WTM/RKA/CFD/DCR/ 67/2012

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: RAJEEV KUMAR AGARWAL, WHOLE TIME MEMBER

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (SEBI Act) read with regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Regulations, 1997) read with regulation 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations, 2011).

In respect of Mr. Sunil Khaitan, Mr. Krishna Khaitan, Khaitan Lefin Limited and The Orientale Mercantile Company Limited in the matter of acquisition of shares of Khaitan Electricals Limited.

Appearances

For the noticees:

1. Shri Vyapak Desai, Advocate, M/s. Nishith Desai Associates
2. Ms. Ruchi Biyani, Advocate, M/s. Nishith Desai Associates
3. Shri Aditya Shukla, Advocate, M/s. Nishith Desai Associates
4. Shri S. Prabhakar, Khaitan Electricals Limited

For SEBI:

1. Shri Anindya Das, Deputy General Manager
2. Shri T. Vinay Rajneesh, Assistant Legal Adviser
3. Shri Piyushkumar Mahajan, Assistant Manager

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1. Khaitan Electricals Limited ('the Target Company') is a company incorporated under the Companies Act, 1956 having its registered office at A-13, Co-operative Industrial Estate, Balanagar, Hyderabad-500037. The shares of the Target Company are listed on the Bombay Stock Exchange Limited ('BSE') and the National Stock Exchange of India Limited ('NSE'). Mr. Sunil Khaitan, Mr. Krishna Khaitan, Khaitan Lefin Limited (KLL) and the Orientale Mercantile Company Limited (OMCL) {hereinafter collectively referred to as "the noticees "}, are from amongst the promoter group of the Target Company. The word 'shares' wherever used in this order would mean shares unless the context otherwise requires.

2. On March 12, 2007, the noticees acquired 13,00,000 shares (upon conversion of warrants) in the Target Company in two tranches i.e. 5,00,000 shares in one transaction and 8,00,000 shares in the other. Out of these 13,00,000 shares, Mr. Sunil Khaitan and Mr. Krishna Khaitan acquired 50,000 shares each, KLL acquired 9,00,000 shares and OMCL acquired 3,00,000 shares.

3. SEBI issued a show cause notice ("SCN") dated March 26, 2012 to the noticees alleging that consequent to the acquisition of shares on March 12, 2007, there was increase in their pre-acquisition shareholding (as on March 11, 2007) of –

   (a) KLL, individually, from 10,73,415 shares (10.52%) to 19,73,415 shares (17.16%) in the Target Company and KLL failed to make a public announcement to acquire shares in accordance with provisions of regulation 10 read with regulation 14(1) of the Takeover Regulations, 1997 within 4 working days from March 12, 2007;

   (b) The promoter group, collectively, from 26,34,639 shares (25.83%) to 39,34,639 shares (34.21%) and the acquirers collectively failed to make a public announcement in accordance with the provisions of regulation 11(1) read with regulation 14(1) of the Takeover Regulations, 1997 within 4 working days from March 12, 2007.

4. The SCN called upon the noticees to show cause as to why suitable directions under sections 11 and 11B of the SEBI Act read with regulations 44 and 45 of the Takeover Regulations, 1997 and regulations 32 and 35 of the Takeover Regulations, 2011 should not be issued against them for the above stated alleged violations.

5. The noticees filed their reply vide letter dated June 11, 2012. During personal hearing before me on August 21, 2012, Mr. Vyapak Desai, Advocate appeared and made submissions on behalf of the noticees. The noticees also filed their written submissions dated August 24, 2012. The submissions of the noticees with respect to specific charges alleged in the SCN are summarised as follows :

   (a) On March 28, 2006, the Target Company allotted 10,00,000 warrants to the noticees by way of preferential allotment out of which KLL was allotted 6,00,000 warrants. On December 14, 2006, KLL was again allotted 10,00,000 warrants.

   (b) On June 30, 2006, out of said 6,00,000 warrants allotted to KLL on March 28,2006, it converted 5,00,000 warrants into shares.

   (c) On March 12, 2007, 5,00,000 equity shares were allotted to KLL, OMCL, Mr. Sunil Khaitan and Mr. Krishna Khaitan pursuant to conversion of 5,00,000 warrants allotted to them. Further, on this date, 8, 00,000 equity shares were allotted to KLL pursuant to conversion of 8,00,000 warrants.

   (d) According to the noticees, pursuant to conversion of warrants into shares on March 12, 2007, the pre-acquisition shareholding (as on June 29, 2006) of KLL in the target company increased from 5,73,415 shares (7.96%) to 19,73,415 shares (17.16%) and

that of promoter group increased from 21,33,468 shares (29.63%) to 39,34,639 shares (34.21%).

(e) The noticees have contended that the application of regulation 10 of the Takeover Regulations, 1997 is limited to only those cases, wherein the acquisition of shares/voting rights by the acquirer taken together with the shares /voting rights already held by *'persons acting in concert'* results in breach of threshold of 15% shares/voting rights in the Target Company. It is not applicable in cases where the acquirer's acquisition which when taken together with shares/voting rights already held by 'persons acting in concert' is already beyond 15% of the shares in the Target Company.

(f) The definition of expression "*person acting in concert*" is acquisition specific. KLL being a disclosed member of promoter group; being a company under the same management and nothing contrary been established, the promoters including KLL are '*person acting in concert'* as defined in regulation 2(1) (e) (2) of the Takeover Regulations, 1997. The preferential allotment of warrants was made with the objective of consolidating the promoters' shareholding in the Target Company. The acquisition of shares/voting rights on March 12, 2007 was an acquisition by promoter group including KLL, who are 'persons acting in concert'. Since KLL is admittedly part of the promoter group, to determine whether the provisions of regulation 10 or 11 are triggered, the acquisitions made by the promoter group acting in concert, as a whole, should be taken into consideration.

(g) Vide order dated August 28, 2008 the Adjudicating Officer of SEBI in the matter of *Jamnalal Sons Private Limited*, has also noted that ' .....*acquisition of shares by the acquirer means acquisition by the acquirer along with other persons acting in concert. In the instant case, as the acquirer admittedly belongs to the promoter group, thereafter for determining the triggering of provisions of SAST, the acquisition made by whole promoter group should be taken into consideration.....'* Thus, as highlighted by SEBI any acquisition made by an acquirer who belongs to promoter group should be considered as being made by whole promoter group, for determining the triggering of provisions of Takeover Regulations.

(h) Additionally, Hon'ble Securities Appellate Tribunal (SAT) vide order dated June 01, 2012 in the matter of *Rajesh Toshniwal vs. SEBI* opined that the promoter group should be regarded as a homogeneous unit and should be taken as such unless proven otherwise. Hon'ble SAT in that case observed that – *'It is a basic principle in corporate law that promoter group is a homogenous class'. It is normal practice to club entire promoter group into one class unless otherwise proved ....."* Hon'ble SAT further opined that-*' The promoters, as a rule, belong to a homogeneous group unless otherwise proved by attendant circumstances to be otherwise*

.....It is matter of record that the shareholding of the entire promoter group was always disclosed as group holding to the regulators.'

(i) Regulation 10 and regulation 11 are mutually exclusive such that only either regulation 10 or regulation 11 may be applicable to an acquisition, but not both. Thus, if an acquirer along with persons acting in concert already holds shares or voting rights in excess of 15%, he can not be in breach of regulation 10. In this case, since promoter group including KLL, being *'persons are acting in concert',* already together held more than 15% shares/voting rights prior to March 12, 2007, further acquisition of shares/voting rights by the promoter group (including KLL) on March 12, 2007 will fall within the ambit of regulation 11 and not regulation 10. Therefore, regulation 10 of the Takeover Regulations, 1997 does not get triggered and hence there is no violation of the regulation 10 read with regulation 14(1).

(j) As regards allegation of violation of regulation 11 of the Takeovers Regulations, 1997, the noticees have contended that regulation 11(1), clearly allows an acquirer who together with *'persons acting in concert'* already holds more than 15% but less than 55% of shares/voting rights of a company, to acquire additional shares or voting rights of up to 5% of the company in a financial year ending on March 31, without making a public announcement. The purpose of regulation 11(1) was to focus on the incremental increase in the shareholding of the acquirers during the financial year ending on March 31. Therefore, any incremental increase in the percentage shareholding of the acquirers has to be reckoned as of the end of the financial year ending on March 31. According to the noticees, this view is substantiated by deliberation and consequent recommendation in *para* 3.3 of Justice P.N. Bhagwati Committee Report of 2002, wherein the Committee observed that- '*For putting the matter beyond doubt and avoiding inadvertent breaching of the Regulations, it was felt that the creeping acquisition limit may be reckoned with respect to financial year ending March 31 (i.e. from 1st April to 31st March).*' And recommended that- '*The creeping acquisition limit may be reckoned with respect to financial year ending March 31(i.e. April 1 to March 31).*'

(k) In the instant case, during the Financial Year 2006-2007 (i.e. between April 1, 2006 to March 31, 2006), there was actually a drop in the total percentage shareholding of the promoter group. As on April 1, 2006 the shareholding of promoter group in the Target Company was 47.68%. Consequent to sale of 13,00,000 shares by promoter group during April/May 2006, their shareholding came down to 29.63%. First acquisition of shares in this financial year by promoter group took place when 5,00,000 warrants were converted into 5,00,000 shares on June 30, 2006, which resulted in increase in their shareholding from 29.63% to 34.20%. Thereafter, there was another acquisition of

1,171 shares through market purchase that increased promoter group's shareholding to 34.22%. On December 14, 2006, Target Company allotted 25,00,000 shares to strategic investors on preferential basis resulting in dilution of promoters' shareholding from 34.22% to 25.83%. Thereafter, pursuant to allotment of shares on March 12, 2007 to members of promoter group on conversion of warrants, their shareholding increased to 34.21%. Acquisitions/disposal of shares/voting rights by the members of the promoter group during March 31, 2006 to March 31, 2007 is submitted as following:

Change in shareholding of the promoter group of the Target Company during 2006-2007								
S.No.	**Description of Transaction**	**Promoter Group Shareholding**				**Total no. of shares**	**% of expanded capital**	**% of unexpanded capital**
		Shares	**Total no. of shares**	**Total % holding**	**Change in % holding as a result of acquisition/sale**			
1	Holding as of March 31, 2006	N.A.	3433268	47.68		7200000		
2	Shares sold by Promoter Group (in April and May 2006)	1300000	2133468	29.63	-18.05	7200000	18.05	18.05
3	Conversion of warrants allotted to Promoter Group (June 30, 2006)	500000	2633468	34.2	4.57	7700000	6.49	6.94
4	Market purchase by Promoter Group (from July to September 2006)	1171	2634639	34.22	0.02	7700000	0.02	0.02
5	Allotment of preferential shares to strategic investors (December 14, 2006)	2500000	2634639	25.83	-8.39	10200000	24.5	32.47
6	Conversion of warrants allotted to Promoter Group (March 12, 2007	500000	3134639	29.3	3.47	10700000	4.67	4.9

7	Conversion of warrants allotted to Promoter Group (March 12, 2007)	800000	3934639	34.21	4.91	11500000	6.95	7.48

(l) The noticees have disputed the reference date i.e. March 11, 2007 taken in SCN for determining the pre- acquisition shareholdings for the purpose of percentage of creep-in acquisition under regulation 11(1). According to the noticees, the reference date for determining the pre-allotment and post-allotment shareholding for the purposes of regulation 11(1) should be the first acquisition of shares by the acquirer in the financial year ending March 31, 2007, which in their case happens to be June 30, 2006 i.e. the day when first conversion of warrants into 5,00,000 shares took place in the relevant financial year. The shareholding of the promoter group just prior to this conversion should be the pre-allotment benchmark shareholding for the purpose of calculating the creeping acquisition by the promoter group. In the instant case, the pre-allotment benchmark shareholding for calculating the percentage of creeping acquisition under regulation 11(1) will be 29.63% i.e. the shareholding of the promoter group as on June 29, 2006.

(m) The noticees have contended that above submissions are based on position taken by SEBI in the following informal guidance dated December 11, 2008 given in the matter of *Kohinoor Foods Limited*:-

> *"4.4 In the case of acquisition of warrants, Regulation 11(1) is triggered on the date of allotment of the shares by the Board of Directors of the company pursuant to conversion of warrants as voting rights are acquired on such date. Therefore, the percentage has to be calculated based on the shareholding on such date and the acquisition cannot increase beyond the percentage specified under Regulation 11(1).*
>
> *4.5 ...., the 5% voting rights shall have to be calculated against the voting rights already held by the acquirer as on the date of acquisition of shares which entitle the acquirer to exercise voting rights in the target company. Further, if at any point of time during the financial year the acquisition is beyond 5% limit, Regulation 11 (1) would be triggered. In the instant case, on conversion of warrants by promoters the shareholding of promoters will increase from 32.06% to 50.69%. This increase of 18.63% on the date of conversion of warrants during the financial year would trigger Regulation 11(1)."*

(n) It has been a consistent policy under the Takeover Regulations to determine the applicability of regulations 10 or 11 in case of fresh allotment/acquisition of shares, by taking into consideration only the incremental voting rights acquired by the acquirer. The Report of the Takeovers Regulations Advisory Committee (TRAC) reaffirms this

practice relating to the calculation of shareholding for the purposes of the Takeover Regulations.

(o) The TRAC Report clearly highlights that in order to calculate the extent of acquisition by an acquirer, the current policy (*for the financial year 2006-2007*) is to take only gross purchase (ignoring any sales or dilution of stake due to equity issuances in which the existing shareholder did not participate) would count towards ascertaining whether the limit under the Takeover Regulations has been reached. In this case, as on March 31, 2006, the promoter group's shareholding in the Target Company was 47.68%. For calculating the benchmark holding for creeping acquisition, as per the current policy, gross purchases had to be included and any sale or dilution of stake due to issuance have to be ignored. Thus, the sale of 1,30,000 shares during April/May 2006 by promoters and allotment of 25,00,000 shares to the strategic investors on December 14, 2006 would be ignored while calculating the benchmark holding. After ignoring these two transactions that resulted in reducing the promoters holding during the financial year, the first acquisition of shares by the noticees during 2006-2007 took place on June 30, 2006 when their 5,00,000 warrants were converted into shares. Thus, the shareholding of the promoters immediately preceding this acquisition would be reckoned as the pre-allotment shareholding of the promoter group. In this case, the shareholding of the promoter group immediately preceding this acquisition was 29.63% and the 5% creeping acquisition limit during the financial year 2006-2007 will be reckoned with this benchmark holding.

(p) SEBI has not stated any basis for taking 25.83% shareholding as on March 11, 2007 as reference shareholding in the SCN. The promoter group shareholding got reduced from 34.63% to 25.83% involuntarily pursuant to preferential allotment of 25,00,000 shares to strategic investors on December 14, 2006 in which promoters did not participate. Hence, 25.83% shareholding as on March 11, 2007 cannot be reference benchmark to calculate incremental increase of voting rights for the purposes of creeping acquisition under regulation 11.

(q) The noticees have argued that the total increase in shareholding of promoter group during the financial year 2006-2007 was from 29.63% as on June 29, 2006 to 34.21% as on March 31, 2007. Since this incremental acquisition (34.21%-29.63% = 4.58%) is within permissible 5% creeping acquisition limit there was no violation of regulation 11 by the noticees.

6. With regard to the acquisition in question the noticees have further submitted that the acquisition was made by the promoter group in transparent and compliant manner after following the prescribed process. Warrants were issued to the promoters at a price higher than

the price calculated as per the SEBI (Disclosure and Investor Protection) guidelines, 2000. The 13,00,000 shares allotted to the promoters pursuant to the conversion of warrants have not been admitted for trading on the stock exchanges and there can be no loss to the investors with respect to those shares. Further, the noticees have not gained anything unduly out of those shares. A mere technical requirement of open offer by the promoter group would principally be unfair and unreasonable to the promoter group where no substantial acquisition in violation of the Takeover Regulations has been made.

7. In view of above, the noticees have submitted that the SCN issued against them be set-aside.

8. I have considered the SCN, the aforesaid submissions of the noticees and the material available on record. I note that on June 29, 2006, KLL was individually holding 7.96% shares in the Target Company. On conversion of its 5,00,000 warrants into 5,00,000 shares on June 30,2006 its shareholding has increased to 13.94% and as on March 11, 2007 its individual shareholding in the Target Company was 10.52%. There is no dispute as to the fact that on March 12, 2007 the voting rights of KLL, individually, increased to 17.16% in the Target Company pursuant to the conversion of 9,00,000 warrants into 9,00,000 shares and, immediately prior to this acquisition, KLL was individually holding less than 15% shares in the Target Company. There is also no dispute as to the fact that KLL is part of the promoter group of the Target Company and all promoters are persons acting in concert. It is admitted fact that the conversion of 13,00,000 warrants on March 12, 2007 resulted in increase in the shareholding of the promoter group in the Target Company to 34.21%.

9. The dispute is only with regard to the breach of regulation 10 by KLL and that of regulation 11(1) by the promoter group. According to the noticees the acquisition in question falls within the ambit of regulation 11 and not within regulation 10 since the promoter group including KLL, being persons acting in concert already held more than 15% shares in the Target Company prior to the acquisition on March 12, 2007. The noticees have further disputed the calculation of the percentage and the reference date (pre-acquisition date) for the purposes of determining the 5% creeping limit under regulation 11(1) and have contended that the acquisition in question, being within the 5% benchmark limit, would qualify for the benefit of creeping acquisition. The question that requires to be addressed, in light of the facts of this case, is as to whether the noticees are required to make a public offer under regulations 10 and 11(1) read with regulation 14(1) of the Takeover Regulations, 1997. As the answer to the question would depend on the proper interpretation of regulations 10 and 11(1), it is necessary to examine the provisions of the relevant regulations that were applicable to the facts of the case at the relevant time. Those provisions are reproduced hereunder:

"Acquisition of fifteen per cent or more of the shares or voting rights of any company.

10. No acquirer shall acquire shares or voting rights which taken together with shares or voting rights, if any, held by him or by persons acting in concert with him, entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations."

"Consolidation of holdings.

11.(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than 55 per cent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

" Timing of the public announcement of offer.

14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:
……
……..."

10. From the expression " *acquire shares or voting rights which taken together with shares or voting rights, if any, held by him* ***or*** *by persons acting in concert with him*" in regulation 10, it is clear that an acquirer is under obligation to make the public announcement to acquire shares of the Target Company in accordance with the Takeover Regulations, in following two different situations , namely :-

    (a) shares/voting rights sought to be acquired by an acquirer + shares/voting rights already held (if any) by the acquirer prior to the acquisition entitle him to exercise 15% or more voting rights ; **or**
    (b) shares /voting rights sought to be acquired by an acquirer + shares/voting rights already held (if any) by the acquirer + shares/voting rights already held (if any) by person acting in concert with the acquirer, entitle him to exercise 15% or more voting rights**.**

11. Thus, the obligation to make public announcement under regulation 10 gets triggered when the acquisition of the acquirer, individually **or** collectively alongwith persons acting in concert with him, would cross the threshold limit of 15%. Thus, if individual acquisition of any person in a group (acting in concert) breaches the threshold limit of 15%, such acquirer is under obligation to make public announcement under regulation 10. In my view, there is no ambiguity in the language of regulation 10 with regard to the obligation of an acquirer whose acquisition increases his individual shareholding beyond threshold limit of 15% and no other interpretation can be given to it. I, therefore, find that in this case, the individual acquisition of

KLL pursuant to conversion of its 9,00,000 warrants into 9,00,0000 shares on March 12, 2007 in the Target Company triggered its obligation to make public announcement under regulation 10.

12. However, if at all any doubt arises about applicability of regulations 10, 11 or 12 the regulations should be construed according to their intent and object. The intent and the object of the Takeover Regulations can be found in the provisions of section 11 of the SEBI Act, 1992 that states duty of the Board, *inter alia* to protect the interests of investors in securities by such *'measures'* as it thinks fit. One of such *measures* is specified in section 11(2)(h) and that is, the *measure* to regulate *'substantial acquisition of shares and takeover of companies'*. The Takeover Regulations, 1997 were framed on the basis of recommendations of Justice Bhagwati Committee Report dated January 18, 1997 which reemphasised the above objective and pointed out that the Regulations should operate principally to ensure fair and equal treatment of all share holders in relation to substantial acquisition of shares and takeovers and they should ensure that such process do not take place in a clandestine manner without protecting the interest of investors. The Committee had also recognised that there should be a set of 'General Principles' which should guide the interpretation and operation of the Regulations, especially in circumstances which are not explicitly covered by the Regulations. These principles include :

    1. *Equality of treatment and opportunity to all shareholders.*
    2. *Protection of interests of shareholders.*

    The Committee had also recommended that -*"In the event of any ambiguity or doubt as to the interpretation of the regulations, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter"*.

13. The Takeover Regulations, 1997 particularly regulations 10, 11 and 12 thereof are, thus, intended to protect the interests of investors in the Target Company. It is relevant to mention that subsequent amendments to Takeover Regulations, 1997 or the new Takeover Regulations, 2011 have retained and continued the inherent and basic objectives as contemplated in section 11 of the SEBI Act and that were highlighted by Justice Bhagwati Committee.

14. Regulations 10, 11 and 12 of the Takeover Regulations, 1997 were core regulations, at the relevant time, to deal with substantial acquisition of shares and control and they all obligated mandatory public announcement in case of substantial acquisition of shares beyond specified thresholds and/or acquisition of control. The intent and object behind the obligation with regard to public announcement under regulation 10, 11 and 12 is common. Regulation 10 does not exempt an acquirer from this obligation when he individually breaches the threshold of

regulation 10 but his shareholding collectively with persons acting in concert with him is beyond the threshold prior to his individual acquisition as sought to be contended by the noticees. In my view, therefore, no interpretation can be taken in violation of the language of the regulations or to defeat the intent and object thereof.

15. If a technical interpretation as argued by the noticees is given to regulation 10 then an individual may acquire substantial shares beyond specified threshold and /or control and evade the obligations by claiming benefit of creeping acquisition under regulation 11 by joining the holdings of other persons who might be persons acting in concert or who may join the acquirer as such to enable him to evade the obligation under regulation 10.

16. I note that the noticees have relied upon an order dated August 28, 2008 passed by an Adjudicating Officer in the matter of *Jamnalal Sons Pvt. Ltd* . I would, however, prefer to form an independent view considering merits of the present case. Further, the decision of Hon'ble SAT in the matter of *Rajesh Toshniwal vs. SEBI* relied upon by the noticees can not be of any help to the noticees as it dealt with different set of facts. I note that the acquisitions in that case were by conversion of warrants into shares by a set of promoters while other promoters were acting in concert with acquiring promoters. The issue in that case was whether the subsequent acquisition of acquiring promoters' attracted prohibition under regulation 20(7) and 20A. In that case, none of the promoters had individually breached threshold limit of 15% under regulation 10.

17. The noticees have further argued that regulation 10 and regulation 11 are mutually exclusive such that only either regulation 10 or regulation 11 is applicable to an acquisition, but not both. From the scheme of Takeover Regulations, 1997, I note that these three core regulations i.e. 10, 11 and 12, as they are written, are mutually exclusive. However, depending upon facts and circumstances of a case, they may coincide and overlap such that an acquisition may together trigger any two or all of them. In this regard, I also note that Hon'ble Supreme Court , vide order date August 25, 2004, in the matter of *Swedish Match AB vs. Securities and Exchange Board of India* held that regulations 10, 11 and 12, as they appear, operate in three different fields. However, there may be cases where, to some extent, regulations 11 and 12 may overlap with each other, in which event it would be open to the acquirer to issue a combined public announcement fulfilling the requirement of both regulations 11 and 12. Hon'ble Supreme Court also held that even when a single acquirer acquires more than 5% voting rights, irrespective of the total voting rights of the promoter group, the acquirer is under an obligation to make public announcement under the Takeover Regulations, 1997. Further, the Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 25, 2012 in the matter of *Hanumesh Realtors Limited vs. SEBI* has held that an acquirer is obligated to make a public

announcement if he is able to exercise more than 5% in a financial year, in terms of regulation 11(1), irrespective of whether the promoter group was able to exercise 5% or more.

18. I am of the view that, since these three regulations have the same object and consequence, the ratio of these judgments will also apply with respect to obligation under regulation 10 ; and, in a given case, regulations 10 and 11 or regulations 10 and 12 may also overlap. Thus, in this case, since KLL individually crossed 15% threshold limit by virtue of its acquisition on March 12, 2007, it was obligated to make a public announcement under regulations 10 and 14(1), within 4 days from March 12, 2007. Having failed to make the obligatory public announcement, it has contravened regulations 10 and 14(1) of the Takeover Regulations, 1997.

19. The next question for my consideration is whether the noticees triggered the obligation to make public announcement under regulation 11(1) by virtue of acquisition of shares by the promoter group on March 12, 2007. On examination of provisions of regulation 11(1), I note that for triggering the obligation to make public announcement under this regulation, following essential ingredients should be satisfied –

(i) The acquirer together with persons acting in concert holds shares between 15% to 55% in the target company,
(ii) The acquirer acquires additional shares or voting rights by himself or through or with persons acting in concert,
(iii) The additional acquisition entitles the acquirer to exercise more than 5% of the voting rights in any financial year ending on 31st March.

20. In this case, admittedly, the first two ingredients are satisfied. However, the acquirers have disputed the reference date for determining the pre-acquisition shareholding and the calculation of percentage of additional acquisition by them, so as to satisfy the third ingredient. Relying upon the recommendation of Justice P.N. Bhagwati Committee Report of 2002, the noticees have contended that as per regulation 11(1) any incremental increase in the acquirer's percentage shareholding has to be reckoned as of the end of the financial year ending on March 31. In this regard, I note that regulation 11(1) as originally made by SEBI Board on the basis of Justice Bhagwati Committee Report of 1997 which had recommended the provisions for creeping acquisitions by certain acquirers upto a specified limit within any period of 12 months. The Committee had emphasised on such consolidation to be only allowed in a regulated manner without unduly affecting the interest of the shareholders. Prior to its amendment on September 09, 2002, the regulation 11(1) provided permissible creeping acquisition in any period of twelve months, without attracting the mandatory public offer requirement. Since this reference period had inherent doubts about determination of reference period, in order to put the matter beyond doubt, the Board amended the regulations on the basis of following recommendation of Justice P.N. Bhagwati Committee Report of 2002 -'*The*

creeping acquisition limit may be reckoned with respect to financial year ending March 31(i.e. April 1 to March 31).'

21. After such amendment, the creeping acquisition limit has to be reckoned *" in a financial year ending March 31st"* and not as of the end of the financial year ending on March 31st as argued by the noticees. It is obvious from the language of regulation 11(1) that to avail benefit of creeping acquisition the additional acquisition should not entitle the acquirer to exercise more than 5% of the voting rights in the Target Company in any financial year that starts on April 01st and ends on March 31st. In my view, the interpretation sought to be given by the noticees will be contrary to the language and object of regulation 11(1). If the argument of the noticees is accepted, an acquirer may acquire any percentage of shares in a financial year and by the end of that financial year he may reduce it to 5% by sale of holding or otherwise. This is not the intention of the regulation which, since inception, had put a limit on percentage of creeping acquisition and did not allow netting of acquisition and disinvestment for determining the percentage of increase. Such intention is noted from *Justice P.N. Bhagwati Committee Report of 1997* wherein the Committee had recommended that -

> *"The percentage of acquisition referred to above is on absolute basis i.e. there should be no netting of acquisition and disinvestment during the said period. In other words, if a person acquired x% during a period of 12 months, sold y% and acquired z% his aggregate acquisitions of (x% + z%) would be reckoned for the purpose of the Regulation and not (x% - y% + z%)."*

22. I, therefore, am of the view that for the purpose of availing creeping benefit under regulation 11(1), the gross acquisition of the acquirer should not be more 5% in a financial year that starts on April 1st and ends on March 31st. Further, if at any point of time, in that financial year, the acquisition breaches the threshold of 5% creeping acquisition, the obligation to make public announcement is triggered at that time itself. Regulation 11(1) does not allow an acquirer to wait till end of the financial year after such breach.

23. The other contention of the noticees is that the reference date for determining the pre-allotment and post-allotment shareholding for the purposes of regulation 11(1) should be the first acquisition of shares by the acquirer in the financial year, which in their case happens to be June 30, 2006 i.e. the day when first conversion of warrants into 5, 00,000 shares took place in the financial year ending on March 31, 2007. The shareholding of the noticees just prior to the first acquisition should be the pre-allotment benchmark shareholding and not the shareholding prior to March 12, 2007 as taken in SCN. According to the noticees, in their case, the pre- allotment benchmark shareholding for calculating the percentage of creeping acquisition under regulation 11(1) will be 29.63% i.e. their shareholding as on June 29, 2006.

24. I am of the view that the pre-acquisition benchmark has to be determined on the date when the acquisition in question breaches the benchmark limit either by itself or taking into account

the gross purchase of the acquirer because if the benchmark limit is breached, the obligation under regulation 11(1) would be triggered. Therefore, it is necessary to understand the date when the obligation of public announcement under regulation 11 is triggered. In my view, from the definition of the word 'acquirer' under regulation 2(1)(b) and the provisions of regulation 11 of the Takeover Regulations, 1997 it is clear that the obligation to make public announcement is triggered on the date of agreement to acquire or acquisition of shares or voting rights, as the case may be. Thus, the shareholding shall be calculated and reckoned taking into account the shareholding of the acquirer immediately prior to the acquisition. I, therefore, hold that the shareholding of the acquirers as on the date of the acquisition of additional shares should be taken into account to determine whether the acquisition entitles the acquirer to exercise more than 5% voting rights in the Target Company in a financial year ending on March 31st. Further, the 5% increase in the financial year has to be calculated on gross basis without netting the dilution and/or divestment and acquisition. Accordingly, the arguments of the noticees in this regard also cannot hold good.

25. In this regard, I have also perused the informal guidance issued by SEBI in the case of *Kohinoor Foods* that has been relied by the noticees. I note that in that matter, the promoters were holding 44.12% shares as on March 31, 2008. After conversion of the FCCBs, the shareholding of the promoters in that target company reduced to 36.06% as on October 08, 2008. The promoters desired to convert their warrants and pursuant to the conversion their shareholding could increase from 32.06% to 50.69%. The company was of the opinion that the promoters could acquire shares so as to increase their shareholding from 32.06% to 49.12% without making open offer under regulation 11(1) as the acquisition would be within creeping limit i.e. 5% increase from 44.12% to 49.12%. I note that in that case, the concerned department of SEBI had informed the company that the percentage has to be calculated based on the shareholding of the acquirer on the date of acquisition of shares pursuant to conversion of warrants and the 5% voting rights shall have to be calculated against the voting rights already held by the acquirer as on the date of acquisition of shares. It also informed that if at any point of time during the financial year the acquisition is beyond 5% limit, Regulation 11(1) would be triggered. In that case, on conversion of warrants by promoters the shareholding of promoters was to increase from 32.06% to 50.69% and therefore, the company was advised that such increase of 18.63% on the date of conversion of warrants during the financial year would trigger regulation 11(1).

26. I note that in that case also, the concerned department of SEBI had informed the above position on regulation 11(1). Therefore, that interpretive letter is of no help to the noticees. I also note that above position of regulation 11(1) had been applied consistently by SEBI and upheld by courts /SAT. The Amendment of 2002 and Takeover Regulations, 2011 have not made any change in that regard.

27. In view of the above position of regulation 11(1), I am of the view that, subsequent dilutions, by way of sale of 1,30,000 shares by the promoter group during April/May, 2006 and allotment of 25,00,000 shares to the strategic investors are not relevant for the purpose of determining the 5% creeping benchmark. The gross acquisitions by way of conversion of warrants or purchase of shares, if any, during the financial year 2006-2007 are relevant for calculating the 5% creeping benchmark.

28. In this case, the relevant financial year is 2006-2007. As on April 01, 2006 the shareholding of the promoter group in the Target Company was 47.68%. The first acquisition happened on June 30, 2006, when 5 lakh warrants held by KLL were converted into 5 lakh shares. Just prior to this acquisition, the promoter group was holding 29.63% shares in the Target Company and thus, this acquisition (4.57%) increased the shareholding of the promoter group from 29.63% to 34.20% shares in the Target Company. This acquisition being within creeping limit of 5% did not trigger regulation 11(1) on June 30, 2006. Thereafter, there was further acquisition of 1,171 shares (0.02%) by the promoter group during this financial year and their shareholding in the Target Company increased to 34.22%. This acquisition itself or when taken together with the earlier acquisition on June 30, 2006, did not trigger regulation 11(1). Prior to the third acquisition by the noticees on March 12, 2007, the shareholding of the promoter group was 25.83% and pursuant to the acquisitions of March 12, 2007, their shareholding increased from 25.83% to 34.21% (i.e. increase by 8.38%). Consequently, this acquisition on March 12, 2007, crossed the benchmark of creeping limit of 5% and triggered the obligation of the noticees to make public announcement under regulation 11(1) within time stipulated in regulation 14(1).

29. I further note that the gross increase in the shareholding of the promoter group during the financial year 2006-2007 was 12.97% (i.e. 4.57% plus 0.02% and 8.38%), as against the permissible limit of 5% and the noticees were under obligation to make public announcement on this ground also.

30. The submissions that there was no change in control or that undue burden would fall on the noticees if they are directed to make a public offer do not have merit. In my view, regulation 11(1) provides exception from obligation to make public announcement only if the acquisition is within permissible creeping limit of 5%. In case of breach of creeping limit, public announcement is the consequence obligated under regulation 11(1).Regulation 44 read with regulation 45 gives flexibility to SEBI to enforce the regulations in the interests of the investors and the securities market which are the statutory guiding principles for this purpose as inbuilt in the SEBI Act, 1992, the Takeover Regulations, 1997 and Takeover Regulation, 2011. In this regard, I note the Hon'ble SAT vide order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI* (Appeal no. 31/2011) observed as follows:

"*It must be remembered that whenever an acquirer violates Regulation 10, 11 or 12 of the takeover code by not making a public announcement, he should be directed to comply with the provision by making a public offer. The words "unless such acquirer makes a public announcement" appearing in Regulations 10 and 11(1) make these provisions mandatory and a public announcement has to be made. Similar words appear in Regulation 12 as well. These provisions make the acquisition conditional upon a public announcement being made. The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation.* "

31. In my view, the facts and circumstance of the case, do not suggest any reason to deviate from the normal rule of requirement of making public announcement in accordance with the Takeover Regulations, 1997 as the same would be in the interest of the public shareholders of the Target Company.

32. In this case, since requisite public announcement has not been made by the noticees, KLL has contravened regulation 10 and the promoter group has contravened regulation 11(1) as discussed above. I note that the Takeover Regulations, 1997 have been repealed by the Takeover Regulations, 2011. In terms of regulation 35(2)(b) of the Takeover Regulations, 2011, the obligation or liability acquired, accrued or incurred under the repealed regulations, shall remain unaffected as if the repealed regulations has never been repealed. In the present case, the noticees triggered the obligation under regulation 10 and 11(1) of the Takeover Regulations, 1997 on March 12, 2007 and in terms of regulation 14(1) thereof they were obligated to make requisite public announcement within 4 days from March 12, 2007. Thus, the noticees had incurred this obligation prior to repeal of Takeover Regulations, 1997 and the obligation has to be completed under Takeover Regulations, 1997.

33. Since obligation under regulations 10 and 11 both have overlapped in this case, as observed by Hon'ble Supreme Court in *'Swedish Mach'* case, the noticees shall make a combined public announcement under regulations 10 and 11 read with regulation 14(1) of the Takeover Regulations, 1997.

34. Had the noticees made the public announcement in accordance with the Takeover Regulations, 1997 regulations and complied all related activities within the timelines specified

under the Takeover Regulations, 1997, all formalities with respect to their public announcement and the open offer would have been completed on June 15, 2007. Since the noticees have failed to make the public announcement within the stipulated time and the public announcement in compliance with this order would be after delay, the noticees shall pay interest on consideration amount as provided under the Takeover Regulations, 1997 to the shareholders who tender their shares in the open offer and who are eligible for interest as per law.

35. I, therefore, in exercise of powers conferred upon me under sections 19, 11 and 11B of the SEBI Act, 1992 and regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulation 32(1)(h) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions :

(a) The noticees, Mr. Sunil Krishan Khaitan, Mr. Krishan Khaitan, Khaitan Lefin Limited and The Orientale Mercantile Company Limited shall make a combined public announcement to acquire shares of the Target Company, Khaitan Electricals Limited, in terms of regulations 10 and 11(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, within a period of 45 days from the date of this Order.

(b) The noticees shall, alongwith consideration amount, pay interest at the rate of 10% per annum, from June 16, 2007 to the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares have been accepted in the open offer, after adjustment of dividend, if any, paid.

36. This Order shall come into force with immediate effect.

Place : Mumbai
Date : December 31st, 2012

RAJEEV KUMAR AGARWAL
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA