BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. : ORDER/SRP/MCS/2018-19/2382-2393]

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

In respect of

NOTICEE NO.	NAME OF THE NOTICEE	PAN
1	M/s. G P Shah Investment Pvt. Ltd.	AAACG7944A
2	M/s. B G Jain Investment Pvt. Ltd.	AAACB8848A
3	M/s. P B Jain investment Pvt. Ltd.	AABCP2964N
4	M/s. Varju Investment Pvt. Ltd.	AAACV7157L
5	M/s. Nakoda Syntex Pvt. Ltd.	AAACN7281K
6	Shri Babulal G Jain	ABNPJ1251A
7	M/s. B G Jain HUF	AABHB6442A
8	Ms. Pushpadevi B Jain	AAQPJ6966L
9	Shri Devendra B Jain	ADTPJ4655Q
10	Shri Kartik B Jain	AEXPJ6838A
11	Ms. Shilpa B Jain	AEXPJ6837R
12	Ms. Neetu D Jain	Not Available

In the matter of **M/s. Nakoda Limited**

I. FACTS OF THE CASE IN BRIEF

1. The Securities and Exchange Board of India (hereinafter referred to as "**SEBI"**) had, *inter-alia,* observed that in the matter of M/s. Nakoda Limited (hereinafter

referred to as “**Company”** or “**Nakoda”** or “**target company”**), M/s. G. P. Shah Investment Pvt. Ltd., M/s. B. G. Jain Investment Pvt. Ltd., M/s. P. B. Jain Investment Pvt. Ltd., M/s. Varju Investment Pvt. Ltd., M/s. Nakoda Syntex Pvt. Ltd., Shri Babulal G. Jain, M/s. B. G. Jain HUF, Ms. Pushpadevi B. Jain, Shri Devendra B. Jain, Shri Kartik B. Jain, Ms. Shilpa B. Jain, and Ms. Neetu D Jain (hereinafter collectively referred to as “**Noticees”** and individually by their name or “**Noticee No**.”) have allegedly failed to make public announcement of an open offer for acquiring shares of Nakoda (target company), and thus violated the provisions of Regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as “**SAST Regulations”**), therefore, SEBI has initiated Adjudication Proceedings under Section 15H(ii) of SEBI Act, 1992.

II. APPOINTMENT OF ADJUDICATING OFFICER

2. Earlier, Shri Biju S, Chief General Manager was appointed as the Adjudicating Officer (**AO**) in the matter under Section 15-I of the SEBI Act, 1992 and Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **“Adjudication Rules”**) to inquire into and adjudge under Section 15H(ii) of the SEBI Act, 1992 the violation of the aforesaid provisions of the SAST Regulations alleged to have been committed by the Noticees. Consequent upon transfer of Shri Biju S, the undersigned has been appointed as AO in the matter on July 06, 2018.

III. SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. Show Cause Notice dated June 28, 2018 (hereinafter referred to as **“SCN”**) was issued to the Noticees, in terms of Rule 4 of the Adjudication Rules read with Section 15-I of SEBI Act, 1992 to show cause as to why an inquiry should not be initiated against them and penalty be not imposed under Section 15H(ii) of the SEBI Act, 1992 for the alleged violation of the provisions of Regulation 3(2) of the

SAST Regulations. From the available records, it is observed that the Noticees have failed to file reply to the allegations in the SCN.

4. In the interest of natural justice and in terms of Rule 4 of the Adjudication Rules, vide Hearing Notices dated September 24, 2018 and October 10, 2018 opportunities of personal hearing before the undersigned have been provided to all the Noticees on October 10, 2018 and October 26, 2018 respectively. It is observed that the said Notices sent through Registered / Speed Post were served upon all the Noticees except the two Noticees *namely,* G P Shah Investment Pvt. Ltd. and P B Jain investment Pvt. Ltd. Subsequently, Hearing Notice was served on the said two Noticees through affixture at their last known address in terms of Rule 7(c) of Adjudication Rules. However, it is noted that the Noticees failed to appear for the personal hearings on any of the scheduled dates.

5. Subsequently, vide letter dated January 05, 2019, Noticee No. 5 *i.e* Babulal G. Jain responded intimating therewith that due to unavoidable circumstances they could not appear for the personal hearing scheduled on October 26, 2018. The Noticee requested for a copy of the SEBI Whole Time Member's (**WTM's**) Order dated July 08, 2013 and further requested for an opportunity to make written submissions and personal hearing thereafter, in the matter. The Noticee also mentioned in the said letter that they had earlier requested for copy of the WTM's Order vide their letter dated July 28, 2018 in response to the SCN.

6. In response, vide letter dated January 09, 2019, it was clarified to the Noticees that the subject line of the SCN dated June 28, 2018 issued by the erstwhile AO, should be read as "*Notice under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 read with Section 15-I of the SEBI Act, 1992 in the matter of Nakoda Limited*", instead of "*Notice under Rule 4(1) of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 in the matter of non-compliance of directions issued by WTM vide order dated July 08, 2013 in the matter of Nakoda*

Limited". Further, a copy of the WTM's Order No. WTM/RKA/CFD/DCR/28/2013 dated July 08, 2013 was also enclosed there with. With a view to give one more opportunity, the Noticees were also given 14 days' time to file their replies to the SCN and were also granted another opportunity of personal hearing on February 05, 2019.

7. However, I note that no reply was received from the Noticees. Further, the Noticees also did not appear for the personal hearing on February 05, 2019.

8. It is noted that the Noticees were provided with ample opportunities to submit reply to the SCN as well as to appear before the undersigned for personal hearing in the aforesaid matter. However, despite the same, the Noticees have failed to submit reply to the SCN or to refute the charges. The principle of natural justice has been followed in the matter as enough opportunities of personal hearings were also provided to the Noticees. Therefore, I am inclined to decide the matter *ex-parte,* taking into account the details/material available on record.

9. In this context, I would like to rely upon the observations of the Hon'ble Securities Appellate Tribunal (**SAT**) in the matter of **Classic Credit Ltd. Vs. SEBI** (Appeal No. 68 of 2003 decided on December 08, 2006) wherein the Hon'ble SAT, *inter alia,* took the following view *"............ the appellants did not file any reply to the second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show-cause notice were admitted by them.......".*

10. Similarly, I note that the Hon'ble SAT has again in the matter of **Sanjay Kumar Tayal & Others Vs. SEBI** (Appeal No. 68 of 2013 decided on February 11, 2014), *inter alia,* observed that *"............as rightly contended by Mr. Rustomjee, learned senior counsel for respondents, appellants have neither filed reply to show cause notices issued to them nor availed opportunity of personal hearing offered to them in the adjudication proceedings and, therefore,*

appellants are presumed to have admitted charges levelled against them in the show cause notices..........”.

IV. ISSUES FOR CONSIDERATION AND FINDINGS

11. I have carefully perused the SCN and the documents / material available on record. The issues that arise for consideration in the present case are:

    a) Whether the Noticees have violated the provisions of Regulation 3(2) of SAST Regulations?

    b) Whether the Noticees are liable for imposition of monetary penalty under Section 15H(ii) of the SEBI Act?

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

12. Before moving forward, it is pertinent to refer to the relevant provisions of SAST Regulations alleged to have been violated by the Noticees, which read as under:

SAST Regulations

3. Substantial acquisition of shares or voting rights*.*

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation.—For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation :-

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

13. From the material/details available on record, I note that the Noticees viz. G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain comprise the promoter group of Nakoda (target company).

14. It is noted that pursuant to a resolution passed by shareholders of Nakoda in its Annual General Meeting (**AGM**) held on June 10, 2010, the target company issued warrants and GDRs as follows :-

   a) On June 23, 2010, the target company allotted 2,70,00,000 warrants to two promoters viz; P. B. Jain Investments Private Limited and Nakoda

Syntex Private Limited (Noticee Nos. 3 and 5 respectively), and 90,00,000 warrants to non- promoters.

b) On November 26, 2011, the target company allotted 20,00,000 GDRs with 6,00,00,000 underlying shares to non-promoters.

15. Subsequently, on December 19, 2011, the target company allotted 5,40,00,000 equity shares to P.B. Jain Investments Private Limited and Nakoda Syntex Private Limited (Noticee Nos. 3 and 5 respectively) pursuant to conversion of the 2,70,00,000 warrants allotted to them on June 23, 2010. Consequent to this allotment of equity shares, the voting rights of Noticee Nos. 3 and 5 individually increased from 11.57% to 24.98% and from 1.92% to 20.36% respectively, and thereby the voting rights of the promoter group of target company collectively increased from 50.23% to 62.92%.

16. It is noted from the facts available on record, that consequent to the aforesaid allotment of equity shares on December 19, 2011, the collective shareholding of the promoters increased from 26.38% to 44.03% and their collective voting rights in the target company as has been stated above, increased from 50.23% to 62.92%. Since, such increase in shareholding/voting rights was more than the permissible creeping acquisition of 5% in a financial year, the promoters were under obligation to make public announcement in accordance with provisions of regulation 3(2) of the SAST Regulations on the date of exercise of option to convert the warrants into equity shares i.e. December 19, 2011. I note that the Noticees did not make public announcement of public offer even though they have breached the threshold limit for acquisition of 5% in the financial year 2011-12, which is in contravention of Regulation 3(2) of SAST Regulations. I note that the said facts have not been refuted by the Noticees. Considering the above, I am of the view that the Noticees have violated the provisions of Regulation 3(2) of SAST Regulations, 2011. In this context it is pertinent to mention here the observations made by the Hon'ble Supreme Court in the

matter of ***Swedish Match Ab Vs. SEBI, 2004 (11) SCC 641*** wherein in respect of failure to make public announcement of open offer it was held that: *"Public announcement of offer is one of the modes of protecting the interests of the shareholders…Regulation 11 does not brook any other interpretation. If additional shares are acquired entitling an acquirer to exercise more than 5% of the voting rights, the statutory embargo to the effect that the acquirer must make a public announcement to acquire shares in accordance with the Regulation comes into operation".* Here, it is pertinent to note that the provisions of Regulation 3(2) of the SAST Regulations are *pari materia* the provisions of Regulation 11(1) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (*since repealed*) with regard to acquisition of shares or voting rights on conversion of warrants, creeping limit and obligation in case of breach of threshold.

17. It may also be mentioned that in the same matter an Order was passed by the Hon'ble Whole Time Member, SEBI (**WTM**) on July 08, 2013 in the proceedings under Sections 11 and 11B of the SEBI Act, 1992, read with Regulation 32 of the SAST Regulations in respect of the Noticees and *inter alia* made the following findings :–

> *" …*
>
> *32. …., the consequence of breach provided in regulation 3(2) should follow unless in the facts and circumstance of the case any other direction could be found in the interest of investors and the securities market. In this case, I have already rejected the contention that conversion of warrant in the financial year 2011-12 was beyond the control of notcees and it was due to the act or omission of the GDR holders. The noticees have further argued that the shareholders who are sought to be protected under the Takeover Regulation, 2011 had duly approved the proposal of issuance of warrants to the noticees. It is to be kept in mind that, by the special resolution, the shareholders of a company approve every proposal of preferential allotment. I note that the Takeover Regulations do not exempt acquisition*

through preferential allotment from obligation of public announcement and in case of acquisition of shares or voting rights or control through preferential allotment also the consequence is the same as in case of acquisition through any other mode. I find that the facts and circumstances of this case do not suggest any reason to deviate from the normal rule of requirement of making public announcement in terms of regulation 3(2) of the Takeover Regulations, 2011. I, therefore, find that the noticees should make open offer to the public shareholders in accordance with the Takeover Regulations, 2011.

33. I note that had the noticees made the public announcement in accordance with the Takeover Regulations, 2011 and complied with all related activities within the timelines specified under therein, all formalities with respect to their public announcement and the open offer would have been completed on March 12, 2012. Since the noticees have failed to make the public announcement within the stipulated time and the public announcement in compliance with this order would be after delay, the noticees shall pay interest on consideration amount to the shareholders who tender their shares in the open offer and who are eligible for interest as per law.

34. I, therefore, in exercise of powers conferred upon me under sections 19, 11 and 11B of the SEBI Act and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions:

(a) The noticees, G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain shall make

a combined public announcement to acquire shares of the target company, M/s Nakoda Limited, in terms of regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, within a period of 45 days from the date of this order;

(b) The noticees shall, along with consideration amount, pay interest at the rate of 10% per annum from March 13, 2012 to 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 adjustment of dividend paid, if any."

18. I also note that the Noticees had preferred an appeal before the Hon'ble SAT (Appeal No. 169 of 2013) against the said SEBI WTM's Order dated July 08, 2013. Thereafter, the Hon'ble SAT, passed Order dated November 13, 2017 wherein it dismissed the appeal of the Noticees and upheld WTM's Order with *inter alia* following observations: –

"…

21. In the case in hand, it is pertinently noted that as on March 31, 2011 and just prior to allotment of 5,40,00,000 equity shares consequent to conversion of 2,70,00,000 warrants of said two entities of the promoter group of the target company, the appellants were holding 3,33,49,600 shares and this shareholding increased to 8,73,49,600 shares on December 19, 2011 pursuant to the conversion of the said warrants. Consequent to conversion of those warrants during the financial year 2011-12 their voting rights in the target company increased from 50.23% (as on March 31, 2011 and just prior to conversion of warrants on December 19, 2011) to 62.92% during the financial year 2011-12.

22. It is, therefore, December 19, 2011 on which date the appellants have attracted the provisions of Regulation 3(2) of the Takeover Regulations, 2011 and have consequently incurred an obligation to make a combined *public announcement to acquire shares of the target company as per law. Therefore, we do not find any fault with the impugned order dated July 8, 2013 passed by the learned WTM.*

23. Similarly, it is evident from the records that appellant no. 1 i.e. P. B. Jain Investment Pvt. Ltd. and appellant no. 2 i.e. Nakoda Syntex, Pvt. Ltd. are part and parcel of the same promoter group consisting of twelve appellants. They formed a homogenous class and hence are persons acting in concert under Regulation 2(1)(q)(2)(iv) of the Takeover Regulations, 2011. It is also the admitted position that prior to the conversion of warrants in question by the two appellants, the collective shareholding and voting rights of the appellants as a promoter group got increased from 50.23% of voting rights to that of 62.92%. Therefore, the findings by the learned WTM in the impugned order are absolutely correct and are hereby upheld."

19. It is pertinent to mention here that till date the Noticees have not complied with the obligation to make public announcement of an open offer for acquiring shares of Nakoda despite the aforesaid directions of the WTM's Order dated July 08, 2013 which were later upheld by the Hon'ble SAT vide the aforesaid Order dated November 13, 2017.

20. Further, in the matter of ***Ranjan Varghese Vs. SEBI*** (Appeal No.177 of 2009 and Order dated April 08, 2010), the Hon'ble SAT had observed the following - *"The fact that the appellants acting in concert with each other had made the acquisitions which triggered the Takeover Code, it was incumbent upon them to make a public announcement which, admittedly, they have failed to do so. This failure has seriously prejudiced the public investors/shareholders of the company who have been deprived of their valuable right to exit by offering their shares to the acquirer. We cannot lose sight of the fact that one of the primary objects of the Takeover Code is to allow the public shareholders an exit route*

when the target company is either taken over by an acquirer or an acquirer makes a substantial acquisition therein."

21. In view of the foregoing, I am of firm opinion that the Noticees, by their failure to make public announcement of open offer have violated the provisions of Regulation 3(2) of SAST Regulations.

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

23. The aforesaid violation of Regulation 3(2) of SAST Regulations by the Noticees attracts monetary penalty under Section 15H(ii) of the SEBI Act, 1992 which *inter alia* reads as follows:

SEBI Act, 1992

Penalty for non-disclosure of acquisition of shares and take-overs

15H. If any person, who is required under this Act or any rules or Regulations made thereunder, fails to-

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

he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

24. While determining the quantum of penalty under Section 15H(ii) of the SEBI Act, 1992 it is important to consider the factors stipulated in Section 15J of the SEBI Act, 1992 which reads as under:-

"15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

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

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

(c) the repetitive nature of the default

Explanation – *For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E,clauses (b) and (c) of section 15F,15G,15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section."*

25. In the instant matter, it is difficult to quantify the gains made by the Noticees or the loss caused to investors as a result of the failure of Noticees to give an open offer. The purpose of Regulation 3(2) of SAST Regulations was to ensure that the public gets an exit opportunity once there is a breach of the threshold. Since, promoters hold a special position in the eyes of the shareholders, it is imperative that they should maintain transparency in governance and acquisition of shares in the Company. The shareholding of promoters forms a very important criterion for the public to make their investment decisions. In the present case, the promoters made certain acquisitions beyond the acceptable threshold and were thus liable to give an open offer. By not giving an open offer mandated by Regulation 3(2) of SAST Regulations, the Noticees have evaded buying of 26% of shareholding from public (i.e. 5,15,84,000 shares) at the price determined as per SAST Regulations. It is noted from the available records that the conversion price of the warrants i.e. Rs. 15/- per share, and on adding 10% interest upto November 2017, the price would have been approximately Rs. 15 + 9 = Rs. 24/- per share. Accordingly, 26% shareholding would have been worth Rs.123.80 crore approximately. Additionally, the Noticees have saved the cost of giving a public offer.

26. Although, as per the available records, the violation of the Noticees is not repetitive but it is the fact that the Noticees have not complied with the obligation to make public announcement of an open offer for acquiring shares of Nakoda even after the directions of SEBI WTM issued vide Order dated July 08, 2013 and which were later upheld by the Hon'ble SAT. The Noticees have thus deprived the shareholders at the relevant time of their statutory rights / opportunity to exit from the Company. Since, the public shareholders were deprived of this valuable right, I am of the view that this is a fit case to impose such penalty that commensurates with the gravity of the violations.

V. ORDER

27. After taking into consideration the nature and gravity of the charges established in the preceding paragraphs, factors mentioned under Section 15J of the SEBI Act and in exercise of the powers conferred upon me under Section 15-I of the SEBI Act, read with Rule 5 of the Adjudication Rules, I hereby impose a penalty of Rs.5,00,00,000/- (Rupees Five Crore Only) on the Noticees, to be paid jointly and severally, under the provisions of Section 15H(ii) of SEBI Act, 1992 for violation of the provisions of Regulation 3(2) of SAST Regulations.

28. The amount of penalty shall be paid by the Noticees jointly and severally either by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai or by e-payment in the account of "SEBI - Penalties Remittable to Government of India", A/c No. 31465271959, State Bank of India, Bandra Kurla Complex Branch, Mumbai, RTGS Code SBIN0004380 within 45 days of receipt of this Order. The said demand draft or forwarding details and confirmation of e-payments made (in the format given below) should be sent to "The Division Chief, Enforcement Department – DRA-III, the Securities and Exchange Board of India, SEBI Bhavan, Plot No. C4 – A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051".

1. Case Name :	
2. Name of Payee :	
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/ disgorgement/ recovery/ settlement amount and legal charges along with order details)	

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

Date : March 13, 2019
Place: Mumbai

Satya Ranjan Prasad
Adjudicating Officer