BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/GR/HK/2023-24/27722]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 (HEREINAFTER, REFERRED TO AS "SEBI ACT") READ WITH RULE 5 OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995 (HEREINAFTER, REFERRED TO AS "SEBI ADJUDICATION RULES 1995")

IN RESPECT OF:

Pallor Trading Company Private Limited [PAN: AACP9462G]

In the matter of Saurashtra Cement Limited

BACKGROUND IN BRIEF

1. The instant proceeding emanated from the Hon'ble Supreme Court order of September 26, 2022 in *Securities and Exchange Board of India vs Fawn Trading Co. Pvt. Ltd.* (C.A. No. 7001/2021), wherein it partly set aside the order of Hon'ble Securities Appellate Tribunal (**'SAT'**) dated October 20, 2021 and held that the direction to make open offer, made *vide* Securities and Exchange Board of India (**'SEBI'**) order dated January 17, 2019 in the present matter, does not arise in view of the facts of the present case, further it was left at the discretion of SEBI to take any other action in accordance with law. The Supreme Court in the said order stated:

   "… the impugned orders are partly set aside in so far as the Appellate Tribunal has directed that only proceedings under Section 15-H of the

Securities and Exchange Board of India Act,1992 can be taken, and we observe that it will be open to the Securities and Exchange Board of India to take proceedings in accordance with law. However, we deem it appropriate to clarify that we agree with the Appellate Tribunal that the direction to issue open offer does not arise in view of the facts of the present case. Further, it is agreed that the regulations applicable would be the extant regulations at the time of violation."

2. At the first instance, SEBI had initiated proceedings which culminated in the Order dated January 15, 1999, wherein it was observed that (a) the Fawn Trading Company Private Limited ('Fawn'), Pallor Trading Company Private Limited ('Pallor') (hereinafter referred to as (**'Noticee'),** Fern Trading Company Private Limited ('Fern'), Willow Trading Company Private Limited ('Willow'), Tejashree Trading Company Private Limited ('Tejashree') [collectively referred to as **'five preferential allottees'**] are part of the promoter group; (b) the details required under regulation 3(1)(c)(ii) were not disclosed in the notice calling for the General Meeting ; (c) accordingly the regulations become applicable and the five preferential allottees were liable to make offer to the remaining shareholders of the Saurashtra Cement Limited (**'target company'/ 'SCL'**); (d) price to be in accordance with the Takeover Regulations.

3. The aforesaid SEBI order was challenged by Fawn and the Target Company by way of two separate appeals before the Central Government. The Central Government (the appellate authority during that point in time) *vide* its Order dated April 05, 1999 rejected the appeals and upheld the SEBI Order dated January 15, 1999. Thereafter, the five preferential allottees challenged the said SEBI Order by way of a Writ Petition (No. 1080 of 1999) before the Hon'ble High Court of Judicature at Bombay. Initially, The Hon'ble High Court stayed the said order of SEBI in 1999 and subsequently while disposing off the said petition *vide* Order

dated March 03, 2011, directed the five preferential allottees to file representation with SEBI and further stated that SEBI shall consider the representation in accordance with law and make appropriate orders.

4. Pursuant to receiving the representations from five preferential allottees, as directed in the above order of Hon'ble High Court, and after conducting the appropriate proceedings SEBI passed an order dated April 25, 2013, on the same grounds as of order dated January 15, 1999, directing the five preferential allottees to make a combined public announcement to acquire, jointly and severally, the shares of the Target Company, in terms of Regulation 11 of the SAST Regulations, 1997 and other relevant regulations thereof.

5. Similar directions were given in the subsequent SEBI orders dated December 31, 2014 and January 17, 2019 after the matter was remanded by Hon’ble SAT to pass fresh orders in both instances upon filing of appeals by the five preferential allottees challenging the aforesaid SEBI orders.

FACTS OF THE CASE

6. Securities and Exchange Board of India (‘SEBI’), on March 17, 1998 received a draft of the public announcement of the offer for acquisition of shares of SCL by Shri Praful M. Patel, Shri Mukesh Patel, Autoriders Industries Ltd. and others (collectively referred. to as ‘the acquirers’). The offer was for acquisition of 20% of the issued and paid up capital of SCL, which was stated to be Rs.1199.22 lakhs consisting of fully paid up equity shares of Rs. 10/- each, at a price of Rs.75/per fully paid-up equity shares. The public announcement appeared in newspapers on March 19, 1998.

7. On March 30,1998, Ind Global Financial Trust Ltd. (merchant banker to the Offer of the acquirers) brought to SEBI's notice that they had been advised by SCL that on the date of public announcement the total subscribed equity shares of SCL were 1,99,99,181 in number.

8. SEBI thereafter had asked for details of total subscribed capital from SCL. From the details furnished by the SCL it was observed that SCL had made preferential allotments of shares to the promoters and others on three dates viz. March 11,1998, March 27,1998 and March 31,1998 and whereas the public announcement by the acquirer was made on March 19,1998.

9. A sequence of event relating to the preferential issue of capital by SCL are as under:

   i) The Annual General Meeting (AGM) of SCL was held on 31/12/1997, pursuant to notice dated 2/12/1997 wherein members approved resolutions authorising the Board of Directors (BOD) or Committee of Directors (COD) of SCL to allot such number of equity shares in one or more tranche for an aggregate amount not exceeding Rs.400 crores at a price not less than Rs.30/-.

   ii) Letter dated 27/2/1998 was sent by SCL to the subsidiary companies of main promoter namely Fawn, Fern, Willow, Tejashree and Pallor (Noticee) which are stated to be wholly-owned subsidiaries of main promoter of SCL namely *Jagmi & Associates*, asking them to contribute 10% of the promoter's contribution of Rs.35.7 crores out of project cost of Rs.296.54 crores. The letter further stated that subject to the approval of BOD, equity shares of Rs.10/- at a premium of Rs.20/- shall be issued and allotted against the remittance.

iii) In reply to the letter sent by SCL five preferential allottees had sent letters dated 9/3/1998 applying for allotment in aggregate of 80,00,000 equity shares of Rs.10/- each @ price of Rs.30/- per share and enclosing 5 cheques dated 9/3/1998 for an aggregate amount of Rs.240 lakhs being payment for 80,00,000 shares @ Rs.3/- per share.

iv) On 11/3/1998, the BOD of SCL:

a) resolved to issue 3,50,00,000 shares of Rs.10/- each at a premium of Rs. 20/- to such class of persons namely Fls, Banks, Foreign companies, promoters; and

b) to allot 80,00,000 shares at a premium of Rs.20 shares against part payment of Rs.3/- to five preferential allottees which are wholly-owned subsidiary of main promoter Jagmi & Co. associates as under:

Name of the allottees	Number of shares allotted
Pallor Trading Company Private Limited	79,96,000 shares
Fern Trading Company Private Limited	1,000 shares
Fawn Trading Company Private Limited	1,000 shares
Tejashree Trading Company Private Limited	1,000 shares
Willow Trading Company Private Limited	1,000 shares
Total	**80,00,000 shares**

v) On 25/3/1998, the Civil Court Porbandar passed an order restraining the acquirers from taking any steps to acquire shares of SCL on the basis of the Public announcement dated 19/3/1998 in Civil Suit No.24/98 filed by Fawn.

vi)The COD of SCL met on 27/3/1998 and resolved to allot 40,00,000 shares to Tejashree, one of the subsidiaries of main promoter against part-payment of Rs.3/- per share.

vii)The COD of SCL met on 31/3/1998 and resolved to allot shares each to F.L. Smitdth & Co. Denmark and the Industrialisation Fund for Developing Countries against remittances received in full.

(viii)The merchant banker of the acquirers vide its letter dated 2/4/1998 to SEBI, inter alia alleged violation of Regulation 23(1)(b) and Regulation 3(1)(c)(ii) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred as **'SAST Regulations'**) and requested SEBI to investigate and to initiate action against the SCL and its BOD which culminated into SEBI order of January 15, 1999.

10. Further, it was observed that out of the above-mentioned five preferential allottees, four i.e. Fern, Fawn, Tejashree and Willow ('Transferor Companies') were amalgamated under the Companies Act, 2013, into the fifth preferential allottee namely Pallor Trading Company Private Limited ('Transferee Company') vide the ***'Scheme of Amalgamation'*** which was sanctioned by the Hon'ble National Company Law Tribunal ('NCLT'), Mumbai Bench vide order dated November 06, 2020 (effective date). The said scheme mentions following with respect to the legal proceedings-

'… 7.1 If any suit, appeal or other legal proceedings of whatever nature is pending by or against Transferor Companies on or before the Effective Date, the same shall not abate or be discontinued or be in any way prejudicially affected by reason of the amalgamation or by anything contained in this Scheme, but the said suit, appeal or other legal proceedings shall be continued, prosecuted and enforced by or against Transferee Company in the same manner and to the same

extent as it would or might have been continued, prosecuted and enforced by or against Transferor Companies, as if this Scheme had not been made.'

11. The instant adjudication proceeding is in continuation to the previous SEBI proceeding wherein order dated January 17, 2019 was passed against the Transferee company and the Transferor companies.

APPOINTMENT OF THE ADJUDICATING OFFICER

12. In view of the aforesaid and subsequent to the order passed by Hon'ble Supreme Court as detailed in Para '1' above, the present proceeding was initiated against the Noticee and the undersigned was appointed as Adjudicating Officer vide order dated February 22, 2023, under Section 15H to inquire into the violation of Regulation 11(1) read with Regulation 3(1) (c) of the SAST Regulations, 1997 against the Noticee.

SHOW CAUSE NOTICE, REPLY AND HEARING

13. A Show Cause Notice (hereinafter referred to as "SCN") bearing ref.EAD-4/ADJ/GR/HK/19958/2023 dated May 17, 2023, was issued to Noticee, under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 to show cause as to why an inquiry be not held against it and penalty be not imposed under Section 15H of the SEBI Act, 1992 for the violation of Regulation 11(1) read with Regulation 3(1) (c) of the SAST Regulations, 1997 alleged to have been committed by the Noticee. The SCN was successfully served upon the Noticee through Speed Post Acknowledgment Due (SPAD) at

the address available on the records. Thus, the said SCN was served upon the Noticee in terms of Rule 7 of the SEBI Adjudication Rules, 1995.

REPLY OF THE NOTICEE

14. The Noticee through its Authorised Representative (**'AR'**) vide letter dated May 30, 2023 filed its preliminary reply to the SCN, wherein it was requested for inspection of all the relied upon documents/materials. In this regard, the AR vide email dated June 02, 2023 informed that in the instant matter after considering the representations made by the five preferential allottees, SEBI has already passed various orders (details of such orders are mentioned in above paragraphs) wherein the violations were established. Those orders were also appealed by the five preferential allottees before various forums. Finally, in the instant matter the Hon'ble Supreme Court vide its order dated September 26, 2022 has also already affirmed the violations against the five preferential allottees (as mentioned in Para.1). Hence, the request for inspection of documents at this stage was considered as unreasonable and inutile. Subsequently, AR of the Noticee vide letter dated June 09, 2023 submitted a detailed reply.

PERSONAL HEARING

15. Vide email dated June 6, 2023, the Noticee was given an opportunity of personal hearing on June 13, 2023. Subsequently, due to unforeseen circumstances the personal hearing was re- scheduled and was held on June 14, 2023. The said hearing was attended by AR of the Noticee. Further, during the said hearing, the AR acknowledged/admitted the violations as established vide multiple SEBI

orders and subsequently affirmed by the Hon'ble Supreme Court vide order dated September 26, 2022. However, it was requested that for the penalty purpose the penal provision as applicable during the period of violation may be considered as per law.

16. Thus, it is relevant to note that the SCN was duly served on the Noticee and the response has been received from the Noticee. Further, the Noticee has also availed the opportunity of personal hearing granted to it. It is, therefore, I am of the view that principle of natural justice has been followed in the matter by granting the Noticee an ample opportunity for replying to the SCN and of being heard. Therefore, I deem it appropriate to decide the matter on the basis of facts/material available on record and reply submitted by the Noticee.

CONSIDERATION OF ISSUES AND FINDINGS

17. I have carefully perused the charges levelled against the Noticee and the documents / material available on record. In order to determine the penalty, it is necessary to examine the following issues:

I. Whether the Noticee is in violation of the provisions of Regulation 11(1) read with Regulation 3(1)(c) of the SAST Regulations, 1997?

II. If yes, does the violation, on the part of the Noticee would attract monetary penalty under Section 15H of the SEBI Act, 1992?

III. If so, what would be the monetary penalty that can be imposed upon the Noticee taking into consideration the factors stipulated in Section 15J of the SEBI Act?

18. The contents of the aforesaid provisions are reproduced herein below:

SAST Regulations, 1997

*"**3. Applicability of the regulation***

(1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:

……….

(c) preferential allotment, made in pursuance of a resolution passed under Section 81(1A) of the Companies Act, 1956 (1 of 1956):

Provided that,

Board Resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board;

full disclosures of the identity of the class of the proposed allottee (s) is made, and if any of the proposed allottee (s) is to be allotted such number of shares as would increase his holding to 5% or more of the post issued capital, then in such cases, the price at which the allotment is proposed, the identity of such person(s), the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company, and whether such allotment would result in change in control over the company are all disclosed in the notice of the General Meeting called for the purpose of consideration of the preferential allotment."

11. Consolidation of holdings.

"1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 10% but not more than 51% of the shares or voting rights in a company, shall 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 2% of the voting rights, in any period of 12 months unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

ISSUES

Preliminary issue raised by the Noticee

Delay of 25 years in issuance of SCN

19. Before proceeding with the merits of the matter, it would be appropriate to first deal with the preliminary contention raised by the Noticee. It has been contended that the instant proceeding deserves to be dropped on account of delay as transaction in question was on December 2, 1997 and the SCN was issued only on May 17, 2023, hence caused prejudices against it and consecutively cannot defend itself effectively. Further it is stated that there is an unexplained delay of 25 years and hence issuing of the SCN by SEBI in the instant matter which was in violation of the established principles of Natural Justice. For this contention reliance was placed on various decisions of Hon'ble SAT and Supreme Court. Some of the orders relied upon are:

i) *ICICI Bank Limited vs. SEBI* (Appeal No. 583 of 2019)

ii) *Ashok Shivlal Rupani and Ors. Vs. Securities and Exchange Board of India* (Appeal No. 417 of 2018)

iii) *Ashlesh Gunvantbhai Shah & Ors. V. SEBI* (Appeal No. 169 of 2019)

iv) *Bharat J Patel vs SEBI* (Date of decision: September 08, 2020)

v) *SEBI vs. Rajeev Bhanot & Ors.* (Civil Appeal No. 6441-6443 of 2021)

20. In the instant matter SEBI passed first order on January 15, 1999 for which vide letter dated November 11, 1998 the violations alleged were communicated to the five preferential allottees. Subsequent to which SEBI passed multiple orders in the instant matter. However, none of the said orders attained finality and were set aside by the appellate authorities and were being remanded back to SEBI to pass fresh order. Present SCN was issued pursuant to the order of Hon'ble Supreme Court dated September 26, 2022 directing SEBI to initiate appropriate proceedings (except direction to make open offer) after accepting the violations by the five preferential allottees as established vide SEBI's latest order in the matter dated January 17, 2019. From the above facts and circumstances of the case, it cannot be said that there was inordinate and unreasonable delay in the matter, as contended by the Noticee. Hence, I am inclined to reject the aforesaid contention of the Noticee. I note that the submission that the SCN is issued after delay of 25 years is false and factually wrong. Further, the orders relied upon by the Noticee in support of the contention, have no nexus with the facts of the present case.

ISSUE I. Whether the Noticee is in violation of the provisions of Regulation 11(1) read with Regulation 3(1)(c) of the SAST Regulations, 1997?

21. In order to address this issue, it is important to revisit the chain of events that led to the present proceeding:

a) The Target Company had, on March 11, 1998, allotted 80,00,000 shares to five preferential allottees, which were the wholly owned subsidiaries of a main promoter (*Jagmi Investments Limited*) of the Target Company (the details of allotment is provided in para. 9 (iv)(b) above). The Target Company had, on March 27, 1998, further issued and allotted 40,00,000 shares to Tejashree.

b) The shareholding and voting rights of the promoters of the Target Company before the first allotment on March 11, 1998 was 48.64%. The shareholding and voting rights of the promoter group increased to 69.19% and 57.20% respectively after the first allotment of 80,00,000 shares. Pursuant to the second allotment made on March 27, 1998, the shareholding and voting rights of the promoter group increased to 74.33% and 60.50% respectively. After the third allotment on March 31, 1998, the promoter group's shareholding came down to 64.14%.

c) Since, disclosures as required to be made in terms of Regulation 3(1)(c)(ii) of the SAST Regulations, 1997 (since repealed) were not made in the notice of the General Meeting called for the purpose of consideration of the preferential allotment of shares, SEBI vide an Order dated January 15, 1999 ('the SEBI Order'), directed the five preferential allottees to make a public announcement to acquire shares from the remaining shareholders (i.e. other than promoters, their associates and persons acting in concert) of the Target Company, for an aggregate minimum of 20% of voting capital of the Target Company within a period of two months of the order at a price in accordance with the regulations.

d) The SEBI Order was challenged by Fawn and the Target Company by way of two separate appeals before the Central Government. The Central Government *vide* its order dated April 05, 1999 rejected the appeals and upheld the SEBI Order. Thereafter, Fawn Trading and the others challenged the SEBI Order by way of a Writ Petition (No. 1080 of 1999) before the Hon'ble High Court of Judicature at Bombay.

e) Pursuant to the Order of the Hon'ble High Court, Fawn Trading, vide letter dated April 14, 2011, filed its representation before SEBI. The representation was filed for itself and on behalf of Pallor, Fern, Tejashree and Willow. Upon receiving the said representation and after carrying out the appropriate proceedings SEBI passed order dated April 25, 2013 directing:

"23. ….. each of the five applicants are jointly and severally responsible to make the public announcement, in accordance with the provisions of the Takeover Regulations, 1997, as directed herein below.

24. I, therefore, in exercise of powers conferred upon me under sections 19 of the Securities and Exchange Board of India Act, 1992 and regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulations 32(1)(h) and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby direct the applicants, Pallor Trading Company Private Limited, Fern Trading Company Private Limited, Tejashree Trading Company Private Limited and Willow

Trading Company Private Limited to make a combined public announcement to acquire, jointly and severally, the shares of the Target Company, Saurashtra Cement Limited, in terms of regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and other relevant regulations thereof, within a period of 45 days from the date of this Order."

f) The five preferential allotees challenged the above SEBI order before Hon'ble SAT, which vide order dated March 10, 2014 remanded the matter to SEBI for passing fresh order on merits in accordance with law. This led to SEBI passing another order dated December 31, 2014 with the following direction:

"11. …in compliance with the Order dated March 03, 2011 of the Hon'ble Bombay High Court and the Order dated March 10, 2014 of the Hon'ble Securities Appellate Tribunal, I hereby direct the noticees, namely, Fawn Trading Company Private Limited, Pallor Trading Company Private Limited, Fern Trading Company Private Limited, Tejashree Trading Company Private Limited and Willow Trading Company Private Limited, to make a public announcement of an open offer to acquire shares of the Target Company, Saurashtra Cements Limited as directed vide SEBI Order dated January 15, 1999 as upheld by the Order dated April 05, 1999 of the Central Government.

12.In view of the delay in making the open offer in terms of the SEBI Order dated January 15, 1999, the above noticees shall, along with the consideration amount, pay interest at the rate of 10% per annum, from the date when they incurred the liability to make the public announcement till the date of payment of consideration, to the shareholders who were holding shares in the Target Company on the date of violation and whose shares have been accepted in the open offer, after adjusting dividend, if any, that was paid."

g) The five preferential allottees again moved to SAT to appeal the above order wherein Hon'ble SAT vide order dated September 06, 2016 read with order dated September 14, 2016 set aside the third SEBI Order with a direction to SEBI to *"pass fresh order on merits and in accordance with law without being influenced by the observation made in the earlier orders on April 25, 2013 and December 31, 2014 respectively."*

h) Pursuant to the above order, SEBI again passed an order dated January 17, 2019 reiterating the directions passed in the previous order of December 31, 2014. In the order of January 17, 2019, SEBI dealt in detail over the issue whether passage of time will have any bearing on the direction to make open offer and whether the direction is tenable considering that only one of the five preferential allottees continues to be the shareholder of the target company. SEBI while addressing the former issue held that, *"if directions were to be* *modified merely because of the efflux of time, due in large part to the noticees* (due to multiple litigations)*, it would set a dangerous precedent for those who infringe the rights of public shareholders and investors and incentivise such persons to avoid their duties under law by resorting to endless litigation. The only consideration for SEBI in such cases would be to evaluate whether such a direction would be in favour of the investors or not. … any provision of law which confers a right on the investors (in this case, the right to receive an exit opportunity at the best possible price) must be interpreted strictly."*

- For the latter issue it was held that, *"one of the noticees i.e. Pallor Trading Pvt. Ltd. continues to be a shareholder in the target company, even though the other noticees are no longer shareholders of SCL as on date. Further as noted earlier, the noticees were also 100% subsidiaries of the promoter company i.e. Jagmi Investments Ltd., which continues to be a major shareholder in the target company. Therefore, this is not a case where the acquirers are no longer associated with the company and are being unfairly cast with the liability to make open offer in a company in which they have no interest any longer. In any case, given the unambiguous language of the regulations and the beneficial intent towards the common investor, whether or not the offending noticee continues to be a shareholder in SCL or not is not relevant to determining his liability under the Takeover Regulations."*

- With regard to open offer another key contention raised was, *"It is also now not possible to trace which shares were held by the shareholders in 1998* *and are continued to be held by them to date since shares are dematerialised."* SEBI order of January 17, 2019, in this regard held, "*it has been submitted that as of December 31, 2018, 1836 shareholders holding 12,03,300 shares (1.74%) continue to be shareholders of the Target Company. Therefore, it would be reasonable to presume that there are large number of persons, who were shareholders on the date of the open offer being triggered, continuing to hold shares in SCL as on date. These shareholders were obviously the immediate victims of the lost opportunity to receive an exit offer, which the noticees failed to give. Even if there are limited number of shareholders who continue to hold shares in SCL, they must not be denied of their statutory right to be offered an exit at the best possible price. Whether that opportunity is seized of by any shareholder or not is a question that is not relevant to determine whether the opportunity itself needs to be given to the public shareholders of SCL."*

Hence, the feasibility to make open offer in the present matter was examined and laid out in the aforesaid order.

i) The five preferential allottees approached SAT to challenge the January 2019 SEBI order, Appeal No. 151 of 2019, which was decided by SAT vide order dated October 20, 2021. It was decided therein that:

"29. The appeal is hereby partly allowed. ***<u>The decision of the respondent SEBI that the appellants had not followed the provisions of Regulation 3 of SAST Regulation is affirmed</u>****. However, the direction of the respondent*

to the appellant to make offer as detailed in the impugned order is hereby set aside. The case is remitted back to the respondent SEBI only to the extent of taking decision on the quantum of penalty as provided under Section 15H of the SEBI Act as it existed at the relevant time…."

From the above I note that the SAT remitted the matter back to SEBI, to the extent of taking decision on the quantum of penalty to be imposed by the Adjudicating Officer. SAT in the aforesaid order mentioned that:

"*22. The issue therefore remains is not as to whether SEBI is empowered to direct the appellants to make open offer but as to whether in the given facts and circumstances of the case, whether it was feasible at the relevant time or as to whether it has lost the relevance later on due to the change in the circumstances.*

…

28. However, considering the lapse of time; the fact that the original shareholders had exited and that respondent SEBI itself had chosen the option to impose penalty in numerous cases as detailed in the written submission of the appellant, in our view, this also is a fit case where 25 respondent SEBI ought to have directed the appellant to pay penalty as provided under Section 15H instead of affirming the earlier order of direction to make an open offer."

j) During the intervening period, Fern, Tejashree, Willow and Fawn were amalgamated into Pallor (Noticee) vide scheme of amalgamation under the

Companies Act, 2013, which was sanctioned by Hon'ble National Company Law Tribunal (NCLT), Mumbai Bench and became effective on November 06, 2020.

k) SEBI challenged the aforesaid order of SAT (October 20, 2021) before the Hon'ble Supreme Court and filed Civil Appeal No.7001 of 2021 (cross-appeal was filed by Noticee – CA No. 1668 of 2022) which was heard and disposed of vide order dated September 26, 2022 by Supreme Court stating:

"… the impugned orders are partly set aside in so far as the Appellate Tribunal has directed that only proceedings under Section 15-H of the Securities and Exchange Board of India Act,1992 can be taken, and we observe that it will be open to the Securities and Exchange Board of India to take proceedings in accordance with law. However, we deem it appropriate to clarify that we agree with the Appellate Tribunal that the direction to issue open offer does not arise in view of the facts of the present case. Further, it is agreed that the regulations applicable would be the extant regulations at the time of violation." (emphasis supplied)

22. In the aforesaid decision, reference was made to the decision of Supreme Court in *Securities and Exchange Board of India vs Shri Sunil Krishna Khaitan & Ors.",* [2022 SCC Online SC 862]. Paragraph no. 87 and 94 of the said decision were quoted, which read as:

"87. There is, as noticed and held below, some merit in the contention of the Board that the Appellate Tribunal could not have imposed penalty under Section 15-H when proceedings under the said Section had not

been invoked by the Board and there is no order passed by the adjudicating authority imposing penalty under Section 15-H of the Act. However, the effect of the argument raised by the Board would be that the order passed by the Whole Time Member under Regulation 44 giving directions would be quashed and set aside. The respondents would have, therefore, escaped without having to pay any penalty for violation of Regulation 11(1) of the Takeover Regulations 1997. It is in this factual background we have to decide the present appeals. As noticed above, the respondents have not filed appeals or cross objections challenging the penalty imposed by the Appellate Tribunal for violation of Regulation 11(1) of the Takeover Regulations 1997.

…

94. Thus, the Appellate Tribunal in Appeal No. 23 of 2013 in the case of Sunil Krishna Khaitan, could not have substituted the penalty imposed by the Board under Regulation 44 with that of penalty under Section 15-H. ***An appropriate view, in our opinion, would be that when the Appellate Tribunal holds that the order passed by the Whole Time member on violation of Regulations 10, 11 and 12 is sustainable, but the directions given in the order under Regulation 44 are not sustainable, it should leave it open to the Board to initiate proceedings and pass an order under Chapter VI-A of the Act****."* (emphasis supplied)

23. In abovementioned order of Hon'ble Supreme Court, the position of SEBI regarding the violation of SAST Regulations by the five preferential allottees was maintained. Here I would mention the observation made by The House of Lords in 1972 while pronouncing judgment in *Caspel Co, Ltd v. Broome* [(1972) A.C. 1027], wherein it was stated:

"*In the hierarchical system of Courts. It is necessary for each lower-tier to accept loyally the decision of the higher tiers. It is inevitable in the hierarchical system of Courts that the decisions of the Supreme Appellate Tribunal do not attract the unanimous approval of the judiciary. But the system only works if someone is allowed to have the last word, which once spoken, is loyally accepted*"

24. From the aforesaid judgment of Hon'ble Supreme Court, I note that, the violation of Regulation 11(1) read with Regulation 3(1)(c) of SAST Regulations, 1997 against the five preferential allottees as established vide multiple SEBI orders, has also been affirmed by the Supreme Court and acknowledged by the Noticee while appearing in the personal hearing. Therefore, to delve into the merits of the case is not required at this point of time.

25. Since the present proceeding is in continuation of the previous proceedings carried out by SEBI wherein violations against the five preferential allottees were established (which included the Noticee), the Noticee, being the transferee company, is liable for the violations of the transferor companies as per the scheme of amalgamation.

ISSUE II. If yes, does the violation, on the part of the Noticee would attract monetary penalty under Section 15H of the SEBI Act?

26. Since the answer to the first issue was in affirmative, to address this issue, it is important to refer to the observation of the Hon'ble Supreme Court of India in the matter of ***SEBI Vs. Shri Ram Mutual Fund*** *[2006] 68 SCL 216(SC).* Therein it was observed 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. Hence, the violation of Regulation 11(1) read with Regulation 3(1) (c) of the SAST Regulations, 1997, makes Noticee liable for penalty under Section 15H of the SEBI Act, 1992 (as it stood at the time of violation) the contents whereof are reproduced herein below-

15H. Penalty for non-disclosure of acquisition of shares and takeovers.

If any person, who is required under this Act or any rules or regulations made thereunder, fails to, —

(i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or

(ii) make a public announcement to acquire shares at a minimum price,

he shall be liable to a penalty not exceeding five lakh rupees.

ISSUE III. If so, what would be the monetary penalty that can be imposed upon the Noticee taking into consideration the factors stipulated in Section 15J of the SEBI Act?

28. For determining the quantum of penalty to be imposed upon the Noticee for the violations established and mentioned in the preceding paragraphs, I note that the violations were crystallised against the five preferential allottees prior to coming into effect of the scheme of amalgamation. The amalgamation was affective from November 06, 2020 whereas the latest SEBI order, where the violations were

established, was passed on January 17, 2019. As seen above, since the said SEBI order was upheld by the Hon'ble Supreme Court, hence as per the Scheme of Amalgamation, I find the following extract relevant for the purpose of calculating the amount of penalty:

> "*4.6 With effect from the effective date, all debts, liabilities, contingent liabilities, duties and obligations of the Transferor companies,….., and all other liabilities which may accrue or arise after the Appointed Date but which relates to the period on or upto the appointed date shall,….., be transferred or deemed to be transferred to and vested in the Transferee company, so as to become as from the Appointed Date the debts, liabilities, contingent liabilities, duties and obligations of the Transferee company on same term and conditions as were applicable to the Transferor Company."*

29. The above condition mentioned in the scheme of amalgamation makes it clear that all the existing and contingent liabilities arising against the said Transferor companies are transferred to the Transferee Company (Noticee) and for the said purpose the Transferee company shall be treated as the Transferor Companies itself.

30. Section 15J of SEBI Act, 1992 states that:

> ***15J. Factors to be taken into account while adjudging quantum of penalty.***

While adjudging quantum of penalty under 15-I or section 11 or section 11B, the Board or 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.

31. It was observed that the preferential allotment of shares of the SCL was made to the promoter group entities without complying with the requirements of SAST Regulations. Hence, the five preferential allottees, being part of the promoter group of target company, acquired the shares of target company in the guise of preferential allotment to avoid the obligation to make public announcement/open offer. While doing that the Noticee / five preferential allottees denied the shareholders of the target company the exit opportunity which they were entitled to receive as per the SAST Regulations. Here it needs to be emphasised that open offer endeavours to protect the interest of the investors of a listed company and makes sure that an exit opportunity is given to the public shareholders at a highest possible price where there is a substantial acquisition of shares or voting rights or control over a listed company or consolidation of holdings by existing shareholders. Hence, this act of the Noticee / five preferential allottees directly affected the interest of investors and denied them the exit opportunity they were legally entitled to. Considering the gravity of the violation and its impact on investors, the violations call for stringent penalty. The amount of loss to the investors has not being quantified, however in order to create sufficient future deterrence, maximum penalty under the applicable provision may to be imposed.

ORDER

32. In view of what has been discussed in the preceding paragraphs, I hold the Noticee, **Pallor Trading Company Private Limited** (PAN: AAACP9462G), has violated Regulation 11(1) read with Regulation 3(1)(c) of the SAST Regulations, 1997 which makes it liable for penalty under Section 15H of the SEBI Act. The Noticee shall also be liable for the penalties of the four transferor companies (Fawn, Fern, Willow and Tejashree).

33. In view of the foregoing, considering the facts and circumstances of the case, the material on record and in exercise of the powers conferred upon the undersigned under Section 15-I of the SEBI Act read with Rule 5 of the SEBI Adjudication Rules,1995, I hereby impose a total penalty of **Rs.25,00,000/- (Rs. Twenty-Five Lakhs only)** under Section 15H of the SEBI Act, 1992, on the Noticee (being the Transferee Company).

34. The Noticee shall remit / pay the said amount of penalty within 45 (forty five) days of receipt of this order 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

35. The details of online payments made (in the format as given in table below) should be forwarded to "The Division Chief, Enforcement Department I-DRA-IV, the Securities and Exchange Board of India, SEBI Bhavan, Plot No. C4 – A, "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:	

36. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, consequential proceedings including, but not limited to, 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.

37. In terms of Rule 6 of the Adjudication Rules, 1995, copy of this order is sent to the Noticee and also to the Securities and Exchange Board of India.

Date: June 23, 2023 **G. Ramar**

Place: Mumbai **Adjudicating Officer**