

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: PRASHANT SARAN, WHOLE TIME MEMBER

ORDER

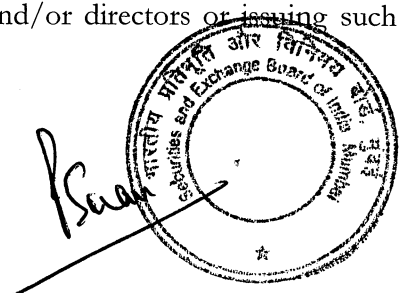
Under sections 11(1), 11(2)(j), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 read with section 12A of the Securities Contracts (Regulation) Act, 1956 in the matter of non-compliance with the minimum public shareholding requirements

In respect of Fresenius Kabi Oncology Limited

1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") vide an *interim ex-parte* order dated June 04, 2013 (hereinafter referred to as the "*interim order*") had issued certain directions in respect of 105 listed public companies who had failed to comply with the Minimum Public Shareholding ("MPS") requirements stipulated under rules 19(2)(b) and 19A of the Securities Contracts (Regulation) Rules, 1957 within the due date i.e., June 03, 2013. Such directions issued vide the *interim order* are as follows:

- a) The *voting rights* and *corporate benefits* like dividend, rights, bonus shares, split, etc. with respect to the excess of proportionate promoter/promoter group shareholding in the non-compliant companies were directed to be frozen, till such time the companies complied with the minimum public shareholding requirement.
- b) The promoters/promoter group and directors of those non-compliant companies were prohibited from buying, selling or otherwise dealing in securities of their respective companies, either directly or indirectly, in any manner whatsoever, except for the purpose of complying with minimum public shareholding requirement till such time those companies complied with the minimum public shareholding requirement.
- c) The shareholders forming part of the promoter/promoter group in the non-compliant companies were restrained from holding any new position as a director in any listed company, till such time those companies comply with the minimum public shareholding requirement.
- d) The directors of non-compliant companies were restrained from holding any new position as a director in any listed company, till such time those companies complied with the minimum public shareholding requirement.

2. The *interim order* was passed without prejudice to the right of SEBI to take any other action, against the non-compliant companies, their promoters and/or directors or issuing such



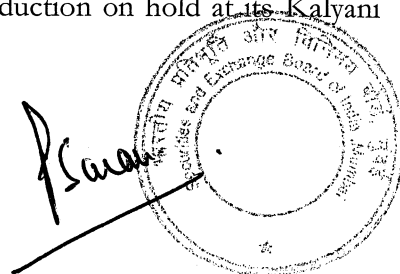
directions in accordance with law. The *interim order* was to be treated as a show cause notice by those companies for action contemplated in paragraph 18 thereof.

3. Fresenius Kabi Oncology Limited (hereinafter referred to as "the Company") was one such company which was found to be non-compliant with the Minimum Public Shareholding ("MPS") norms. The promoter's [*Fresenius Kabi (Singapore) Pte Limited* – referred to as "FKSL"] shareholding in the said company as on the date of the *interim order* was 81%. The shares of the Company are listed on the Bombay Stock Exchange Limited ("BSE") and the National Stock Exchange of India Limited ("NSE").

4. Pursuant to the *interim order*, the Company filed an appeal (*Appeal No. 117 of 2013*) challenging the *interim order* before the Hon'ble Securities Appellate Tribunal. The Hon'ble Tribunal in its order dated June 24, 2013, while taking note of the fact that the Company has voluntarily decided to delist its shares from the stock exchange, directed the Company to approach SEBI by filing a reply/representation detailing the facts and circumstances regarding delisting. SEBI was directed to take a decision on such representation within a period of 4 weeks and convey the same to the Company after granting an opportunity of hearing to it. In the meanwhile, the Company filed its reply dated June 21, 2013 to the *interim order*.

5. As directed by the Hon'ble Tribunal, the Company submitted its representation dated June 26, 2013, requesting SEBI to (i) modify paragraph 17(b) of the *interim order* so as to permit FKSL to buy securities of the Company from its public shareholders as part of the delisting offer; (ii) grant exemption to the independent directors of the Company from the application of paragraphs 17(b) and 17(d) of the *interim order*; and (iii) condone the delay of the Company in complying with the MPS norms and grant extension by three months for complying with the MPS norms in view of the delisting offer.

6. An opportunity of personal hearing was afforded to the Company on July 05, 2013. On the said date, the Company was represented by Mr. Stephan Sturm (Chief Financial Officer), Mr. Gerrit Steen (Director), Mr. Nikhil Kulshreshtha (Company Secretary and Head-Legal), Ms. Akila Agarwal and Mr. Tejas Karia (Advocates) and Mr. Ajay Pancholi (Managing Director, DSP Merrill Lynch Limited). Liberty was granted to file additional submissions/documents, if so desired by the Company. Pursuant to the hearing, the Company vide letter dated July 08, 2013 submitted copies of its (i) letter dated February 26, 2013 addressed to the stock exchanges (BSE and NSE) informing *inter alia* that the Company had voluntarily put the production on hold at its Kalyani

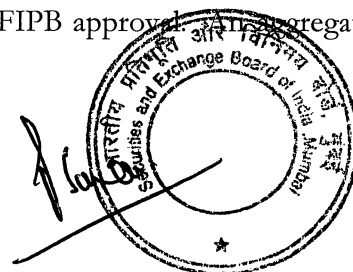


Plant post the inspection by FDA, US, and (ii) letter dated July 05, 2013 addressed to the stock exchanges informing that the Company has received a warning letter from US FDA issued with respect to the Company's operations at its plant at Kalyani.

7. I have considered the reply dated June 26, 2013, the oral submissions made during the personal hearing and the documents submitted by the Company. It is the case of the Company that on introduction of the SEBI Circular dated February 08, 2012, the Company through its Board of Directors had approved, on May 30, 2012, i.e., within a period of four months, the proposal for undertaking an Offer for Sale ("OFS") in order to comply with the MPS norms. The Company claims that it was one amongst the first few companies which undertook OFS for complying with the MPS requirements. The acquisition of shares of the Company by eligible foreign investors under the OFS required the approval of the Foreign Investment Promotion Board ("FIPB") and therefore, the Company made an application on June 25, 2012. Pursuant to the approval on September 04, 2012, the Company launched the OFS on October 12, 2012 and its promoter (i.e., FKSL) divested an aggregate of 9% shares. Thereafter, the promoter shareholding in the Company came down from 90% to 81%.

8. According to the Company, while it was deliberating further steps for achieving full compliance with the MPS norms, the US Food and Drug Administration ("US FDA") conducted an inspection, during January 2013, at the Company's plant located at Kalyani (W.B.), wherein various non-compliances were observed. During the personal hearing, the Company submitted that pursuant to the inspection of the US FDA, it conducted an investigation at the plant and had detected a fraud, which led to the revamp of the management personnel there. In view of these events, the Fresenius Group decided to enhance their involvement in the management of the Company, infuse more capital and attain greater operational control and flexibility over the management to support its business. Accordingly, the Company decided to delist itself from the stock exchanges as with FDA warning letter and closed plant, it was practically not feasible to either sell the existing shares or to issue fresh shares to non-promoters. Therefore the promoter, FKSL proposed to initiate voluntary delisting offer to the public shareholders of the Company in order to acquire the entire public shareholding of 3,00,63,255 equity shares representing 19% of the share capital of the Company and delist the equity shares from the stock exchanges in accordance with the SEBI (Delisting of Equity Shares) Regulations, 2009.

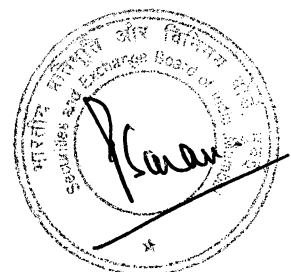
9. The Company had commenced with steps required to comply with the MPS norms when it went ahead with the OFS during October 2012, after obtaining FIPB approval. An aggregate



of 9% of the promoter's holding was divested through the OFS. I note that the Company changed its plans pursuant to the inspection findings of the US FDA and the detection of fraud at the said plant. The Company had informed the stock exchanges vide letter dated February 26, 2013 regarding the said inspection and the fact that it has taken immediate remedial measures and voluntarily put the production in the plant on hold. Further, the receipt of a warning letter from the US FDA which *inter alia* required the Company to take more corrective and preventive measures, have also been reported to the stock exchanges by the Company vide letter dated July 05, 2013, in compliance with clause 36 of the listing agreements.

10. I note from the submissions of the Company that the delisting offer was approved and the resolution was passed by its public shareholders with a two-third majority. The outcome of the postal ballot with respect to the delisting offer was informed to the stock exchanges. The Company has also received in-principle approvals for commencement of the delisting offer of FKSL. The grievance of the Company is that the *interim order* prohibits FKSL, its promoter from continuing with the delisting process, forcing the Company to remain a listed entity and thereby compels FKSL to divest excess shares even though the intention to delist was clearly announced. Though, the fact is that as on June 03, 2013, the Company was non-compliant with the MPS requirements, I wish to take note of the special facts and circumstances of this case discussed above including the OFS made in October 2012 which clearly shows the intention of the Company was to comply with the MPS requirement. I find it reasonable and appropriate to modify the directions issued vide the *interim order* to the extent that the same does not affect or prejudice the efforts of the Company/its promoter from continuing with the delisting offer/process. I also note that the Company has sought 3 months' time for complying with the MPS norms in view of its delisting offer.

11. While considering the above, I also note that SEBI has received complaints from investors alleging, *inter alia*, that the entities who had purchased shares in the aforesaid OFS might have participated in the OFS with an intent to subsequently tender their shares at an artificial price in the bids for the delisting offer, which will be determined in collusion with the promoters of the company, and thus, enable the Company to successfully complete the delisting offer. Keeping the above in view, I am of the opinion that it will be just and reasonable to stipulate that for the purpose of regulation 17 of the SEBI (Delisting of Equity Shares) Regulations, 2009, the pre-OFS shareholding of the promoter should be applicable.

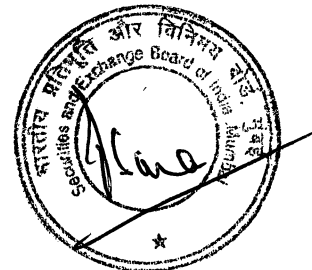


12. The Company having failed to comply with the MPS requirements as on the due date should ideally be required to comply with such requirements and also be visited with penalty. However, considering the facts and circumstances as brought out by the Company and also the concerns raised in the preceding paragraph, I am convinced that the Company be allowed to proceed with its delisting process, but subject to the condition that its pre-OFS promoter shareholding be considered for computing the percentages under regulation 17 of the delisting regulations, as observed above.

13. In view of the foregoing, I in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11(1), 11(2)(j), 11(4) and 11B thereof and section 12A of the Securities Contracts (Regulation) Act, 1956, hereby issue the following directions which are in modification of the directions issued vide the *interim order* dated June 04, 2013 :

- (i) The direction issued in paragraph 17(b) of the *interim order* dated June 04, 2013 stands modified to the extent that it shall not hinder the already announced voluntary delisting offer/process initiated by the Company, Fresenius Kabi Oncology Limited and that Fresenius Kabi (Singapore) Pte. Limited (*the promoter of the Company*) shall be permitted to buy the equity shares from the public shareholders as part of the delisting offer. The Company shall endeavour to complete the delisting process within a period of three months from the date of this Order and report its outcome on completion of the three months' period.
- (ii) In the proposed delisting offer of the Company, the pre-OFS shareholding of the promoter shall be applicable for the purposes of regulation 17 of the SEBI (Delisting of Equity Shares) Regulations, 2009.
- (iii) The direction contained in 17(b) of the *interim order* dated June 04, 2013 shall be re-imposed/revived immediately in case the delisting process of the Company is not successful within a period of three months from the date of this Order.
- (iv) The directions contained in paragraphs 17(a), (c) and (d) of the *interim order* dated June 04, 2013 shall continue till the time the Company is delisted from the stock exchanges or till the time the Company becomes compliant with the MPS norms.

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



15. The aforesaid directions are issued without prejudice to the right of SEBI to initiate action as contemplated in paragraph 18 of the *interim order* in case the delisting process of the Company is not successful within a period of three months from the date of this Order.

16. Copy of this Order shall be served on the stock exchanges and depositories for their information and action that may deem fit and necessary in this case.



PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Date : July 22, 2013

Place : Mumbai