BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/PB/AU/2021-22/11988]

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

In respect of

Sl. No.	Name of the Entity	PAN Card No.
1	M/s Enam Securities Ltd. (Now known as M/s Axis Capital Limited)	AAACU8367M

In the matter of Spicejet India Limited

FACTS OF THE CASE IN BRIEF

1. Spicejet India Limited (hereinafter referred to as "Spicejet/Target Company") made a public offer of 800 Foreign Currency Convertible Bonds (hereinafter referred to as “FCCBs”) of a denomination of USD 100,000 with a condition to exercise the option of conversion of FCCB into equity shares no later than November 11, 2010. The FCCBs issued by the Target Company were subscribed by Goldman Sachs Investment Partners (Mauritius) Ltd (GS) (435 FCCBs) and Istithmar World PJSC (375 FCCBs).

2. Pursuant to a Securities Sale and Purchase Agreement dated August 19, 2008, M/s WLR Recovery III Ltd. (hereinafter referred to as "WLR 1"), WLR Recovery IV/ ESC Ltd. (hereinafter referred to as "WLR 2"), India Asset Recovery Fund Ltd. (hereinafter referred to as "WLR 3") and WLR/GS India Ltd. (hereinafter referred to as "WLR 4") (collectively referred to as "WLR entities") acquired 680 FCCBs from GS and Istithmar. On August 29, 2008, WLR 3 converted 2 FCCBs and was allotted 368,960 equity shares in the Target Company. Further, on June 10, 2010, the WLR entities converted 227 FCCBs and were allotted 41,876,900 equity shares of the Target Company.

3. Pursuant to Share Purchase Agreement (hereinafter referred to as "SPA") dated June 12, 2010 between the KAL Airways Pvt. Ltd and Mr. Kalanithi Maran (hereinafter referred to as "Acquirers") and Royal Holdings Services Ltd. (hereinafter referred to as "RHSL"), the acquirers agreed to acquire 31,077,500 equity shares of the Target Company representing 9.67% of the paid up capital of the Target Company. Further, pursuant to another SPA dated June 12, 2010 between Acquirers, the Target Company and WLR entities, WLR entities have agreed to transfer 451 FCCBs constituting 8,32,00,480 equity shares upon conversion and 4,22,45,920 equity shares collectively aggregating 1,25,446,400 equity shares representing 30.24% of the total voting capital of the Target Company.

4. Thus, the Acquirers agreed to acquire an aggregate of 1,56,523,900 (31,077,500+1,25,446,400) equity shares in the Target Company. The Acquirers made an open offer in accordance with regulation 10 and regulation 12 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as “SAST Regulations”).

5. A public announcement was made by the Acquirers dated June 14, 2010 wherein it was stated that the public offer is being made by the Acquirers with WLR entities as 'persons acting in concert' within the meaning of SAST Regulations. M/s Enam Securities Limited

(Now known as M/s Axis Capital Limited) (hereinafter referred to as "Noticee") filed the draft letter of offer with Securities and Exchange Board of India (hereinafter referred to as 'SEBI') vide letter dated June 24, 2010.

6. Pursuant to above, SEBI, issued a letter of observations vide letter dated October 04, 2010, inter alia stating as under:

"(i) "WLR entities shall not be holding any stake at all in the Target Company once the offer is consummated and ii) as sellers, their objective is diametrically opposite to that of the Acquirers. It is concluded that the WLR entities cannot be termed PACs to the offer as their objective is diametrically opposite to that of the Acquirers.

(ii) The trigger of Regulation 10 by the WLR entities has been disclosed in the P.A. made on June 24, 2010 in connection with the instant offer. It is noted that pursuant to conversion of FCCBs, the shareholding of WLR entities shall rise to 30.24% of the total voting capital of the Target Company which, in the absence of a PA by WLR entities to acquire at least 20% of the share capital of the TC, amounts to a violation of Regulation 10 of the Takeover Regulations. It is noted that WLR entities shall be transferring this shareholding to the Acquirers under the WLR SPA. Considering the fact that WLR entities shall not be holding any stake at all in the Target Company once the WLR SPA is consummated and have no intention of acquiring control over the Target Company (ref. your email dated August 27, 2010), SEBI had decided to initiate adjudication proceedings against the WLR entities for the aforecited violation."

7. It was alleged that the Noticee had amended the SPA on October 05, 2010 i.e. after issuance of the letter of observations by SEBI dated October 04, 2010. On comparison of original SPA dated June 12, 2010 vis-a-vis amended SPA dated October 05, 2010, the following major differences were observed:

i. As per the original SPA, the Existing Shares Escrow Account was meant to hold only existing sale shares. In the amended SPA, the Shares Escrow Account was redefined and was also used to hold converted sale shares (which the sellers, i.e. the WLR entities were supposed to hold, as per the original SPA).

ii. As per original SPA, the transfer of shares from the Existing Shares Escrow account (which indicated the shareholding of WLR entities) to the Balance Shares Escrow Account (which indicated shares held by Escrow agent for the benefit of the Acquirers) was slated to be done only on the date of the release notice. The so called 'sale' to the Acquirers which involved transfer of shares from the Balance Shares Escrow Account to the Existing Shares Escrow Account in tranches, even before release notice, was provided for vide amendment executed on October 05, 2010. The clause that the Appellants shall have no rights over the shares held in the Existing Shares escrow account was absent in original SPA and was introduced in the amended SPA.

iii. The clause that WLR entities shall have no rights over the shares held in the Existing Account was added in the amended SPA. No such provision was present in the original SPA.

8. It was alleged that vide letter dated October 11, 2010, the Noticee presented fresh information on the basis of its discussion with WLR entities regarding the FCCB conversion, inter alia stating that WLR entities have not triggered regulation 10 of SAST Regulations on account of the conversion of FCCBs. It was further alleged that vide the said letter, the Noticee did not mention that SPA entered into between Acquirers, Target Company and WLR entities has been amended post issuance of letter of observations of SEBI dated October 04, 2010. In fact, the letter sought to convey the impression that the mechanism of FCCB conversion and transfer had not been altered since the Public announcement dated June 14, 2010 was made even if information in this respect was not correctly presented before SEBI. It was further stated that in its

letter that the Noticee was looking forward to receive a positive response from SEBI at the earliest, however the fresh and significant information was incorporated in the letter of offer without waiting for SEBI's comments. It was observed that the final letter of offer received by SEBI on October 14, 2010 whereby the fresh information regarding FCCB conversion which was presented in letter dated October 11, 2010 was incorporated. Thus, it was alleged that the Noticee went on to incorporate the fresh and significant information in the letter of offer without waiting for SEBI's comments.

9. It was alleged that the Noticee failed to inform SEBI of the singularly important information about amended SPA done post issuance of observations by SEBI vide letter dated October 04, 2010 and included information based on this amendment in the letter of offer received by SEBI on October 14, 2010 issued to shareholders without waiting for SEBI's comments. Therefore, it was alleged that the Noticee suppressed the information and thus fell short of SEBI's expectations of the standards of conduct befitting a registered intermediary of SEBI in disposing its duties which appeared to be an attempt to mislead the regulator as well as public at large.

10. SEBI while observing the letter of offer noted that under para 3.1.4 of the letter of offer made by the acquirers in the matter of M/s Spicejet India Ltd. dated October 11, 2010, the Noticee had provided in a table an overview of the manner in which the conversion transactions of the FCCBs took place on different dates. In the said table, the total no. of FCCBs converted, total no. of shares acquired/converted and percentage of resulting share and voting capital amounting to 680 FCCBs, 12,54,46,400 shares and 30.24% respectively, were not provided, although SEBI had told to do so while the matter was being processed at SEBI's end. It was only after SEBI directed the Noticee to issue corrigendum, that these above details were disclosed in a public notice appearing in newspaper.

11. Further, SEBI vide email dated July 08, 2010 sought explanation with reference to paragraph 3.1.1. of the draft letter of offer as to how the WLR entities triggered regulation 10 of SAST Regulations, 1997. The Noticee vide letter dated July 13, 2010 submitted that the conversion of FCCBs held by WLR entities into equity shares will result in WLR entities holding 12,54,46,400 equity shares or 30.24% of the resulting share and voting capital of target company and thus may be considered to cross the permissible threshold of 15% of the share capital in the target company as prescribed under regulation 10 of SAST Regulations, 1997. Further, the Noticee has submitted that pursuant to the SPA, the WLR entities had an objective of converting their FCCBs into equity shares and holding equity shares beyond 15% in the Target Company. However, vide letter dated October 11, 2010, the Noticee submitted that, according to the transaction documents entered into between the WLR entities and the Acquirers, it was never intended that the WLR entities would hold fifteen percent or more of the shares or voting capital of the company at any point in time pursuant to the conversion of FCCBs much less 30.24% of the shares or voting capital of the Target Company.

12. SEBI vide email dated July 26, 2010 enquired as to how many shares and what percentage of the total voting capital of the Target Company had so far been transferred to the Acquirers. The Noticee vide email dated July 30, 2010 submitted that as on July 30, 2010 no shares of the Target Company had been transferred to the Acquirers. The Noticee further submitted a table summarizing the shares on conversion of FCCBs transferred to the Escrow account till date i.e. July 30, 2010. Upon perusal of the said table, it was observed that as per the Noticee's submission 10,60,76,000 shares constituting 25.57% of the share and voting capital of the Target Company were yet to be transferred to the escrow account. However, upon perusal of transaction statement of HSBC AGENCY KAPL- KM DEMAT ACCOUNT ONE, it was found that 4,88,87,200 shares constituting 14.90% of the share and voting capital were transferred by WLR entities on July 02, 2010 by which the shareholding of WLR entities

became nil. Further, upon conversion of 310 FCCBs the shareholding of WLR entities as on July 13, 2010 was 14.85% as against the submission made by the Noticee that 10,60,76,000 shares constituting 25.57% of the share and voting capital of the Target Company were yet to be transferred to the escrow account.

13. SEBI vide email dated August 04, 2010 sought certain information in respect of FCCBs held by WLR entities. It is observed from the email dated August 04, 2010 of SEBI that one of the information sought was how many shares and FCCBs were held by WLR entities as on the date of public announcement. The Noticee vide email dated August 04, 2010 responded to SEBI that as on July 13, 2010 WLR entities were holding 10,60,76,000 shares constituting 25.57% of the share and voting capital of Target Company, whereas upon perusal of transaction statement of HSBC AGENCY KAPL-KM DEMAT ACCOUNT ONE, it is found that 4,88,87,200 shares constituting 14.90% of the share and voting capital were transferred by WLR entities on July 02, 2010 by which the shareholding of WLR entities became nil. As on July 13, 2010, the shareholding of the WLR entities was 5,71,88,800 shares constituting 14.85% of the share and voting capital of Target Company as against the claim by the Noticee that WLR entities were holding 10,60,76,000 shares constituting 25.57% of the share and voting capital of Target Company.

14. On August 06, 2010, SEBI forwarded a complaint dated June 21, 2010 filed by Mr. Arun Goenka and email dated August 13, 2010 requesting the Noticee to provide the point-wise reply to each allegation raised by Mr. Goenka. The Noticee vide email dated August 17, 2010 submitted the reply to the said complaint to SEBI. It is observed from the said reply that, the Noticee had submitted that in terms of regulation 14(1) of the SAST Regulations, 1997 entering into an agreement for acquisition of shares exceeding 15% of resulting share and voting capital of the Target Company triggers regulation 10 of the SAST Regulations, 1997 by the WLR entities. However, vide letter

dated October 11, 2010, the Noticee had submitted that, according to the transaction documents entered into between the WLR entities and the Acquirers, it was never intended that the WLR entities would hold fifteen percent or more of the shares or voting capital of the company at any point in time pursuant to the conversion of FCCBs much less 30.24% of the shares or voting capital of the company.

15. In view of the same, it was alleged that the Noticee had concealed the said information from shareholders and has submitted contradictory information to SEBI as seen in paras above which resulted in violation of regulation 45(5) of SAST Regulations, 1997 and Clause 4 and Clause 20 of the Code of Conduct for Merchant Bankers provided under schedule III of the SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as "MB Regulations") read with regulation 13 of MB Regulations and therefore, liable for monetary penalty under Section 15 HB of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “SEBI Act”.

APPOINTMENT OF ADJUDICATING OFFICER

16. The undersigned was appointed as the Adjudicating Officer, vide order dated March 28, 2011 under Section 15-I of the SEBI Act read with rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as “Rules”) to inquire and adjudge the alleged violations of regulation 45 (5) of the SAST Regulations,1997 and Clause 4 and Clause 20 of the Code of Conduct for merchant bankers provided under schedule III of the MB Regulations read with regulation 13 of MB Regulations committed by the Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

17. A Show Cause Notice (hereinafter referred to as ‘SCN’) dated August 31, 2011 was issued to the Noticee under the provisions of Rule 4(1) of the Rules to show cause as

to why an inquiry should not be held and penalty be not imposed under Section 15 HB of the SEBI Act for the alleged violation specified in the SCN.

18. Vide letter dated February 27, 2012, the noticee, in reply to the SCN issued, submitted that the WLR-SPA was amended by the parties of the SPA and not by the Noticee as merchant bankers. It was further submitted that the amendments in the SPA were mere procedural, and not 'material' in nature. The mechanism of conversion of FCCBs was not altered at all and purely the process of transfer of the converted sale shares and payment to the purchase consideration that was amended in the WLR-SPA and the escrow mechanism. The Noticee denied that the amendments were initiated after receipt of SEBI observation on October 5, 2010, and contended that the amendments were envisaged much before. As there has been no mis-statement/ concealment in the matter, the Noticee contended that the provisions of regulation 45(5) of SAST Regulations, 1997 and Clause 4 and Clause 20 of the Code of Conduct for merchant bankers provided under MB Regulations, 1992 has no application to the facts of the case.

19. Vide letter dated May 18, 2012, the Noticee filed a supplemental reply in the matter. It was submitted that whether or not the WLR entities were persons acting in concert with the Acquirer was a matter of legal interpretation. The Noticee, in its opinion, submitted that this was indeed the case. In this regard, the Noticee placed reliance on the Open Offer for Ashok Alco-chem Limited and on non-action letter dated August 5, 2011 issued by SEBI in the matter of Massachusetts Mutual Life Insurance Company.

20. In the interest of natural justice, an opportunity of hearing was provided to the Noticee on June 21, 2012 vide hearing notice dated May 29, 2012. Mr. Somasekhar Sundaresan, Partner, J Sagar Associates, Mumbai and Mr. Ravichndra S. Hegde, Associate, J. Sagar Associates, Mumbai, Mr. M. Natarajan, Mr. Anay Khare and Ms. Shilpa Jhaveri of M/s Enam Securities Ltd., Authorized Representatives of M/s Enam

Securities Ltd. appeared on behalf of the Noticee. The AR agreed to make additional submissions within two weeks from the date of hearing.

21. Vide letter dated July 18, 2012, the Noticee reiterated the submissions made vide letters dated February 27, 2012 and May 18, 2012. Further, with regard to query on submission of contradictory information, the Noticee submitted that it had not made any contradictory statements, rather replied to SEBI's queries which were in different contexts and formats. With regard to query on amendments in the SPA, the Noticee submitted that since the amendments were not considered material in nature, it was not incumbent on the Noticees to inform SEBI specifically in any highlighted manner.

22. A supplementary Show Cause Notice dated July 31, 2012 was issued to the Noticee in continuation to the original Show Cause Notice dated August 31, 2011. The details of the allegation made in the supplementary SCN may be seen in the aforesaid paras. Vide letter dated August 24, 2012, the Noticee submitted its reply to the supplementary SCN. The Noticee reiterated the submissions made vide letters dated July 18, 2012, May 18, 2012 and February 27, 2012.

23. During the progress of the proceedings, the Noticee applied for settlement in the captioned matter. In view of the same, adjudication proceedings were kept on hold till the disposal of settlement application. It is observed that the consent application filed by the Noticee had been rejected by SEBI.

24. In view of the same, another opportunity of hearing was provided to the Noticees on April 20, 2021 vide hearing notice dated March 25, 2021. Shri. Somasekhar Sundaresan, Shri Yugandhara Khanwilkar, Shri Vikram Raghani, Shri Pulkit Sukhramani, and Ms. Vidhi Jhawar - the authorized representative of the Noticees (hereinafter referred to as 'AR') attended the hearing on April 20, 2021 and made submissions. AR agreed to make additional submissions by April 27, 2021. The Noticee vide letter dated April 26, 2021 made the following additional submissions:

“

….

5. The crux of the charges in the SCN is that the amendments made on October 05, 2010 to the Share Purchase Agreement dated June 12, 2010 ("Original SPA") were material in nature. It is alleged that the amendment agreement of that date ("Amended SPA") was a reaction to SEBI's observation letter dated October 4, 2010, which directed that the Sellers should not be treated as persons acting in concert. Accordingly, the SCN alleges that the Amended SPA ought to have been disclosed to SEBI first before incorporating its contents in the final letter of offer sent to the shareholders.

6. The response to the foregoing is that the contents of the Amended SPA were in fact an integral outcome of the Original SPA and that such process changes could be effected was also identified and contracted in the Original SPA. It is submitted that the amendments made to the Original SPA were procedural amendments. Whether or not the WLR Entities were persons acting in concert with the Acquirer was a matter of legal interpretation. The Noticee and its clients were of the bona fide opinion that this was indeed the case.

7. Leaving this interpretation issue aside, the Original SPA always contemplated that the WLR Entities would never convert the FCCBs in a manner that would result in the WLR Entities acquiring shares in excess of 15% of the then share capital. Further, the Original SPA also contemplated that the manner of conversion of FCCBs would potentially undergo a change if SEBI were to conclude that the WLR Entities were not persons acting in concert with the Acquirer. This position was clearly captured in Clauses 5.2(i) and 5.3 of the Original SPA, which, for ease of reference, are reproduced below:

Escrow

The Acquirer shall jointly, and in accordance with the Escrow Agreement, deliver a release notice to the Escrow Agent, to release from the Existing Shares Escrow Account, and the Escrow Agent shall immediately deliver to the Bank of New York, the Conversion Documents executed by each of the Sellers with respect to the Converted Sale Shares. It is hereby clarified that the Conversion Documents shall be in relation to only such portion of the FCCBs as would result in the Sellers holding up to a maximum of 14.95% (fourteen point nine five per cent) of the then Share Capital; and

5.3 It is hereby clarified that the Conversion of the FCCBs may occur in one or more tranches, subject to applicable Law. In the event it is determined under applicable Law that WLR is not a "person acting in concert" with the Acquirer for the purposes of the Takeover Code, the Conversion maybe completed in such number of tranches as may be required to ensure that the open offer requirements of the Takeover Code are not triggered and there would be consequential amendments to tranches offered pursuant to Clause 8.2.

8. It is submitted that the Amended SPA only captured the revised tranches in which the FCCBs would convert and the procedural steps to achieve the same. A table showing how the amendments made in the Amended SPA were only procedural in nature and only expanded upon the understanding already captured in the Original SPA has been set out as Annexure A.

9. It is clear from Annexure A that the Amended SPA was only an administrative / procedural document to implement the understanding already recorded in Clause 5.2 and Clause 5.3 of the Original SPA. In any case, since it was always envisaged and was an integral part of the Original SPA, which had always been disclosed to SEBI from the very outset, it would not be tenable to allege that SEBI was kept in the dark or that amendments were effected behind the back of SEBI. Since the position articulated above was already captured in the Original SPA, it cannot be concluded that the amendments were some new and special reaction to the observation letter of SEBI.

10. The parties to the Original SPA had acted upon the terms of the Original SPA, which envisaged such process changes. When they executed the Amended SPA, the Noticee was fully justified, in exercise of its professional judgment, to conclude that the amendments were not material in nature. Therefore, the question of doing anything behind the back of SEBI does not arise at all.

11. The Supp SCN alleged that the Noticee has provided incorrect or misleading information in respect of the shareholding of the WLR Entities from time to time. The Supp SCN is only in aid of the First SCN and therefore, the allegations are dealt with in a composite manner in these submissions.

12. The allegation after the Supp SCN is that in the final Letter of Offer which was sent by the Noticee to the public shareholders, the table providing an overview of the manner in which the FCCBs were converted was inconsistent with the table provided by the Noticee to SEBI and did not disclose that the total number of shares acquired including upon conversion of the FCCBs aggregated to 30.24% of the shares carrying voting rights of the Target Company.

13. It is submitted that this allegation is incorrect since the fact that the FCCBs would convert to 20.5% and that prior to conversion, WLR Entities already held 10.18% equity shares of SpiceJet (therefore aggregating to 30.24% of the voting share capital) was disclosed in the Letter of Offer at paragraph 3.1.4 (reproduced below for ease of reference). As such, the question of concealing any information from the public shareholders does not arise.

14. For ease of reference, the contents of the Letter of Offer are set out below:

> *3.1.4 As of the date of the Public Announcement, RHSL is the legal and beneficial owner of 3,10,77,500 equity shares in the Target Company, representing 7.49% of the Resulting Share and Voting Capital of the Target Company ("RHSL Shares").*
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> *As of the date of the Public Announcement, (i) WLR was the legal and beneficial owner of 4,22,45,920 equity shares in the Target Company, representing 10.18% of the Resulting Share and Voting Capital of the Target Company in following manner:*

Entity	*Equity shares held*
WLR 1	*14,75,840*
WLR 2	*1,45,73,920*
WLR 3	*1,88,16,960*
WLR 4	*73,79,200*

(ii) WLR held 451 FCCBs which upon the conversion thereof would equal 8,32,00,480 equity shares in the Target Company, representing 20.05% of the Resulting Share and Voting Capital of the Target Company.

15. It is submitted that in the course of evaluating a draft Letter of Offer, SEBI often asks for data to be produced in a certain specific manner to appreciate the contents of the draft Letter of Offer. Therefore, such exchange of data is a manner of explanation of the same data. Such provision of data in a specifically requested form, is responsive to the query posed by the department in SEBI. The content is the same, and form is responsive to aid SEBI's assessment and review. Merely because the same format of presentation as contained in the discussions with SEBI is not reproduced in the final Letter of Offer, it would not follow that the information provided is misleading. The professional judgement was that the information and the contents being the same, there is no question of hiding anything in any case, and therefore the Letter of Offer did not contain the same format as was used to explain facts to SEBI. It is submitted that such presentation would never make the Letter of Offer misleading or inaccurate.

16. The key issue in this regard in the SCN arises out of a comparison between the table provided by the Noticee to SEBI on August 4, 2010 and the information which was finally disclosed in the final Letter of Offer. It is submitted that the information provided on August 4, 2010 was in response to a specific query from SEBI about the shareholding percentages arising upon conversion of each tranche of the FCCBs. On the other hand, the disclosure made in the Letter of Offer dated October 11, 2010 was aimed at providing the public shareholders with a clear view of the sequence of events in terms of conversion of the FCCBs and sale of equity shares.

17. The Noticee believes that it was incumbent upon the Noticee to provide such a clear and complete depiction of the transaction in the Letter of Offer and no fault can be found in such approach of the Noticee. In any case, if one were to aggregate the number of equity shares issued on conversion of the FCCBs in various tranches as provided in the final Letter of Offer, the aggregate would still amount to 30.24%.

18. For the convenience of the Ld. AO, a tabular chart summarizing the allegations raised in the Supp SCN and the Noticee's response to the same has been annexed as Annexure B.

19. In these facts and circumstances, it would be incorrect to conclude that the information provided in the final Letter of Offer is misleading and inaccurate merely because factual information has been depicted differently when compared to information furnished to SEBI by the Noticee in response to a specific query. Such a conclusion would be unfair and untenable since the Noticee is duty bound to ensure that information contained in the Letter of Offer is complete and accurate and gives a clear picture of the transaction as it transpired."

CONSIDERATION OF ISSUES AND FINDINGS

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

(a) Whether the Noticee has violated the provisions of regulation 45(5) of SEBI SAST Regulations, 1997 and Clause 4 and Clause 20 of the Code of Conduct for Merchant Bankers provided under schedule III of the MB Regulations read with regulation 13 of MB Regulations?

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

(c) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of the SEBI Act?

FINDINGS

26. Before moving forward, it is pertinent to refer to the relevant provisions of the SAST Regulations and MB Regulations, which reads as under:

SAST Regulations:

45 (5) For any mis-statement to the shareholders or for concealment of material information required to be disclosed to the shareholders, the acquirers or the directors where the acquirer is a body corporate, the directors of the target company, the merchant banker to the public offer and the merchant banker engaged by the target company for independent advice would be liable for action in terms of the regulations and the Act.

MB Regulations

Code of conduct

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

SCHEDULE III

Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992

[Regulation 13] CODE OF CONDUCT FOR MERCHANT BANKERS

4. A merchant banker shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment.

20. A merchant banker shall not make untrue statement or suppress any material fact in any documents, reports or information furnished to the Board.

27. For considering the present case under above regulations, I deem it necessary to consider the standard of 'due diligence' expected from a merchant banker in issue process as settled by Hon'ble SAT and Hon'ble Supreme Court of India in several cases. In this regard, the following position held by the Hon'ble SAT in the matter of

Imperial Corporate Finance and Services Private Limited Vs. SEBI [2005] 61 SCL 197 (SAT) is worth mentioning:-

"It can be safely said that lack of due diligence should run from the facts of each case and ultimately there can be no hard and fast rule as to what constitutes lack of due diligence. It depends entirely on the facts of each case. We however hold that before any person is found to have violated the concept of "due diligence", there must be an enquiry and the finding must be sustained by a higher degree of proof than that required in a civil suit, yet falling short of the proof required to sustain a conviction in a criminal prosecution. There must be convincing preponderance of evidence (see AIR 1984 SC 110).

A Lead Manager is required to employ reasonable skill and care but he is not required to begin with suspicion and to proceed in a manner of trying to detect a fraud or lie unless such information excites his suspicion or ought to excite his suspicion as a professional man of reasonable competence."

28. Hon'ble Supreme Court of India, in the matter of Chander Kanta Bansal V. Rajinder Singh Anand MANU/SC/7310/2008: (2008) 5 SCC 117 has held as under :

"The words "due diligence" have not been defined in the Code of Civil Procedure, 1908. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's law Dictionary (18th Edn), "Due Diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Pharses by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due Diligence" means reasonable

diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

29. In the matter of Keynote Corporate Services Ltd. Vs SEBI (order dated February 19, 2014) Hon'ble SAT has held as following:-

"..Due diligence on part of Merchant Banker does not mean passively reporting whatever is reported to it but to find out everything that is worth finding out. It is about making an active effort to find out material developments that would affect interest of investors. It is on faith that intermediary has conducted due diligence with utmost sincerity that investing public goes forward and decides to invest in a particular company....."

30. In the abovementioned Keynote Corporate Services Ltd., Hon'ble SAT has laid down further principles regarding the role of a merchant banker in the issue process as under:

"...As a matter of fact he is responsible for adequacy and veracity of all disclosures in all documents pertaining to issue of IPO, since as BRLM / Merchant Banker solemn duties are cast on him and for justifying the same he has to play a pro-active role by looking into authenticity of various matters/disclosures/statements, etc. contained in prospectus;..... BRLM has to bring out documents pertaining to IPO so that investors can take judicious and informed decisions on subscription to IPO and thus he is responsible for failing investor's trust in prospectus of ESL for IPO and for doing considerable higher damage to securities market....

..... this Tribunal expects better standards of performance from professionals, who charge reasonably good fee from clients and who bring out documents (prospectus in this case), which are relied on by investors, at large, to take informed decisions regarding investments in scrips / IPO and this standard of professionalism should be higher than a reasonable man with ordinary prudence will demonstrate in the matter of due diligence.....

..... ensuring the truth and correctness of the letter of offer is a fundamental responsibility of the merchant banker which he has to discharge by exercising due diligence. In fact, an incorrect or wrong information in a letter of offer or other similar documents issued for the benefit of investors in general could lead to serious consequences including loss of credibility for the market operators and for the regulatory system. This kind of failure has to be taken very seriously by the market regulator..."

31. From the above position pronounced by Hon'ble SAT and Hon'ble Supreme Court, I note that the standard of due diligence expected from a merchant banker is of reasonable diligence and it depends upon the facts and circumstances of the case. Such obligation has to be enquired into and found out on the higher degree of preponderance of probability taking into account the facts and circumstances of the case. The merchant banker cannot be expected to look into each and every statement and information provided by the issuer with suspicion unless the facts and circumstances at the relevant time demand so. However, considering the professional role in the issue process, the merchant banker is expected not to passively disclose whatever is given to it by the issuer but to exercise reasonable diligence and find out everything which is worth finding and to ensure adequate, true and fair disclosures in the RHP/Prospectus.

32. Taking into account the above principles, I proceed to deal with the allegations against the Noticee. I have carefully perused the SCN, Supplementary SCN, replies, written and oral submissions of the Noticee and other material available on record. The allegations against the Noticee, reply of the Noticee and my findings thereon are as under:

a) Allegation: The Noticee amended the SPA on October 05, 2010 i.e. after issuance of the letter of observations by SEBI dated October 04, 2010.

Reply: As a merchant banker, the Noticee did not cause the amendments. Therefore, the allegation that the Noticee initiated amendments subsequent to the receipt of the SEBI observations with an intention to change the structure of the transaction is unsustainable.

Finding: I am of the view that an amendment can only be executed and signed by the parties to the original agreement and no person who is not a party to the original agreement will be authorized to sign the amendment agreement. In the present case, I have pursued the SPA dated June 12, 2010 entered into between Acquirers, Target Company and WLR entities and upon perusal of the same, I find that the Noticee was not a party to the said agreements. Further, under the existing legal framework, the Noticee cannot amend the original agreement which was executed between the original parties. In view of the same, I find merit in the submissions of the Noticee that it did not cause amendment to the SPA.

b) Allegation: As per the original SPA, the Existing Shares Escrow Account was meant to hold only existing sale shares. In the amended SPA, the Shares Escrow Account was redefined and was also used to hold converted sale shares (which the sellers, i.e. the WLR entities were supposed to hold, as per the original SPA).

Reply: This amendment was only procedural in nature and appropriate amendments were made to original WLR SPA to provide for payment of the purchase consideration in tranches to the WLR Entities, and simultaneous transfer of shares arising upon conversion of the FCCBs to the Existing Shares Escrow Account in order to achieve the commercial intent of the Parties, to the extent possible, given the revised time frames that the Parties were looking at.

Finding: I find that as per original SPA, the following clauses were provided with regard to Existing Shares Escrow Account and Balance Shares Escrow Account:

Existing Share Escrow Account:

shall mean the escrow account opened and maintained with the Escrow Agent to hold the Existing Sale Shares and the Escrow Property in escrow, to be released in accordance with this Agreement and the Escrow Agreement.

Balance Shares escrow account:

shall mean the escrow account opened and maintained with the Escrow Agent to hold the Converted Sale Shares in escrow, to be released in accordance with this Agreement and the Escrow Agreement.

As per amended SPA, the following clauses were inserted:

Existing Shares Escrow Account

shall mean the escrow account opened and maintained with the Escrow Agent to hold the Existing Sale Shares, the Converted Sale Shares in accordance with Clause 8.3 and the Escrow Property in escrow, to be released in accordance with this Agreement and the Escrow Agreement.

Clause 8.3:

8.3 The release of the Balance Purchase Consideration on each of the 3 (three) or 4 (four) tranches referred to in Clause 8.2 and the simultaneous Transfer of the Converted Sale Shares from the Balance Shares Escrow Account to the Existing Shares Escrow Account shall happen in the following manner

i. *October 5, 2010 - 1,93,70,400 (one crore ninety three lakhs seventy thousand four hundred) Converted Sale Shares shall be Transferred from the Balance Shares Escrow Account to the Existing Shares Escrow Account against the release of a sum of Rs. 91,52,51,400 (Rupees Ninety One Crores Fifty Two Lakhs Fifty One Thousand Four Hundred only) from the Consideration Escrow Account to the Sellers;*

ii. *October 11, 2010 - 2,85,94,400 (two crores eighty five lakhs ft ninety four thousand four hundred) Converted Sale Shares shall be Transferred from the Balance Shares Escrow Account to the Existing Shares Escrow Account against the release of a sum of Rs. 135,10,85,400 (Rupees one hundred and thirty five crore ten lakhs eighty five thousand four hundred any from the Consideration Escrow Account to the Sellers;*

iii. *In the event all the (Converted Sale Shares are deposited in the Balance Sale Shares Account on or prior to October 17, 2010 on October 18, 2010 - 2,85,94,400 (two crores eighty five lakhs ninety four thousand four hundred) Converted Sale Shares- shall be Transferred from the Balance Shares Escrow Account to the Existing Shares Escrow Account against the release of a sum of Rs. 135,10,85,400 (Rupees one hundred and thirty five crores ten lakhs eighty five thousand four hundred only) from the Consideration Escrow Account to the Sellers;*

iv. *However, in the event all the Converted Sale Shares are not deposited in the Balance Sale Shares Account on or prior to October 17, 2010, then:*

a) *on October 18, 2010 - 92,24,000 (ninety two lakhs twenty four thousand)Converted Sale Shares shall be Transferred from the Balance Shares Escrow Account to the Existing Shares Escrow Account against the release of a sum of Rs. 43,58,34,000 (Rupees forty three crores fifty eight lakhs thirty four thousand only) from the Consideration Escrow Account to the Sellers; and*

b) *one Business Day after the date on which the remaining Converted Sale Shares are credited into the Balance Shares Escrow Account - 1,93,70,400 (one crore ninety three lakhs seventy thousand four hundred) Converted Sale Shares shall be Transferred from the Balance Shares Escrow Account to the Existing Shares Escrow*

Account against the release of a sum of Rs. 91,52,51,400 (Rupees Ninety One Crores Fifty Two Lakhs Fifty One Thousand Four Hundred only) from the Consideration Escrow Account to the Sellers.

From the above, I have noted that original SPA provided for Existing Share Escrow Account to hold the existing shares and Balance Shares Escrow Account to hold the converted shares. However, as per amended SPA, the existing sale shares as well as converted sale shares were to be held in one account i.e. Existing Shares Escrow Account. I find that the process of transfer of the converted sale shares and payment of purchase consideration was amended in SPA and in escrow mechanism. I am of the view that the same was procedural in nature and does not alter the transaction structure as envisaged by the parties. In view of the same, I find merit in the submissions of the Noticee that the amendment was procedural in nature.

c) Allegation: As per original SPA, the transfer of shares from the Existing Shares Escrow account (which indicated the shareholding of WLR entities) to the Balance Shares Escrow Account (which indicated shares held by Escrow agent for the benefit of the Acquirers) was slated to be done only on the date of the release notice. The so called 'sale' to the Acquirers which involved transfer of shares from the Balance Shares Escrow Account to the Existing Shares Escrow Account in tranches, even before release notice, was provided for vide amendment executed on October 05, 2010.

Reply: In the original SPA, it was envisaged that the FCCBs would be converted as per the Schedule and would be retained in the Balance Shares escrow account. These shares and shares held in Existing Shares Account were to be swapped with the consideration which has been put in a separate cash escrow account on the closing day. The original SPA envisaged that closing day would be any day as may be decided by the party but not later than October 18, 2010. Since the offer process was delayed, it wouldn't have been possible to have undertaken the above process on or before

October 18, 2010. Hence, as envisaged, as contingency in the original SPA, the FCCBs were converted in one or more tranches and brought into the Existing Escrow Account from the Balance Escrow Account. The intention that the WLR will never cross 15% in any form has been indicated in the SPA as well as in our submissions to SEBI.

Even though the voting rights in respect of both these escrow accounts has been exercised only by the escrow agent, to demonstrate that they had no intention to acquire at any time more than 15% in any manner, it was decided to transfer from the Balance Escrow Account to the Escrow Account. The amendment was procedural in nature.

Finding: With regard to the aforesaid submission of the Noticee, I have noted the clauses 5.2 and 5.3 of the original SPA which are produced as under:

"5.2 Process for Conversion of FCCBs and Deposit of Converted Sale Shares in Escrow

(i) The Acquirer shall jointly, and in accordance with the Escrow Agreement, deliver a release notice to the Escrow Agent, to release from the Existing Shares Escrow Account, and the Escrow Agent shall immediately deliver to the Bank of New York, the Conversion Documents executed by each of the Sellers with respect to the Converted Sale Shares. It is hereby clarified that the Conversion Documents shall be in relation to only such portion of the FCCBs as would result in the Sellers holding up to a maximum of 14.95% fourteen point nine five per cent) of the then Share Capital; and

(ii) The Escrow Agent shall, upon receipt of the notice for release of the Conversion Documents, deliver the same to the Bank of New York, which shall, within 3 (three) days issue such portion of the Converted Sale Shares to the Sellers as specified in the relevant Conversion Documents, which shall be directly credited to the Balance Shares Escrow Account."

"5.3 It is hereby clarified that the conversion of the FCCBs may occur in one or more tranches, subject to applicable Law. ***In the event it is determined that WLR is not "persons acting in concert" with the Acquirer for the purpose of the Takeover Code, the conversion may be completed in such number of trenches as may be required*** to ensure that the open offer requirements of the Takeover Code are not triggered and ***there would be consequential amendments to the tranches offered pursuant to clause***

8.2"

Upon perusal of the aforesaid clauses, it is envisaged that the WLR entities would never convert FCCBs in a manner that would result in the WLR entities acquiring the shares in excess of 15% of the Target Company. The original SPA also contemplated that the manner of conversion of FCCBs would potentially undergo a change if SEBI was to conclude that the WLR entities were not persons acting in concert with the Acquirer. I am of the view that amended SPA only captured the revised tranches in which the FCCBs would convert and the procedural steps to achieve the same. In view of the same, I find merit in the submissions of the Noticee that the amendment was procedural in nature.

d) Allegation: The clause that WLR entities shall have no rights over the shares held in the Existing Shares Escrow Account was added in the amended SPA. No such provision was present in the original SPA.

Reply: The clauses of the original SPA as well as Escrow agreement with respect to the WLR entities provided for WLR entities have no voting rights over shares in the Existing Shares Escrow Account. The amendment clarified that WLR has no rights to instruct the Escrow Agent on voting on shares in the Existing Shares Escrow Account, since this represented shares in which the Acquirers had an interest, and which had been paid for by release of corresponding purchase consideration to WLR entities. This was the arrangement inter se between the Acquirer and WLR. Under the escrow agreement, the Escrow Agent was to vote on the Sale Shares as per the joint instructions of WLR and the Acquirer. Neither the Escrow Agent nor WLR were entitled to exercise voting rights on such shares singly. This amendment was clarificatory in nature.

Finding: The relevant clauses of original SPA, original Escrow Agreement and amended SPA are reproduced as under:

The relevant clauses of original SPA and original Escrow Agreement:

Clause 2.1.of original WLR SPA read as under:

"The Acquirer further acknowledges that it will not be entitled to exercise any voting rights attached to the Sale Shares commencing from the effective date to the closing date, during which period, such voting rights shall be assigned in favor of the Escrow Agent in accordance with this Agreement and the Escrow Agreement"

Clause 4.1 (iv) of the original Escrow Agreement read as under: -

"WLR shall deposit with the Escrow Agent, duly executed, stamped and irrevocable powers of attorney in favour of the Escrow Agent in the format as set forth in SCHEDULE VII, authorizing the Escrow Agent, if required, to vote on and/or appoint proxies with respect to the Existing Sale Shares and Converted Sale Shares, and to sign, issue, forward and deliver any other documents as may be required in connection with the transfer of the Sale Shares to the Acquirer and as may be instructed jointly by WLR and the Acquirer. The Escrow Agent shall vote on the Existing Sale Shares and Converted Sale Shares in such manner as may be instructed jointly by WLR and the Acquirer, and it is clarified that the Escrow Agent shall not be entitled to exercise voting rights on such shares singly."

Clause 4.4 of the original WLR SPA read as under:-

"Each Seller shall deposit with the Escrow Agent duly executed, stamped and irrevocable powers of attorney in favour of the Escrow Agent, in a form and manner satisfactory to the Acquirer, authorizing the Escrow Agent, if required, to vote on and/or appoint proxies with respect to the Sale Shares deposited in the Existing Shares Escrow Account and the Balance Shares Escrow Account to sign, issue, forward and deliver any other documents as may be required in connection with the transfer of the Sale Shares to the Acquirer."

Clause 5.7 of the original Escrow Agreement read as under:-

"Upon the occurrence of any event which requires the WLR Shares to be voted upon, including the receipt of any notice by the Sellers by virtue of being shareholders of the Company stating that a general meeting of the shareholders of the Company has been called, the Sellers and/or Company shall immediately provide notice thereof to the Acquirer and the Escrow Agent, along with a copy of any notice so received by the Sellers. The Company hereby undertakes to issue duplicate notices of all such events to the Escrow Agent. Thereafter, the Escrow Agent shall seek instructions from WLR and the Acquirer as to the manner in which the WLR Shares shall be voted upon and shall act in accordance with such joint instructions."

Clause 9.1 of the original WLR SPA read as under: -

"Between the Effective date and the closing date, the WLR entities shall not vote and/or appoint proxies or give instructions to the Escrow Agent with respect to any of the Converted sales Shares, except with in accordance with the Escrow Agreement."

The relevant clause of amended WLR SPA:

Clause 8.2:

(i) *Subject to the fulfilment of the Conditions Precedent set forth in Clauses 6.1(i),(iii), the Balance Purchase Consideration shall be released from the Consideration Escrow Account in 3 (three) or 4 (four) tranches as stated below:*

(ii) *....*

(iii) *....*

(iv) *It is clarified that as of date of the WLR SPA, WLR has no rights (including the right to jointly instruct the Escrow Agent as to the manner in which the WLR Shares shall be voted) or control over the Existing Shares Escrow Account.*

Upon perusal of the aforesaid clauses of Original SPA and Original Escrow Agreement and amended SPA, I find the Original SPA and Original Escrow Agreement provided that the Escrow Agent shall vote on the existing sale shares and converted sale shares in the manner as may be instructed by WLR

and the Acquirer. Further, I find that Escrow Agent was authorized to vote with respect to the Sale shares deposited in the Existing Shares Escrow Account and Balance Shares Escrow Account and WLR entities were not having any rights over the shares in the Existing Shares Escrow Account. Since, the acquirers had paid for the release of the corresponding purchase consideration for the shares in the Existing Shares Escrow Account and the Acquirers had an interest on those shares, WLR entities would not have exercised the voting rights with regard to the said shares of the Acquirer. In view of the same, I find merit in the submissions of the Noticee that the amendment was clarificatory in nature.

e) Allegation: Vide letter dated October 11, 2010, the Noticee had presented fresh information on the basis of its discussions with WLR entities regarding the FCCB conversion, inter-alia stating that WLR entities have not triggered regulation 10 of SAST Regulations on account of the conversion of FCCBs.

Reply: The maintenance of shareholding of the WLR entities below 15% was clearly envisaged in the Original SPA in Clauses 5.2 and 5.3. Therefore, it was our bonafide belief that it was wrong to compare the final disclosures in the letter of offer with the replies given to SEBI in response to a specific query from SEBI. In responses to SEBI, it had provided all the information what is available in the primary source document i.e. Share Purchase Agreement and Escrow Agreement.

Finding: With regard to the aforesaid submission of the Noticee, I have noted the clauses 5.2 and 5.3 of the original SPA which are produced as under:

"5.2 Process for Conversion of FCCBs and Deposit of Converted Sale Shares in Escrow

(i) The Acquirer shall jointly, and in accordance with the Escrow Agreement, deliver a release notice to the Escrow Agent, to release from the Existing Shares Escrow Account, and the Escrow Agent shall

immediately deliver to the Bank of New York, the Conversion Documents executed by each of the Sellers with respect to the Converted Sale Shares. It is hereby clarified that the Conversion Documents shall be in relation to only such portion of the FCCBs as would result in the Sellers holding up to a maximum of 14.95% fourteen point nine five per cent) of the then Share Capital; and
(ii) The Escrow Agent shall, upon receipt of the notice for release of the Conversion Documents, deliver the same to the Bank of New York, which shall, within 3 (three) days issue such portion of the Converted Sale Shares to the Sellers as specified in the relevant Conversion Documents, which shall be directly credited to the Balance Shares Escrow Account."

"5.3 It is hereby clarified that the conversion of the FCCBs may occur in one or more tranches, subject to applicable Law. ***In the event it is determined that WLR is not "persons acting in concert" with the Acquirer for the purpose of the Takeover Code, the conversion may be completed in such number of trenches as may be required*** to ensure that the open offer requirements of the Takeover Code are not triggered and ***there would be consequential amendments to the tranches offered pursuant to clause 8.2"***

Upon perusal of the aforesaid clauses, it is envisaged that the WLR entities would not convert FCCBs in a manner that would result in the WLR entities acquiring the shares in excess of 15% of the Target Company. The original SPA also contemplated that the manner of conversion of FCCBs would potentially undergo a change if SEBI was to conclude that the WLR entities were not persons acting in concert with the Acquirer. Since, the Noticee has submitted that it had provided all the information what is available in the primary source document i.e. Share Purchase Agreement and Escrow Agreement, the benefit of doubt can be given to the Noticee in this regard.

f) Allegation: The letter dated October 11, 2010 by the Noticee did not mention that SPA entered into between Acquirers, Target Company and WLR entities have been amended post issuance of the letter of observations of SEBI dated October 04, 2010.

In fact, the letter from the Noticee sought to convey the impression that the mechanism of FCCB conversion and transfer had not been altered since the Public announcement dated June 14, 2010 was made even if information in this respect was not correctly presented before SEBI. It was further stated in abovementioned letter that the Noticee was looking forward to receiving a positive response from SEBI at the earliest, however the fresh and significant information was incorporated in the letter of offer without waiting for SEBI's comments. It is observed that the final letter of offer received by SEBI on October 14, 2010, whereby the fresh information regarding FCCB conversion which was presented in letter dated October 11, 2010 was incorporated. Thus, the Noticee went on to incorporate the fresh and significant information in the letter of offer without waiting for SEBI's comments.

Reply: The amendment to SPA was consequential and clarificatory amendments were necessitated on account of the events envisaged in the original SPA. All these amendments had been incorporated in the Letter of Offer sent to the shareholders. SEBI observation letter provided the time frame to dispatch the Letter of offer and open the offer schedule. Since the information which was already available to the market and what was available in the Letter of Offer would be different, the Noticee decided to include the same in the Letter of Offer to ensure that there was no misleading information which went to the shareholders.

In terms of the amendment to the Original WLR SPA, the first sale event was scheduled for October 5, 2010, which necessitated an outward remittance and therefore entailed certain formalities for procedural compliance actions to be undertaken even prior to October 5, 2010. For example, a certificate from a chartered accountant which was required to be filed for purposes of outward remittance was dated October 4, 2010. This will demonstrate that the allegation of amendments being initiated after receipt of SEBI's observations would be completely misplaced.

Finding: I find from the material available on record that SEBI issued its observation letter on October 04, 2010 and the amendments to the original SPA were effected on October 05, 2010. I am of the view that to effect the amendment to SPA, the parties to the agreement needs to participate in the discussions and finalise the terms of the agreement. After the said actions, the parties will prepare the draft agreement which will be finalized by the parties and will be given effect to the amendments. The said exercise can not be done overnight. Further, I find that BMR Associates, a Chartered Accountant issued a certificate dated October 04, 2010 for the purpose of outward remittance, the date on which SEBI issued its observation letter. In view of the same, I find merit in the submissions of the Noticee that amendments to the SPA were not carried out after receipt of SEBI observation letter dated October 04, 2010.

As already observed by the undersigned in the above paragraphs, the amendments to the SPA were not carried out by the Noticee. Further, the amendments to SPA only captured the revised tranches in which FCCBs would convert and the procedural steps to achieve the same. These amendments were procedural and clarificatory in nature. Further, I find from the material available on record that the Noticee met SEBI officials on October 14, 2010. Vide letter dated October 15, 2010, SEBI directed the Noticee to send an individual corrigendum to all the shareholders which had the effect of amending the Letter of Offer and to issue a corrigendum Public Announcement which was complied with by the Noticee. Further, as directed by SEBI, an amended Letter of Offer to SEBI was submitted by the Noticee. This act and conduct on the part of the Noticee clearly and in absolute unambiguous terms establishes its intention to comply with regulatory directions.

g) Allegation: In the Letter of offer dated October 11, 2010, the Noticee had provided in a table an overview of the manner in which the conversion transactions of the FCCBs

took place on different dates. In the said table, converted, total no. of shares acquired/converted and percentage of resulting share and voting capital amounting to 680 FCCBs, 12,54,46,400 shares and 30.24% respectively were not provided, although SEBI had advised to do so while the matter was being processed at SEBI's end. It was only after SEBI directed the Noticee to issue corrigendum that these above details were disclosed in a public notice appearing in newspaper. The Noticee was alleged to have concealed the said information from shareholders.

Reply: The fact that the FCCBs would convert to 20.05% and that prior to conversion, WLR Entities already held 10.18% (therefore aggregating to 30.24% of the voting share capital) was already disclosed in the LOF which was dispatched to the shareholders prior to the Corrigendum and Amended and Restated Letter of Offer. As such, the question of concealing this information does not arise.

Finding: Upon perusal of the contents of the Letter of Offer, the following details are noted:

> *"3.1.4 As of the date of the Public Announcement, RHSL is the legal and beneficial owner of 3,10,77,500 equity shares in the Target Company, representing 7.49% of the Resulting Share and Voting Capital of the Target Company ("RHSL Shares").*
>
> *As of the date of the Public Announcement, (i) WLR was the legal and beneficial owner of 4,22,45,920 equity shares in the Target Company, representing 10.18% of the Resulting Share and Voting Capital of the Target Company in following manner:*

Entity	*Equity shares*
WLR 1	*14,75,840*
WLR 2	*1,45,73,920*
WLR 3	*1,88,16,960*
WLR 4	*73,79,200*

(ii) WLR held 451 FCCBs which upon the conversion thereof would equal 8,32,00,480 equity shares in the Target Company, representing 20.05% of the Resulting Share and Voting Capital of the Target Company."

Upon perusal of the aforesaid table in the Letter of Offer, I find that WLR entities were holding 10.18% equity shares of the Target Company and were holding 451 FCCBs which upon conversion would equal to 20.05% of the Resulting Share and Voting Capital of the Target Company aggregating to 30.24% of the voting share capital which was disclosed in the Letter of Offer. Further, I find that upon direction of SEBI, the Noticee issued Corrigendum to the shareholders of the Target Company, wherein date of transaction, No. of FCCBs converted, Total no. of shares acquired/converted, % of Resulting Share and Voting Capital, Cumulative No. of shares, prior and post conversion of shareholding of WLR entities was disclosed. I find that the details of the converted FCCBs and to be converted FCCBs amounting to 30.24% of the shareholding of WLR entities was already disclosed by the Noticee in the Letter of Offer. Further, as directed by SEBI, more detailed disclosure with regard to prior and post holding of the WLR entities which was 30.24% of the Resulting Share and Voting Capital of the Target Company was disclosed by the Noticee. In view of the same, I am of the view that the Noticee did not conceal information from the shareholders of the Target Company.

h) Allegation: The Noticee submitted the contradictory information vide email dated July 30, 2010 to SEBI's email dated July 26, 2010 with regard to WLR entities holding post conversion of FCCBs.

Reply: Upon a perusal of the table set out in the Noticee's letter dated July 30, 2010, it is evident that SEBI's observation is based on the remarks against the July 13, 2010 entry, which is being misread to mean that the entire 106,076,000 shares were yet to

be transferred to the escrow. It is relevant to note that the remark against the previous entry *i.e.,* June 21, 2010, clearly shows that 48,887,200 shares (11.78%) had already been transferred since the remark under the column 'Transferred to Escrow Account' against this entry is "yes".

Finding: I have perused the documents available on record. I find that 48,887,200 shares converted on June 21, 2010 were transferred to Escrow Account on July 2, 2010. In view of the same, I find merit in the submissions of the Noticee.

i) Allegation: SEBI vide email dated August 04, 2010 sought the information from the Noticee that how many shares and FCCBs were held by WLR entities as on the date of Public Announcement. However, the Noticee vide email dated August 04, 2010 submitted the contradictory information.

Reply: The table provided on August 4, 2010 was specifically in response to a query on how many equity shares and how many FCCBs do the WLR Entities hold as **on the date of the PA**. Since there was a follow up query in relation to a transaction dated June 12, 2010, the Noticee provided full details of the number of FCCBs held, no. of equity shares into which FCCBs had already converted and the FCCBs which were pending conversion. This had nothing to do with the onward transfer of shares to the escrow accounts / Acquirer.

The fact that 14.90% was already transferred on July 2, 2010 was publicly disclosed by then (vide disclosure made on July 02, 2010, annexed as Annexure A to the WS*)* and hence the question of providing incorrect information does not arise.

Finding: I find that SEBI had sought information with regard to details of holding of WLR entities only as on the date of Public Announcement i.e. June 14, 2010. Since, the Noticee had received follow up query in relation to a transaction dated June 12,

2010, the Noticee provided details of FCCBs held, converted and pending for conversion. I find that the Noticee has submitted to SEBI that as on July 13, 2010 WLR entities were holding 10,60,76,000 shares constituting 25.57% of the share and voting capital of the Company. I am of the view that SEBI had sought information with regard to holding of WLR entities only as on the date of public announcement and not onward transfer of shares to the escrow account/acquirer. Further, the Noticee had submitted the information to follow up query raised by SEBI. In view of the same, the Noticee provided the aforesaid information. In view of the above, I am of the view that the Noticee did not give any contradictory information.

Allegation: The Noticee had vide email dated August 17, 2010 and letter dated October 11, 2010 respectively submitted contradictory information with regard to trigger of regulation 10 of the SAST Regulations, 1997 by the WLR entities.

Reply: Reference is drawn to Clause 5.3 of the Original SPA which always envisaged that the WLR Entities would at any given point of time hold a maximum of 14.95% shares of SpiceJet. It is pertinent to note that the Original SPA was entered into between the parties to acquire an aggregate of 30.24% shares of SpiceJet by the Acquirers from the WLR Entities (in tranches), and accordingly, in terms of Regulation 14(1) of the Takeover Code, the agreement was to acquire more than 15% shares. The same cannot be read in isolation to conclude that the WLR entities held more than 15% shares of SpiceJet, thereby, independently triggering Regulation 10 of the Takeover Code.

Finding: With regard to the aforesaid submission of the Noticee, I have noted the clauses 5.2 and 5.3 of the original SPA which are produced as under:

"5.2 Process for Conversion of FCCBs and Deposit of Converted Sale Shares in Escrow

(i) The Acquirer shall jointly, and in accordance with the Escrow Agreement, deliver a release notice to the

Escrow Agent, to release from the Existing Shares Escrow Account, and the Escrow Agent shall immediately deliver to the Bank of New York, the Conversion Documents executed by each of the Sellers with respect to the Converted Sale Shares. It is hereby clarified that the Conversion Documents shall be in relation to only such portion of the FCCBs as would result in the Sellers holding up to a maximum of 14.95% fourteen point nine five per cent) of the then Share Capital; and

(ii) The Escrow Agent shall, upon receipt of the notice for release of the Conversion Documents, deliver the same to the Bank of New York, which shall, within 3 (three) days issue such portion of the Converted Sale Shares to the Sellers as specified in the relevant Conversion Documents, which shall be directly credited to the Balance Shares Escrow Account."

"5.3 It is hereby clarified that the conversion of the FCCBs may occur in one or more tranches, subject to applicable Law. ***In the event it is determined that WLR is not "persons acting in concert" with the Acquirer for the purpose of the Takeover Code, the conversion may be completed in such number of trenches as may be required*** to ensure that the open offer requirements of the Takeover Code are not triggered and ***there would be consequential amendments to the tranches offered pursuant to clause 8.2"*** ***"***

Upon perusal of the aforesaid clauses, it is envisaged that the WLR entities would not convert FCCBs in a manner that would result in the WLR entities acquiring the shares in excess of 15% of the Target Company. The original SPA also contemplated that the manner of conversion of FCCBs would potentially undergo a change if SEBI was to conclude that the WLR entities were not persons acting in concert with the Acquirer. Further, I find that as per Original SPA, Acquirer was to acquire an aggregate of 30.24% shares of Target Company from the WLR entities in tranches which was more than 15% of shares of the Target Company. In view of the same, I find merit in the submissions of the Noticee.

33. In view of the above, I conclude that the allegations against Noticee for violations of regulation 45 (5) of the SAST Regulations and Clause 4 and Clause 20 of the Code

of Conduct for merchant bankers provided under schedule III of the MB Regulations read with regulation 13 of MB Regulations do not stand established.

ORDER

34. In view of my findings noted in the preceding paragraphs and in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Rules, I hereby dispose of the Adjudication Proceedings initiated against the Noticee vide SCN dated August 31, 2011 and Supplementary SCN dated July 31, 2012 without imposition of any monetary penalty.

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

Date: May 28, 2021
Place: Mumbai

Parag Basu
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER