**WTM/PS/43/CFD/OCT/2014**

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**
**CORAM: PRASHANT SARAN, WHOLE TIME MEMBER**

**ORDER**

**In respect of the representations made by Mr. Ashok Banwarilal Gupta in the matter of open offer made by Lorgan Lifestyle Limited to acquire shares of SVC Resources Limited**

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**Date of personal hearing: October 10, 2014**

**Appearance:**

Mr. Ashok Gupta appeared along with his Advocates, Ms. H.V. Tamanna and Mr. RohitPande

**For the Securities and Exchange Board of India:**

1. Ms. AnithaAnoop, Deputy General Manager
2. Ms. Divya Veda, Deputy General Manager
3. Mr. T. Vinay Rajneesh, Assistant General Manager
4. Mr. Sunil Kumar Singh, Assistant General Manager

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**1.** The Hon'ble Securities Appellate Tribunal ("Hon'ble SAT"), vide Order dated September 24, 2014 (in Misc. Appln. No. 134 of 2014 and Appeal no. 293 of 2014 - *Ashok Banwarilal Gupta vs. Securities and Exchange Board of India and others*), had directed the Securities and Exchange Board of India (hereinafter referred to as "the SEBI") to consider the representations (dated January 28, 2014 and September 04, 2014) of the appellant (i.e., Mr. Ashok Banwarilal Gupta) afresh and pass appropriate order as deemed fit within a period of 6 weeks from the date of the order.

**2.** Mr. Ashok Banwarilal Gupta (hereinafter referred to as "the complainant") had filed two representations dated January 28, 2014 and September 04, 2014 with SEBI. These representations were in respect of an open offer made by one Lorgan Lifestyle Limited ("Lorgan" or "the acquirer") to acquire shares in SVC Resources Limited ("the target company"). Lorgan had made a public announcement on January 08, 2014 for an voluntary offer to acquire 26% of the equity share capital of the target company under regulations 3(1) and 4 of the SEBI (Substantial

Acquisition of Shares and Takeovers) Regulations, 2011 ("the Takeover Regulations"). This public announcement was followed by a detailed public statement dated January 16, 2014, a draft letter of offer dated January 23, 2014 and the Letter of Offer ("LOF") dated August 22, 2014. The said open offer of Lorgan opened on September 02, 2014 and closed on September 15, 2014. As per the post-offer advertisement dated September 27, 2014, Lorgan has stated that it has accepted 26,50,000 shares and its post-open offer shareholding is 1,99,35,658 shares (18.11% of paid-up capital made up of 11,00,77,759 equity shares) [Pre-open offer shareholding of Lorgan was 1,72,85,658 shares (15.7%)].

**3. <u>Representations/complaints made by the complainant</u>**:

**A. <u>Complaint dated January 28, 2014</u>**:

Pursuant to the public announcement made on January 08, 2014 and the detailed public statement dated January 16, 2014 by Lorgan, one Divesh Koli in his capacity as a director of the target company filed the above complaint dated January 28, 2014. I note that the above complaint was not made by this complainant (i.e., Mr. Ashok Gupta). However, the same is considered in compliance with the directions of the Hon'ble SAT as mentioned above.

The submissions/allegations made in this complaint *inter alia* are:

a) **Offer size and paid-up equity share capital of the target company was grossly mis-stated in the public announcement and the detailed public statement** :

According to this complaint, the voluntary offer was made to acquire 1,80,78,667 equity shares representing 26% of the total paid-up share capital of the target company being ₹ 6,95,33,333/- comprising of 6,95,33,333 equity shares of ₹ 1/- each as on the date of the public announcement and the detailed public announcement.

The complaint has mentioned that apart from the paid-up share capital of ₹ 6,95,33,333/- comprising of 6,95,33,333 equity shares, the target company has allotted 1,08,44,426 equity shares and 2,97,00,000 equity shares on May 08, 2013 and August 05, 2013 respectively. Therefore, the

total paid-up equity capital of the target company became ₹ 11,00,77,759/- comprising 11,00,77,759 equity shares of ₹ 1/- each. Lorgan's shareholding was 1,72,85,658 equity shares representing 15.70% of the total paid-up share capital of the target company comprising of 11,00,77,759 equity shares.

The target company had intimated BSE regarding the total paid-up capital on January 08, 2014 after the public announcement was made by Lorgan. In the detailed public announcement, Lorgan disclosed to the target company's shareholders that in calculating its total shareholding and the open offer size, it had not taken into consideration the allotment of the further allotments made in 2013.

It is alleged that the non-disclosure of the paid-up capital, taking into consideration the further allotted shares, was not made in the public announcement and that such failure to disclose vital information in the public announcement for the voluntary acquisition of shares not only indicated gross negligence on the part of the acquirer but also revealed their intention to actively conceal such crucial information from the shareholders of the target company.

The complaint also mentioned that the reason stated by the acquirer for not considering the further allotted shares is that the voting rights on such shares have been frozen vide Order of CLB dated June 12, 2013 and the Hon'ble Bombay High Court's Order dated August 26, 2013 and consequently do not qualify to be shares in terms of the definition of "shares" under regulation 2(1)(v) of the Takeover Regulations. The complaint asserted that this reason was not only a blatant mis-statement but also misinterpretation of the interim orders in cases that are *sub-judice*.

It is also stated that the disputes between the parties therein (*Company Petition No. 31 of 2013*) are still ongoing. Further, the freezing of voting rights cannot be construed to mean that shares lack voting rights as the shares have been allotted and that they carry voting rights. The acquirer had proceeded to make voluntary open offer assuming that the CLB and the Hon'ble Bombay High Court has already passed final orders directing the target company to cancel the allotment of

further shares or declare them as illegal, null and void and thereby reduce the paid-up share capital of the target company.

b) **Offer size in terms of regulation 7(1) of the Takeover Regulations is mis-stated and disclosures with respect to financial arrangements in the detailed public statement are inadequate.**

The complaint states that though it denied that Lorgan was eligible to make a public announcement, it should have made the same to acquire atleast 2,86,20,217 equity shares of the target company being 26% of the total aid-up share capital of ₹ 11,00,77,759/- comprising of 11,00,77,759 equity shares. The same is a requirement under the Takeover Regulations and an acquirer has to take into account all potential increases in the number of outstanding shares during the offer period contemplated as on the date of the public announcement.

It was stated that in the present case, the acquirer, while calculating the open offer size, was required to proceed on the basis that the interim orders freezing the voting rights (*if at all such interim orders exist*) on the further allotted shares will be vacated during the offer period.

It is also alleged that Lorgan should have disclosed, in the detailed public announcement, whether it has adequate financial resources to make an open offer to acquire 26% of paid-up shares.

c) **Reference to regulation 4 of the Takeover Regulations in the public announcement as well as in the detailed public statement is misconceived and completely out of context.**

The complaint states that Lorgan had stated in various places in the public announcement as well as in the detailed public statement stated that the voluntary open offer made by it was in terms of regulation 4 of the Takeover Regulations.

Referring to the provisions of regulations 4 and 2(1)(e) {definition of 'control'}of the Takeover Regulations, the complaint states that change in control would be effected when a person (along with PACs, if any) acquires right to appoint majority of the directors or can control management

or policy decisions (directly or indirectly) by virtue of his/their shareholding or management rights or shareholders agreements or voting agreements etc., and in case of such change in control the person/s acquiring such control would be under an obligation to make a public announcement of an open offer in terms of the Takeover Regulations.

The complaint states that by no stretch of imagination has Lorgan by its holding of 1,72,85,658 equity shares of the target company, acquired controlling interest in the equity share capital of the target company which would entitle Lorgan to appoint majority of the directors or control management or policy decisions of target company. The complaint further states that there has not been any shareholders' agreement or voting agreement between Lorgan and the existing promoters and the members of the promoter group of the target company which bestowed controlling rights upon Lorgan. It is therefore alleged in the complaint that Lorgan cannot make a public announcement of open offer to be made under regulation 4 of the Takeover Regulations and that the public announcement of open offer to be made under regulation 4 of the Takeover Regulations by a person upon acquisition of control over the target company is compulsory and not voluntary in nature.

The complaint alleges that even if the open offer was successful and that 26% shareholding was acquired, Lorgan would at most hold 3,75,04,514 equity shares representing 34.07% of the total paid-up share capital. This is after taking into consideration the promoters shareholding of 40.93% and public shareholding of 25%. Such acquisition of equity shares by Lorgan would still be 'substantial acquisition' of shares and cannot be a 'takeover' of the target company within the meaning of the Takeover Regulations. Therefore, as per the complaint, the claim made by Lorgan that it would be classified as a promoter of the target company is a blatant mis-statement and has been made to misguide the shareholders and with malicious intent to usurp the management control of the target company.

The complaint also alleged that the Merchant Banker to Lorgan has ignored the ineligibility of the acquirer to make a public announcement of an open offer for acquiring shares of the target

company under regulation 4 and that the interpretation given by the merchant banker that voluntary open offer can be made in terms of regulation 4 is unprecedented.

d) **Ineligibility of Lorgan to make voluntary open offer under the Takeover Regulations:**

The complaint has stated that as Lorgan has made a voluntary open offer, it should be eligible in terms of regulation 6 of the Takeover Regulations for doing so. As per regulation 6(1) of the Takeover Regulations, an acquirer who together with PACs with him, holds shares or voting rights in a target company entitling them to exercise 25% or more but less than the maximum non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with the regulations, subject to their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding. The regulation also provides that where an acquirer or any PAC with him has acquired shares of the target company in the preceding 52 weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation.

According to the complaint, though it was disputed, Lorgan was shown to be holding 24.86% in the public announcement and in the detailed public statement. Further, the 1,72,85,658 shares held by Lorgan were bought within 52 weeks preceding the date of the detailed public statement without attracting the obligation to make a public announcement of an open offer under the provisions of the Takeover Regulations. Resultantly, Lorgan was not eligible to make the voluntary open offer to the shareholders of the target company under the Takeover Regulations.

**e) Lorgan - whether intending to make hostile takeover of the target company.**

According to this complaint, Lorgan was ineligible to make the public announcement of open offer as on the date of public announcement and detailed public statement under regulations 3(1), 4 and 6 of the Takeover Regulations. If Lorgan intended to make a hostile takeover, disclosures in that regard should have been made. Such disclosures were not only crucial but also necessary for Regulators to evaluate the said open offer and determine whether or not it is possible for

Lorgan to make such public announcement of a voluntary open offer for hostile takeover of the target company under the provisions of the Takeover Regulations.

The complaint has alleged that considering the litigations between the target company and other parties, Lorgan had found this as an opportune moment to usurp the management and controlling interest over the target company, without being eligible to make the voluntary open offer. The merchant banker of Lorgan in this open offer, i.e., Corporate Professional Capital Private Limited has not done even the elementary level of due diligence which would have been enough to conclude that Lorgan is ineligible to make a public announcement to voluntarily make open offer.

In view of the submissions/allegations, the complaint requested SEBI for an Order and made the following prayers:

a) The public announcement dated January 08, 2014 by Lorgan under regulation 15(1) of the Takeover Regulations for making an open offer for acquisition of 1,80,78,667 equity shares from the shareholders of the target company is bad in law and hence should be recalled at once ;
b) Detailed public statement dated January 16, 2014 by Lorgan made in furtherance of the public announcement dated January 08, 2014 is bad in law and hence should be recalled at once by making a public announcement of such withdrawal in the aforesaid newspapers in which the said detailed public statement was published ;
c) Appropriate orders may be issued against Lorgan to desist from making any public announcement of an open offer in terms of the provisions of the Takeover Regulations till such time the matters pending before the Company Law Board and the Hon'ble Bombay High Court are finally heard and disposed of ;
d) Order may be passed against Lorgan and merchant banker Corporate Professionals for having colluded and conspired to defraud the shareholders of the target company by consciously making false/incorrect statements/disclosures and by providing misleading information in the public announcement and the detailed public statement ; and

e) Provide such other reliefs as may be warranted in the facts and circumstances relating to the matter as SEBI deems fit.

**B. Complaint dated September 04, 2014 of the complainant, Mr. Ashok Gupta:**

The statements, submissions and allegations made by the complainant in this complaint are summarized below:

a) The complainant is the Chief Financial Officer (CFO) and Managing Director of the target company and holds more than 30 lakh shares.
b) The open offer made by Lorgan is fraudulent and there are serious discrepancies made in the offer document which warrants action.
c) The main objective behind this open offer by certain persons, whether or not acting in concert, with vested interest is to gain control over the affairs of the company by circumventing the provisions laid by SEBI under the Takeover Regulations.
d) By this open offer, the acquirer is trying to shield the price rigging in the scrip by the directors who claim to be in absolute control of the target company.
e) The offer document shows that the allotment of 1,08,44,426 equity shares on May 08, 2013 and 2,97,00,000 equity shares on August 05, 2013 have been kept in abeyance by order of the High Court. As the shares continued to be valid and not revoked, it is a mis-statement by the acquirer in the offer document. There is no stay of any nature on the further allotted equity shares as claimed in the offer document by the merchant banker. If the shares for which voting rights have been suspended temporarily as informed in the offer were to be reckoned the acquirer would not be the major stakeholder in the target company and is therefore ineligible for open offer.
f) The list of directors shown in paragraph 5.10 (from sr. nos. 5-7 of table) of the letter of offer includes directors appointed pursuant to the EGM held on January 11, 2014. Three directors (sr. no. 1- Neha Kiran Gandhi, sr. no. 2- Divesh Shantaram and sr. no. 3 - Shrishti Suresh Deora) continued to be in the Board of the Company after the conclusion of EGM and the CLB Order. Hence, when the Board of Directors convened Board meeting on April 30, 2014, the directors declared by CLB chose not to attend the meeting

and also failed to furnish information that are required to enable the Company to file the necessary forms as stipulated under Companies Act, 2013. It is pertinent to note that the new directors declared by CLB on April 07, 2014 could not have held any board meeting on April 09, 2014 and the meeting claimed by Mr. Mohd. Ali (director at sr.no.4 in table at para 5.10 of LOF) is bad in law and *non-est*. According to the complaint, it was clear that no valid meeting was held for inducting three directors as indicated in the announcement (LOF).

g) New directors cannot induct themselves as directors unless the notice convening the meeting is issued to all board members. In this case, no notice was issued by persons who claim themselves as directors of the company, hence the same shall be treated as invalid. Any outcome reported of board meeting not held in accordance with law and without giving notice to the existing director is void ad hence all actions taken/purported to be taken or reported cannot take effect.

h) No date is mentioned for the documents purported to have been relied upon in the open offer viz., at para 9.4 (copy of escrow agreement between acquirer, the Development Credit Bank Limited and Manager to the offer), 9.5 (certificate from the Development Credit Bank Limited confirming the amount kept in escrow account opened as per Takeover Regulations and a lien in favour of manager to offer), 9.6 (copy of PA, published copy of detailed public statement, which appeared in the Newspapers on January 16, 2014, Issue Opening PA and any corrigendum to those), 9.7 (copy of recommendation made by the Board of target company), 9.8 (copy of comments letter from SEBI), 9.9 (copy of agreement between the Acquirer and the registrar to the issue) and 10 (Declaration by acquirer). No board resolution is passed by the target company as claimed in the offer document.

i) The statement indicating Mr. Mohd. Ali as the Managing Director of the target company is completely false. His appointment has not been made in accordance with the provisions of section 152 of the Companies Act, 2013 as the directors have failed to give declaration in accordance with the Act that he is not disqualified in terms of section 152(4) or section 164 of the Companies Act, 2013. In addition to these, director is duty bound to disclose their interest in other companies as well as other particulars as specified

in Companies (Appointment and Qualifications of Directors) Rules, 2014 in order to enable the company to file Form DIR-12 or else the forms cannot be filed. As on date (of complaint), as per the MCA website, Mr. Mohd. Ali and or other three are not directors.

j) The registered office of the company as stated is also not true. The MCA website shows a different office address than what was stated. The merchant banker is duty bound to mention the correct address of the target company as per the MCA records. This offer document is not received by the company till date (i.e. date of complaint) and hence open offer is required to be stayed/cancelled.

k) None of the directors have been validly appointed and their appointment does not appear in MCA as none of these three directors attended the board meeting convened to induct the new directors and hence the question of holding a meeting of independent directors does not arise. The committee for recommendation is not constituted at all for the company as claimed in the open offer document.

l) The directors have wrongly declared the existing paid-up capital as ₹ 6,95,33,333/- instead of ₹ 11,05,00,000/-.

m) Further, the board failed to take cognizance of the Independent Director's Report filed by director under sr. no. 1 to 3. Thus, for the same open offer, there cannot be two reports leaving a big question about the legality of the second report which the exchange failed to appreciate and no such disclosures are made in the offer document by the acquirer. The orders mentioned in the offer document, which is relied upon by the acquirer, are mis-interpreted by the acquirer to suit his purpose and solely with an intention to defraud the shareholders.

n) In addition to the fact that the acquirer has made an open offer to acquire 26% of the paid-up capital by wrongly stating the paid-up capital, by getting the resolution for removal of 4 directors, a hostile takeover is planned by gaining substantial control over the operations/management of the company.

The complainant has requested SEBI to stay/cancel the open offer of Lorgan so that public at large do not suffer irreparable loss by offering their shares on the basis of fraudulent and wrong declarations in the offer document filed by the merchant banker.

**4.** The complainant was afforded an opportunity of personal hearing on October 10, 2014, when the complainant along with his Advocates, Ms. H.V. Tamanna and Mr. Rohit Pande appeared and made submissions. The submissions were a reiteration of the statements and allegations made in the two complaints mentioned above. The complainant was afforded liberty to file written submissions in the matter by October 14, 2014. The complainant filed written submissions vide letter dated October 13, 2014, stating therein that it is an interim reply/arguments. Thereafter, vide letter dated October 14, 2014, the complainant filed his written submissions through his Advocate. This letter also enclosed copies of (i) complaint dated January 28, 2014, (ii) two complaints dated September 04, 2014 of the complainant which are identical in contents and (iii) Letter of Offer of the acquirer. The submissions made in the written submissions dated October 13, 2014 and October 14, 2014 were almost similar in their contents. The submissions already made in the complaints (summarized above in this order) and which have been reiterated in the written submissions are not being stated again for the sake of brevity. The other submissions are :

a) The complainant is part of the promoter group in the target company holding more than '1 crore' in the target company.
b) The complainant has been the managing director and Chief Financial Officer of the target company until the first quarter of this year.
c) Voluntary offer could be made under regulation 6 of the Takeover Regulations in compliance with the said regulation. The Letter of Offer does not state that the offer was under regulation 6.
d) As the acquirer is not holding more than 25% (as specified in regulation 6) and has acquired shares within the 52 week period preceding the public announcement without attracting obligation to make a public announcement and has therefore not satisfied the conditions mentioned under regulation 6 for making a voluntary open offer.
e) Admittedly, the open offer was made under regulation 3(1) and 4 of the Takeover Regulations. Open offer stipulated under regulation 3(1) is triggered if the acquirer has acquired shares/voting rights which entitle him to exercise voting rights in excess of 25%.

In this case, the acquirer has not triggered any open offer under regulation 3(1). Likewise, under regulation 4, an acquirer who acquires control over the target company is obligated to make an open offer. Open offer under regulation 3 and 4 are mandatory and the event triggering open offers under these regulations are absent in this case.

f) No agreement has been entered into by the acquirer for purchase of shares or for effecting takeover in the target company. The acquirer cannot avail itself the option of making a voluntary open offer. The acquirer has made a conscious attempt to wrongly and illegally tie mutually exclusive provisions of law to suit its convenience.

g) The acquirer finds its foundation in disregarding the allotments made by the target company on May 08, 2013 and August 05, 2013 in the Order dated June 12, 2013 of the Company Law Board and Order dated August 26, 2013 of the Hon'ble Bombay High Court. The acquirer has sought to interpret the same to its convenience.

h) Minority shareholders of the target company known as "Khullar Group" filed a Company Petition No. 31 of 2013 alleging oppression and mismanagement, whereunder a number of Company Applications were preferred. The allotment of 1,08,44,426 equity shares made by the target company on May 08, 2013 was challenged by the Khullar Group before the CLB. The voting rights on these shares were frozen by CLB vide Order dated June 12, 2013. However, this Order lapsed after one extension. On August 01, 2013, the CLB refused to grant further extension. The applicants (Khullar group) preferred an appeal before the Hon'ble Bombay High Court. In the meanwhile, the target company on August 05, 2013 issued 2,97,00,000 shares to a company called Subhtex India Limited in lieu of a debt owed by the target company to Subhtex. The issue of additional shares was resolved in the AGM of the target company held on August 30, 2013. The Hon'ble Bombay High Court passed an Order dated August 26, 2013 in the appeal directing that a proper application be made before the CLB for extension of the Order dated June 12, 2013. The High Court also directed that any steps taken by the target company after August 01, 2013 will be kept in abeyance and is subject to the order to be passed by CLB in the application seeking extension. Therefore, the High Court does not impose any stay on the allotment of shares amounting to 2,97,00,000 and the same could be questioned only after the decision of the CLB.

i) It is submitted that CLB has not taken any decision on the issue of extension of its order dated June 12, 2013. Inspite of litigations and proceedings where no conclusive decision is arrived, the acquirer has misrepresented that the further allotted shares are irregular and do not merit consideration.

j) The dispute regarding the further allotted shares on May 08 and August 05, 2013 seem to be a dispute of old management and present management. The proceedings are *sub judice* before the CLB.

k) The EOGM and the decisions taken therein to reconstitute the board of directors have been questioned before CLB and that the present board of directors stand shrouded in dispute and disagreement to the extent that while some directors of the target company have given their consent and cooperation to facilitate the voluntary open offer of the acquirer, other directors are constrained to make representations to SEBI.

l) The directors namely Nehakiran Gandhi, Divesh Shantaram Koli and Shrishti Suresh Deora, mentioned at sr.nos. 1, 2 and 3 of paragraph 5.10 of LOF, are named as additional directors. The LOF incorrectly mentions that their appointments are kept in abeyance vide High Court's Order dated August 26, 2013. Mere perusal of the Order is proof of the fraudulent statement made by the acquirer. On the contrary, the three directors had to be re-elected as directors of the target company in compliance with the Orders dated August 14th and 26th, 2013 of the Hon'ble Bombay High Court. It is submitted that the appointment of directors was made only with an intention to comply with the order passed by the Hon'ble High Court whereby implied directions were given to the company to maintain status quo of the shareholding pattern and board of directors of the company.

m) The acquirer has made a fraudulent declaration in the LOF because the said three directors have refused to lend support and co-operation to the acquirer in its nefarious attempt to acquire shares of the target company to acquire control over the affairs of the target company in complete disregard of all rules and regulations.

n) The acquirer has also submitted false information with respect to the registered office address of the target company. At the time of making the open offer, the MCA was showing a different registered office (than what was mentioned in the offer document).

The new directors, without taking into consideration the consent of the additional directors and without following the due procedure of law, have changed the registered office of the company on September 07, 2014. In the LOF dated August 22, 2014, the incorrect information was published to deceive and suppress material information regarding 'registered office address' to the shareholders.

o) The acquirer through the LOF is in the process of taking over the target company with complete and thorough disregard for any rule, regulation or law.

The complainant has requested for copies of letters issued by SEBI to acquirer pursuant to which the LOF was filed.

In view of the allegations/submissions, the complainant has requested SEBI to set aside the Letter of Offer of the acquirer or in the alternative to stay the acquisition of shares through the alleged voluntary open offer made by the acquirer and order a detailed investigation into the affairs at hand.

**5.** I have considered the complaints dated January 28, 2014 and September 04, 2014 and other material available on record. As per the Letter of Offer dated August 22, 2014, Lorgan has made an open offer to acquire 2,86,20,218 equity shares of face value ₹ 1/- each, representing 26% of the equity share capital of the target company.

**6.** As regards the allegation that the acquirer and the merchant banker had mis-stated the paid-up capital of the target company in the public announcement and in the detailed public statement, I note that the public announcement of the acquirer stated that the offer size was to acquire 1,80,78,667 shares constituting 26% of the paid-up capital considering the same to be ₹ 6,95,33,333/-. In the detailed public statement, in paragraph B.5., it was stated that the paid-up equity share capital of the target company is ₹ 6,95,33,333/- divided into 6,95,33,333 equity shares of ₹ 1/- each. However, as directed by SEBI vide letter dated June 06, 2014, the paid-up share capital was corrected in the Letter of Offer to include the further shares allotted in 2013. The paid - up capital was stated to be ₹ 11,00,77,759/- comprising of 11,00,77,759 equity shares

of ₹ 1/-. The same was the case with the offer size, which has been corrected in the Letter of Offer pursuant to SEBI's comments. Accordingly, the allegations regarding paid-up capital and offer size made by the complainant has been addressed in the Letter of Offer made by Lorgan. The complainant has made the allegation that in paragraph 3.1.2 of the Letter of Offer, it has been wrongly mentioned that the acquirer holds 24.86%. I have perused Paragraph 3.1.2 of the letter of offer which clearly mentions the paid-up capital as 11,00,77,759 shares considering the further allotment of shares and that the acquirer's shareholding represented 15.7% of the said paid-up equity share capital.

**7.** The next allegation is regarding the eligibility of the acquirer to make a public offer under regulations 3(1) and 4 of the Takeover Regulations. The complainant has also alleged that the conditions prescribed under regulation 6 were not satisfied by the acquirer to make a voluntary open offer.

In this regard, I note that the Takeover Regulations are framed to regulate substantial acquisition of shares/voting rights and acquisition of control in a target company by an acquirer. Regulation 3 and 4 mandate open offer by an acquirer if he breaches the limits mentioned therein and if control is acquired. However, there could be situations where proposed acquirers could make an open offer as they intend to consolidate/increase their shareholding in a target company when such post-offer shareholding is expected to be in excess of the percentages mentioned under regulation 3 and/or regulation 4. An open offer is an opportunity to an existing shareholder of a target company to either exit or hold on to his shares in case any acquirer wishes to acquire shares through means including open offers.

Such position and interpretation of the Takeover Regulations, 2011 has been explicitly said in the 'Frequently Asked Questions' for Takeover Regulations as placed in the website of SEBI. The relevant questions and answers are reproduced below:

"*18.Can a person holding less than 25% of the voting rights/ shares in a target company, make an offer?*

*Yes, any person holding less than 25% of shares/ voting rights in a target company can make an open offer provided the open offer is for a minimum of 26% of the share capital of the company.*

*19. How is the voluntary offer made by a person holding less than 25% of shares/ voting rights in a target company different from the voluntary offer made by a person holding more than 25% of shares/ voting rights of the target company?*

| ***Voluntary offer by a person holding less than 25%*** | ***Voluntary offer by a person holding more than 25%*** |
|---|---|
| *Minimum offer size of 26%.* | *Minimum offer size of 10%.* |
| *Maximum can be for entire share capital of the target company* | *The maximum offer size is linked to maximum permissible non public shareholding permitted under Securities Contracts (Regulations) Rules 1957.* |
| *No such conditions* | • *Acquirer should not have acquired any shares during 52 weeks period prior to Public Announcement.*<br>• *Acquirer is not entitled to acquire any shares of the target company for a period of 6 months after the completion of the open offer except for a voluntary open offer.* |

In cases, where an acquirer holds less than 25% and intends to consolidate his shareholding and attempts to takeover control, he may make an open offer to acquire shares under regulations 3 and 4 of the Takeover Regulations. Further, the pricing would be in terms of the Takeover Regulations. Regulation 6 would not be applicable to such case nor can it be said that voluntary open offers could be made only under and in terms of regulation 6 of the Takeover Regulations. However, if an acquirer makes a voluntary open offer under regulation 6, he must comply with the conditions as prescribed under regulation 6. The said regulation is reproduced below :

> *"6(1) - An acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise twenty-five per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations, subject to their aggregate*

*shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding:*

***Provided*** *that where an acquirer or any person acting in concert with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation:*

***Provided further*** *that during the offer period such acquirer shall not be entitled to acquire any shares otherwise than under the open offer*

*6(2) - An acquirer and persons acting in concert with him, who have made a public announcement under this regulation to acquire shares of a target company shall not be entitled to acquire any shares of the target company for a period of six months after completion of the open offer except pursuant to another voluntary open offer."*

Such conditions were placed in the regulation to allow only shareholders having 25% or more of the paid-up capital to consolidate their positions under this provision. This regulation has been inserted pursuant to the 'TRAC Committee' recommendation, which reads as follows–

"*the Committee felt that voluntary offers are an important means for substantial shareholders to consolidate their stake and therefore recognized the need for a specific framework for such open offers. However, to discourage non-serious voluntary offer, the Committee decided to set a minimum offer size of 10%."*

From the above, it may be noted that voluntary offer for a reduced size of 10% offer size has been permitted under regulations 6 and 7, subject to the conditions specified therein.

As stated above, if an acquirer wishes to make a full sized open offer, i.e., 26%, then the Acquirer may choose to do so under regulation 3(1) or 3(2), as the case may be. In the instant case, the holding of acquirer was less than 25%, therefore it made a voluntary offer under regulation 3(1) of the Takeover Regulations. Further, it intended to acquire control and therefore open offer was also made under regulation 4 of the Takeover Regulations. The scheme and framework of the

Takeover Regulations is not to prevent an open offer, especially one that is being made without compulsion on crossing 25% threshold or acquiring control. If such open offers are scuttled, the same would only be prejudicial to the shareholders of a target company. In the recent past, offers made by an acquirer (who either held more than 25% or even less than 25%) which are for the normal offer size (i.e., 26%) or more have been permitted under regulation 3 by SEBI. Such cases are given below:

(a) Pre-offer holding of acquirer who made PA on July 10, 2013 to acquire shares of Kalindee Rail Nirman was 0%.
(b) Pre-offer holding of acquirer who made PA on February 21, 2014 to acquire shares of ICRA Ltd. was 28.51%.
(c) Pre-offer holding of acquirer who made PA on April 15, 2014 to acquire shares of United Sprits Ltd. was 28.78%.

As regards acquisition of 'control', it needs to be clarified that a Public Announcement (PA) made after acquiring control would be treated as a delayed PA. Further, regulation 22(1) specifically provides for completion of acquisition of control only after the expiry of the offer period. Therefore, acquisition of control prior to making the PA would also be in violation of this regulation.

Thus, under the Takeover Regulations, an acquirer is required to make the PA upon agreeing to take control or as in this case, upon taking necessary steps for acquiring shares which may bestow control. A number of open offers with the intention to acquire control are made irrespective of the holding of acquirer post open offer. Moreover in the instant case, as submitted by the Merchant Banker (MB) vide email dated August 10, 2014, assuming the 100% response in the open offer, the acquirer shareholding would increase to 41.70% of the share capital of the company, which would be more than the promoters' shareholding. Such statements are also disclosed under paragraph 3.3.3 of the LOF. In this case, as informed by the target company, the acquirer has already acquired 1,99,35,658 shares post the open offer.

In view of the above, I find that the allegation made by the complainant that the acquirer was ineligible to make an open offer under regulations 3(1) and 4, have no merit.

**8.** The complainant has raised a question as to whether the acquirer is making a 'hostile takeover'. The Takeover Regulations does not recognize 'hostile takeovers'. The FAQs on the Takeover Regulations placed in the SEBI website states "*There is no such term as hostile bid in the regulations. The hostile bid is generally understood to be an unsolicited bid by a person, without any arrangement or MOU with persons currently in control*". Any acquisition of substantial shares and/or control is considered to be valid, if the same complies with the relevant provisions of the Takeover Regulations.

**9.** The complainant's Advocates acknowledged the existence of SEBI's FAQs as reproduced on pages 15-16 of this Order but argued that FAQs does not have the force of regulations and therefore should not be considered at all. The question before me is whether SEBI can interpret its own regulations, which it has done in the form of FAQs. I am of the opinion that it can and it should, otherwise doubts raised about the effect of regulations would bring the entire business to a halt. I am of the opinion that such interpretations are valid so long as these are transparent and applied consistently without discrimination. No case has been made out that SEBI interpreted regulations 3(1), 3(2) and 4 otherwise in any other matter, or that SEBI's interpretation was not known publicly.

**10.** The complainant has also alleged that dates were not mentioned for certain documents listed under paragraph 9 of the Letter of Offer. In this regard, I note that paragraph 9 of the LOF deals with 'Documents for Inspection'. The LOF mentioned that the documents, as listed therein, were made available in the office of the Merchant Banker for inspection. Further, Clause 9 of the format for letter of offer (prescribed by SEBI), as updated on November 21, 2011,prescribing what all should be the contents of an LOF, provides only the list of the documents to be made available for inspection under the head "*Documents for Inspection*" and does not prescribe that the date of such documents should also be mentioned. Therefore, when there is no requirement to do something, the merchant banker/acquirer cannot be faulted with for not mentioning the dates of such documents. Moreover, as per the LOF, such documents were

available for inspection in the premises of the merchant banker for verification. Therefore, the complainant cannot be aggrieved in this regard.

**11.** The complainant has also alleged that the LOF incorrectly mentions that the appointments of three additional directors namely Neha Kiran Gandhi, Divesh Shantaram Koli and Shrishti Suresh Deora (who were appointed on 30.08.2013) were kept in abeyance vide the Hon'ble High Court's Order dated August 26, 2013. I have perused paragraph 5.10 of the LOF which mentions the composition of the board of directors of the target company. The said paragraph is reproduced herein below :

"5.10. *Thecomposition of the Board of Directors of SVC is as under*:

| S.No. | Name and Address of Director | Designation | Date of appointment |
|---|---|---|---|
| 1. | *****Ms. NehaKiran Gandhi<br><br>IV-1, Ashirwad, Plot No. 22, 6th Road Friends, Society, J.V.P.D.Scheme, Juhu, Vile Parle (West), Mumbai-400056 | Additional director | 30/08/2013 |
| 2. | *****Mr. DiveshShantaramKoli<br><br>DharaviKoliwada, Room No. 180-D9, Near Holi Maidan, J JKeni Lane, Dharavi, Mumbai- 400017 | Additional director | 30/08/2013 |
| 3. | *****Mr. Shrishti Suresh Deora<br>Santogen House,18 Hatkesh Soc., 6th Road, J.V.P.D. Vile Parle (West), Mumbai-400056 | Additional director | 30/08/2013 |
| 4. | # Mr. Mohammed Ali | Managing Director | 09/04/2014 |
| 5. | #Mr. Zalak Shah | Director | 04/04/2014 |
| 6. | #Mr. Om Prakash Chugh | Director | 04/04/2014 |
| 7. | #Dr. Riyaz Mohammed Kamruddin Khan | Director | 04/04/2014 |

*None of the above Directors is representative of Acquirer.*

****Appointment is kept in abeyance vide High Court order dated August 26, 2013.***

*#Appointed pursuant to Bombay High Court Order dated January 9, 2014, Members Resolution passed in EGM dated January11, 2014, Court appointed Observers' Report dated January 15, 2014 and CLB Order dated April 4, 2014. Mr. Mohammed Aliwas appointed by the three directors appointed by CLB."*

{Emphasis supplied}

In this regard, I note that the merchant banker in its letter dated September 08, 2014 to SEBI has submitted that it had relied on the MCA and BSE portals for information regarding the board of directors of the target company and that as per the information (downloaded on 08.09.2014)

available on the MCA portal, Mr. Mohd. Ali was indicated as the managing director. Further, as per clause 5 {*background of the target company which includes details of present composition of the board of directors* (*names of directors with dates of appointment*)} such details should be restricted only to the relevant information from the public domain. The acquirer/merchant banker has stated that such details are taken from the MCA website and BSE portal, which are sources for relevant information in the public domain.

**12.** I have also perused the Order dated August 26, 2013 passed by the Hon'ble Bombay High Court, wherein the Hon'ble High Court had *inter alia* directed as follows :

" 8. …… *Therefore, it is directed that till the Company Law Board decides the application for extension of stay made by the appellants (Mohit Khullar and others), any steps which have been taken by the respondent-company after the order of the Company Law Board on 1 August 2013 will be subject to the outcome of the order of extension, and also that the steps taken by the respondent-company after 1 August 2013 shall not be used for any purpose. It goes without saying that this direction will also include, the directions in the order dated 14 August 2013*. "{Emphasis supplied}

The Hon'ble Bombay High Court vide Order dated August 14, 2013 had made the following direction:

"1. *At the request of Mr. Ashok Gupta, the Managing Director of Respondent No. 1 stand over to 19th August, 2013 at 3:00 p.m..Mr. Ashok Gupta states that until further orders, the Respondent No.1 Company shall maintain status quo as of today in respect of its share holding. The statement is accepted as an undertaking given to the Court*. "{Emphasis supplied}

In terms of the Order dated August 14, 2013 of the Hon'ble High Court, the complainant has undertaken that the target company shall maintain status quo in respect of its shareholding. Further, as per the High Court's Order dated August 26, 2013, any steps taken by the target company after the CLB's Order on August 01, 2013, would be subject to the outcome of the 'extension' and cannot be used for any purpose. The above said three directors have been appointed on August 30, 2013, which is after August 01, 2013. The complainant has not disputed the date of appointment. Therefore, it becomes difficult to comprehend as to how his allegation that the statement in LOF that the 'appointment of the three directors (i.e., Neha Kiran

Gandhi, Divesh Shantaram Koli and Shrishti Suresh Deora) were kept in abeyance in terms of the High Court's Order dated August 26, 2013' is a mis-statement.

**13.** I have also perused the Minutes of the EOGM of the target company held on January 11, 2014, wherein Zalak Shah, Om Prakash Chugh and Riyaz Mohd. Kamruddin were appointed as directors and the previous board of directors, including the complainant Mr. Ashok Gupta, was removed from the post of directors. This EOGM was held in compliance with the CLB's Order dated December 11, 2013. The Hon'ble High Court of Bombay vide Order dated January 09, 2014, while noting that the agenda on January 11 2014 meeting is for appointment of new directors and removal of some of the directors, had directed that "…Any resolution passed for removal of these directors or appointment of new directors, should not be give effect to till further orders by the CLB". I have also perused the Order dated April 04, 2014 passed by the CLB, wherein it was directed "*Company M/s SVC Resources Ltd. is directed to implement the resolution passed in EOGM dated 11.01.2014 in toto. The existing Board of Directors of SVC Resources Ltd. stands superseded by the Board of Directors appointed in the EOGM dated 11.01.2014. The company is directed to file Form No. 32 regarding the cessation of the existing Board and appointment of new Directors as resolved in the EOGM at 11.01.2014. Necessary steps shall also be taken by the company with the Bombay Stock Exchange in this regard. The Bombay Stock Exchange is also directed not to publish any announcement or news submitted by the erstwhile management to mislead the shareholders/stakeholders. The newly constituted Board of Directors of the company shall hold their first meeting within four weeks from today.* " This order of CLB has validated the appointment of new directors and the removal of directors take in the EOGM dated January 11, 2014. The date of appointment of the three directors appointed in the EOGM dated January 11, 2014 has been mentioned as April 04, 2014, the date of ratification of their appointment by the CLB read with the aforesaid Hon'ble High Court's order. It is stated as per the letter dated April 09, 2014 from Company to BSE that the newly appointed directors had a meeting on April 09, 2014 and had appointed Mr. Mohd. Ali as the MD till such time the target company appoints permanent MD and Company Secretary. Further, the decision to change the registered office address was taken in this meeting of new directors and informed to BSE and MCA. Such publicly available information was mentioned in the LOF of the acquirer.

I have also perused the target company's letters dated April 7th, 9th and 19th 2014 to BSE informing about the outcome of the EGM held on January 11, 2014, the cessation of the old board of directors and new directors who were appointed in the meeting.

As seen from the table in para 5.10 of the LOF, the aforesaid three directors have been appointed on August 30, 2013, which is done after August 01, 2013. The statement made in the LOF that the appointment of such directors has been kept in abeyance in terms of High Court's Order dated August 26, 2013 cannot be faulted (the order of CLB was on April 04, 2014 whereas LOF was on August 22, 2014, i.e. subsequently). I am also of the view that any grievance regarding non-compliance with the orders passed by the Hon'ble High Court and the CLB may be brought before such Hon'ble Courts for redressal and necessary orders.

**14.** The complainant has also alleged that the newly appointed directors cannot induct themselves as directors unless notice is given to all directors in the board. This allegation again does not fall within the purview of SEBI and it may be brought before the concerned authority. Further, the challenge to the appointment of Mr. Mohd. Ali as the managing director and the related alleged non-compliance with the provisions of Companies Act, 1956 also needs to be taken before appropriate authority.

**15.** The complainant has also alleged that the board has not taken cognizance of the report of three independent directors - Neha Kiran Gandhi, Divesh Shantaram Koli and Shrishti Suresh Deora. I have perused the comments made by the merchant banker made vide letter dated September 8, 2014, wherein it is stated that it considered the discrepancies in the constitution of the committee of directors by the old management, the fact that the board of the target company was changed in the EOGM, the recommendation of the newly elected board was taken into consideration. I am in agreement with this view. As stated above, new directors were appointed in the EOGM and the same was also approved by the CLB.

**16.** I also note that the complainant has not stated as to how he was aggrieved by the above allegations of mis-statement made by the acquirer/merchant banker. During the personal

hearing, the complainant has stated that when he tendered shares, which were disputed, the same were not accepted in the open offer made by the acquirer. In this regard, it is the complainant's statement that the target company has taken steps to cancel the shares allotted in 2013. The LOF also, in paragraph 3.1.2 states that "... *the Target Company has filed an application before CLB for cancellation of these two irregular allotments*". This grievance is not the subject matter of this enquiry and needs to be made separately to SEBI for consideration.

**17.** I note that the open offer was cleared in the normal course by SEBI based on the provisions of Takeover Regulations, consistent with its earlier practice in similarly placed cases. Further, the open offer has been completed as per the reports of the merchant banker/acquirer and shareholders have parted with their shares in the open offer. Beneficial ownership has also been created in favour of the acquirer in respect of the shares accepted in the open offer. The complainant has not made a case for himself in the complaints dated January 28, 2014 and September 04, 2014 by substantiating as to how his interests have been adversely affected because of the open offer/allegations made by him in the complaints.

**18.** In view of the above reasons and observations, the complaints dated January 28, 2014 and September 04, 2014 of the complainant, Mr. Ashok B. Gupta, and the grievances/allegations made therein are accordingly disposed of as having no merit.

**19.** This Order is issued in compliance with the directions of the Hon'ble Securities Appellate Tribunal made vide Order dated September 24, 2014 (in Misc. Appln. No. 134 of 2014 and Appeal no. 293 of 2014 - *Ashok Banwarilal Gupta vs. Securities and Exchange Board of India and others*).

**PRASHANT SARAN**
**WHOLE TIME MEMBER**
**SECURITIES AND EXCHANGE BOARD OF INDIA**

**Date: OCTOBER 30, 2014**

**Place: Mumbai**