data, it has not been identified whether the same selling shareholders were holding the same shares on 4.10.2010. obviously there may have been many traders in the market who may have bought and sold off shares between 8.10.2010 and 24.5.2011, which obviously cannot be considered in any computation.*

8.9) Even as per SEBI's own previous calculation (which is incomprehensible and flawed), the so-called notional loss by shareholders selling on market from 8.10.2010 to 24.5.2011, as *further increased by adding interest at the rate of 10%, was Rs. 15.68 lacs.* ***{Please see page 94 of order dated 9.8.2018 }***

25. Noticee has also *inter-alia* stated the following:

"5) It is an admitted fact that the new promoter / acquirer - M/s Jayanti Prime Software Advisory Private Limited - acquired 8,65,661 shares of the Target Company and made an Open Offer at the rate of ***Rs. 18.50*** *per share for which Public Announcement was made on 24/05/2011. Admittedly then existing Shareholders of the Target Company were benefitted as the Open Offer price of Rs.18.50 was higher than the price of Rs. 16.39 at which the Noticees were allegedly required to make an Open Offer which was allegedly triggered by the said acquisition on* <u>*08/10/2010*</u>*. Hence, no loss was caused to the shareholders of the Target Company and they in fact got an exit option at a higher price. In fact, if the Noticees had made the open offer, they would have acquired at Rs. 16.39 and would have been able to sell off to the new promoter at Rs. 18.50, making a substantial profit in just a few months.*

6) While the said trigger was alleged to be in October 2010, in fact admittedly an open offer was made to the shareholders by the new promoters in May 2011. The new acquirers made the open offer at Rs. 18.50. As per the pricing certificate of Microsec Capital Ltd., if the Noticees had made an open offer in October 2010 , then the same would have been at Rs. 16.39. No loss is caused to the investors/shareholders if the Noticees did not make any open offer in October 2010. In fact, the shareholders got better exit option and the same ought to be considered by SEBI whilst determining the quantum of penalty, if any."

26. I now proceed to make findings with respect to computation of loss alleged to be caused to investors by erstwhile AO in the impugned AO order.

27. I note that, one of the document provided to the Noticees was the Pricing certificate. In this respect, the Offer Price of Rs.16.39/- per share at which the Open Offer should have been made has been provided by Manager to the Offer, Microsec Capital Ltd. who issued

a pricing certificate from a Chartered Accountant with detailed working, according to which the Offer Price at which the Open Offer was required to be made by the Noticees was Rs. 16.39 i.e. the 26 weeks average price and volume data prior to the last date of the Public Announcement i.e. October 08, 2010.Thus, in view of the same, I do not find any fault in the calculations at which offer price of Rs. 16.39 has been arrived and I note that same has also not been disputed by Noticees.

28. Another document provided to Noticees was Equity Trade log of company sought by erstwhile AO from BSE for the period from 8.10.2010 till 24.5.2011. On perusal of Trade log of the company for the said period from 8.10.2010 till 24.5.2011, I note that, it contains the data of investors who have traded in shares of the company on stock exchange during the aforesaid period. I find that data shows only the trades executed by these investors and on perusal of trade log, I also find that, many of the investors were intra-day traders. Only on the basis of trade log and computation done by erstwhile AO as shown in AO order, I do not find any analysis of data available on record which shows that, shareholders who sold their shares during the aforesaid period have made profit or loss on the trades executed by them. further, I do not find the date of buying and selling of shares by these shareholders and the price at which shares were bought and sold by them.

29. I note that AO order mentions the computation of loss caused to shareholders who have transferred the shares off-market during the period from October 08, 2010 to May 24, 2011 at a price lower than Rs. 16.39. in this regard, It may be noted that, there are deals which match off market i.e., the buyer and the seller agree on the price and quantity and execute the transaction outside the market and then report the same to the exchange. These are also called negotiated transactions. Thus, I do not find the computation of loss caused to investors who traded in off-market as logical, since the price is already agreed into parties to such transaction. Also, I do not find the data which shows that, whether these shares were partly paid up or fully paid. Whether, they have made profit or loss on the shares transferred by them. Further, the computation of loss as

mentioned in AO order also includes shared transferred by Noticees also in the off market.

30. In view of the aforesaid, I agree with the submission of Noticees that computation of loss caused to the shareholders, based on market sales at less than Rs. 16.39 as mentioned in AO order is an incorrect approach / methodology and is merely based on assumptions and incomplete data.

31. I find that the Noticees has submitted that, *the new promoter / acquirer - M/s Jayanti Prime Software Advisory Private Limited - acquired 8,65,661 shares of the Target Company and made an Open Offer at the rate of Rs. 18.50 per share for which Public Announcement was made on 24/05/2011. Admittedly then existing Shareholders of the Target Company were benefitted as the Open Offer price of Rs.18.50 was higher than the price of Rs. 16.39 at which the Noticees were allegedly required to make an Open Offer which was allegedly triggered by the said acquisition on 08/10/2010. Hence, no loss was caused to the shareholders of the Target Company and they in fact got an exit option at a higher price. In fact, if the Noticees had made the open offer, they would have acquired at Rs. 16.39 and would have been able to sell off to the new promoter at Rs. 18.50, making a substantial profit in just a few months.*

32. In this regard, Firstly, I find that public announcement to the shareholders who had not exited the Company was not made by the Noticees and in fact was made by the Acquirer Jayanti Prime Software Advisory Private Limited on May 24, 2011 to acquire shares at a price of Rs. 18.50 per fully paid up shares. Secondly the statement, that no loss was caused to the shareholders of the Target Company and they in fact got an exit option at a higher price is flawed as the same is based on assumptions. Considering, preponderance of probability, it might be the case that, there may be investors, who would have exit at the offer price of Rs. 16.39, if open offer would have been made by Noticees in compliance with regulation and not on the traded price at stock exchange which was below the offer price of Rs. 16.39/-.

33. I note that, the new promoter / acquirer - M/s Jayanti Prime Software Advisory Private Limited - acquired 8,65,661 shares of the Company and made an Open Offer at the rate of Rs. 18.50 per share for which Public Announcement was made on 24/05/2011 which was 7 months 16 days after the date Noticees should have made open offer for crossing the threshold limit set as a trigger point for the open offer on October 04, 2010.

34. I further find that, the Noticees has stated the violation as venial breach of "just 0.28%". In this regard, I would like to stated that, any transaction which requires compliance of the Takeover Regulations, if not complied, is always a serious matter, and cannot be considered a mere 'technical' violation, even if the transaction is otherwise in compliance, since the shareholders/ investors were deprived of an exit opportunity at the relevant point of time. Further, Acceptance of any argument for not making a public announcement of an open offer would tantamount to total disregard to the concerns of the public share-holders as the violation is not one of mere procedural nature but goes against the very grain of the statute under consideration [Bhagirath Kanoria & Ors. v State of M.P., 1984 (4) SCC 222].

35. Thus, where the threshold limit is set as a trigger point for the open offer, it provides an exit opportunity for the shareholders. Thus, the guiding principles for the directions as provided in the Takeover Regulations are the interest of the investors in the securities market, which are the statutory guiding principles as inbuilt in the SEBI Act and the Takeover Regulations, 1997.

36. I note that Noticees have cited various case laws and judgments of Hon'ble SAT and SEBI with respect to imposition of quantum of penalty on Noticees. In this regard, I don't find the ratio applicable to facts and circumstances of the instant matter.

37. In view of the charges as established and affirmed by Hon'ble SAT in its order dated October 20, 2021 against Noticees, submissions of Noticees and various judgments cited by Noticees in its submission regarding imposition of quantum of penalty, my findings on the data relied for computation of loss caused to investors in the impugned AO order and

material available on record, While determining the quantum of monetary penalty under Section 15H(ii) of SEBI Act, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:

"15J - Factors to be taken into account by the adjudicating officer
While adjudging quantum of penalty under Section 15-I, 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."
[Explanation. —For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.]"

38. I note that, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. The Regulation seeks to achieve fair treatment by inter alia mandating disclosure of timely and adequate information to enable shareholders to make an informed decision and ensuring that there is a fair and informed market in the shares of companies affected by such change in control. Correct and timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so results in preventing investors from taking well-informed decisions Thus, the cornerstone of the Takeover regulations is investor protection.

39. I note from the submissions of Noticees that, they have made no profit at all from the said acquisition of 1 lac shares as they have acquired 1,00,000 (2.11%) shares of the Company from one public shareholder at Rs. 10 per share, of which Rs. 2.50/- was paid to the seller and Rs. 7.50/- was paid to the company to avoid forfeiture of the shares and

then Noticees had sold all their shares to the new acquirer / new promoters at the rate of Rs. 10 per share as recorded in the said Letter of Offer. In this regard, I note that, Noticees have not submitted any evidence with respect to the payment made with respect to acquisition of 1 lakh shares and it may be noted that this reason for acquisition was also not submitted to the then AO. Thus, in view of the absence of any evidence of payment made in lieu of acquisition of shares of said 1 lakh shares, I do not accept the submissions of Noticees with conviction that, aforesaid 1 lakh shares were acquired at Rs. 10 per share and not Rs. 2.50/- per share and whether any profit of Rs. 7.50/- shares was made by Noticees or not by selling it to new acquirer for Rs. 10/- per share.

40. Thus, it is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of violation of the relevant provision of Takeover Regulations, 1997 by the Noticees is available on record. I also find that the Noticees have violated the aforesaid regulation only once.

41. Further from the material available on record, it is not possible to ascertain the exact monetary loss caused to the investors on account of violation of Regulation 11(1) read with Regulation 14 of the Takeover Regulations, 1997 during the year 2010 by the Noticees. As the calculation made in the impugned Order by erstwhile AO was made on assumptions and incorrect analysis and did not took into consideration the factors as mentioned above.

42. I also note from Adjudication order that, erstwhile AO has found out from BSE website that as on quarter ended September 2010, Dhananjay Somani, Aradhana Somani, Chemo Pharma and Shree Consultation i.e. the Noticees were the only promoters of the Company and thus, I note that, there was no change in the management and control of company pursuant to the said acquisition of 1,00,000 equity shares of the company through off market transaction on October 4, 2010 by Noticees from one public shareholder which increased the shareholding of the Noticees from 53.17% to 55.28%. However, I cannot lose sight of the fact that, the Noticees have failed to comply with the

statutory requirements prescribed in the Takeover Regulations, 1997 by not making the public announcement as per the mandatory requirement of Regulation 11 of the Takeover Regulations,1997 and the open offer being a consequential and necessary part thereof, which was absolute in nature. The violation is a disobedience of the statutory provisions by which the acquisition of securities giving the Noticees enhanced control by the exercise of voting rights, etc.

ORDER

43. Accordingly, taking into account the aforesaid observations, the facts and circumstances of the case, the material available on record and the factors mentioned in Section 15J of the SEBI Act and in exercise of power conferred upon me under section 15 I of the SEBI Act read with rule 5 of the Rules, I hereby impose Penalty of Rs. 4, 00, 000/- (Four Lakhs Rupees only) on the Noticees under Section 15H(ii) of SEBI Act payable jointly and severally, which will be commensurate with the violations committed by the Noticees.

PENALTY PAYMENT OPTIONS

44. The amount of penalty shall be paid either by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, or by online payment through following path at SEBI website www.sebi.gov.in ENFORCEMENT → Orders → Orders of AO → Click on PAY NOW or at link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticee may contact the support at portalhelp@sebi.gov.in.

45. The said demand draft and its details or details of online payments made (in the format as given in table below) should be forwarded to "The Division Chief (Enforcement Department-1-DRA-1), the Securities and Exchange Board of India, SEBI Bhavan II, Plot No. C7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051."

Case Name :	

Name of Payee :	
Date of Payment:	
Amount Paid :	
Transaction No. :	
Bank Details in which payment is made :	
Payment is made for : (like penalties/ disgorgement/ recovery/ settlement amount and legal charges along with order details)	

46. 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.

47. In terms of Rule 6 of the Adjudication Rules, 1995, copy of this Order is sent to the Noticees and also to the Securities and Exchange Board of India.

Date : April 12, 2022 **Vijayant Kumar Verma**
Place : Mumbai **Adjudicating Officer**