WTM/RKA/CFD-DCR/06/2014

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011- In respect of IndusAge Advisors Limited, Growsafe Securities Private Limited, Shri Salim Govani and Foresight Enterprises.

In the matter of acquisition of shares and control of Madhusudan Securities Limited.

Appearances:

For the Noticees:

1. Mr. R. S. Loona, Advocate
2. Mr. Abhishek Bargikar, Advocate
3. Mr. V. Balaji Bhat
4. Mr. Salim Govani
5. Mr. Maulik Sanghavi

For SEBI:

1. Mr. Santosh Kumar Shukla, Joint Legal Adviser
2. Ms. Divya Veda , Deputy General Manager
3. Mr. Peeyush Gaurav Soni, Assistant Legal Adviser
4. Mr. Abhishek Khandelwal, Assistant General Manager

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1. M/s Madhusudan Securities Limited (hereinafter referred to as "the target company") is a company having its registered office at 6/A-2, Court Chambers, 35, New Marine Lines, Mumbai – 400020. The shares of the target company are listed on the Bombay Stock Exchange ("BSE"). At the relevant time the target company was a stock broker registered with the Securities Exchange Board of India (hereinafter referred to as 'SEBI') and was a member of the Bhuvaneshvar Stock Exchange and OTC Exchange of India.

2. On February 4, 2011, Primus Retail Private Limited ("PRPL") entered into a Business Transfer Agreement ("BTA") with the target company, wherein the target company agreed to issue 61,42,857 fully paid equity shares of □ 10/- each at a premium of □ 60/- per share

aggregating to 80.37% of its post allotment share capital to PRPL by way of preferential allotment.

3. On the same day (i.e. February 4, 2011), IndusAge Advisors Limited ("IAL") and Growsafe Securities Private Limited ("GSPL") each acquired 2,31,000 equity shares in the market at a price of 61.25/- per share from the promoters/promoter group of the target company. Thus, IAL and GSPL collectively acquired 6.04% of the expanded share capital of the target company.

4. With regard to the above two acquisitions, PRPL, IAL, GSPL (hereinafter collectively referred to as "the acquirers"), Mr. Salim Govani (holding 0.07% of the expanded capital of the target company) and Foresight Enterprises (1.89% of the expanded capital of the target company) were acting in concert with common objective of acquisition of shares and control in the target company. Mr. Salim Govani and Foresight Enterprises are hereinafter collectively referred to as "the PACs". Pursuant to the above acquisitions, the total shareholding of the acquirers and PACs in the target company increased to 67,54,857 equity shares aggregating to 88.38% of the post-allotment share capital of the target company. These acquisitions triggered the obligations of the acquirers and PACs to make public announcement in accordance with regulations 10 and 12 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "the Takeover Regulations, 1997"). The existing promoters of the target company who were holding 1,98,300 shares (2.59% of the expanded share capital of the target company) had entered into an arrangement with the acquirers that they would continue to hold the same till the completion of the open offer formalities.

5. On February 10, 2011, Centrum Capital Limited, the Merchant Banker (hereinafter referred to as "the Merchant Banker") made a Public Announcement ("PA") on behalf of the acquirers and PACs to make an open offer to the public shareholders (excluding the existing prompters) of the target company to acquire 6,89,700 fully paid up equity shares of 10/- each, representing 45.98% of the paid up share capital existing as on that date and 9.02% of the expanded paid-up share capital of the target company at a price of 70/- per share in compliance with regulations 10 and 12 of the Takeover Regulations, 1997.

6. On February 24, 2011, the draft letter of offer in respect of the aforesaid open offer was filed with SEBI. It was observed from the draft letter of offer that upon completion of the open offer, the target company intended to acquire the apparel and accessories business under the brand names "Weekender", "Weekender Kids" and "Toon world" (hereinafter collectively referred as "Weekender Brands") and certain brands of Walt Disney and Warner Bros (hereinafter collectively referred as "Licensed Brands") from PRPL under the BTA, which

triggered the open offer. Since , the target company, being a stock broker and member of the recognised stock exchanges was prohibited and disqualified from engaging in the proposed business in terms of the requirements of rule 8(1)(f) of Securities Contracts (Regulation) Rules, 1957 (SCRR), it sought cancellation of its registration and vide email dated October 17, 2012, the Merchant Banker forwarded to SEBI the copies of the approval by respective stock exchange regarding the surrender of certificate of the target company.

7. While the draft letter of offer was being considered by SEBI , the Merchant Banker vide email dated November 20, 2012, intimated that on October 8, 2012 Hon'ble High Court of Karnataka, had passed an order for winding up of PRPL. SEBI, vide letter dated January 11, 2013, sought information from the Merchant Banker regarding the steps taken to proceed with the open offer. Vide its email dated January 18, 2013, the Merchant Banker informed that PRPL has not yet received the copy of the order passed by the Hon'ble High Court of Karnataka regarding its winding up. It informed that since the particulars of the order were not known, the acquirers were unable to determine the further actions to be taken. It also informed that legal advisors had advised the acquirers to understand all the terms and conditions of the order before deciding the next steps. The Merchant Banker, therefore, requested SEBI to grant an extension of two weeks for responding to SEBI's letter.

8. SEBI, vide letter dated January 25, 2013, informed the Merchant Banker that the acquirers and PACs are jointly and severally liable to complete the open offer. In light thereof, notwithstanding any unforeseen circumstances affecting any one of the acquirers, the rest of the acquirers and the PACs are required to proceed with the open offer within the prescribed time lines. Accordingly, SEBI advised the Merchant Banker to take necessary steps to immediately proceed with the open offer and submit the revised letter of offer latest by January 31, 2013, failing which, they shall be liable for action in terms of the provisions of Takeover Regulations, 1997 and the SEBI Act, 1992.

9. Vide its letter dated January 31, 2013, the Merchant Banker submitted that as per the order of winding up dated October 8, 2012 passed by the Hon'ble High Court of Karnataka, all property and effects of PRPL are deemed to vest with the Court and, thereafter, with the Official Liquidator appointed in respect of PRPL. It stated that the powers of the existing directors of PRPL ceased and all powers pertaining to the affairs of the PRPL shall be exercised by the Official Liquidator and that PRPL was incapable of performing its obligations under the BTA entered into with the target company.

10. The Merchant Banker in its aforesaid letter also stated that the above occurrences had adversely affected the ability of the acquirers and PACs to comply with the open offer

requirements under the Takeover Regulations, 1997 and that the current financial position of the other two acquirers i.e. IAL and GSPL had deteriorated, and hence they were not in a position to complete the open offer. The Merchant Banker requested SEBI to exercise the powers under regulation 27 of the Takeover Regulations, 1997 and allow the acquirers to withdraw the open offer.

11. SEBI, vide letter dated February 15, 2013, informed that out of the three acquirers and two PACs, only one acquirer had been subjected to winding up. Since the acquirers and the PACs are jointly and severally liable to complete the open offer in terms of regulation 22(19) of the Takeover Regulations, 1997, the request for withdrawal of open offer was not acceded to. SEBI, therefore, directed the Merchant Banker to proceed with the open offer.

12. Since, the acquirers and the PACs did not take any steps to proceed with the open offer despite clear advice of SEBI as stated above, SEBI issued a combined Show Cause Notice dated June 24, 2013 to IAL, GSPL, Mr. Salim Govani and Foresight (hereinafter collectively referred to as "the Noticees") calling upon them to show cause as to why suitable directions under sections 11 and 11B of the SEBI Act, regulations 44 and 45 of Takeover Regulations, 1997 read with regulations 32 and 35 of the Takeover Regulations, 2011 should not be issued.

13. Subsequently, the Noticees, vide letter dated August 16, 2013, submitted an application, under regulation 4 of the Takeover Regulations, 1997 read with regulation 35(2) of the Takeover Regulations, 2011, seeking exemption from the applicability of regulation 21(5) of the Takeover Regulations, 1997. SEBI, vide its letter dated September 13, 2013 returned the said application and advised the Noticees that the exemption as sought by trhem can be considered only in case of a proposed acquisitions and not with regard to the completed acquisitions as in the case of the Noticees. It was also informed to the Noticees that the application, if admitted, will render the proceedings initiated under Sections 11 and 11B of the SEBI Act, 1992 infructuous.

14. Thereafter, the Noticees filed their reply to the SCN vide letter dated September 24, 2013, wherein they *inter alia* submitted as follows:

    i. Every allegation, contention or conclusion sought to be drawn in the SCN which is contrary to what is stated in the reply is denied.
    ii. The PA and the open offer were made by PRPL and the Noticees primarily on account of the execution of the BTA in terms of which the target company was to acquire the transferred business consisting of the 'Weekender Brands' and other brands.
    iii. During the time, which was taken for completion of open offer formalities PRPL (the lead acquirer and the executant party to the BTA) has gone into liquidation because of

which the business is no longer transferable. In view of the winding up order of PRPL, the whole object of the transaction has become infructuous

iv. Since the aforesaid brand names have not been transferred due to the liquidation of PRPL, the target company has been deprived of the benefit which it was to derive out of the said BTA. This in turn has materially altered the transaction and has taken away the incentive of acquiring further shares in the target company.

v. Further, on October 31, 2011, the target company made another preferential allotment of 10,52,630 shares at 76/- per share to three entities namely, Foresight Holdings Pvt. Ltd. (PAC being a partner of Foresight Enterprises), Dewsoft Overseas (Public Shareholder) (hereinafter referred to as "Dewsoft") and Acme Investment (Public Shareholder) (hereinafter referred to as "Acme"). The lock-in restrictions on 6,57,894 equity shares, issued by target company to the two public shareholders named above under the preferential allotment on October 31, 2011, have expired thereby substantially increasing the financial obligation of the Noticees under the open offer.

vi. There is no value in investing in the target company by acquiring its shares as the same had practically become a shell company without any worthwhile business or future business plans.

vii. When the Noticees had made the open offer, they were confident of performing their financial obligations under the open offer .At the time of making the PA, the acquirers were fully aware of and financially prepared to acquire the shares of the target company and they also deposited the amount of 120.70 lakhs in escrow account.

viii. Because of the declining market conditions, the financial condition of IAL and GSPL has deteriorated substantially and they do not have the financial capacity to purchase the shares of the target company.

ix. If the Noticees are forced to make the open offer, it will be detrimental to their financial stability thereby affecting their ability to manage the affairs of the target company post acquisition which will consequently affect the shareholders of the target company.

x. Hon'ble SAT in its order dated June 19, 2013 in the matter of *Akshya Infrastructure Pvt. Ltd. v. SEBI* has held that if the time frame prescribed for smooth completion of the process of open offer and exit by the public shareholders lapses then the open offer becomes redundant. The Hon'ble Tribunal has further clarified that SEBI should consider the reasonable request of the applicant and allow withdrawing of open offer if genuine reasons are shown.

xi. The recommendations of the Takeover Regulations Advisory Committee (2010) in respect of withdrawal read with the Hon'ble SAT's order in the above matter demonstrate the judicial and legislative intent relating to withdrawal of open offer and

indicate that withdrawal of open offer can be allowed if the underlying agreement is rescinded due to factors beyond the control of the acquirer. Therefore, the Noticees' case is a fit case for withdrawal.

xii. Under regulation 23(1)(c) of the Takeover Regulations, 2011, an open offer can be withdrawn if any condition stipulated in the agreement for acquisition attracting the obligation is not met for reasons outside the control of the acquirer and such agreement has been rescinded, subject to such conditions having been disclosed in the detailed public statement. Although the regulation has been inserted in the new Regulations, the same is very relevant in the present case as the whole purpose of acquisition has been defeated. PRPL cannot take part in the open offer as it cannot transfer the assets to the target company for the reason that its assets are now in possession of the Official Liquidator pursuant to the winding up order.

xiii. The acquirer had filed the draft letter of offer with SEBI on February 25, 2011. Thereafter there has been undue delay in the progress of open offer because of reasons such as:

a) The acquirers were advised by SEBI to ensure that the target company surrenders it membership with the Stock Exchanges. The same could be completed in October 2012.

b) SEBI took time in examination of regulatory compliances in respect of the preferential allotments made by the target company.

xiv. Due to the circumstances not attributable to the acquirers, the completion of open offer was delayed and the acquirers are now not in a position to complete the same and wish to withdraw the open offer.

xv. In view of the above, the Noticees prayed that they may be allowed to withdraw the open offer and drop the present proceedings against the Noticees without passing any adverse directions.

15. An opportunity of personal hearing was granted to the Noticees and the date in that regard was fixed on December 4, 2013 and the same was communicated to the Notricees vide SEBI's letter dated November 11, 2013. In the meanwhile, the Merchant Banker, vide its letter dated November 29, 2013, informed that the Noticees are willing to fulfill their open offer obligation and, *inter alia,* submitted that :

i. PRPL went into liquidation pursuant to the order of Hon'ble High Court of Karnataka dated October 8, 2012 and was therefore incapacitated form participating in the

proposed open offer. Further, the shareholders of the target company also approved cancellation of 6,1,42,857 shares allotted to PRPL.

ii. Pursuant to the preferential allotment dated October 31, 2011 to two public shareholders Dewsoft and Acme the total share capital of the target company had increased to 86,95,487 shares of 10/- each. Also the offer price had to be revised to 76 per share in terms of regulation 20(7) of the Takeover Regula*tions, 1997*.

iii. Two public shareholders namely, Dewsoft and Acme have given undertakings to the noticees that they will not be tendering their shares held in the target company in the proposed open offer and also will not sell, transfer or dispose of the same till the completion of the open offer.

16. In light of the aforesaid, the Merchant banker made following requests to SEBI for the purpose of completing the open offer:

(a) to grant the Noticees an exemption from providing the disclosures, undertakings and the confirmations in relation to PRPL as an acquirer in the open offer; and

(b) to allow the Noticees to restrict the offer size to 6,89,700 shares i.e. 7.9% of the fully diluted capital which will cover entire public shareholding excluding Dewsoft and Acme.

17. The Notiicees filed their common reply dated November 30, 2013 wherein they submitted that they would complete the open offer in order to comply with their statutory obligation once the permissions sought from SEBI vide the aforesaid letter of the Merchant Banker dated November 29, 2013 are granted. The Noticees also requested that the personal hearing in the matter may be kept in abeyance till the completion of the open offer. SEBI informed the Noticees that the hearing can not be kept in abeyance as it was pursuant to the enforcement action initiated by SEBI. Vide e-mail dated December 3, 2013, the Noticees requested for another date of personal hearing which was granted to them on January 8, 2014 when the authorised representatives of the Noticees appeared and made submissions on the lines of above replies , submissions and requests of the Noticees.

18. I have carefully considered the SCN, replies and submissions made by and on behalf of the Noticees and other relevant material available on record. It is admitted position that the acquisition pursuant to BTA dated February 04, 2011 by PRPL and by way of market purchases dated February 04, 2011 by IAL and GSPL triggered the obligation of the acquirers and PACs in this case to make public announcement as required under regulation 10 and 12 of the Takeover Regulations, 1997. Accordingly, the public announcement in this case was

made by them on February 10, 2011 and the draft letter of offer was filed with SEBI on February 24, 2011. It has been alleged in the SCN that the Noticees have failed to complete the open offer in terms of the Takeover Regulations, 1997 though they had been advised to do so by SEBI.

19. I note that though in their replies to the SCN the Noticees had again contended that they may be allowed to withdraw the open offer, subsequently, they have agreed to proceed with the open offer in order to fulfill their statutory obligations. In view of the same, I do not deem it necessary to deal with the reasons cited by the Noticees in support of their contention for permitting withdrawal of the open offer. However, in my view, it is important to note that the open offer in this case is a triggered offer and the exceptional circumstances envisaged in regulation 27(1) of the Takeover Regulations, 1997 for permitting withdrawal of open offer do not exist in this case. Further, except PRPL who has been ordered for winding up by the Hon'ble High Court of Karnataka by an order dated October 08, 2012, the remaining acquirers and PACs are jointly and severally responsible to complete the open offer that was already made by them under the Takeover Regulations, 1997. In this case, it is undisputed fact that the Noticees have not completed the open offer despite clear advice by SEBI in that regard; vide letters dated January 25, 2013 and February 15, 2013.

20. The Noticees have further submitted that the undue delay in completing the open offer happened on account of the time taken by SEBI with regard to advice regarding surrender of certificate of registration by the target company and examination of regulatory compliance in respect of preferential allotment made by the target company. I find that in this case, the target company being a registered stock broker is prohibited by Rule 8 (1)(f) and 8(3)(f) of the SCRA from undertaking any business other than securities business except as permitted by the said Rule. In this case, while executing the BTA, the target company, being a stock broker, was prohibited from undertaking the business as contemplated under the BTA unless it severs its connection with that business. Being a registered stock broker the target company was expected to know this law and sever its connection with the business contemplated in the BTA. However, since the BTA was executed and the acquirers had made the open offer pursuant thereto, the target company should have stopped its stock broking business and surrendered its certificate of registration promptly after executing the BTA or making of the public announcement or filing of the draft letter of offer with SEBI. In this case, however, the target company did so in October 2012.

21. I further note that in the Public announcement dated February 10, 2011, it was clearly disclosed that there would be change in control pursuant to the above acquisitions. However, in the Explanatory Statement to the notice of Extra-Ordinary General Meeting sent to the

shareholders of the target company, the target company disclosed PRPL as non-promoter even after the preferential allotment. In terms of regulation 2(1)(za)(i) of SEBI (ICDR) Regulations, 2009, the persons who are in control of a company are included in the definition of the "promoter". Further in terms of regulation 73(1)(e) of the SEBI (ICDR) Regulations, 2009, the target company was under the obligation to disclose in the Explanatory Statement *'change in control ,if any, consequent to the preferential issue.'* However, in this case, in the explanatory statement the target company disclosed that proposed preferential allotment "*will not result in change in management or control´* of the target company. The target company and the merchant banker can not be expected to be ignorant of statutory requirements under the ICDR Regulations. I note that in view of these contradictory disclosures, SEBI had to engage in several discussions with the Merchant Banker and indulge in correspondence with the Merchant Banker from time to time in relation to the open offer. I therefore, find that the allegation that there was delay on the part of SEBI is not correct.

22. The Noticees have now undertaken to complete the open offer in order to complete their statutory obligations and have requested for two relaxations. The first request of the Noticee is that they may be exempted from providing the disclosures, undertakings and the confirmations in relation to PRPL as an acquirer in the open offer. In this regard, the Noticees have submitted that since PRPL has gone into liquidation pursuant to the Hon'ble High Court's order and that its assets are now in possession of the Official Liquidator, the disclosures, undertakings and the confirmations in respect of PRPL may not be required to be included in the open offer. In the facts and circumstances brought out by the Noticees, I find merit in this submission and permit the Noticees to proceed with the open offer without providing the disclosures, undertakings and confirmations in respect of PRPL in the letter of offer.

23. The second request is with regard to the reduction of offer size in view of the undertakings given by Dewsoft and Acme for not tendering their shares in the open offer. They have submitted that the offer size may be reduced to 6,89,700 shares representing 7.9% of the equity share capital of the target company and they may be permitted to make the open offer to all the public shareholders excluding the two public shareholders *viz;* Dewsoft and Acme. In this regard, I note that regulation 21 of Takeover Regulations, 1997, provides for minimum number of shares to be acquired by an acquirer in the public offer made by him. As per this regulation:-

(a) the offer should be made to minimum twenty per cent of the voting capital of the target company;

(b) where the offer is made by an acquirer who has acquired 55% or more but less than 75% shares or voting rights in the target company, the minimum offer size shall be 20% of the voting capital of the target company or any lesser percentage of the voting capital so as to maintain the prescribed minimum public shareholding in the target company, whichever is less.

24. Regulation 21(5) clearly explains that for the purpose of computation of above percentages, the voting rights on expiry of 15 days after the closure of the open offer shall be reckoned. In this case, subsequent to the public announcement and before the closure of the open offer the target company made preferential allotment of its additional shares to Dewsoft and Acme on October 31, 2011. Consequently, the total public shareholding in the target company increased to 13,47,594 equity shares aggregating to 15.5% of its expanded equity share capital pursuant to this preferential allotment. Therefore, in terms of regulation 21(5) of the Takeover Regulations, 1997 the offer size should include the shares allotted to these two public shareholders.

25. In this case, it is noted that the offer size is less than the limit prescribed in regulation 21 of the Takeover Regulations. Further, in my view, reducing the offer size on the basis of undertakings given by few shareholders may lead to undesirable consequences and may be prone to misuse to the detriment of small shareholders in a target company. In my view, the offer size should not be reduced except as permitted under the takeover Regulations, 1997 and therefore, the offer size should not be reduced as requested by the Noticees. Further, if Dewsoft and Acme do not tender their shares in the open offer as undertaken by them, the Noticees will not be required to acquire their shares and make any payment to them. Thus, if Dewsoft and Acme act upon their undertakings, the Noticee shall acquire shares of the remaining public shareholders who tender their shares in the open offer and make payment to them. I, therefore, do not find any merit in the contention of the Noticees that making an open offer to all the public shareholders would increase the financial burden of the Noticees.

26. Considering the above, I, in exercise of the powers conferred upon me by virtue of section 19 read with sections 11 and 11B of the SEBI Act read with provisions of regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 hereby direct the Noticees to complete the open offer announced vide the public announcement dated February 10, 2011 at the price determined in accordance with regulation 20 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

27. I note that had the Noticees complied with all open offer related activities within the timelines specified in the Takeover Regulations, 1997, all procedures relating to the open offer including payment of consideration to the shareholders would have been completed on May 07, 2011. In this case, the Noticees have failed to complete the open offer within the stipulated time and the completion of the open offer in compliance of this order would be after delay. I, therefore, further direct, the Noticees to pay, alongwith the consideration amount, interest at the rate of 10% per annum from May 08, 2011 to the date of payment of consideration, to the shareholders who were holding shares in the target company as on the date of trigger i.e. February 04, 2011 and whose shares have been accepted in the open offer, after adjustment of dividend paid, if any to them by the target company.

28. This order shall come into force with immediate effect.

DATE: February 20, 2014 **RAJEEV KUMAR AGARWAL**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA