BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER No.: ORDER/VV/AS/2022-23/18677]

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

In respect of:

Jaywant Sugars Limited,
PAN: AABCJ6812D
DMS Complex, Malkapur, Tal – Karad,
Dist. Satara – 415539 (Maharashtra)

In the matter of Jaywant Sugars Limited

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1. Jaywant Sugars Limited (hereinafter referred to as "**Noticee**") is an unlisted company. Securities and Exchange Board of India ("**SEBI**") received a reference dated March 11, 2019 from Indian Council of Investors ("**ICI**"), wherein it was stated that certain sugar companies including the Noticee have raised funds by issuing Non-Convertible Redeemable Preference Shares ("**NCRPS**") to more than 49 persons in a financial year. It was also stated that the Noticee has allotted shares to more than 49 persons in the financial year 2009-10. Accordingly, an examination was initiated with respect to issuance of NCRPS by the Noticee to ascertain violations of the provisions of the Companies Act, 1956 and SEBI (Disclosure And Investor Protection) Guidelines, 2000 (hereinafter referred to as "**DIP Guidelines**") during the period 2006-07 to 2012-13 and following was observed:

   a. The Noticee is in the business of sugar and allied industries and incorporated on January 05, 2006 and its registered office address is "*Gata No 83 to 87 and 115 to 127 at Dhawarwadi, Post - Chore, Tal Karad, Satara*".

   b. The Noticee vide its letter dated December 24, 2019 submitted that it is in process of refunding the money to investors. Vide email dated May 12, 2020, the Noticee was advised to comply with the SEBI circular no. CIR/CFD/DIL3/18/2015 dated December 31, 2015. The Noticee, vide its letter dated May 21, 2020 submitted that the process of giving Exit/Refund option to all their existing Non-Convertible Debenture ("**NCD'**)/ Redeemable Preference Shares ("**RPS**") holders has been completed, however, due to ongoing Covid pandemic, it would not be possible for them to provide the requisite documents relating to the process of the Exit/Refund option to all their existing NCD/RPS holders. It also submitted that its and it's Auditors offices are closed and it will provide the details sought by SEBI, once the lockdown is lifted.

c. Vide letter dated December 10, 2020, the Noticee was advised to confirm the refund of money to NCD/RPS holders and to submit a certificate from an independent peer reviewed practicing Chartered Accountant/Company Secretary. The Noticee was also advised to apply for compounding of violation with National Company Law Tribunal ("**NCLT**") for violations pertaining to Companies Act, 1956 and submit evidence of the same to SEBI.

d. Vide letter dated January 07, 2021, the Noticee confirmed regarding the exit offer to all the shareholders on November 01, 2019 in respect of all the allotments to 49 or more allotees in one single financial year. It further confirmed that the amount was refunded along with an interest @15% per annum. Peer reviewed Chartered Accountant ("**CA**") certificate dated December 29, 2020 from C.V. Chitale & Co., Chartered Accountants is also submitted by the Noticee along with its reply.

e. Details of allotment of NCRPS as per the information provided by the Noticee and Registrar of Company, Pune ("**ROC-Pune**") is as follows:

Table-I: Details provided by the Company

Financial Year	**Date of Issuance**	**No. of investors to whom NCRPS issued**	**Amount raised (Rs. in Crore)**
2006-07	-	1181	0.84
2007-08	-	913	0.47
2008-09	-	1194	0.72
2009-10	-	4063	8.75
2010-11	-	565	0.89
2011-12	-	1325	2.26
2012-13	-	239	0.42
Total		**9,480**	**14.35**

(Source: Noticee's letter dated February 20, 2021)

Table-II: Details provided by RoC, Pune

Financial Year	**Date of Issuance**	**No. of investors to whom NCRPS issued**	**Amount raised (Rs. in Crore)**
2006-07	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	1,331	0.94
2007-08	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	719	0.37

2008-09	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	1,291	3.31
2009-10	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	3,873	6.04
2010-11	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	658	1.09
2011-12	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	1,325	2.24
2012-13	Issued in multiple tranches during the year (each issue to 49 or less number of investors)	191	0.33
Total		**9,388**	**14.32**

f. A comparison of the data provided by the Noticee and the RoC-Pune in above tables, indicates a difference of 92 investors. SEBI has relied on the data submitted by the Noticee vide its letter dated February 20, 2021, for the purpose of the aforesaid examination i.e. 9,480 investors. Further, from the above Table - I, it was observed that the Noticee had allotted NCRPS to 9,480 persons during the financial years 2006-07 to 2012-13. The aforesaid allotments were made in several tranches on multiple dates and in each such tranche, allotments were made to 49 or less number of investors. However, on a cumulative basis, the Noticee had allotted RPS to more than 49 investors during each of the six financial years under examination. Therefore, considering the submission of the Noticee, information pertaining to the number of investors and money raised as per Table-II has been considered during examination.

g. On perusal of the Noticee reply dated February 20, 2021, it was observed that number of shareholders/investors have reduced from 9480 investors to 3167 investors after secondary transfers. A copy of the relevant form i.e. MGT-7 filed by the Noticee with Ministry of Corporate Affairs ("**MCA**") was attached to the aforesaid letter. Vide aforesaid reply, the Noticee submitted the details of the exit offer provided to allottees and it was noted that exit option was offered to 3167 allottees of NCRPS (i.e. investors at the time of exit option) of which 22 allottees accepted the offer of refund. The same was certified by the Peer Reviewed Charted Accountant.

h. The total amount refunded (*inclusive of principal and interest @ 15%*) to 22 allottees amounted to Rs.3.33 lakh approximately. The Noticee provided exit option to the investors who were holding NCRPS on the date of exit option as per Form MGT-7. As per aforesaid Form MGT-7, it was observed that the number of investors are 3352 (including promoters i.e., equity shareholders). In this regard, the Noticee vide its email dated April 19, 2021 clarified that – '*in form MGT 7 of F.Y. 2018-19 of Jaywant Sugars Ltd., the total number of shareholders are* *written as 3352. But actually the total number of shareholders are 3342. There was a mistake in the calculation of serial nos.'*

i. Vide email dated April 16, 2021, the Noticee submitted the reconciliation of exit option w.r.t. the number of investors to whom exit option was provided by it. The details of same are as follows:

Table III

Offer for Exit Option made to total: (3167+22), as per certificate of Chartered Accountant (During FY 2006-07 to 2012-13)	3189
(-) Multiple offers made to same shareholders	36
Total Number of shareholders to whom offer is made	3153
(+) No of Shareholder to whom allotment was made (where the no. of allottees were within prescribed limit) (During FY 2013-14 to 2018-19)	189
Total Number of shareholders as on 31st March 2019 (As per Form MGT-7)	3342

j. The Noticee vide its email dated April 12, 2021 has submitted that, it has filed for application for compounding of violations of Section 56, 60, 67(3) and 73 of the Companies Act, 1956 with NCLT vide its application dated December 26, 2020.

2. In view of above, it was observed that the Noticee has raised funds through issuance of NCRPS to 9480 persons amounting to Rs. 14.35 crores during F.Y. 2006-07 to FY 2012-13. The said allotments were made in several tranches on multiple dates and in each such tranche, allotments were made to less than 49 investors. However, on a cumulative basis, the Noticee had allotted RPS to more than 49 investors during each of the six financial years under examination.

3. DIP Guidelines were repealed on August 26, 2009 and subsequently SEBI (Non-Convertible Redeemable Preference Shares) Regulations (hereinafter referred to as "**NCRPS Regulations**") were notified on June 12, 2013. Further, in line with the policy note dated April 19, 2017, the Noticee has provided an exit offer to all allottees, wherein 22 allottees have opted for a refund aggregating to Rs.3.33 lakh. For the FY 2010–11, 2011-12 and 2012-13, it was alleged that the Noticee has violated the provisions of the Companies Act, 1956. Since, the Noticee has filed compounding application for the violations of Sections 56, 60, 67(3) and 73 of the Companies Act, 1956 with NCLT, accordingly, no action proposed under the SEBI Regulations for the violations of the said provisions of the Companies Act, 1956 for the aforesaid period.

4. In view of the aforesaid examination and findings, it was alleged that the Noticee made the aforesaid public issue of RPS during said financial years and thus, violated the provisions of Sections 56(1), 56(3), 60, 67(3) and 73 the Companies Act, 1956 and Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3, 5.3.5, 5.3.6, 5.4, 5.6, 5.6A, 5.7, 5.8, 5.9, 5.9.1, 5.10, 5.12.1, 5.13, 6.0, 6.1 to 6.15, 6.16 to 6.34, 8.3, 8.8.1, 9, 10.1 and 10.5 of the DIP Guidelines for the FY 2006-07, 2007-08, 2008-09 and 2009-10 (as the NCRPS were issued to more than 49 investors before August 26, 2009).

5. The competent authority in SEBI has *prima facie* felt satisfied that there are sufficient grounds to inquire and adjudicate the alleged violations of the aforesaid provisions of the Companies Act, 1956 and DIP Guidelines by the Noticee. Accordingly, vide communication order dated June 25, 2021, undersigned has been appointed as Adjudicating Officer under Section 15-I (1) of the SEBI Act, 1992 read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') in the matter to inquire and adjudge under Rule 5 of the Adjudication Rules and under section 15HB of the SEBI Act, of the alleged aforesaid violations by the Noticee.

6. Accordingly, a notice to show cause no. EAD-9/ADJ-SCN/VKV/OW/15260/2021 dated July 14, 2021 (hereinafter referred to as "**SCN**") was issued to the Noticee calling upon it to show cause as to why an inquiry should not be held against it in terms of Rule 4 of the Adjudication Rules and penalty be not imposed under Section 15HB of the SEBI Act for the aforesaid alleged violations. The SCN was duly served upon the Noticee. In response to the SCN, vide letter dated July 26, 2021, the Noticee has requested for inspection of all documents available with authority in the captioned matter, including, copy of complaint, copy of authority / delegation of powers of the Board under which the present proceedings have been initiated, documents w.r.t. violation of provisions of Section 67(3) of the Companies Act 1956 in respect of private placements/offers, documents showing that the noticee has made an offer to more than 49 persons in any individual offer, copy of SEBI's internal policy on the procedure to deal with Deemed Public Issue cases, Copy of any communication with the RoC/MCA on the impugned allotments made by the Companies, etc. The Noticee's request for inspection has not been considered by undersigned, as all relevant material relied upon in the instant proceedings have been provided to the Noticee along with the SCN and most of the relevant and relied upon documents were the documents and replies furnished by the Noticee itself during examination. The decision on same has been communicated to the Noticee by my office vide letter dated July 27, 2021 forwarded *via* e-mail.

7. Thereafter, vide e-mail dated August 02, 2021, the Noticee has forwarded copy of a letter dated July 31, 2021, wherein, it was duly informed that the noticee has filed a settlement application in the matter. Further, vide letter dated August 03, 2021, the Noticee has denied all the allegations made against it in the SCN and again sought several documents, such as - copy of SEBI's internal policy of August 2016 dealing with DPI cases, copy of file noting's and board agenda notes on the concerned issue. Vide e-mail dated September 01, 2021, Ms. Aayushi Sharma, Advocate ("**AR**") forwarded copy of authority letter dated July 31, 2021 issued by the Noticee regarding her appointment as authorized representative to represent Noticee before me during instant proceedings and again requested for inspection of documents in the instant matter. Accordingly, vide e-mail dated September 01, 2021, my office has informed the Noticee that, my decision regarding inspection of documents has already been communicated to the Noticee vide letter dated July 27, 2021. Further, the documents sought vide letter dated August 03, 2021 by the Noticee are not the part of record before me and also same are not part of the relied upon documents in the instant proceedings. Further, in quasi-judicial proceedings, only those records and documents can be provided to the Noticee on which reliance has been placed upon for framing the charges against the Noticee and same has already been provided along with the SCN. Also the Board Agenda Notes and relevant circulars issued from time to time by the Board are disseminated in the public domain through SEBI website. Accordingly, request for non-relied and non-relevant documents sought by the Noticee was not considered.

8. After considering the material on record and preliminary replies of the Noticee, the Noticee's were granted an opportunity of personal hearing in terms of Rule 4(3) of Adjudication Rules on September 14, 20221 at 11:00AM *via* video conferencing through WEBEX platform. Accordingly, vide e-mail dated September 14, 2021, the AR informed that the Noticee has filed a preliminary reply dated September 11, 2021 and sought adjournment of the aforesaid hearing. Thereafter, the Noticee has submitted another preliminary reply dated September 23, 2021. The Noticee has also raised the issue of issuance of communication w.r.t. inspection of documents from my office. In this regard, vide e-mail dated September 29, 2021, it was informed to the Noticee that the internal document of SEBI dated August 18, 2016 provided and relied upon by the Noticee w.r.t. communications from my office, pertains to formal orders and not relevant to communications made to Noticee, as formal order in the instant proceedings is yet to be passed by the undersigned. Further, the Noticee was advised to file its reply to the SCN based on the merits (*on the basis of relied upon material provided to the Noticee along with the SCN*) by October 15, 2021, wherein, it was allowed to raise other contentions (*legal, administrative, any other, etc.*), if any and it was informed to the Noticee that all the contentions and submissions of the Noticee will be suitably dealt in single order *qua* the Noticee in the concerned matter.

9. Meanwhile, instead of filing reply to the SCN, the Noticee has moved an application before Hon'ble Whole Time Member ("**WTM**") of SEBI regarding withdrawal of communication order dated June 25, 2021 w.r.t. undersigned appointment for initiating instant proceedings. The Noticee has also taken excuse of Covid 19 pandemic for not filing reply to the SCN by given date.

10. Subsequently, vide e-mail dated January 05, 2022, the Settlement Division informed that – "*despite providing sufficient opportunities to attend the Internal Committee meeting to the Noticee, the Noticee has failed to attend the meetings held on November 18 and 30, 2021*" and accordingly its "*Settlement Application*" has been rejected by the competent authority filed in the instant matter.

11. Thereafter, vide letter dated March 03, 2022, the Noticee has given reference of the Hon'ble Supreme Court judgement in the matter T. Takano vs SEBI & Anr. (C.A. Nos. 487 - 488 of 2022) dated February 18, 2022, wherein, it is held that – not only those documents that have been relied upon but also those documents that have close nexus with the matter and are relevant in determining the issues in the present matter have to be provided to the Noticee. Accordingly, the Noticee has again requested for documents and the inspection of those documents sought by it vide its letters dated July 26, 2021 and August 03, 2021. Further, vide letter dated April 08, 2022, the Noticee has made interim submissions and requested for inspection of documents and also requested to not proceed further, till the pendency of its application before Ld. WTM. A similar request has again made by the Noticee vide letter dated May 26, 2022.

12. Vide letter dated July 07, 2022, it was informed to the Noticee that SEBI's internal policy documents were issued to ensure consistency and uniformity in handling such cases by the concerned operational department. Further, no circular or communication was issued about aforesaid policy, as the same was framed for the purpose of bringing consistency and uniformity while dealing with DPI matters within SEBI. It has been also informed to the Noticee that, in terms of the principle pronounced *via* the Hon'ble Supreme Court judgement in the matter of *T.Takano vs SEBI & Anr. (Supra)*, the relevant portion of the examination report has been brought out in detail in the SCN. It was further informed to the Noticee that internal file noting's sought by the Noticee are not the part of record before me and also same are not the relied upon/ relevant documents in the instant proceedings, as the reliance has not been placed upon this noting's/ documents for framing the charges against the Noticee. Also, the Board Agenda Notes and relevant circulars issued from time to time by the Board are disseminated in the public domain through SEBI website. Accordingly, request for these documents by the Noticee are rejected hereby. Further, on considering the repeated and persistent request of the

Noticee, relevant and redacted portion of the said policy, related to internal procedure prescribed for dealing with DPI cases was forwarded to the Noticee along with the letter and they were allowed inspection of documents on July 13, 2022. Accordingly, AR of the Noticee has undertaken inspection of following documents on July 14, 2022, after seeking short adjournment:

Table IV

a.	Relevant Portion of DPI Policy Document.
b.	Reference dated March 11, 2019 from Indian Council of Investors
c.	Copies of letter dated December 24, 2019, email dated May 12, 2020 and letter dated May 21, 2020.
d.	Noticee letter dated December 10, 2020.
e.	Noticee letter dated January 07, 2021.
f.	Noticee letter dated February 20, 2021.
g.	Details of the issuance of NCRPS.
h.	Noticee email dated April 19, 2021.
i.	Noticee email dated April 16, 2021.
j.	Noticee email dated April 12, 2021.
k.	Copy of Communication Order.

13. During the inspection of documents, the AR has recorded her comments on the proceedings sheet *inter alia* as – *"…all the documents sought undercover of letters dt 26/07/2021, 03/08/2021, 11/09/2021, 23/09/2021, 15/10/2021, 04/03/2022, 08/04/2022 and 26/05/2022 have not been given during the inspection proceedings held on 14/07/2022 at 02:30 PM. Therefore, the Noticee reserves its rights to seek the documents sought under the abovementioned letters and make submissions to that effect"*. Vide e-mail dated July 14, 2022, it was informed to the Noticee that in terms of earlier letter dated July 07, 2022, the Noticee has been allowed time up to July 18, 2022 to file additional written submissions and they have been granted an opportunity of hearing on July 26, 2022 in terms of Rule 4(3) of the Adjudication Rules. Accordingly, AR appeared for hearing on scheduled date and advanced the argument on behalf of Noticee's written submissions dated July 26, 2021, August 03, 2021, September 11, 2021, September 23, 2021, October 15, 2021, March 04, 2021, April 08, 2022 and May 26, 2022. AR has sought two weeks' time for making additional written submissions in the matter and accordingly, the Noticee has been granted time up to August 04, 2022 to file additional written submissions in the matter. Hearing in the matter has been held through WEBEX platform and concluded on July 26, 2022. Noticee has filed additional written submission vide letter dated August 04, 2022 in the matter.

14. I note that the Noticee have *inter alia* made the following submissions in its replies dated July 26, 2021, August 03, 2021, September 11, 2021, September 23, 2021, October 15, 2021, March 04, 2021, April 08, 2022, May 26, 2022 and August 04, 2022:

a. The Company is involved in the business of sugar and allied industries and deals mainly with farmers. In the FY 2006-07, 2007-08, 2008-09 and 2009-10 the Noticee has made the following allotments/offers as per the table below and in each tranche/individual issue such offer was made to less than 49 persons in accordance to the Companies Act, 1956 and Regulations:

Table V

Financial Year	No. of Allottees
2006-07	1181
2007-08	913
2008-09	1194
2009-10	4063

b. SEBI's interpretation of the limit of 50 persons in one financial year is absolutely incorrect as the word financial year itself does not find any mention in law and the relevant provision of the Companies Act, 1956 talks about a particular offer and not number of allottees in one financial year. Even this limit of 50 for one offer is not applicable in cases where the offer is made to a domestic concern. It has made these offers mentioned in Para 1 under the purview of the Companies Act, 1956 which states:

> "…
>
> **Section 67 (3) of the Companies Act, 1956 provides that —**
>
> *No offer or invitation shall be treated as made to the public by virtue ofsub- section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-*
>
> *(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or*
> *(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation*
>
> ***Provided that*** *nothing contained in this section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fiftv persons or more"*

c. A simple reading of Section 67 (3) of the Companies Act, 1956, it is clear that an invitation to subscribe can be extended in one single offer to not more than 49 persons in a private placement. It is pertinent to note that the Companies Act, 1956 is silent on the number of offers a company can make in any period or a financial year. There was no cap on the number of offers which could be floated in a particular financial year by a company under the Companies Act, 1956.

d. It would be pertinent to note the distinction between offers and allotment and the fact that they do not mean one and the same thing. An OFFER means an act of solicitation to subscribe to securities. Every OFFER may not result into ALLOTMENT, for example - because of lack of subscription or devolvement of issue. OFFER is preceded by approval by shareholders or by the Board, as the case may be. OFFER is followed by receipt of application and application money from subscribers. An ALLOTMENT on the other hand is the act of allocation of new securities to the concerned subscriber. With the ALLOTMENT the name of the subscriber is entered in the register of the company that keeps record of the holders of the securities. ALLOTMENT is pursuant to the board approving the same and is preceded by OFFER, receipt of application for subscription and receipt of application money.

e. In respect of each of the offers and allotments were made on a different date and it has made separate ROC filings for the same, separate Form 2 for each such private placements / offers has been filed, from which it can be seen that it has not offered shares to more than 49 persons in any of the individual offers. All offers have been made well within the limit prescribed in the Companies Act, 1956 on separate days. Thus, each offer falls under the category of private placement and not public issue.

f. The cap of 200 on the number of persons to whom offer / allotment can be made in one financial year was introduced only after the enactment of Companies Act, 2013 (effective from 1St April, 2014). Hence, in respect of the offers made before 31St March, 2014, this limit is not applicable. The Noticee has issued NCRPS from financial year 2014-15 to 2020-21 to less than 200 persons in each financial year as permitted under the Companies Act, 2013 and relevant Regulations. In the present case it has been submitted that all these offers "*allotments were made only to our sugarcane suppliers/farmers who work on day to day business with the Company*." These issues amount to domestic concern, where expressly Section 67(3) has no application. On this ground itself, the matter should be closed on immediate basis without any adverse findings.

g. Letter dated June 21, 2018, from the Registrar of Companies addressed to the NCLT in the matter of M/S Vishwaraj Sugar Industries Ltd., clearly states that a plain reading of Section 67(3) of the Companies Act, 1956, reflects that, if multiple separate/different allotments are made to 49 persons or less after obtaining shareholders' approval by way of Board Resolution, it cannot be said that the company has violated the provisions of the Companies Act, 1956. This said letter and the view taken by the Registrar of Companies has also been observed and accepted by the NCLT in its order passed in the said matter. The letter of the

Registrar of Companies addressed to NCLT has been attached under cover of our letter dated April 8, 2022 for reference.

h. In contradiction to what the Registrar of Companies has held, the SCN alleges violation on the same facts and on the same sections/law and clearly there are two contradictory views being taken by two different authorities. It would like to rely upon the following orders/judgments which state that in the event of two views or interpretations being possible, penalty cannot be levied. In this regard, Noticee has placed reliance upon the judgement of Hon'ble High Court of Kolkata in the matter of *M/s Durga Kamal Rice Mills vs CIT dated 09.04.2003*, judgement of Income Tax Appellate Tribunal, Delhi in the matter of *M/S Inspectorate Singapore Pte. Ltd. Vs ADIT*, judgement of Income Tax Tribunal, Delhi in the matter of *M/S. Padmini Infrastructure vs DC-IT*, dated February 07, 2019.

i. Its letter dated July 26, 2021, August 03, 2021 and April 8, 2022, the Noticee had sought a list of crucial documents, which would enable it to understand the instant matter properly, however, not all the documents relevant and having close nexus to the present proceedings as sought by it, which go to the core of the issue, was given and therefore inspection of documents remains incomplete. In this regard, the Noticee has placed reliance upon the judgement of Hon'ble Supreme Court in the matter of *T. Takano vs SEBI & Anr. (Supra).*

j. With regard to the documents sought by way of inspection, the Quasi-Judicial Authorities have regularly been seeking information relevant to the case, when they are not in possession of such information or when the information is not readily available to them and have been giving it to the Noticees. In this regard, the Noticee has placed reliance upon the judgement of Hon'ble Securities Appellate Tribunal ("**SAT**") in the matter of *Pooja Wadhawan vs SEBI* in Appeal No. 487 of 2021 dated 13th September, 2021.

k. With regards to SEBI's denial to provide documents under inspection, the Noticee submits that the decision on whether inspection should be given or not is a Quasi-Judicial decision and cannot be taken by anyone else apart from the Quasi-Judicial Authority who, in this case, is the Adjudicating Officer. Reliance in this regard has been placed upon the matter of *Adventz Finance Private Limited* in which, the request of the Appellant / Noticee was rejected by means of a letter issued by the Chief General Manager, SEBI (and not by the Quasi-Judicial Authority) and it was admitted that it was not an order and just a letter issued by the Chief General Manager of SEBI.

l. It has moved an application before Hon'ble WTM, *inter alia* praying that the Hon'ble WTM Order dated June 25, 2021 appointing the Adjudicating Officer in the instant matter be withdrawn and that the said application is presently pending before the Hon'ble WTM and the Hon'ble WTM has not rejected the said application and is still to hear it in the said matter. The Noticee has even enumerated several orders/judgments passed by various High Courts and Tribunals which state that when a matter is pending before a higher authority, the lower authority has no jurisdiction over the cause and cannot proceed to pass orders therein. In this regard, the Noticee has placed reliance upon the judgements of Income Tax Appellate Tribunal in the matter of *MSEB vs. Joint CIT (81 ITD 299) (Mum)*, Hon'ble Allahabad High Court in the matter of *Behari Lal and Anr. Vs M.M.Gobardhan Lal and Ors.* dated April 29, 1948 and Hon'ble Madras High Court in the matter of *Ramanadhan Chetti vs Narayanan Chetti Alias* dated 25 February, 1904.

m. The said transactions in question are of the year 2006-2010 and therefore, there is a delay of over 11 years in issuing the SCN dated July 14, 2021, due to which the Noticee is seriously prejudiced and handicapped, because the primary documents and records for that period are not readily available for such an old period. Kindly note that the law does not mandate it to preserve books of accounts for the concerned period as on today's date. In this regard, the Noticee has placed reliance upon the judgements of Hon'ble SAT in the matter of *Yatin Pandya HUF vs SEBI* (Order dated December 16, 2021 in Appeal No 719 of 2021), *Ashlesh Gunvantbhai Shah vs SEBI* on 31.1.2020, *Mr. Rakesh Kathotia & ors. vs SEM*, *Ashok Shivlal Rupani vs SEBI* on 27.5.2019, *Sanjay Jethalal Soni & Ors. vs SEBI*, *Parag Sarda vs SEBI* on 12.11.2020, *ICICI Bank Ltd. vs SEBI* on 8.7.2020 and judgement of Hon'ble WTM in the matter of *Monarch Netwoth Capital Ltd.*

n. The Noticee has complied with the advisory of SEBI letter dated December 10, 2020 and therefore, initiation of the present proceedings is bad in law on this ground as well and should be disposed of in view of the same. Investors' interest got adequately protected when investors were given an option to take refund as per this approved policy of SEBI. Therefore, even if any prejudice has been caused to any investors the same stands rectified/ corrected by the Noticee in accordance with SEBI's circular of CIR/CFD/DIL3/18/2015 dated 31st December, 2015 and no investor stands prejudiced as on date. In this regard, Noticee has placed reliance upon the judgement of *CESTATA Bangalore in the matter of YCH Logistics (India) Pvt. Ltd vs C.C.E & C.S.T* dated 13th March, 2020, in the matters of *M/s BPI Sanyo Utilities & Appliances Ltd v. The Commissioner of Customs* dated 2nd August, 2001 and *M/s*

Sub Zero Icecream Pvt. Ltd. vs CCE dated 30 April, 2001, before Customs, Excise and Gold (control) Appellate Tribunal South Zonal Bench at Bangalore.

o. Since an exit offer was given in the present matter, the violation alleged is merely technical in nature and reliance has been placed on the judgement of Adjudicating Officer in the matter of Gallops Enterprise Limited dated 22.2.2019 (Order No. EAD8/KS/AA/AO/232/2018-19).

p. With regard to penalty amount under Section 15HB of the SEBI Act, the Noticee has placed reliance upon the judgement of Hon'ble SAT in the matter of *PG Electroplast Ltd. & Ors. vs Sebi* dated August 02, 2019. Only aberration to the precedents cited by it (where penalty has not been initiated for similar violations) has been the case of *M/s Vishwaraj Sugar Industries Limited* and vide the Adjudication Order No. Order/MC/DS/2019-20/7326, dated March 23, 2020. However, the said order In the matter of *M/s Vishwaraj Sugar Industries Limited* can be distinguished from the present matter.

q. Similar to the present matter, SEBI has not taken any adverse action and has not initiated adjudicating proceedings imposing penalties such similarly placed entities. In fact, in these similar cases, the entities had not even given exit option to investors to take refund of the monies collected in accordance with SEBI's circular of CIR/CFD/DIL3/18/2015 dated 31st December, 2015 and SEBI by its Order had to direct them to give refund to the investors. Therefore, those matters are in fact graver than the present matter; and despite that no penalty proceedings were initiated.

15. I have carefully considered the allegations as levelled against the Noticee, the reply/submissions of the Noticee and the relevant material available on record. I note that, in its submissions and during hearing, the Noticee has raised several technical objections before me and I find it appropriate to deal with these objections before dealing the instant matter on merits. The technical objections raised by the Noticee are as follows:

I. Delay of 11 years in issuance of the SCN

a. On question of delay, I note that the examination in this matter has been initiated on the basis of a reference received from ICI on March 11, 2019. Thereafter, documents and information were obtained from the Noticee and RoC, Pune. After examining the information and documents obtained, vide e-mail dated May 12, 2020, the Noticee was advised to comply with the SEBI circular no. CIR/CFD/DIL3/18/2015 dated December 31, 2015, wherein, Noticee sought additional time on the ground of ongoing covid pandemic. Thereafter, vide letter dated December 10, 2020, the Noticee was advised to confirm the refund of money to NCD/RPS holders and to submit a certificate from an independent peer reviewed practicing Chartered Accountant/Company Secretary and on January 07, 2021, the Noticee confirmed the compliance of SEBI's direction regarding exit offer and filing of compounding application before NCLT. Accordingly, on completion of aforesaid process, examination report has been submitted on May 11, 2021 and action has been approved on May 14, 2021. Thereafter, undersigned has been appointed as Adjudicating Officer on June 25, 2021 and on receipt of records on July 01, 2021, the SCN has been issued on July 14, 2021. I further note that, for establishing the delay, if any, in the matter, the date when the violation came to the notice of the SEBI would be the relevant point, which is March 11, 2019 and not the date of violation. Whether a delay in a particular case is justified or not depends on the facts and circumstances of each case and in this case examination is completed within 2 years of period, which also include period of covid pandemic and SCN has been issued within 15 days of the receipt of the records. I, therefore, find that there was no delay in issuance of SCN and no prejudice has been caused to the Noticee due to extensive procedure followed for completion of investigation.

b. I further note that, though the Noticee has claimed that grave prejudiced caused to it in locating the documents and preparing for its defense, however, in this case, all the relied upon documents, which has been considered as evidence are the documents furnished by the Noticee itself and by RoC, Pune; and no other documents obtained from any third party are part of evidence in these proceedings. The Noticee has placed reliance upon various judgements of Hon'ble SAT on the question of delay. In this regard, I would like to highlight the pertaining remark made by the Hon'ble SAT in the matter of *Hemant Madhusudan Sheth and Ors. vs. SEBI* (Appeal No. 06 of 2020; Date of Decision: 24.06.2021) – "…*We find that the show cause notice was issued within a period of four years after analysing the facts given in the investigation report…. we are satisfied that in the given case there was no laches on the part of the respondent in initiating the proceedings*". Also, it is a settled principle that a delay in a particular case depends on the facts and circumstances of each case. In this regard, I note that Hon'ble SAT has qualified through its several rulings by saying that the reasonable period would depend on the facts and circumstances of each case and that no hard and fast rule can be laid down in this regard. I have perused the judgements relied upon by the Noticee in this regard and I found that the delay in all those cases can be easily distinguished on the basis of foretasted principle. I am of the view that present proceedings do not suffer from any infirmity on the ground of delay.

II. All documents sought by the Noticee has not been furnished during the proceedings

a. The Noticee has contended that the several crucial documents sought by it vide its letters dated July 26, 2021, August 03, 2021 and April 8, 2022, which would enable it to understand the instant matter properly, however, not all the documents relevant and having close nexus to the present proceedings as sought by it, which go to the core of the issue, was given and therefore inspection of documents remains incomplete. In this regard, I note that during instant proceedings the Noticee has sought inspection of all the documents including, copy of complaint, copy of authority / delegation of powers of the Board under which the present proceedings have been initiated, documents w.r.t. violation of provisions of Section 67(3) of the Companies Act 1956 in respect of private placements/offers, documents showing that the noticee has made an offer to more than 49 persons in any individual offer, copy of SEBI's internal policy on the procedure to deal with Deemed Public Issue cases, copy of any communication with the RoC/MCA on the impugned allotments made by the Companies, copy of SEBI's internal policy of August 2016 dealing with DPI cases, copy of file noting's and board agenda notes on the concerned issue etc. As provided in earlier paras, most of the documents sought by the Noticee during the proceedings are the documents already provided to it along with the SCN and are the documents furnished by the Noticee itself during the examination i.e. Noticee's letter dated December 24, 2019, May 21, 2020, January 07, 2021, February 20, 2021, Noticee's e-mail dated April 12, 16 and 19 of 2021. Noticee has also been provided with the copy of ICI reference dated March 11, 2019, SEBI's letters dated May 12, 2020 and December 10, 2020, communication order regarding undersigned appointment and provisions violated in the instant matter. The Noticee has sought board agenda notes regarding DPI policy and relevant circulars issued by SEBI and it was duly informed to the Noticee during proceedings that the Board Agenda Notes and relevant circulars issued from time to time by the Board are disseminated in the public domain through SEBI website. It was also informed to the Noticee that file noting's and copy of SEBI's internal policy of August 2016 dealing with DPI cases are not the part of record before me and also same are not part of the relied upon documents in the instant proceedings. However, in terms of Hon'ble Supreme Court judgement in the matter of *T.Takano (Supra),* the Noticee has been extended with the opportunity of inspection of relied upon and relevant documents on July 14, 2021.

b. The Noticee has continuously sought copies of SEBI internal policy for dealing with the DPI cases and in this regard, I am of a view that the SEBI's internal policy documents are issued to ensure consistency and uniformity in handling such cases by the concerned operational department. Further, no circular or communication was issued about aforesaid policy, as the same was framed for the purpose of bringing consistency and uniformity while dealing with DPI matters within SEBI. Therefore, in my considerate views, the aforesaid policy documents which deals with the internal procedures and process to examine the DPI cases within SEBI are not the relevant document for instant proceedings. However, on persistent request the Noticee has been provided with the relevant and redacted portion of the said policy, related to internal procedure prescribed for dealing with such DPI cases.

c. I have perused the judgement of Hon'ble Supreme Court in the matter of *T.Takano (Supra)* and I note that in terms of the principle pronounced *via* the aforesaid judgement of Hon'ble Supreme Court, the relevant portion of the examination report has been brought out in detail in the SCN and the relied upon and relevant documents for instant proceedings are duly provided to the Noticee during the proceedings. It is pertinent to note that the question before the Hon'ble Supreme Court in the aforesaid judgement was whether an investigation report under Regulation 9 of the PFUTP Regulations must be disclosed to the person whom a notice to show cause is issued, when all the relied upon documents have been furnished to the noticee. In this context, Apex court has opined at para 39 of the judgement that "*the actual test is whether the material that is required to be disclosed is relevant for the purpose of adjudication*". The Apex Court also relied on test for the standard of '*relevancy'* laid down by a four judge Bench of the Hon'ble Supreme Court in *Khudiram Das v. State of West Bengal* (1975) 2 SCC 81. The test is a two prong test where; *firstly*, the material must have nexus with the order and *secondly*, the material might have influenced the decision of the authority. The Black's Law Dictionary defines "*nexus*" as "*a connection or link, often a casual one*". Since, all relevant material relied upon in the instant proceedings have been provided to the Noticee and most of them are the documents and replies furnished by the Noticee itself such as - the details of issuance of NCRPS to more than 49 investors and the certificate of refund made to shareholders has been furnished by the Noticee itself during the examination (*Annexure D, E, F & H to the SCN specifically*), I found that the principle pronounced by the Hon'ble Supreme Court in said order has been duly complied with and therefore, I reject such contentions of the Noticee.

d. The Noticee has also raised an issue regarding communication issued by my office regarding rejection of their requests for inspection of documents in these proceedings. In this regard, I note that that all the communications issued to the Noticee during the instant proceedings are either issued by me or issued under my directions by my office. Further, the order of Hon'ble SAT in the matter of *Adventz Finance Private Limited (Supra)* and internal document of SEBI dated August 18, 2016 is not relevant w.r.t. the communications issued by my office, since the said communications are not the formal order passed by me, instead those are communications related to different process of the instant proceedings. Therefore, I reject such frivolous contentions of the Noticee.

III. Pending of miscellaneous application before Ld. WTM of SEBI regarding appointment of Adjudicating Officer

The Noticee has submitted that it has moved an application before Hon'ble WTM, *inter alia* praying that the Hon'ble WTM Order dated June 25, 2021 appointing the Adjudicating Officer in the instant matter be withdrawn and that the said application is presently pending before the Hon'ble WTM. It further stated that, I cannot proceed in the matter till the time, a decision is made by the Ld. WTM on the said application of the Noticee. In this regard, I note that, till now there is no directions issued by the Ld. WTM with regard to keeping the instant proceedings in abeyance. In my view, in absence of any specific directions/ order to keep the adjudication proceedings in abeyance by the competent authority or in absence withdrawal of appointment of undersigned as adjudicating officer on the basis of said application of the Noticee by the competent authority, I can proceed with the matter and can decide the matter on the merits. I have also perused the judgements relied upon by the Noticee and I note that, these judgements discuss about the appeals filed before the appellate court/ tribunal, however, in this matter the application is filed before the Ld. WTM in SEBI, instead of the appellate tribunal/ court. Therefore, the aforesaid judgements can easily be distinguished on the basis of above fact. Considering the above discussion, I found the above contention of the Noticee to be devoid of any merit.

16. After dealing the aforesaid technical objections of the Noticee, now I will deal this case on the basis of merits. I note that, in the instant case, it is an admitted fact that the Noticee has made allotment of NCRPS to 9,480 investors during financial year 2006-07 to 2012-13 and raised Rs. 14.35 crores (*Refer Table I*). It is further observed that the aforesaid allotments were made in several tranches on multiple dates and in each such tranche, allotments were made to 49 or less number of investors, however, on a cumulative basis, the Noticee had allotted NCRPS to 1181, 913, 1194, 4063, 565, 1325 and 239 investors, respectively, during financial year 2006-07 to 2012-13 (*Refer Table I*). I note that the DIP Guidelines were repealed on August 26, 2009 and subsequently NCRPS Regulations were notified on June 12, 2013. As NCRPS were issued to more than 49 persons during financial year 2006-07 to 2012-13 by the Noticee, accordingly, it has been alleged that the Noticee has violated:

a) Provisions of Sections 56, 60, 67(3) and 73 of the Companies Act, 1956 during financial year 2010–11, 2011-12 and 2012-13; and

b) Provisions of Sections 56(1), 56(3), 60, 67(3) and 73 the Companies Act, 1956 and Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3, 5.3.5, 5.3.6, 5.4, 5.6, 5.6A, 5.7, 5.8, 5.9, 5.9.1, 5.10, 5.12.1, 5.13, 6.0, 6.1 to 6.15, 6.16 to 6.34, 8.3, 8.8.1, 9, 10.1 and 10.5 of the DIP Guidelines for the FY 2006-07, 2007-08, 2008-09 and 2009-10.

17. As already mentioned in previous paras that the Noticee has filed compounding application for the violations of Sections 56, 60, 67(3) and 73 of the Companies Act, 1956 with NCLT, accordingly, no action proposed under the SEBI Regulations for the violations of the said provisions of the Companies Act, 1956 for the financial year 2010–11, 2011-12 and 2012-13. Therefore, the limited questions before me is, whether the allotments made by the Noticee during financial year 2006-07, 2007-08, 2008-09 and 2009-10 is public offer/ issue in terms of Section 67 of the Companies Act, 1956? and if answer for the same is yes, whether the same is in violation of the provisions of Sections 56(1), 56(3), 60, 67(3) and 73 the Companies Act, 1956 and Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3, 5.3.5, 5.3.6, 5.4, 5.6, 5.6A, 5.7, 5.8, 5.9, 5.9.1, 5.10, 5.12.1, 5.13, 6.0, 6.1 to 6.15, 6.16 to 6.34, 8.3, 8.8.1, 9, 10.1 and 10.5 of the DIP Guidelines.

18. In order to ascertain whether an issue of securities is a *'public issue'* or done on *'private placement'*, it is necessary to make a reference to Section 67(3) of the Companies Act, 1956, which reads as under:

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

(2) ...

(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-
(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …

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

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

In terms of Section 67(3), as amended by the Companies (Amendment) Act, 2000, with effect from December 13, 2000, no offer or invitation shall be treated as made to the public by virtue of sub-sections (1) or (2), as the case may be, if the offer or invitation can properly be regarded, in all circumstances - (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. In terms of the first proviso to the aforesaid section, the provisions of Section 67(3) shall not apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Therefore, the number of subscribers becomes relevant in order to conclude whether an issue of shares is for public or on a private placement basis. In view of the same, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue.

19. The Hon'ble Supreme Court of India in the matter of *Sahara India Real Estate Corporation Limited & Others Vs. SEBI and another* (Civil Appeal Nos. 9813 and 9833 of 2011; decided on August 31, 2012) ('**the Sahara case**') had *inter alia* held that –

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public".

Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. …

Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. …

I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …"

20. It can be seen from table I and II that the number of persons to whom NCRPS were allotted clearly exceeded 49 in every financial year in question. Therefore, considering the number of persons to whom NCRPS has been allotted by the Company by issuing NCRPS, which is definitely more than 49 persons, it can be concluded that the Company had made a public issue of NCRPS in terms of the first proviso to Section 67(3) of the Companies Act, 1956. By making a public issue of NCRPS, as discussed above, the Company was mandated to comply with all the legal provisions that govern and regulate public issue of such securities, including the Companies Act, 1956 and the SEBI Act and regulations. In this context, I refer and rely on the below mentioned observation made by the Hon'ble Supreme Court of India in the matter of Sahara case:

"... ... that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …"

21. In view of the above observations, by virtue of Section 55A(a) and (b), the SEBI has jurisdiction and would govern the issue of NCRPS as the same was made to more than 49 persons. In terms of Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its *'prospectus'* with the RoC, before making a public offer/ issuing the *'prospectus'*. As per the aforesaid Section 2(36), "*prospectus*" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. I note that the Noticee has not produced any record to show that it has issued prospectus containing the disclosures mentioned in Section 56(1) of the Companies Act, 1956, or filed a *Prospectus* with ROC or issued application forms accompanying the abridged prospectus.

Therefore, I find that, the Noticee has failed to issue *prospectus* and has not complied with Section 56(1), 56(3) and 60 of the Companies Act, 1956.

22. Further, by issuing impugned debentures to more than forty-nine persons, as stated above, the Noticee had to compulsorily list such securities in compliance with Section 73 of the Companies Act, 1956. As per Section 73(1) and (2) of the Companies Act, 1956, every company intending to offer shares or debentures to the public for subscription by the issue of a *prospectus*, is required to make an application, before such offer, to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. I find that no records have been submitted to indicate that the Noticee has made an application seeking listing permission from stock exchange. Thus, the Noticee has contravened the said provisions. The Noticee has also failed to provide any record to show that the amount collected by it was kept in a separate bank account. Therefore, I find that the Noticee has also not complied with the provisions of section 73(3) as it has not kept the amounts received from investors in a separate bank account.

23. The Noticee was also mandated to comply with the provisions of DIP Guidelines, while issuing NCRPS. From the available record in the matter, I found that that the Noticee has failed to comply with the following clauses of DIP guidelines for financial years 2006-07, 2007-08, 2008-09 and 2009-10 (as the NCRPS were issued to more than 49 investors before August 26, 2009):

"…

i.	*Clause 2.1.1*	*filing of offer document*
ii.	*Clause 2.1.4*	*Application for listing*
iii.	*Clause 2.1.5*	*Issue of securities in dematerialized form*
iv.	*Clause 2.8*	*Means of finance*
v.	*Clause 4.1*	*Promoters contribution in a public issue by unlisted companies*
vi.	*Clause 4.11*	*Lock-in of min. specified promoters' contribution in public issues*
vii.	*Clause 4.14*	*Lock-in of pre-issue share capital of an unlisted company*
viii.	*Clause 5.3.1*	*Memorandum of understanding*
ix.	*Clause 5.3.3*	*Due diligence certificate*
x.	*Clause 5.3.5*	*Undertaking*
xi.	*Clause 5.3.6*	*List of promoters group and other details*
xii.	*Clause 5.4*	*Appointment of intermediaries*
xiii.	*Clause 5.6*	*Offer document to be made public*
xiv.	*Clause 5.6A*	*Pre-issue Advertisement*
xv.	*Clause 5.7*	*Dispatch of issue material*

xvi.	*Clause 5.8*	*No complaints certificate*
xvii.	*Clause 5.9*	*Mandatory collection centres*
xviii.	*Clause 5.9.1*	*Minimum number of collection centres*
xix.	*Clause 5.10*	*Authorised collection agents*
xx.	*Clause 5.12.1*	*Appointment of Compliance Officer*
xxi.	*Clause 5.13*	*Abridged prospectus*
xxii.	*Clause 6.0*	*Contents of offer documents*
xxiii.	*Clause 6.1 to Clause 6.15*	*Contents of Prospectus*
xxiv.	*Clause 6.16 to Clause 6.34*	*Contents of abridged prospectus*
xxv.	*Clause 8.3*	*Rule 19(2)(b) of SC(R) Rules, 1957*
xxvi.	*Clause 8.8.1*	*Opening & closing date of subscription of securities*
xxvii.	*Clause 9*	*Guidelines on advertisements by issuer company*
xxviii.	*Clause 10.1*	*requirement of credit rating*
xxix.	*Clause 10.5*	*redemption*

As per Regulation 111(1) of the ICDR Regulations, the DIP Guidelines, "shall stand rescinded". However, Regulation 111(2) of the ICDR Regulations, provides that:

"(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments,— (a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations; (b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

24. I note that the Noticee in its submissions has contended that it has not made offer to more than 49 persons in a single offer during and therefore, its offers of NCRPS was a private placement, therefore, it does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956. Further, the Companies Act, 1956 is silent on the number of offers a company can make in any period or a financial year and there was no cap on the number of offers which could be floated in a particular financial year by a company under the Companies Act, 1956. In this regard, I note that Section 67(3) of Companies Act, 1956 provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming

available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the first proviso to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. I further note that, even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the *"Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged."* In respect of those issuances, the Noticee has not placed any material that the allotment was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. The Noticee in its submissions has merely made a statement that the allotments were made only to its sugarcane suppliers/farmers who work on day to day business with it, however, nothing has been produced before me in support of the aforesaid statement. Therefore, I find that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble SAT in *Neesa Technologies Limited vs. SEBI* (Appeal No. 311 of 2016), wherein, Hon'ble Tribunal held that *"In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and* ***<u>their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning</u>****". (emphasis implied)*

25. Considering the aforementioned principle pronounced by the judgement of Apex court in the matter of Sahara case and Hon'ble SAT judgement in the matter of *Neesa Technologies Limited vs. SEBI (Supra),* I am of the view that issuance of NCRPS by the Noticee during financial years 2006-07, 2007-08, 2008-09 and 2009-10 was deemed public issue and in no way same can be considered as private placement, as claimed by the Noticee.

26. During the proceedings, the Noticee has produced a letter of Registrar of Companies, Karnataka dated June 21, 2018 addressed to NCLT, Bangalore, wherein, RoC, Karnataka has given an opinion before NCLT, Bangalore that – "*By plain reading of Sec 67(3) and its proviso, it cannot be said that the Company has violated the said provision.*" The issue involves in above case is same as in this case i.e. multiple separate/different allotments are made to 49 persons or less. The Noticee has also specifically submitted that – "*<u>This said letter and view taken by ROC has also been observed and accepted by the NCLT in its order passed in the said matter</u>*". I have perused the

aforesaid judgement of NCLT, Bangalore dated October 31, 2018 (C.P. No. 325/BB/2018) in the matter of *M/s Vishwaraj Sugar Industries Limited* and I found that Manager, SEBI has filed SEBI's observations by way of an affidavit before NCLT, Bangalore and specifically submitted that – "*In light of these decisions, it was submitted that the fact that each allotment is made to forty nine or less persons alone cannot be considered for determining whether an offer/ issue is a public offer/ issue. The facts and circumstances surrounding each case is relevant to determine whether the series of allotment is part of a single offer. In the instance case, the frequency and time span between such allotments coupled with the series of allotments made every five days pursuant to a single resolution passed in the AGM authorizing such issuances, clearly indicates that it is a single offer and thus, a public issue*".

27. I further note that the counsel representing the Noticee has tried to mislead by stating that "*<u>This said letter and view taken by ROC has also been observed and accepted by the NCLT in its order passed in the said matter</u>*". Instead in its aforesaid judgement Ld. Tribunal has *inter alia* held that – *"……<u>SEBI is the regulating authority to deal with the issues raised by the Applicants</u>. The interests of farmers are at stake in the instant case, and <u>it is SEBI that has to decide the issue when the issue has come before them</u>…. Tribunal cannot prejudge the issue before SEBI judging the issue at appropriate time…. The petition bearing no. C.P. No. 325/BB/2018 is hereby rejected as premature, <u>leaving the matter to SEBI to decide the issue in accordance with law at the appropriate time.</u>"* I also note that, nowhere in the said order Ld. NCLT has stated that it is in agreement with or accepted the view opined by the RoC, Banagalore. Nevertheless, I note that, SEBI has been mandated under Section 55A of the Companies Act, 1956 to administer various provisions of the said Act with respect to issue and transfer of securities of listed companies, companies that intend to list as well as companies that are required to list its securities while making offer and issue of securities to the public and same has also been accepted by the Ld. NCLt, Banagalore in its said order relied upon by the Noticee. While examining the scope of this section in the Sahara Case, Apex Court held as follows: -

> *'We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and nonpayment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India." "SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange."*

28. The question relating to what constitutes a public issue is also clarified in the order of Sahara case (*refer para 20 of this order*). In terms of aforesaid Apex court judgement, it is amply clear that

SEBI has power to administer the aforesaid provisions and sections of the Companies Act, which are related to issue of securities and over public companies who have issued shares or debentures to fifty or more but not complied with the provisions of Section 73(1) of the Companies Act. Considering the same, I further note that the judgement of Hon'ble High Court of Kolkata in the matter of *M/s Durga Kamal Rice Mills vs CIT dated 09.04.2003*, judgement of Income Tax Appellate Tribunal, Delhi in the matter of *M/S Inspectorate Singapore Pte. Ltd. Vs ADIT*, judgement of Income Tax Tribunal, Delhi in the matter of *M/S. Padmini Infrastructure vs DC-IT*, dated February 07, 2019, relied upon by the Noticee in this regard is not applicable in the facts and circumstances of this case. Therefore, in my considerate view, the Noticee undoubtedly went for a public issue in a truncated manner in this case during financial years 2006-07, 2007-08, 2008-09 and 2009-10 and violated the relevant provisions of the Companies Act, 1956 and DIP Guidelines. Thus, I find no merit in such arguments of the Noticee. I also reject the Noticee's arguments related to '*offer*' and '*allotment*', as I found same to be irrelevant in terms of discussion so far, as it is already established that offering of NCRPS to 49 persons on separate days in aforesaid financial year was part of deemed public issue.

29. The Noticee has further contended that, it has given exit offer to the investors pursuant to SEBI's direction and therefore, the violation alleged is merely technical in nature. In this regard, I note that, as per SEBI DPI policy, the Noticee was directed to provide exit offer to its NCRPS investors and file compounding application in NCLT for violation of NCRPS issuance to public during financial years 2010–11, 2011-12 and 2012-13. In my considerate view, complying with above directions of SEBI, does not change the fact that the Noticee by issuing NCRPS to more than 49 investors during financial years 2006-07, 2007-08, 2008-09 and 2009-10 has violated the relevant provisions of the Companies Act, 1956 and DIP Guidelines. Therefore, in no way the non-compliance on part of the Noticee can be considered as technical and venial in nature. Thus, I found the Noticees reliance upon the judgement of *Gallops Enterprise Limited, P.G. Electroplast Ltd. & Ors. vs Sebi and M/S. Hindustan Steel Ltd. vs. State of Orissa,* 1969(2) SCC 627 is out of place and I reject such contentions of the Noticee.

30. One of the Noticee contention is that, SEBI has not taken any adverse action and has not initiated adjudicating proceedings imposing penalties against such similarly placed entities. In this regard, I note that, undersigned has been appointed as adjudicating officer by the competent authority to inquire and adjudge the instant matter w.r.t. violations committed by the Noticee in terms of issuance of impugned NCRPS. Therefore, the instant proceeding has limited scope of inquiring and adjudging the charges and allegations framed w.r.t. the Noticee. Further, the other entities referred by the Noticee are not part of the instant proceedings, therefore, it is beyond my scope to inquire and adjudge and decide upon the act of entities, who

are not the Noticee before me. Considering the same, I do not find merit in this contention of the Noticee.

31. In view of the discussion so far, it has been found that the Noticee's issuance of NCRPS to investors during financial years 2006-07, 2007-08, 2008-09 and 2009-10 were deemed public issues and the Noticee has failed to comply with the provisions of Sections 56(1), 56(3), 60, 67(3) and 73 the Companies Act, 1956 and Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3, 5.3.5, 5.3.6, 5.4, 5.6, 5.6A, 5.7, 5.8, 5.9, 5.9.1, 5.10, 5.12.1, 5.13, 6.0, 6.1 to 6.15, 6.16 to 6.34, 8.3, 8.8.1, 9, 10.1 and 10.5 of the DIP Guidelines in this regard. The violations in the facts and circumstances as found hereinabove, in my view deserves imposition of monetary penalty upon the Noticee under section 15HB of the SEBI Act which provides as following: -

<u>SEBI Act</u>

Penalty for contravention where no separate penalty has been provided.

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

32. For the purpose of adjudication of quantum of penalty, it is relevant to mention that under section 15I of the SEBI Act imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. Further, while adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having due regard to the factors specified in section 15J. The factors stipulated in Section 15J of the SEBI Act, which reads as following:

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 investor/s 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.

33. I note that it is a settled position that the factors under section 15J are not exhaustive but are inclusive. From the available records, I further note that during financial years 2006-07 to 2012-13, the Noticee has raised Rs 14.35 crores from 9,480 investors and same is substantial amount. Further, the Noticee has raised Rs 10.78 crores during financial years 2006-07, 2007-08, 2008-09 and 2009-10 *via* impugned NCRPS issue from 7,351 investors and while doing so the Noticee has failed to comply with the relevant provisions of the Companies Act, 1956 and DIP Guidelines.

34. I further note that the impugned deemed public issues are in violation of law and money is collected from innocent, ill-informed and gullible public, without the Company giving the statutory protection available to those investors under the law such as, full and necessary disclosures about the company, an exit opportunity by way of listing of the shares. In this regard, I note that the remedy under Section 73 of Companies Act, 1956 for failure to file prospectus or apply for listing is to repay the money to investors with specified interest. I further note that the SEBI circular dated December 31, 2015 provides that "*companies may avoid penal action if they provide the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money paid along with 15% interest p.a. thereon or such higher return as promised to investors*" in respect of cases "*involving issuance of securities to more than 49 persons but up to 200 persons in a financial year.*" In this case, the Noticee has given the exit offer to its investors only after the direction of SEBI vide letter dated December 10, 2020 and the number of investors in each of the financial years in question is way more than 200 persons. However, in my considerate opinion providing exit offers to its investors is a mitigating factor while deciding upon the quantum of penalty in this case. Similarly, the fact that the impugned NCRPS issuance belongs to period of FY 2006 – 07 to 2009 – 10 is also a mitigating factor in this case.

35. In this case, the Noticee has issued NCRPS to more than 49 investors, continuously for 7 financial years, including financial year i.e. from FY 2006 – 07 to 2009-10, therefore, the default in this case is repetitive in nature. I note that the nature of the default by the Noticee is found to be serious and such defaults by the Noticee are blameworthy and grave considering the amount of Rs. 10.78 crores raised by it from 7,351 investors during aforesaid period. Therefore, no lenient view should be taken in this matter and the case deserves imposition of monetary penalty proportionate to the default as found in this case.

36. Therefore, having regard to the factors listed in Section 15J and principle pronounced through judgement of Hon'ble Supreme Court in the matter of *Bhavesh Pabari vs SEBI* (2019) 5 SCC 90, and considering the facts and circumstances of the case and the findings arrived in the matter and mitigating factors of this case, I, in exercise of the powers conferred upon me under Section

15I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose a monetary penalty of total **Rs 5,00,000/- (Rupees Five Lakhs Only) on the Noticee, M/s Jaywant Sugars Limited**, for the violations of relevant provisions of the Companies Act, 1956 and DIP Guidelines, under section 15HB of the SEBI Act. In my view, the said penalty is commensurate with the violations committed by the Noticee as found in this case.

37. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order in either of the way of demand draft in favour of "*SEBI - Penalties Remittable to Government of India*", payable at Mumbai, or by following the path at SEBI website, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticees may contact the support at portalhelp@sebi.gov.in

38. The Demand Draft or details and confirmation of e-payment made in the format as given in table below shall be sent to *"The Division Chief, EFD-DRA-IV, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051"* and also to e-mail id: - tad@sebi.gov.in.

1	Case Name	
2	Name of the 'Payer/Noticee'	
3	Date of Payment	
4	Amount Paid	
5	Transaction No.	
6	Bank Details in which payment is made	
7	Payment is made for - (like penalties along with order details)	

39. 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.

40. In terms of Rule 6 of the Adjudication Rules, copies of this order are sent to the Noticee and also to SEBI.

Date: August 29, 2022
Place: Mumbai

Vijayant Kumar Verma
Adjudicating Officer