BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER No.: ORDER/AP/AS/2020-21/9142]

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

In respect of:

Mr. Rana Kapoor,
PAN: AHIPK0411A
427-428, 27th Floor, Penthouse, Samudra Mahal,
Dr. Annie Besant Road, Worli,
Mumbai - 400018

In the matter of YES Bank Ltd.

1. YES Bank Limited (hereinafter referred as "YBL" or "the Company") is a company having its securities listed on the Bombay Stock Exchange Limited ("BSE") and National Stock Exchange Limited ("NSE"). Securities and Exchange Board of India ("SEBI") observed that there were reports in the media related to YBL November, 2018 transactions. An extract of one such report is as follows:

   "*Morgan Credits Pvt. Ltd., unlisted promoter entity of Yes Bank had raised Rs. 950 Cr from Reliance Mutual Funds through unlisted Zero Coupon Non-Convertible Debentures("ZCNCDs") in April, 2018. As part of this transaction, the promoter i.e. Morgan Credits Pvt. Ltd. acceded to a condition that they will always maintain a cap on the borrowing cap at 0.5 X.*"

2. In view of the transaction by Morgan Credits Pvt. Ltd. ("Morgan") of raising Rs 950 crore from Reliance Mutual Fund ("RMF") through unlisted Zero Coupon Non-Convertible Debentures ("ZCNCDs") on April 19, 2018, SEBI undertook examination in the matter about the possible requirements of disclosure under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("the SAST Regulations") and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("the LODR Regulations"). Accordingly, vide email dated February 20, 2019, SEBI sought information/ comments from BSE and NSE with respect to aforesaid transaction. The BSE and NSE vide e-mail dated February 26, 2019 and February 27, 2019, respectively, informed that they had not received any disclosures under the LODR Regulations and the SAST Regulations from the Company or its promoters regarding the aforesaid transaction by its promoter entity. SEBI also sought comments from the Company and vide its email dated March 05, 2019, the Company informed that its promoter Morgan had raised Rs 950 crore from RMF, which was not in the in the nature of encumbrance of shares by promoters and thus, there has been no requirement of disclosures under the LODR Regulations and SAST Regulations.

3. Vide email dated March 06, 2019, the Company forwarded response of its promoter Morgan, wherein, it has been stated that Morgan is not a "*group entity*" of the Company and it is a part of the Promoter/ Promoter Group of the Company. Further, the Company was not privy or party to the said transaction, apparently entered between Morgan and RMF and in terms of Regulation 31 of the SAST Regulations the Company has not received any disclosure from Morgan about any encumbrance on its shareholding in the Company.

4. During the course of examination, it was observed that Mr. Rana Kapoor (hereinafter referred as "the Noticee") has entered into an agreement with Morgan and Milestone Trusteeship Services Private Limited ("Milestone"). Accordingly, the Amended and Reinstated Debenture Trust Deed (hereinafter referred as 'Trust Deed') entered by the Noticee was perused and it was observed that the Noticee, then Managing Director ("MD") and Chief Executive Officer ("CEO") of the Company, had entered into an agreement as a "*guarantor"* with Morgan and Milestone as a debenture trustee with respect to said ZCNCDs. The agreement was executed on November 14, 2018 with a guarantee amount to the extent of Rs 410 Crore with respect to a total borrowing amount of Rs 950 crore. The details of the aforesaid Trust Deed agreement are as follows:

   a. Morgan is an unlisted promoter entity of the Company, which issued unlisted ZCNCDs worth Rs 950 crore in April 19, 2018, and the said ZCNCDs were subscribed by Reliance Mutual Fund.

   b. One of the conditions prescribed in Trust Deed of ZCNCDs was that; the borrower i.e. Morgan will always maintain a cap on the borrowing cap at 0.5 X, which means that Morgan will always maintain ownership of minimum as many shares of YBL which are worth two times the outstanding amount.

   c. In respect of aforesaid agreement, the Noticee has agreed to provide a personal guarantee to the extent of Rs 410 Crore (referred to as '*guarantee gap*' in the agreement) forming part of the guarantor's total liability.

   d. The Noticee also agreed to provide, if required under certain circumstances, such number of his shares in YBL as security for the outstanding amounts which in value are equal to two times the Guarantee Gap i.e. Rs 820 Crore.

5. SEBI, vide email dated May 06, 2019, sought following information from the Noticee:

   "…As the guarantor & party to the agreement on one hand and being the then MD & CEO of Yes Bank on the other hand, at the time of entering into the agreement / post entering into the agreement, did you inform Morgan Credits Private Limited to ensure disclosure of the said agreement to Yes Bank under Reg 31 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011? If yes, provide details.

      I. It is noted that the said agreement was not/ has not been disclosed to Yes Bank by Morgan Credits Private Limited. Having been the guarantor and a party to such transactions on one hand and being the then MD & CEO of Yes Bank on the other hand, did you inform Morgan Credits Private Limited subsequently to ensure the said disclosure as per the regulatory norms? If yes, provide details.

II. *In your capacity as the then MD & CEO of the Bank, having being aware that the said agreement was not disclosed to Yes Bank by Morgan Credits Private Limited on one hand and having executed the guarantee and being a party to the agreement yourself, did you take up/ inform Yes Bank of the same? If Yes, provide details….."*

6. Vide e-mail dated May 10, 2019, the Noticee submitted following response to the said email:

"….

I. *In our view the agreements for borrowing executed by Morgan Credits Private Limited (MCPL), do not create any encumbrance or pledge on Yes Bank shares.*

II. *As is customary in transactions of this nature and as a prudent risk management practice, lenders typically stipulate caps on the overall borrowing capacity of the Borrower (Morgan Credits Private Limited). Accordingly, such conditions in borrowing cap have been documented in the transaction agreements.*

III. *The transaction has been duly rated by an independent rating agency (CARE) considering '**unsecured**' nature of borrowing with "no encumbrance on shares" and consequently no Structured Obligation (SO). This rating has been duly published as well.*

IV. *On a separate note, we would like to clarify that the present principal outstanding in the case of MCPL stands reduced to Rs 950 Cr as the borrower has repaid Rs 50 Cr (along with interest thereon) in April 2019.*

V. *We would like to reiterate that since the aforementioned transaction does not create any encumbrance of shares, it does not necessitate any disclosure requirements under SEBI regulations referred in the email attached below…*"

7. On a perusal of the aforesaid Trust Deed, submissions of the Company, Morgan and the Noticee and extant legal framework, SEBI observed the following:

a. Noticee being a guarantor to said transaction was aware of all aspects of the transactions.

b. Said transaction/ condition were in '*nature of encumbrance*' on the Company shares held by Morgan and such encumbrance are required to be disclosed under the provisions of Regulation 31 of SAST Regulations.

c. The Noticee was holding the post of MD and CEO in the Company, when the said transaction took place. Further, as per the provision of Regulation 4(2)(f)(i)(1) of the LODR Regulations, a key managerial personnel ("KMP") have responsibility to disclose to the board of directors whether they, directly, indirectly or on behalf of the parties, have a material interest in any transaction or matter directly affecting the listed entity.

d. On account of being a *guarantor*, the Noticee had a substantial material interest in the said transaction which directly affects the listing entity and therefore, being a KMP of the Company, he had a responsibility to disclose said transaction to the board of directors of the Company. Further, Regulation 4(2)(f) (i)(1) of the LODR Regulations also obligates the Noticee, being a director, to be more transparent to stakeholders by disclosing the details of the said transactions.

e. The Noticee neither ensured the disclosure of aforesaid encumbrance nor informed the board of directors of the Company about his material interests in the said transaction.

8. In view of the above, it has been alleged that the Noticee has failed to comply with the provisions specified under the Regulations 4(2)(f)(i)(1) and 4(2)(f)(i)(2) of the LODR Regulations. These provisions of the LODR Regulations are reproduced as follows: -

LODR Regulations

'Principles governing disclosures and obligations.

4(2)(f) *Responsibilities of the board of directors: The board of directors of the listed entity shall have the following responsibilities:*

(i) *Disclosure of information:*
(1) *Members of board of directors and key managerial personnel shall disclose to the board of directors whether they, directly, indirectly, or on behalf of third parties, have a material interest in any transaction or matter directly affecting the listed entity.*

(2) *The board of directors and senior management shall conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture of good decision-making.'*

9. Vide a *communication-order* dated August 08, 2019, the competent authority in SEBI appointed Shri Santosh Shukla, Chief General Manager (hereinafter referred as 'erstwhile AO') under Section 15-I of the SEBI Act and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'the SEBI Adjudication Rules') to inquire into and adjudge the alleged violations of the provisions of Regulations 4(2)(f)(i)(1) and 4(2)(f)(i)(2) of the LODR Regulations by the Noticee *viz.* Mr. Rana Kapoor under Section 15HB of the SEBI Act.

10. Accordingly, a notice to show cause no. EAD/SS/SKS/OW/32586/2019 dated December 06, 2019 (hereinafter referred to as 'the SCN') was issued to the Noticee calling upon him to show cause as to why an inquiry should not be held against him in terms of rule 4 of the Adjudication Rules and penalty be not imposed under Section 15HB of the SEBI Act for the aforesaid alleged violations. The SCN was duly served upon the Noticee. In response to the SCN, vide letter dated December 23, 2019, the Noticee's authorised representative Khaitan & Co. Advocates requested for complete inspection of documents along with copies of the full record in the captioned matter.

11. Meanwhile, by a common *communication-order* dated January 07, 2020, this case was transferred to the undersigned with the advice that except for the change of the Adjudicating Officer, the other terms and conditions of the original orders *'shall remain unchanged and shall be in full force and effect'* and that the "*Adjudicating Officer shall proceed in accordance with the terms of reference made in the original orders".*

12. After considering the material on record, the undersigned allowed the inspection of the relevant and relied upon documents/records in connection with the matter and on January 14, 2020, the authorized representative of the Noticee undertaken the inspection of the documents and also sought additional documents vide e-mail dated January 17, 2020. Thereafter, vide e-mail dated January 22, 2020, the concerned Department provided the relevant documents and replied to queries and other requests of the Noticee's.

13. Vide e-mail dated February 10, 2020, the Settlement Division informed that the Noticee has filed a "Settlement Application" in the instant matter. Since, the Noticee had not filed any reply to the SCN post inspection of documents, therefore, vide letter dated February 11, 2020, the Noticee was advised to submit his reply to the SCN. Thereafter, vide letter dated February 24, 2020, the authorized representative of the Noticee submitted the reply to the SCN on behalf of the Noticee.

14. On August 14, 2020, the Settlement Division informed that the Settlement Application of the Noticee has been rejected by the competent authority. Accordingly, in terms of Rule 4(3) of the Adjudication Rules, the Noticee was granted an opportunity of personal hearing on September 04, 2020. After seeking adjournment, the Noticee availed the opportunity of personal hearing on September 10, 2020 when Mr. Tomu Francis, Advocate and Mr. Arka Saha, Advocate, appeared on behalf of the Noticee through video conferencing at webex platform and made oral submissions on the lines of the written reply dated February 24, 2020. During hearing Mr. Tomu Francis stated that currently Noticee is lodged in jail and due to Covid measures concerned jail authorities are not allowing the Noticee's Authorised Representatives ("ARs") to meet the Noticee. This has made it impossible for the ARs to co-ordinate with the Noticee for the purposes of seeking instructions/relevant information for the purpose of the hearing. In this regard, the ARs were informed during hearing that vide letter dated December 19, 2020, the Noticee had duly authorized Mr. Tomu Francis, Mr. Manish Chhangani, Mr. Arka Saha and other advocates of Khaitan & Co. to represent, act, appear, tender submissions, replies, plead, file a settlement application, attend Internal Committee meeting, submit settlement proposal, accept any settlement proposal as conveyed by SEBI, to send and receive correspondences on behalf of Noticee in the captioned matter and undertake any other ancillary action in respect of the captioned matter. Further, ARs had already undertaken the inspection of relied upon documents in the matter on January 14, 2020 on behalf of the Noticee and thereafter, filed the written reply to the SCN on February 24, 2020. Accordingly, the ARs are duly authorized to represent the Noticee in scheduled personal hearing and there is no reason to adjourn the hearing or grant other opportunity of hearing in the matter. However, the ARs were allowed 14 days' time i.e. up to September 24, 2020 to make additional written submission, if any. Vide letter dated September 24, 2020, the ARs made additional written submissions in the matter.

15. I note that the Noticee have *inter alia* made the following submissions in his replies dated February 24, 2020 and September 24, 2020:

    a. It is submitted that the SCN is vitiated by an inordinate and unexplained delay in the issuance thereof. The Morgan NCDs were issued in May 2018 and the Noticee came to be a guarantor to the said

transaction on November 14, 2018. However, the SCN was issued on December 6, 2019, that is, even after all obligations of the Noticee under the Trust Deed coming to end pursuant to Morgan divestment of its entire holding therein between September 18, 2019 and September 20, 2019 in order to reduce its borrowings. It is further significant, that such delay has caused grave prejudice to the Noticee as he no longer holds any position in the Company, either directorial or managerial. Therefore, the SCN is vitiated by delay and ought to be quashed and set aside on such ground alone.

b. Morgan is classified as a promoter and part of the promoter group of YBL, and held 7,02,50,000 shares of the Company amounting to 3.03% of its total paid up share capital as on March 31, 2019. As of December 31, 2019, Morgan holds nil shareholding in the Company.

c. Morgan issued and allotted 9500 unlisted, unsecured, rated, redeemable, non-convertible debentures ("Morgan Credits NCDs") of the face value of INR 10,00,000 each on a private placement basis, aggregating up to INR 950,00,00,000 in May 2018. Such issue of ZCNCDs was pursuant to a debenture trust deed dated May 17, 2018 and on terms and conditions contained therein. On November 14, 2018, an Amended and Restated Debenture Trust Deed was executed by Morgan and had the Noticee as a guarantor to the said transaction. Milestone was the Debenture Trustee. The raising of loans by virtue of issuance of the ZCNCDs was a transaction involving a promoter entity of the listed Company for an independently-owned and professionally-managed family office and had nothing to do the Company. In light thereof, such transaction cannot be said to be directly affecting the Company. In fact, such transaction was in accordance with the prevalent market practice as undertaken by various other market participants.

d. It is submitted that the charges contained in the SCN are vague and incoherent. The SCN invokes general provisions contained in the LODR Regulations to arbitrarily allege a violation thereof. In this regard, it is submitted that it is settled law that a show cause notice must clearly specify the charges and substantiate the framing thereof in order to enable the responding entity to appropriately deal with such charges for the purposes of its defense. It is to be noted that a show cause notice is provided to a person in the furtherance of sacrosanct principles of natural justice and in specific, the principle of *audi alterem partem*, which necessitates that the adjudicating authority ought to hear the person against whom proceedings have been initiated. In the absence of a specific show cause notice, the Noticee herein has been gravely prejudiced. It is submitted that the vagueness of SCN is making it impossible for the Noticee to tender the complete and effective defense in the matter. In this regard, the Noticee had placed reliance upon the judgment of Hon'ble Supreme Court of India in the matter of *Food Corporation of Indiav, State of Punjab and others (2001) 1sec291, Canara Bank v. DebasisDas, {2003}4SCC557 and S.L. Kapoor v. Jagmohan,AIR1981SC136*.

e. The charges contained in the SCN state that SEBI has found that the transaction pertaining to the issue of the Morgan NCDs resulted in an '*encumbrance*' on the shares of the Company held by Morgan by virtue of clauses/obligations contained in the Trust Deed coming within the meaning of '*encumbrance*' in

Regulation 28 (3) of the SAST Regulation, thus requiring disclosure under Regulation 31 thereof. The SCN states that as no such disclosure was made by Morgan to the Company, the Noticee, being a *guarantor* for the purposes of the transaction, thus being in the know thereof, ought to have ensured such disclosure as he was the MD of the Company at the relevant point of time. Further, the SCN alleges that by virtue of being a *guarantor*, the Noticee had a material interest in the transaction and ought to have disclosed to the Board of Directors of the Company, such material interest. Such charges are unfounded, baseless and without any merit due to the following reasons-

i. No obligation vested on the Noticee to ensure the disclosure of the alleged encumbrance of shares of the Company held by Morgan; and

ii. The Noticee did not have material interest in a transaction directly affecting the Company.

f. The Noticee submitted that no obligation vested on the Noticee to ensure disclosure of the alleged encumbrance of shares of the Company held by Morgan as the clauses contained in the Morgan Debenture Trust Deed did not amount to an *'encumbrance'* as per Regulation 28 of the SAST Regulations (as it then existed) on the shares of the Company held by Morgan, thus warranting disclosure thereof under Regulation 31of the SAST Regulations. In this regard, the submissions made by Morgan vide its reply dated June 21, 2019 in the proceedings initiated against it *via* the show cause notice dated May 28, 2019 bearing reference number - EAD-2/SS-SKS/OW/13478/1/2019 and its written submission dated August 30, 2019 are repeated and reiterated in extenso. The Noticee annexed the reply dated June 21, 2019 and the written submissions dated August 30, 2019. In light of the same, no obligation to ensure disclosure of the alleged encumbrance ever vested on the Noticee.

g. The Noticee submitted that no obligation of any kind was created over the shares of the Company held by Morgan, let alone the shares held by the Noticee (who was solely a guarantor) at the time of entering into the aforesaid transaction, and thus the transaction could not be said to be directly affecting the Company, requiring disclosure by the Noticee. In fact, when such an encumbrance was created in terms of the Trust Deed on July 18 and July 22, 2019 through pledge of shares of the Company by the Noticee, appropriate disclosures were made.

h. Further, without prejudice to the above, it is submitted that as per Regulation 31 of the SAST Regulations, the duty to make disclosures there under vests on the promoter of a target company who has encumbered shares of such target company and not any other parties to any agreement which led to such encumbrance, such as a guarantor thereto. It is submitted that in light of such specific requirement of the Takeover Code which vests such duty on a promoter of a listed entity which encumbers its shares in such listed entity, general provisions of the LODR Regulations may not be invoked to penalize a mere guarantor to such transaction which may have, assuming without admitting, created an encumbrance over shares of the Company by stating that such guarantor had to ensure the disclosure by the promoter of the Company.

i. It is submitted that the SCN, invokes general provisions contained in the LODR Regulations to arbitrarily allege a violation thereof. SEBI, has invoked the general principles contained in the LODR Regulations being Regulation 4 (2) (f) (i) (1) and Regulation 4 (2) (f) (i) (2) of the LODR Regulations against the Noticee especially when (a) the transaction being referred to does not directly affect the Company and (b) as per the specific provisions contained in Regulation 31 of the Takeover Code, no obligation to make any disclosure vested on the Noticee as none of the shares held by him at the relevant time were even allegedly encumbered in any manner. Such submission, it must be noted, is without prejudice to the submissions made by Morgan in relation to the question of whether or not the covenants contained in the Morgan Credits Debenture Trust Deed amount to an encumbrance of its shareholding in the Company, for the purposes of which an appeal has been preferred against the order dated March 31, 2020 passed by SEBI which is currently *sub judice* before the Hon'ble Securities Appellate Tribunal.

j. With respect to the alleged violation of Regulation 4(2)(f)(i)(2) of the LODR Regulations, it is submitted that the Noticee has always conducted himself in a manner so as to meet the expectations of operational transparency to stakeholders of the Company. It is submitted that the said provision mandates that the board of directors and senior management ought to conduct themselves in a manner so as to meet the expectations of operational transparency to stakeholders of the Company. Clearly, the said provision only pertains to matters that would affect the operational transparency of a listed company i.e. would restrict or affect the operations in any manner. In the instant case, the issuance of ZCNCDs by Morgan and the acting of the Noticee as *guarantor* to the said issue do not affect the operations of the Company and only pertains to the raising of funds by Morgan, a promoter of the Company. In light thereof, no liability can vest on the Noticee for any failure to disclose his role as *guarantor* in such a transaction to the board of directors of the Company.

k. The LODR Regulations create an obligation on the members of board of directors and key managerial personnel to disclose to the board of directors whether they, directly, indirectly, or on behalf of third parties, have a material interest in any transaction or matter that directly affects the listed company. Clearly, such obligation will apply only to transactions that would be material to the company failing which every transaction entered in the personal capacity of such Directors and KMPs (including small and petty transactions) would have to be disclosed to the shareholders of the company. This cannot be the intent of the regulations. Guidance for such principles of materiality can be borrowed from the Principles of determining Materiality by the Company which states that a transaction would be material if the particular transaction/event has an *impact on the profitability of the bank by 5% or more of the Profit Before Tax (PBT) of the immediately preceding financial year*. It is submitted that the transaction entered into by the promoters does not affect the revenues or the profit before tax at all and thus cannot be considered to be material information in any event.

l. It is submitted that the intent and purpose behind disclosures contained in the LODR Regulations is to ensure of fair, accurate & timely dissemination/ disclosure of material information by listed entities to

investors on an equal and timely basis. It is significant that upon the disclosure dated July 22, 2020 being made, there was no adverse price movement in the scrip of the Company evidencing that even the actual encumbrance in the nature of pledge on the shares of the Company held by the Noticee (as well as Morgan) was not material information. In this regard, it is significant that the price of the scrip of the Company moved from Rs. 91.15 (on July 22, 2019) to Rs. 90.70 (on July 23, 2019) upon such disclosure being made.

m. It is submitted that the Noticee had filed a Settlement Application (4111/2020) to amicably settle the proceedings initiated against him by the SCN. In this regard, ARs attended the internal committee meeting dated March 04, 2020, wherein, an amount was provided to them by SEBI that would be required to be paid by the Noticee to amicably settle the proceedings. However, soon thereafter, SEBI sought clarifications from ARs vide its e-mail dated March 19, 2020, asking to explain how the Noticee's arrest would impact the settlement proceedings. In spite of re-assertion from us vide our e-mail dated March 27, 2020 that the instant proceedings are in no manner related to the Noticee's arrest and proceedings initiated by the Central Bureau of Investigation and the Enforcement Directorate were in no manner connected to any alleged violation of the LODR Regulations. Subsequently SEBI, vide e-mail dated August 17, 2020, rejected the Noticee's settlement application without providing any reason thereof, and merely stating that in view of the certain events that have transpired after the Internal Committee meeting and the proceedings by the enforcement agencies against the applicant for certain alleged violations, the material facts and events, the settlement application was rejected. It is submitted that it was clarified that such action by the enforcement agencies had no bearing on the matter at hand which was not even considered. Such conduct and the sequence of events commencing from the rejection of the Noticee's settlement application displays that SEBI is conducting the said proceedings with a closed and pre-determined mind.

n. Such fact is further borne out by the fact that as per market practice and generally accepted principles, various market participants have entered into such transactions and have also pledged shares of their company and none of them have been called on to make disclosures of the same to the board of directors of the listed entity in which they serve by SEBI. SEBI has thus only singled out the Noticee and invoked general provisions of the LODR Regulations to initiate action against him for reasons best known to it, and taken no action against such other persons. SEBI has thus acted arbitrarily, and in gross violation of its duty as the regulator of the Indian securities markets.

o. Morgan is a separate legal entity with its own board of directors and personnel. In light thereof, alleging a violation of the LODR Regulations by the Noticee for not "*ensuring*" disclosure of an alleged encumbrance is erroneous, whimsical and *mala fide*.

p. The Noticee did not have material interest in a transaction directly affecting the Company. The raising of loans by virtue of issuance of the Morgan Credits NCDs was a transaction involving a promoter entity of the listed Company, and had nothing to do with the Company. Funds were raised *via* such

issuance for the purposes of Morgan and the clauses in the Trust Deed pertained to shares of the Company owned by Morgan. In light thereof, such transaction cannot be said to be directly affecting the Company.

q. Further, without prejudice to the above, it is submitted that the transaction cannot be stated to be directly affecting the Company as it did not result in an encumbrance of shares of the Company held by Morgan as stated hereinabove.

r. In light thereof, no obligation whatsoever had vested in the Noticee as per Regulation 4{2}(f)(i)(1) and (2) of the LODR Regulations with respect to the aforesaid transaction. Considering the same, the SCN ought to be quashed and set aside.

16. I have carefully considered the allegations as levelled against the Noticee, the reply/submissions of the Noticee and the relevant material available on record. In the instant case, the fact about the Noticee being MD and CEO of the Company during relevant period of time is an admitted position. The Noticee was also the promoter of the Company during relevant period. It is also an admitted fact that the Noticee has entered into an agreement as a '*guarantor'* with Morgan and Milestone with respect to ZCNCDs of Rs 950 Crore on November 14, 2018 *via* Trust Deed. In respect of Trust Deed, the Noticee has provided a '*personal guarantee'* to the extent of Rs 410 Crore forming part of the *guarantor's* total liability. The Noticee also agreed to provide, if required under certain circumstances, such number of his shares in the Company as security for the outstanding amounts which in value are equal to two times the Guarantee Gap i.e. Rs 820 Crore. In view of above facts and circumstances, the question before me is, firstly, whether the Noticee being a KMP have a material interest in aforesaid transaction, if yes, whether he had disclosed the same to the Board of Directors of the Company or not. Secondly, the Noticee being aware of the transactions and clauses of Trust Deed, which were in nature of "*encumbrances*" and the fact that no disclosure was made by the promoters group entity Morgan to Stock Exchanges under Regulation 31(1) read with Regulation 28(3) of the SAST Regulations and whether he failed to be more transparent to stakeholders by not disclosing the details of the said transactions.

17. The Noticee has raised a technical objection that the SCN is vitiated on account of an inordinate delay in the issuance thereof. In this regard, it is noted that the issuance of ZCNCDs of Morgan in question pertains to April 19, 2018, wherein, the Noticee became a '*guarantor'* to the said transaction by executing an agreement on November 14, 2018. It is noted from record that SEBI started its inquiry and examination in March 2019 and the instant adjudication proceedings were approved by competent authority in SEBI on July 29, 2019 and the same was communicated to erstwhile AO on August 08, 2019. The SCN in the matter was issued on December 06, 2019. Thus, there is no delay at all, either in approval of action or commencement of these proceedings by issuance of the SCN, as sought to be contended by the Noticee. I, therefore, reject these contentions of the Noticee.

18. With regard to Settlement Proceedings, the Noticee has stated that the rejection of the Noticee's settlement application displays that SEBI is conducting the said proceedings with a closed and pre-determined mind.

In this regard, I note that the Settlement Proceedings are a separate set of proceedings and undersigned is in no way concerned with the said Settlement Proceedings. Undersigned has been appointed as Adjudicating Officer under section 15I (1) of the SEBI Act for holding an inquiry in the prescribed manner as per section 15I (2) of the SEBI Act and Adjudication Rules. Further, during the instant proceedings, the Noticee has failed to demonstrate that SEBI was acting with a closed and pre-determined mind at any stage. In view of the same, I am of the opinion that the Noticee is raising a vague contention and therefore, I do not find such contentions of the Noticee tenable.

19. The Noticee has contended that charges contained in the SCN are vague and incoherent. The SCN invokes general provisions contained in the LODR Regulations to arbitrarily allege a violation thereof. The Noticee had placed reliance upon the judgment of Hon'ble Supreme Court of India in the matter of *Food Corporation of India vs. State of Punjab and others (2001)1sec291, Canara Bank v. Debasis Das, {2003} 4SCC557 and S.L.Kapoor v. Jagmohan, AIR1981SC136*. In this regard, I note that charges have been clearly spelt out in the SCN, wherein, it is mentioned that "*On account of being a guarantor, the Noticee had a substantial material interest in the said transaction which directly affects the listing entity and therefore, being a KMP of the Company, he had a responsibility to disclose said transaction to the board of directors of the Company. Further, Regulation 4(2)(f) (i)(2) of the LODR Regulations also obligates the Noticee, being a director, to be more transparent to stakeholders by disclosing the details of the said transactions.*". It is also mentioned in the SCN that – "*The Noticee neither ensured the disclosure of aforesaid encumbrance nor informed the board of directors of the Company about his material interests in the said transaction*". In view of the above, it is alleged that the Noticee has failed to comply with the provisions specified under the Regulations 4(2)(f)(i)(1) and 4(2)(f)(i)(2) of the LODR Regulations. In my opinion there is no generality, arbitrariness or ambiguity in specifying the charges against the Noticee and the principle of '*audi alterem partem'* has been followed while making charges in the SCN. Therefore, I do not find contentions of the Noticee tenable.

20. The Noticee submitted that no obligation vested on him to ensure disclosure of the alleged *encumbrance* of shares of the Company held by Morgan, as the clauses contained in the Trust Deed did not amount to an *'encumbrance'* as per Regulation 28 of the SAST Regulations on the shares of the Company held by Morgan, thus warranting disclosure thereof under Regulation 31 of the SAST Regulations. In this regard, I will place reliance upon the Adjudication Order dated March 31, 2020 passed by the Adjudicating Officer of the SEBI in respect of Morgan and Yes Capital India Private Limited in the matter of Yes Bank Limited, wherein, the Learned Adjudicating Officer had *inter alia* held that: –

> *"…..I conclude that transactions carried out by the Noticees by way of raising funds through unlisted ZCNCD with the conditions of maintaining a 'Cover ratio' / 'Borrowing Cap' as part of borrowings is construed as a form of 'encumbrance' on the underlying shares of YBL held by the Noticees and that by not making requisite disclosures of the said encumbrances on shares of YBL held by them to the stock exchanges and YBL, the Noticees have violated the provisions of Regulation 31(1) read with 31(3) and Regulation 28(3) of the SAST Regulations."*

21. The subject matter of '*encumbrance'* of shares of the Company held by Morgan in aforesaid case decided on March 31, 2020 and in the instant case is common. Although the same issue of '*encumbrance'* is not before

me. In view of the same, I am of the opinion that, the contention of the Noticee with respect to alleged '*encumbrance'* and not warranting any disclosures under respective regulation, already has attained finality, as far as I am concerned. Therefore, I reject contentions of the Noticee in this regard.

22. The Noticee has further contended that the said order of the Adjudicating Officer is pending before Hon'ble Securities Appellate Tribunal ("SAT") and therefore matter is *sub judice*. In this regard, I note that the operation of the aforesaid adjudication order dated March 31, 2020 has not been stayed by the Hon'ble SAT and therefore, I note that, there is no bearing of aforesaid appeal filed before Hon'ble SAT in the instant proceedings. Moreover, I also note that preside proceedings before me are entirely on different set of facts and provisions of law, and therefore, there cannot be a bearing of the outcome of the pending appeal before Hon'ble SAT to the proceedings in the instant matter. I therefore, reject such contentions of the Noticee.

23. The Noticee in his submissions has contended that he did not have material interest in a transaction directly affecting the Company. The raising of loans by virtue of issuance of the Morgan ZCNCDs was a transaction involving a promoter entity of the listed Company, and had nothing to do with the Company. In this regard, I note that, as per Para 3 of the Trust Deed, the Noticee being a '*guarantor'* of the said agreement has provided "*personal guarantee*" for the obligations of the Morgan to the extent of Rs 410 Crore and provided his shares in the Company as a security for the outstanding amounts equal to Rs 820 Crore. The content of Para 3 of the Trust Deed is as follows:

> "*3. The Guarantor is the legal and beneficial owner of Guarantor Listed Shares in the Listed Company. The Company and the Promoters have approached the Guarantor to provide a personal guarantee to secure the Outstanding Amounts under the Original DTD and offer all or part of the Guarantor Listed Shares as security for the Outstanding Amounts, if required, in accordance with the provisions of DTD. The Guarantor being a member of the Promoter Family is related to the Promoters of the Company. In consideration of the aforementioned, the guarantor has agreed to provide a personal guarantee for the obligations of the Company under the Original DTD to the extent of INR 410,00,00,000 (Indian Rupees Four Hundred and ten Crores Only ("**Guarantee Cap**") forming part of the Guarantor's Total Liability and , if required as per the provisions of this Deed, such number of Guarantor Listed Shares as security for the Outstanding Amounts which in value are equal to 2.0x (two times) the Guarantee Cap.*"

24. Further, as per Para 22.2(a) of the Trust Deed, the Noticee being a *guarantor* of the said agreement, agreed and undertaken that, in the event of default or redemption of debentures, the first ranking exclusive pledge will be created on the relevant listed shares such that the required redemption cover is maintained. Later on, a pledge has been created by the trustee Milestone on July 18, 2019, on all the shareholding of the Noticee i.e. 10 Crore Shares (4.31% shareholding of the Company). Considering the aforesaid facts and circumstances, I am of the view that the Noticee as a '*guarantor'* has material interest in the said transaction and therefore, I reject such contentions of the Noticee.

25. The Noticee also submitted that the aforesaid transaction has not directly affected the Company. In support of the same, the Noticee stated that, on July 18, 2019 and July 22, 2019, when pledge on his shares was created, the same did not resulted in fall of the price of the shares of the Company. In this regard, I note

that, the pledge on the shares of the Noticee was created on July 18, 2019 and the disclosure was made on July 22, 2019. Prior to that no disclosure was in public domain regarding the Noticee being a "*guarantor*" to the said agreement or from Morgan regarding "*encumbrance*" on its shareholding in the Company. As observed from BSE website, on July 22, 2019, the closing price of the share of the Company was Rs 91.15. From there on the share price keep on declining and on the day when pledge was invoked i.e. on October 01, 2019, the closing price of the share of the Company was Rs 32.00. It is very obvious that the said transaction was material and which has also affected the listed entity. Therefore, saying that the aforesaid transaction has not directly affected the Company is not found to be true and thus, I do not agree with such argument of the Noticee.

26. The Noticee has submitted that he has always conducted himself in a manner so as to meet the expectations of operational transparency to stakeholders of the Company. Provisions of Regulation 4(2)(f)(i)(2) of the LODR Regulations only pertains to matters that would affect the operational transparency of a listed company i.e. would restrict or affect the operations in any manner. In the instant case, the issuance of ZCNCDs by Morgan and the acting of the Noticee as *guarantor* to the said issue do not affect the operations of the Company and only pertains to the raising of funds by Morgan, a promoter of the Company. In this regard, I note that, the "*operational transparency*" can be generally understood as *lacking of hidden agendas or conditions, accompanied by the availability of full information required of collaboration, cooperation, and collective decision making in operations of a Company*. Further, the operation means "*discharge of a function or an active process*". In the instant case, the Noticee has hidden the material information of him being a '*guarantor'* to the said transaction from the board of directors of the Company and the same has directly impacted the Company in terms of the market capitalization as observed in para 25 above. Considering the same, saying that '*operations'* of the Company has not been affected and operational transparency to stakeholders of the Company has been maintained, is not tenable and thus, I reject the argument of the Noticee in this regard.

27. I also note that the Noticee was the Managing Director and Chief Executive Officer of the Company at relevant period i.e. when he executed Trust Deed agreement as a '*guarantor'* to the obligations / liabilities of the Morgan. The term *"managing director"* has been defined in the Companies Act, 2013 under sub-section 54 of section 2, – as applicable at the relevant time -, as "*managing director means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called."* A Managing Director holds the position of trust and has fiduciary duties towards the company, the shareholders and other stakeholders. Therefore, the Noticee was responsible and was under the duty of trust to the Company and its shareholders while dealing in aforesaid transaction. However, the Noticee failed in ensuring the disclosure of aforesaid '*encumbrance'* by Morgan, despite being an integral part of the transaction. The Noticee also failed in informing the Board of Directors of the Company about his material interests in the said transaction.

28. In view of the above, I conclude that transaction carried out by the Noticee *via* Trust Deed dated November 14, 2018 by way of providing "*personal guarantee*" for the obligations of the Morgan issued ZCNCDs was an

event involving substantial material interest and was having direct bearing on the Company and therefore, by not disclosing the same to the Board of Directors of the Company, the Noticee has violated the provision of Regulation 4(2)(f)(i)(1) of the LODR Regulation. Further, the Noticee has failed in maintaining expected operational transparency towards the Company and stakeholders and thus, violated the provision of Regulation 4(2)(f)(i)(2) of the LODR Regulation. The breach in the facts and circumstances as found hereinabove, in my view deserves imposition of monetary penalty upon the Noticee under section 15HB of the SEBI Act which provides as following: -

SEBI Act

Penalty for contravention where no separate penalty has been provided.

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

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

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

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

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

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

(c) the repetitive nature of the default.

Explanation-

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

30. It is noted that from the material available on record, any quantifiable gain or unfair advantage accrued to the Noticee or the extent of loss suffered by the investors as a result of the default in this case cannot be computed. It is also a settled position that the factors under section 15J are not exhaustive but are inclusive. The provision of Regulation 4(2)(f)(i)(1) of the LODR Regulation is meant to ensure timely disclosure of the matter of material interest by the members of board of directors and key managerial personnel as such disclosures infuse transparency in the whole system. As per Regulation 4(2)(f)(i)(2), the Board of Directors and Senior Management of the listed company are required to conduct themselves so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality

of information in order to foster a culture of good decision-making. These provisions are also as corollary to principles laid down for corporate governance as enshrined under the Companies Act, 2013, LODR Regulations and Exchange Listing Agreements and are thus meant for ensuring corporate governance in a listed company. Thus, the Noticee, being the MD and CEO of the Company, was primarily responsible to ensure timely disclosures of material events as observed in this case. The provisions of regulation 4 of the LODR Regulations are meant to ensure timely dissemination of material and price sensitive information to enable investors to make well-informed investment decisions and, timely, adequate and accurate disclosure of information on an ongoing basis and need of uniformity in disclosures made by the KMPs to ensure compliance in letter and spirit. It has been demonstrated in preceding paras 24 and 25, that the information which was material in nature had a potential to effect the listed entity.

31. I further note that true, fair, adequate and timely disclosures by the KMP form one of the basic tenets of governance in the listed companies and are essential for maintaining the integrity of the securities market. Timely disclosures of the details of the abovementioned material events are of significant importance as such disclosures also enable the regulators to monitor such a material events. Such disclosures also bring about transparency and enable the investors in the scrip to take an informed investment or disinvestment decision. Hon'ble SAT in the matter of *Coimbatore Flavors & Fragrances Ltd. vs SEBI (Appeal No. 209 of 2014 order dated August 11, 2014)*, has also held that "*Undoubtedly, the purpose of these disclosures is to bring about more transparency in the affairs of the companies. True and timely disclosures by a company or its promoters are very essential from two angles. Firstly; investors can take a more informed decision to invest or not to invest in a particular scrip secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same.*" Further in the matter of Appeal No. 66 of 2003 -*Milan Mahendra Securities Pvt. Ltd. vs. SEBI*–the Hon'ble SAT, vide its order dated April 15, 2005 held that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market.*"

32. In this case, the nature of the default by the Noticee is found to be serious, since the Noticee failed to disclose material events / information as found hereinabove. Such defaults by the Noticee being a MD and CEO of the Company are blameworthy and grave considering the degree of responsibility and duty cast upon him under the law. The Noticee has breached his fiduciary duties by not only failing to disclose but also by deliberately hiding the material events thereby affecting the listed entity adversely. Considering the magnitude of the information involved in the material events as found in this case, the default of the Noticee certainly caused adverse effect on the market integrity. In this regard, the observations of the Hon'ble Supreme Court, as a word of caution, in the matter of *N. Narayanan vs. Adjudicating Officer, SEBI, in Civil Appeal Nos. 4112-4113 of 2013*, (order dated April 26, 2013) is worth mentioning:

> *"People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity."*

33. This is a case where by not disclosing the substantial material interest in the transaction to the Board of Directors of the Company, the Noticee has created an opaque layer between him and stakeholders. The law does not permit any allowance to be made for such defaults as found in this case. The brazen failure with regard to disclosures of material information and cardinal principles of corporate governance as found in this case, had clearly defeated the purposes of the Regulations i.e. investor protection and protection of integrity of the securities markets. This is not a case where the information with regard to the material events had to come from any third party to the Noticee. In fact, the Noticee was in possession of and was privy to all the material events. Therefore, no lenient view should be taken in this matter and the case deserves imposition of monetary penalty proportionate to the default as found in this case. I am of the considered opinion that the deliberate defiance of the mandatory obligations and hiding the crucial and material information, as found in this case should be dealt with sternly and the penalty in such cases should serve as effective deterrence.

34. Therefore, having regard to the factors listed in section 15J and considering the facts and circumstances of the case and the findings arrived in the matter, I, in exercise of the powers conferred upon me under section 15I of the SEBI Act read with rule 5 of the Adjudication Rules, hereby impose a consolidated monetary penalty of total Rs 1,00,00,000/- (Rupees One Crore Only) on the Noticee, Mr. Rana Kapoor, for the violations of Regulations 4(2)(f)(i)(1) and 4(2)(f)(i)(2) of the LODR Regulations, under section 15HB of the SEBI Act. In my view, the said penalty is commensurate with the violations committed by the Noticee as found in this case.

35. The Noticee shall remit / pay the aforesaid amount of penalty imposed upon them separately within 45 days from April 15, 2020, either of the way of demand draft in favour of "*SEBI - Penalties Remittable to Government of India*", payable at Mumbai, or by following the path at SEBI website www.sebi.gov.in, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticee may contact the support at portalhelp@sebi.gov.in.

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

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

37. In the event of failure to pay the aforesaid amount of penalty by the Noticee within 45 days from April 15, 2020, recovery proceedings may be initiated under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia,* by attachment and sale of movable and immovable properties of the Noticee.

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

Date: September 25, 2020
Place: Mumbai

Amit Pradhan
Adjudicating Officer