

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. Order/MC/DS/2020-21/ 8343-8350]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995 AND SECTION 23-I OF THE SECURITIES CONTRACTS (REGULATION) ACT READ WITH RULE 5 OF SCRA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 2005

In respect of –

- 1) **Rajkumar Saraf (PAN - AURPS4374C)** having address at - 5th Floor, Saraf House, SVP Road, Chowpatty, Mumbai-400007.
- 2) **Akash Rajkumar Saraf (PAN - AAFPS8849C)** having address at - 5th Floor, Saraf House, SVP Road, Chowpatty, Mumbai-400007.
- 3) **Vipin M. Shah (PAN - AAHPS8417J)** having address at - Flat No. 4-a, 4th Floor, Happy Home Apartments, 28-a, Napean Sea Road, Mumbai - 400 036.
- 4) **Vijay Ramchandra Mukhi** having address at - Kalpataru Habitat, B Wing, 15th Floor, Flat No. 158, Parel, Mumbai-400012.
- 5) **Devita Rajkumar Saraf (PAN - AAFPS8848D)** having address at - 5th Floor, Saraf House, SVP Road, Chowpatty, Mumbai-400007.
- 6) **Vijayrani Rajkumar Saraf (PAN - AMTPS0851J)** having address at - 5th Floor, Saraf House, SVP Road, Chowpatty, Mumbai-400007.
- 7) **Zenith Technologies Pvt. Ltd. (PAN - AAACZ2074L)** having address at - 3rd Floor, A-Z Industrial Estate, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013.
- 8) **Vu Technologies Pvt. Ltd. (PAN - AACCV1663P)** having address at - 30, MIDC Central road, Andheri (East), Mumbai-400093.

In the matter of Zenith Infotech Limited.

1. Securities and Exchange Board of India (hereinafter be referred to as, '**SEBI**') initiated adjudication proceedings in the matter of Zenith Infotech Limited (hereinafter referred to as 'ZIL/Company/Scrip') against (i) **Rajkumar Saraf**, (ii) **Akash Rajkumar Saraf**, (iii) **Vipin M. Shah**, (iv) **Vijay Ramchandra Mukhi**, (v) **Devita Rajkumar Saraf**, (vi) **Vijayrani Rajkumar Saraf**, (vii) **Zenith Technologies Pvt. Ltd.** and (viii) **Vu Technologies Pvt. Ltd.** (hereinafter referred to as '**the Noticee No. 1 to 8** respectively or as "**the Noticees / You**" collectively).
2. Adjudication Proceedings were initiated against Noticees under section 15HA and 15HB of SEBI Act, 1992 (hereinafter referred to as '**SEBI Act**') and Section 23A of Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as '**SCRA**') for alleged violations of Section 12 A (b) and (c) of SEBI Act, Regulations 3 (a), (c) and (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as '**PFUTP Regulations**'), Clauses 21 and 36 of the Listing Agreement read with Section 21 of SCRA, Clause 2.1 and Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12 (2) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as '**PIT Regulations**'). Further, Adjudication Proceedings were initiated against Noticee 2 under section 15A(a) of SEBI Act for alleged violations of Section 11C(2) read with Section 11C(3) of the SEBI Act.

APPOINTMENT OF ADJUDICATING OFFICER

3. SEBI appointed Shri Jeevan Sonparote as Adjudicating Officer *vide* an order dated May 18, 2017, to enquire into and adjudge under Section 15A(a), 15HA and 15HB of the SEBI Act and Section 23A of SCRA, the aforesaid alleged violations against Noticees. Subsequently, the undersigned was appointed as Adjudicating Officer *vide* an order dated January 07, 2020.

SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice No. SEBI/EAD-8/OW/ZENITH/JS/SP/P/2017/30982/1 dated December 11, 2017 (hereinafter be referred to as, the '**SCN**') was served upon the Noticees under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 and under Rule 4 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 to show cause as to why an inquiry should not be held and penalty be not imposed against Noticees under Section 15A(a), 15HA and 15HB of SEBI Act and Section 23A of SCRA as applicable for the aforesaid alleged violations.
5. Relevant facts of the case in brief, as described in the show cause notice, are discussed in the following paragraphs.
6. On September 15, 2006, ZIL offered USD 33 million 3.0% Convertible Bonds due for repayment or redemption in August 2011. Subsequently, on August 14, 2007, ZIL offered USD 50 million 3.0% Convertible Bonds due for redemption in August 2012. The aforesaid two series of FCCBs issued by ZIL had terms of cross default stipulating that default in redemption of FCCBs due in August 2011 would automatically cause a cross default on ZIL's obligation on the other series of FCCBs due for redemption in August 2012.
7. ZIL, vide its letters dated October 13, 2011 to BSE/NSE and December 10, 2011 to SEBI, informed that they were in negotiations with the FCCB holders to extend the time for redemption of FCCBs while the trustees on behalf of the FCCB holders filed a suit against ZIL for recovery on October 21, 2011 and also filed a winding up petition against ZIL on December 21, 2011.

8. It was observed that ZIL failed to disclose the information of default in redemption of FCCBs and the pending litigation. Hence, it was alleged that ZIL concealed material price sensitive information in violation of Clause 36 of the Listing Agreement and Clause 2.1 read with Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12(2) of the PIT Regulations. (Charges against ZIL).
9. Further, it was alleged that ZIL failed to fulfil its obligation under clause 21 of the listing agreement by not fixing and notifying the exchanges at least 21 days in advance, the redemption date and the amount payable on redemption of FCCBs and by not issuing cheques to the FCCB holders so as to reach them before the date of redemption.
10. The shareholders of ZIL at its Extra Ordinary General Meeting held on January 29, 2011 approved and authorized the Board of Directors of ZIL to raise money for repayment/redemption of FCCBs in one or more of the following methods:
- i. *"To borrow moneys from Domestic markets and/or through External Commercial Borrowings up to an amount not exceeding Rs. 1500 crores.*
 - ii. *To sell and /or lease the business and/or divisions including the subsidiaries (wholly and partly) of the company and for that purpose to issue debt securities/ bonds, etc, in the domestic or international markets, as permitted by law so as to redeem/ re-pay the outstanding Foreign Currency Convertible Bonds which would come for re-payment / redemption in August, 2011 and August 2012.*
11. On September 26, 2011, ZIL informed the BSE that *"the Company have spun-off one Division of its Business known as MSD Division to M/s. Zenith Monitoring Services Pvt. Ltd., Mumbai, which will be a subsidiary of Zenith RMM LLC, by way of an Asset Purchase Agreement. However, Zenith Infotech Ltd., is going to be a*

major shareholder". Further, Zenith RMM, appears to have been purportedly set up to acquire the MSD business of ZIL and Noticee 2 was to be a member of the Board of Directors of Zenith RMM.

12. ZIL had received a total consideration of USD 54.7 million from the sale of MSD business, out of which an amount of USD 6 million was kept in the Escrow account. Of the remaining amount of USD 48,712,391 received, USD 21,712,411 was received in the Citibank EEFC a/c No. 0350609288 of ZIL and USD 26,999,980 was received in the Standard Chartered account No. 01-2069905-01 of Zenith Infotech (FZE), Dubai (hereinafter referred to as, '**Zenith Dubai**'), a wholly owned subsidiary of ZIL, based in Dubai, on September 27, 2011. However, no announcement was made by ZIL to the exchanges on the fact that Zenith Dubai owned a part of the MSD business and that the sale proceeds of the MSD business would be transferred to Zenith Dubai.

13. The details observed from the Annual Report 2010-11 of ZIL, with respect to the assets sold during the period April 01, 2010 to September 30, 2011 and the gain on the sale of MSD Division are as follows:

Particulars	ZIL Standalone (In Lakhs) (1)	ZIL Consolidated (In Lakhs) (2)	ZIL Subsidiaries (In Lakhs) (3)=(2)-(1)
WDV of assets sold during the period	16530.29	17389.21	858.92
Gain on Sale of MSD	4579.69	10393.37	5813.68
Sale Price of Assets Sold	21109.98	27782.58	6672.60

From the above table, it is observed that though ZIL owned 95% of the assets sold during the period April 01, 2010 to September 30, 2011, only 44% of the gain on sale of MSD was appropriated to ZIL, while the subsidiaries which owned only 5% of the assets sold during the year were appropriated 56% of the gains arising out of the sale of MSD.

14. Further, the Asset Purchase Agreement (**APA**) dated September 23, 2011, entered between ZIL, Zenith Dubai and Zenith RMM LLC, stating the disclosure schedule to the APA and providing the list of various assets transferred, indicates that the SAAZ software was as an important intellectual property forming the backbone of the service delivery from the network operations center in Mumbai. Hence, the SAAZ software is alleged to be owned by ZIL and there is no mention of Zenith Dubai having any ownership, thus raising a question on the reason for having transferred a major part of the sale proceeds of the MSD business to Zenith Dubai.

15. As per submissions made by ZIL vide their letter dated March 11, 2014, the sale proceeds received had been utilized in the manner as indicated in the following table:

S. No.	Particulars	Amount in Millions (USD)
i.	Transferred to Zenith Singapore for payment to be made to Standard Chartered Bank in respect of a secured working capital loan obtained by Zenith Singapore from Standard Chartered Bank	10.40
ii.	Payment of Advance Tax (Estimated Capital Gain Tax on sale of MSD Division)	5.80
iii.	Payments made to business creditors of Zenith Infotech	6.00
iv.	Purchase of capital goods for Zenith Infotech	4.53
v.	Investment in Zenith Cloud Computing FZC	5.00
vi.	Investment in VU Telepresence FZC	8.00
vii.	Further payment to Standard Chartered Bank to completely repay working capital loan	2.20
viii.	Amounts not utilised and lying with ZIL	6.07
TOTAL		48.70

16. ZIL submitted copies of letters from Standard Chartered bank showing repayment of loan by Zenith Singapore and statements and emails showing transfer of money to Zenith Singapore by Zenith Dubai.

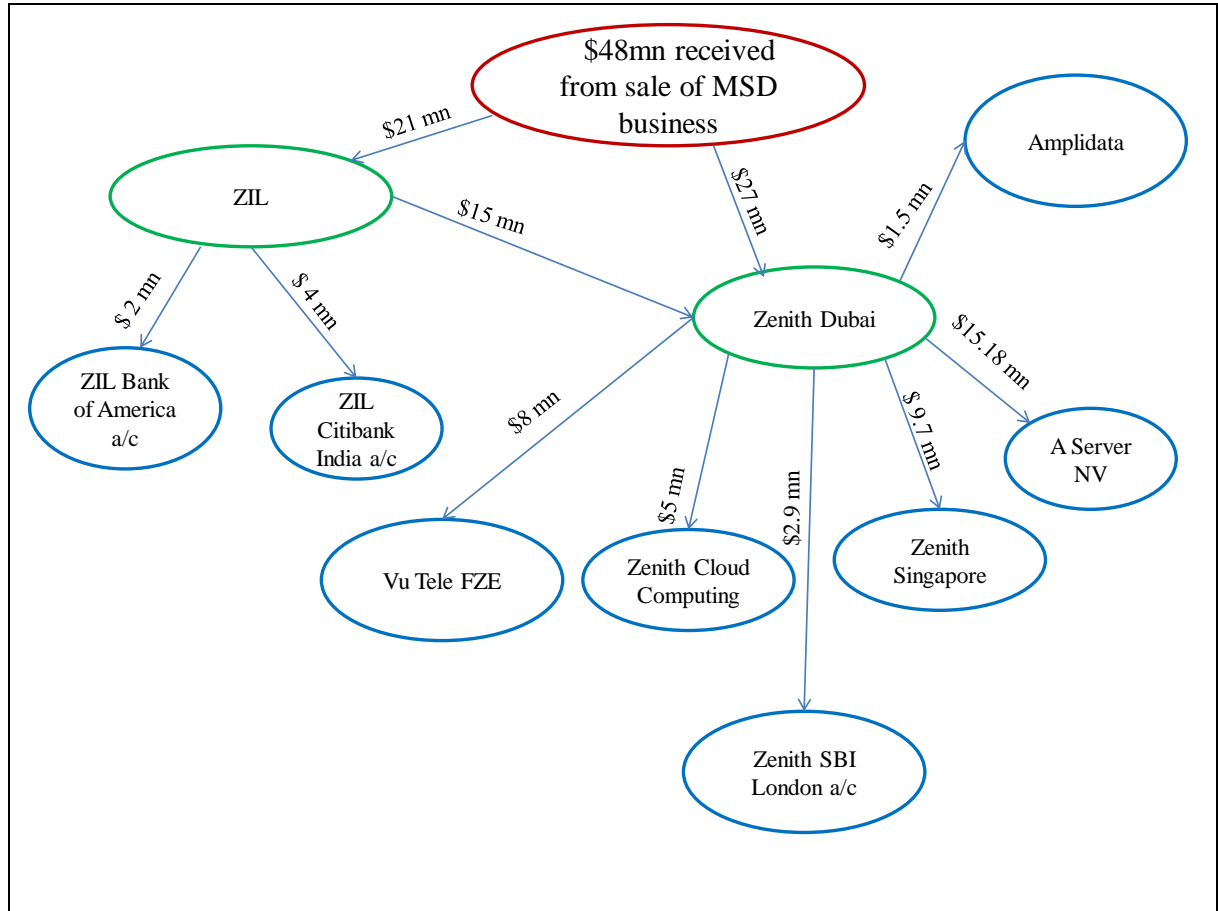
17. ZIL submitted copies of bank transaction showing payments made to the various creditors, and/or in some cases letters from the creditors to whom payments have been made. The detailed list of creditors who received payment from ZIL, as per the documents submitted by ZIL is as follows.

S.No.	Name of Creditors	Amount (In US\$)	Documents submitted by ZIL as proof of payment
1	Storage Craft Technology	19,55,710.00	Transaction Details Image Print of Bank of America dated 18/10/2011, 27/10/2011, 21/11/2011 and 29/11/2011. Confirmation from Storage Craft Technology Corporation that it has received US\$ 19,55,710 from Zenith Infotech Limited during the period between 01/10/2011 and 31/12/2011.
2	Ongoing operations LLC	10,00,000.00	Transaction Details Image Print of Bank of America dated 05/10/2011, 18/11/2011 and 13/12/2011. Confirmation from Ongoing Operations LLC that it has received US\$ 1,000,000 from Zenith infotech for providing Zenith Infotech with data center hosting and co-location services.
3	DSSDR LLC	10,50,000.00	Transaction Details Image Print of Bank of America dated 17/10/2011, 31/10/2011, 17/11/2011, 21/11/2011 and 06/10/2011. Confirmation from DSSDR LLC for receiving payment for US\$ 10,50,000 from Zenith infotech limited between 01/10/2011 and 15/12/2011. In Page No. 599 & Transaction Details from bank of America.
4	Kernel Drivers	4,50,000.00	Transaction Details Image Print of Bank of America dated 05/10/2011 and 28/10/2011 and Confirmation from Kernel Drivers LLC.
5	AMD Int'l Sales & Service	3,15,000.00	Transaction Details Image Print of Bank of America dated 06/10/2011
6	Tech Target	2,20,385.11	Transaction Details Image Print of Bank of America dated 20/10/2011 and Confirmation from Tech Target
7	Sunbelt Software Distribute	2,19,000.00	Transaction Details Image Print of Bank of America dated 12/10/2011
8	1105 Media Inc	1,23,330.58	Transaction Details Image Print of Bank of America dated 30/09/2011, 20/10/2011 and 16/11/2011
9	Everything Channel	90,083.36	Transaction Details Image Print of Bank of America dated 30/09/2011 and 16/11/2011
10	Commcentric Solutions Inc	87,828.65	Transaction Details Image Print of Bank of America dated 30/09/2011 and 16/11/2011
11	Enterprise Media Group	82,666.00	Transaction Details Image Print of Bank of America dated 30/09/2011 and 20/09/2011
12	Channel Pro	66,998.00	Transaction Details Image Print of Bank of America dated 30/09/2011 and 16/11/2011
13	Sales Force. Com INC	62,179.60	Transaction Details Image Print of Bank of America dated 30/09/2011 and 03/10/2011
14	Kroll Ontrack	50,000.00	Transaction Details Image Print of Bank of America dated 13/12/2011

15	Fedex	46,155.72	Transaction Details Image Print of Bank of America dated 29/09/2011, 17/10/2011, 07/11/2011, 16/11/2011, 30/11/2011,13/12/2011 and 15/12/2011
16	Hurricane Electric LLC	43,250.00	Transaction Details Image Print of Bank of America dated 01/11/2011 ch no 005734 for invoice no.9718662 – 1H
17	ITE Ex	33,000.00	Transaction Details Image Print of Bank of America dated 30/09/2011
18	Spice Works	27,488.59	Transaction Details Image Print of Bank of America dated 20/10/2011 ch.no.005973 for invoice no.4542/4575/4976
19	Law Office of Bradley Gross P.A.	21,394.01	Transaction Image print of Bank of America ch.no.005733 dt 30/09/2011 for invoice no.ZE92701 – 1
20	Nine Lives Media Inc	19,005.00	Transaction Details Image Print of Bank of America. cheque no. 005735 dated 30/09/2011 for invoice no. 1073 and 1128 and 20/10/2011 for invoice no.1034, ch.no.005781
21	Penton media Inc	17,670.00	Transaction Image Print of Bank of America. cheque no. 005780 dated 20/10/2011 for Invoice no. NL 1043177, dated 16/11/2011 for invoice no. IIL 1055543
22	Connectwise Inc	15,000.00	Transaction Image Print of Bank of America. dated 30/09/2011 for invoice no. CW89325 , cheque no. 005734
23	Resolutions Enterprises Ltd.	13,470.08	Transaction Image Print of Bank of America. dated 16/11/2011 for invoice no. RC-4024, and dated 30/09/2011 for invoice no. RC-4021.
24	Emedia Communications LLC	10,000.00	Transaction Details Image Print of Bank of America. dated 30/09/2011 for invoice no. 9154, cheque no. 005741
25	Nelson Ruest	10,000.00	Transaction Image Print of Bank of America, showing details as Bnf: Nelson Ruest, BNF: Bank - Bank of Montreal, payment dated 30/09/2011 to A/c no. 00124701254
26	Marketo Inc	18,073.72	Transaction Details of Bank of America. dated 20/10/2011 for invoice no. 7614 /7706 /7332 /8027 /8062 /8516, cheque no. 005775
27	On 24 Inc	18,450.00	Transaction Image Print of Bank of America dated 30/09/2011 for invoice no. 1105-0527, 1106-0543 and dated 20/10/2011 for invoice no 1107-0520/ 1108 – 0538V2
28	Network World Seminars & Events	6,500.00	Transaction Image Print of Bank of America. dated 20/10/2011 for invoice no. 1197495, cheque no. 005779
29	Ziff Davis Enterprise	41,452.00	Letter dated jan 17, 2012 from Ziff Davis enterprise certifying receipt of \$41452 from ZIL, bet Oct 1 to Dec 15, 2011
	Grand Total	61,03,240.49	

18. The bank statement of ZIL and Zenith Dubai show that ZIL had received approximately USD 21 million in its bank account no. 0350609288 with Citibank and Zenith Dubai received approximately USD 27 million in its a/c no. 01-2069905-01 with Standard Chartered Bank.

19. The flow of funds as observed from the examination of bank statements of ZIL, Zenith Dubai and Zenith Singapore is depicted in the chart below:



20. It was observed that on September 27, 2011, ZIL received an amount of approx USD 21 million from Zenith RMM LLC for the sale of the MSD business. ZIL transferred an amount of USD 2 million to its a/c No. 663807237 with Bank of America on October 03, 2011. Further, a total amount of USD 4 million was transferred to its account No. 0350609288 held with Citibank, on October 03, 2011 and October 04, 2011 and an amount of USD 15 million was transferred to Zenith Dubai's a/c no. 01-2069905-01 with Standard Chartered Bank on November 14, 2011.

21. ZIL had vide letter dated March 11, 2014, submitted that an amount of USD 6 million was paid to business creditors of ZIL from its Bank of America a/c out of the sale proceeds of the MSD business. However, it is observed that out of the sale proceeds only USD 2 million has been transferred to the said a/c, which has been subsequently transferred to various business creditors. Accordingly, the balance of USD 4 million was not paid to business creditors of ZIL, on the contrary, the USD 4 million forms part of the USD 15 million transferred to Zenith Dubai, of which ZIL made no mention in any of their submissions/disclosures. Thus, the claims of ZIL that USD 6 million of the sale proceeds has been utilised for payment to various creditors was factually incorrect.

22. Further, ZIL was summoned on August 26, 2014 to provide the nature of services availed from the creditors warranting payment from the sale proceeds of the MSD business. However, ZIL failed to provide the information, giving rise to suspicion of the genuineness of the existence of some of the companies and /or their providing services to ZIL. Further, ZIL made a payment of amount totaling USD 347004.19 prior to the receipt of the sale proceeds in the Bank of America account and the details are as follows:

S.No.	Name of Creditors	Amount paid in USD	Date of payment
1	1105 Media Inc	72000.00	30/09/2011
2	Everything Channel	63416.68	30/09/2011
3	Commcentric Solutions Inc	87041.51	30/09/2011
4	Enterprise Media Group	41214.00	30/09/2011
5	Channel Pro	40332.00	30/09/2011
6	ITE Ex	33,000.00	30/09/2011
7	Nelson Ruest	10,000.00	30/09/2011
TOTAL		347004.19	

23. ZIL submitted that they made a payment of USD 3 million from the said Bank of America account, which could not have been made out of the sale proceeds, as

only USD 2 million has been transferred to the Bank of America account, out of the sale proceeds. The details of the payment made and the documents submitted by ZIL in this regard, is as mentioned in below table:

S.No	Name of Vendor	Amount (In USD)	Documents Submitted
1	Trigem Enterprises	18,50,000.00	Bank of America confirmation for amount of \$1.85 million, and Finetec Computer Company (Trigem Enterprises) have confirmed receipt of \$1.85million
2	ASA Computers INC	11,50,000.00	Bank of America confirmation for amount of \$1.50 million, and ASA computers vide letter dated Dec 20, 2011 have confirmed receipt of \$1.50 million from ZIL

24. It was observed that the total amount of USD 4 million was transferred to ZIL's Citibank account No. 0350609121 in India which corresponds to the receipt of a total of INR 19,73,30,000/- (i.e. INR 14,84,10,000 and INR 4,89,20,000 on Oct 3, 2011 and Oct 4, 2011, respectively), in the said account, which was placed as short term fixed deposits with various banks and other institutions.

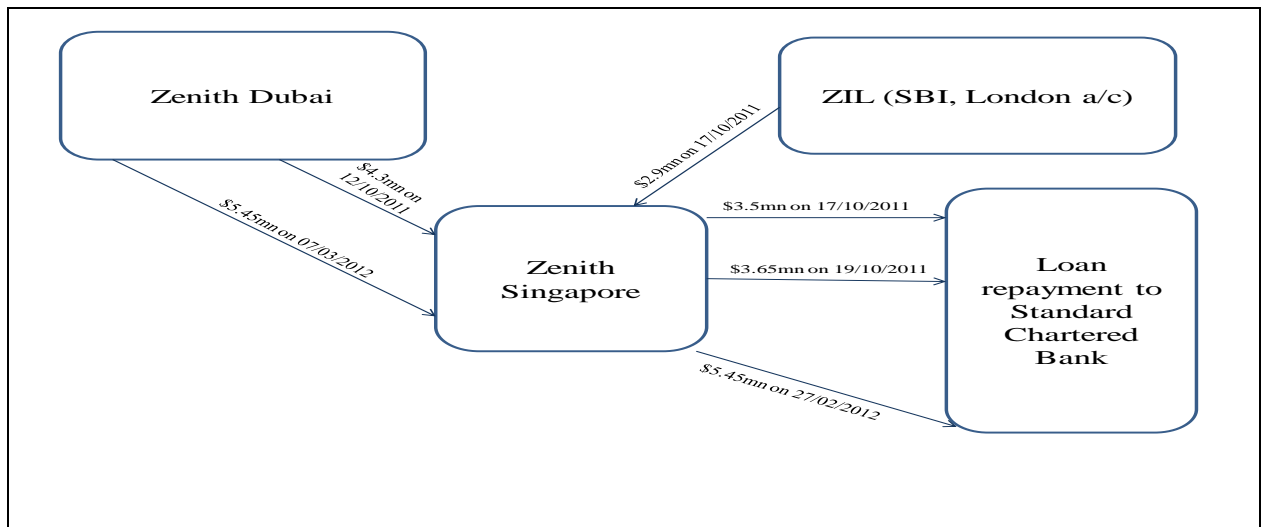
25. Further, an amount of USD 15 million was transferred to Zenith Dubai's A/c No. 01-2069905-01 with Standard Chartered Bank 01-2069905-01 on November 14, 2011. ZIL was summoned on August 26, 2014 to provide the reasons along with necessary documentary evidence for the said transfers. However, ZIL did not provide any information in this regard.

26. It was observed that Zenith Dubai received an amount of USD 42 million from the sale proceeds of the MSD business. Out of this, USD 27 million was received from Zenith RMM LLC and USD15 million was received from ZIL. The sale proceeds so received were subsequently transferred to other subsidiaries of ZIL and business associates. Zenith Dubai had transferred funds to subsidiaries of ZIL, namely Vu Telepresence FZC, Zenith Cloud Computing FZC and Zenith Singapore. The relationship between ZIL and the said subsidiaries is as explained below:

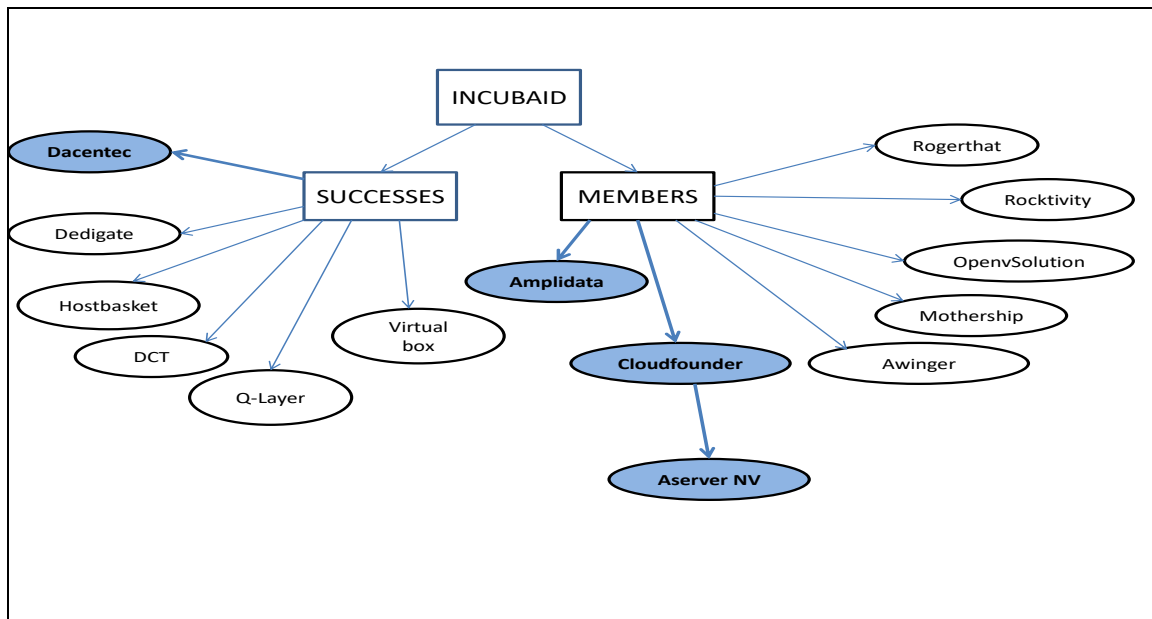
S.No.	Name of the entity	Relationship with ZIL
1	Vu Telepresence FZC	As per the Annual Report of ZIL for the period 01/10/2011-30/09/2012, ZIL holds 93.58% of its holdings. Thus, it is observed that Vu Telepresence FZC is a subsidiary of ZIL.
2	Zenith Cloud Computing FZC	As per the Annual Report of ZIL for the period 01/10/2011-30/09/2012, ZIL holds 99.20% of its holdings. Thus, it is observed that Zenith Cloud Computing FZC is a subsidiary of ZIL.
3	Zenith Singapore	As per the Annual Report of ZIL for the period 01/10/2011-30/09/2012, ZIL holds 97.56% of its holdings. Thus, it is observed that Zenith Singapore is a subsidiary of ZIL.

27. It was further observed that Zenith Dubai transferred an amount of USD 8 million to Vu Telepresence FZC. Further, an amount of USD 5 million was transferred to Zenith Cloud Computing FZC from the account of Zenith Dubai. Vu Telepresence FZC and Zenith Cloud Computing FZC have not been included in the list of subsidiaries in ZILs Annual Report for the period April 1, 2010 to September 30, 2011. However, Vu Telepresence FZC and Zenith Cloud Computing FZC have been shown in the list of other related parties.

28. As per the submission made by ZIL, an amount of USD12.6 million was transferred to a/c No. 0170250903 of Zenith Singapore, with Standard Chartered Bank, from the sale proceeds of the MSD business. The amount was utilised for settlement of working loan/ overdraft facility availed by Zenith Singapore from Standard Chartered Bank. The following chart shows the details of the funds received by Zenith Singapore and the subsequent utilization of the said funds by Zenith Singapore.



29. It is observed from copies of letters submitted by ZIL that Amplidata received USD 1.53 million from Zenith Dubai for purchase of Amplidata Dispersed Storage System under the OEM and software purchase agreement. The said transaction also reflects in the Standard Chartered Bank statement of Zenith Dubai. On examination of the bank statement of Zenith Dubai it is observed that on receipt of USD 15 million from ZIL, Zenith Dubai transferred the said amount to AServer NV. ZIL has neither mentioned about their dealings with AServer NV in any of their correspondence with respect to the utilisation of the sale proceeds nor have provided the reason for transfer of a substantial portion of the sale proceeds to AServer NV, in any of their submissions. On perusal of information available on the internet about Amplidata and Aserver NV, connections have been observed as follows:



30. Thus, it was alleged that the consideration received out of the sale of the MSD business was transferred to ZIL's group companies/subsidiaries or other business associates apart from repayment of creditors and purchase of capital goods, in contrast to the shareholders' approval. ZIL through their decision and announcement dated December 27, 2010, made a promise to the shareholders without intending to perform the same, thus acting in a manner that is fraudulent and detrimental to the interest of the shareholders.

31. Thus, it was alleged that promoters/directors of ZIL not only failed to use the sale proceeds of the MSD business for the purpose authorised by the shareholders but have also taken away the assets of ZIL either for their own benefit or for that of the entities owned and controlled by them without authority of shareholders and in blatant disregard of their approval, resulting in the following consequences:

- i. Shareholders/investors lost considerable amount of money as a result of a sharp price fall in the scrip of ZIL.

- ii. The shareholders' value got eroded because of the misconduct of the promoters/directors.
- iii. ZIL remained fastened with the liability to pay back the FCCB holders leading to further financial burden on the shareholders' wealth in ZIL.

32. In view of the above, it was alleged that Noticees 1 to 8, namely Rajkumar Saraf, Akash Rajkumar Saraf, Vipin M Shah, Vijay Ramchandra Mukhi, Devita Rajkumar Saraf, Vijayrani Rajkumar Saraf, Zenith Technologies P Ltd. and Vu Technologies P Ltd., being promoters/directors of ZIL contravened Section 12 A(b) and (c) of the SEBI Act, 1992, Regulations 3 (a), (c) and (d) of PFUTP Regulations, Clause 36 and Clause 21 of the Listing Agreement, read with Section 21 of SCRA and Clause 2.1 read with Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12 (2) of the PIT Regulations. Further, Noticee No.2 failed to reply to the summons issued vide dated March 28, 2014 and August 26, 2014 and was thus alleged to have contravened Section 11C(2) read with Section 11C (3) of the SEBI Act.

33. The aforesaid alleged violations, if established, make the Noticees liable for monetary penalty under Section 15A(a), Section 15HA, Section 15HB of SEBI Act, 1992 and Section 23A of The Securities Contracts (Regulation) Act, 1956 which reads as follows:

SEBI ACT, 1992

15A. *Penalty for failure to furnish information, return etc.*

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

Penalty for fraudulent and unfair trade practices.

15HA If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

Penalty for contravention where no separate penalty has been provided.

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

SECURITIES CONTRACTS (REGULATION) ACT, 1956

Penalty for failure to furnish information, return, etc.

23A Any person, who is required under this Act or any rules made there under,

- (a) to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefore in the listing agreement or conditions or bye-laws of the recognised stock exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less for each such failure;
- (b) to maintain books of account or records, as per the listing agreement or conditions, or bye-laws of a recognised stock exchange, fails to maintain the same, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

34. In response to the SCN, the Noticee No. 1, vide letter dated December 22, 2017 informed that Noticee No.3 and 6 had passed away in March 2017 and March 2015 respectively. Vide letter dated December 27, 2017, Noticee No.1 sought inspection of documents relied upon, which was granted vide letter dated January 04, 2018. An opportunity of hearing was granted to Noticee No.1 on February 20, 2018, and again on March 09, 2018 at the request of the Noticee. In the hearing on March 09, 2018, representatives of Noticee No.1 submitted a list of dates and events relevant to the case, and made submissions on case laws such as National Institute of Technology & Anr Vs Pannalal Choudhary & Anr Noticee (dt 1/7/15), Maharashtra State Mining Corp vs Sunil S/o Pundikarao Pathak (dt 24/4/06) and Sri Parmeshari Prasad Gupta vs. UOI (dt 2/8/1973).

35. Noticees filed written submissions vide letter dated February 19, 2018. An opportunity of hearing was granted to the Noticees on March 09, 2018. The hearing was attended by Noticee 1 and 2 and their authorized representatives Shri Ravi Kadam, Shri KRCV Seshachalam, Shri Nirav Shah and Shri Nausher Kohli. After the hearing, the Noticees 1 and 2 filed additional written submissions dated March 23, 2018.

36. Subsequent to the appointment of the undersigned as AO, another opportunity of hearing was provided to Noticees 1 and 2 on July 9, 2020. The hearing took place through videoconferencing and was attended by Noticee 1 and 2 and their authorized representatives Shri Nirav Shah, Ms. Anjali Shah, Shri Pesi Modi and Shri Neville Lashkari. The Noticees reiterated the submissions made earlier in their reply and written submissions, and stated that they will make additional submissions by July 22, 2020. Additional submissions were filed by the Noticees 1 and 2 on July 21, 2020.

37. A summary of the submissions made by the Noticees in their reply dated February 19, 2018 and written submissions subsequent to hearing dated March 09, 2018 and July 21, 2020 is given below:

38. The sequence of events which are relevant to the matter is as given below:

(a) ZIL had raised monies from foreign lenders by issuing Foreign Currency Convertible Bonds ("**FCCBs**") of USD 33 million in September 2006 ("**2006 FCCBs**") and those of USD 50 million in August 2007 ("**2007 FCCBs**"). The FCCBs were due for redemption in September 2011 and August 2012 respectively. The Bank of New York Mellon ("**BNYM**") was appointed as the common trustee for both 2006 FCCBs as well as 2007 FCCBs.

(b) The 2006 FCCBs became due for redemption on September 21, 2011.

- (c) On September 26, 2011, ZIL Informed the BSE, *inter alia* that: the Company has spun - off one Division of Its Business known as Managed Service Division Business ("**MSD Business**") to M/s. Zenith Monitoring Services Pvt. Ltd., Mumbai which will be a Subsidiary of Zenith RMM LLC, by way of an Asset Purchase Agreement.
- (d) The trustee of the holders of the FCCBs viz., BNYM Issued Notice of Default in respect of the 2006 FCCBs on September 27, 2011.
- (e) ZIL received an amount of USD 21.7 million and Zenith Infotech FZE (wholly owned subsidiary of ZIL) received an amount of USD 27 million towards payment from sale of MSD Business on September 27, 2011.
- (f) An amount of USD 6 million was directly deposited by the buyer into a special purpose escrow account to cover any claims arising out of this transaction. Zenith Infotech FZE received common units (equity shares) worth approximately USD 7.4 million of Continuum Managed Services LLC {earlier known as Zenith RMM LLC - purchaser of the MSD Business}.
- (g) The trustees of the holders of FCCBs viz., BNYM Issued a notice of Cross Default to ZIL on September 30, 2011 alleging occurrence of a Cross Default in relation to the 2007 FCCBs pursuant to Clause 11 of 2007 FCCBs. Hence, the total amount due and payable to BNYM towards 2006 FCCBs and 2007 FCCBs aggregated to approximately USD 89 million. While the sale proceeds of MSD Business were good enough to pay the 2006 FCCBs, the same were grossly insufficient to repay both the 2006 FCCBs and 2007 FCCBs.
- (h) Officials of ZIL were in continuous negotiations with representatives of instructing bondholders viz., Mr. Mickey Commar and Mr. Prabhjot Commar (to make a part payment and extend the maturity date for the

rest of the amounts) from September 21, 2011 and other bondholders till the time BNYM filed the recovery suit before the Hon'ble Bombay High Court.

- (i) BNYM Issued a Notice of Acceleration / Cross Default in respect of 2006 FCCBs and 2007 FCCBs on October 10, 2011 and Notice of Acceleration in respect of 2007 Bonds on October 12, 2011, respectively.
- (j) During the period December 2011 to May 2012, ISM Capital was assisting ZIL in negotiating a settlement with the bondholders. Thereafter, from the period June 2012 to October 2012 the lawyers for ZIL were assisting M/s Doijode & Associates were assisting us in negotiating a settlement with the bondholders. However, despite tremendous effort no settlement that was mutually acceptable to ZIL and the FCCB holders was reached. ZIL was unable to settle with the FCCB holders and hence was unable to utilize the proceeds of the MSD Business for partial repayment of the FCCBs.
- (k) On October 13, 2011, BSE sought clarification from ZIL. By their letter dated October 13, 2011, ZIL *inter alia* informed BSE that the Company had defaulted on its 2006 FCCBs which were due on September 21, 2011 and the Company was {and Is) in negotiations with the bondholders to extend the time for repayment.
- (l) By their letter dated October 13, 2011, ZIL also informed BSE that they had received monies due from Zenith RMM, LLC (a special purpose vehicle formed -by the buyers of the MSD Business) except for the amount to be held In escrow, part of which the company had planned to utilize for partial repayment of FCCBs.
- (m) BNYM filed Suit No. 2865 of 2011 on October 21, 2011 and Company Petition No. 28 of 2012 on December 21, 2011, both before the Hon'ble Bombay High Court. Various orders were passed in the Suit from time to time.

(n) The Learned Single Judge on October 9, 2012 disposed of the Application for further ad-interim order in terms of the said order dated July 9, 2012 and passed injunctive orders restraining ZIL from creating any third party rights on its cloud computing business, various assets as well as liquid Investments/ cash to the tune of Rs. 497 Crore. Thus, the interests of BNYM / instructing bondholders were fully protected by the order dated October 9, 2012 and ZIL, Mr. Rajkumar Saraf and Mr. Akash Saraf have, till date of submissions, been in full compliance and continue to be in full compliance of the said order dated October 9, 2012.

(o) By its order dated July 30, 2013, Mr. Justice Kathawalla had admitted the winding up petition and appointed an administrator for ZIL. An appeal challenging the order of Mr. Justice Kathawalla dated July 30, 2013 was filed before the Hon'ble Bombay High Court. By its order dated September 2, 2013, their lordships Dr. Justice Chandrachud and Mr. Justice Sonak dismissed the appeal. A special leave petition was filed challenging the order dated September 2, 2013 passed by their lordships Dr. Justice Chandrachud and Mr. Justice Sonak. However, the same was withdrawn by ZIL.

(p) Thereafter, by his order dated December 13, 2013, His lordship Mr. Justice Kathawalla allowed the company petition filed by BNYM and passed order for winding up of ZIL. ZIL, Its promoters, directors and subsidiaries have preferred an appeal against the order of Mr. Justice Kathawalla allowing the company petition and the same is pending before the appeal bench of the Hon'ble Bombay High Court. Appeal (L) No.14 of 2014 against the winding- up order was dismissed by the Hon'ble Division Bench of the Bombay High Court.

39. Noticees referred to order dated March 14, 2018 passed by Whole Time Member Shri Mahalingam in the same case, wherein it was held that

“38. The aforesaid facts and circumstances compel me to conclude that ZIL and its promoters/directors did convey the message that there was an intent to use augmented funds for repayment of FCCB holders, got shareholder approval for the same and then reneged on the said decision by diverting the funds to Zenith Dubai at the stage of sale itself.”

“42. In view of the aforesaid facts and attendant circumstances, I am of the view that ZIL and its directors had engaged in a device or artifice intended to defraud the shareholders and bondholders of ZIL and the securities market in general.”

“43. Therefore merely singling out the instance of non-compliance with EGM resolution and seeking to rectify the same through post facto ratification cannot be accepted as a valid defence to the whole artifice perpetrated by ZIL and its promoters/directors.”

“50. In view of the facts and circumstances stated and for the reasons elaborated in this Order, I find that ZIL and its directors have violated Section 12 A (b) and (c) of the SEBI Act, 1992, Regulations 3 (a), (c) and (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, Clause 36 and Clause 21 of the Listing Agreement, read with Section 21 of the Securities Contracts (Regulation) Act, 1956 and Clause 2.1 read with Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12 (2) of the SEBI (Prohibition of Insider Trading) Regulations, 1992.”

“ 52. However the SCN issued post the confirmatory order has included ZIL also in the list of noticees based on the allegation that the company along with its directors and promoters perpetrated fraud on the investors

and the securities market. Further the SCN has also proposed to issue disgorgement orders against the noticees including ZIL.

40. Noticees 1 and 2 submitted that the primary allegations in the SCN are against ZIL and SCN should have included ZIL as Noticee. It has been clearly held by the Whole Time Member that the primary party to the violations mentioned in the SCN is ZIL, and it becomes a necessary party to the proceedings. As the Chairman of ZIL (Noticee 1), and Managing Director of ZIL(Noticee2), Noticees 1 and 2 only hold a fiduciary duty towards ZIL and cannot be made solely liable for the violations, if any, committed by ZIL. Further, if any adverse order is to be passed against any of the Noticees, such order shall first be passed against ZIL and not the Noticees as per the findings recorded in the order dated March 14, 2018.
41. Noticees also submitted that Noticees 3, 4 and 6 have passed away on or about March 2017, January 2018 and May 2015 respectively. Copies of death certificate of Noticees 4 and 6 were also submitted.
42. Noticees 1 and 2 submitted that during the hearing on March 09, 2018, their Advocates had appended a tabular statement recording the assets available with ZIL as on date. As per the set tabular statement assets available with ZIL as on date are in excess of Rs.699 crores.
43. Noticees submitted that the entire premise on which the SCN is based is that the shareholders resolution dated January 29, 2011 was passed without an intention to perform the same because the explanatory statement to the notice sent to all the shareholders stated that the proceeds of the sale of any business will be used to pay the bond holders. In the absence of ZIL or the Noticees having any knowledge in December 2010 or January 2011, it is inconceivable to contend that either ZIL or the Noticees were aware that the bondholders would call upon ZIL to redeem the bonds. Moreover at that point there was no decision made to sell the MSD business. Rather, the shareholders of ZIL gave its board of directors approval

to raise funds by various means. Hence, to allege that there was a conspiracy back in December 2010 to sell the MSD business and apply the proceeds in contravention to the explanatory statement is erroneous and misconceived.

44. Noticees further stated that there was unintentional an unexpected delay in completing the sale of the MSD business and receiving the sale proceeds thereof. On account of the delay of 6 days, the cross default clause in the 2007 FCCBs was triggered and bondholders called upon the repayment of 2007 FCCBs along with 2006 FCCB. While the sale proceeds of the MSD business were good enough to pay the 2006 FCCBs, the same was grossly insufficient to repay both the 2006 and 2007 FCCBs. When it seemed that formal extension would not be granted by the trustee/ bondholders, upon receipt of cross default notice in respect of 2006 and 2007 FCCB and notice of acceleration in respect of 2007 bonds, ZIL informed BSE on October 13 2011 that it had defaulted on USD FCCBs which were due on September 21, 2011.

45. Noticees submitted that the utilisation of funds by ZIL was unanimously ratified by the shareholders of ZIL. The corporate announcement of shareholders decision cannot be treated as a promise made to any third person in law. It is a decision taken by company to commit itself for doing something. If there is a failure to comply with the decision, company law provides for remedies to the persons aggrieved and SEBI has no jurisdiction whatsoever to enforce shareholder resolutions. Noticees also submitted that SEBI is not acting on the basis of a complaint filed by any shareholder in relation to them having been misled or cheated by ZIL. Assuming, whilst denying, that there has been a violation, at best the purported violation may be construed as a corporate misdemeanor and the same cannot be categorised as a fraud. As the shareholders of ZIL via a special resolution have unanimously ratified the act of the ZIL, there can be no question of any violation being committed.

46. Noticees submitted that the language used in both section 12A(b) and 12 A(c) of SEBI Act stipulates that the act contemplated thereunder should be “in connection with the issue dealing in securities”. Nowhere in the SCN has SEBI stated that the Noticees have done any act which is “in connection with the issue or dealing in securities.” Further, a plain reading of regulation 3 (c) and (d) of the SEBI PFUTP Regulations 2003 will make it apparent that the same is confined and restricted to fraudulent unfair “trading in securities.” Noticees submitted that the SCN completely fails to make out any case of them having committed fraud as defined in the Regulation 2(c) of the PFUTP Regulations.
47. Noticees 1 and 2 submitted that clause 21 of Listing Agreement is not applicable to FCCBs as the requirement of clause 21 is to issue cheque to debenture holders. The question of this provision being applicable to FCCB does not arise as the redemption of FCCB is done by the authorised dealer and not via cheques. Further there is full compliance with clause 36 as ZIL informed BSE in announcement dated September 26, 2011 regarding sale of MSD business and in announcement dated October 13, 2011 informed of default on FCCBs and that ZIL was in negotiations with bondholders for repayment. There is no factual basis even prima facie for alleging a violation of Schedule II dealing with Code of Corporate Disclosure Practices for Prevention of Insider Trading as it is not SEBIs case that there has been any insider trading by the Noticees 1 and 2.
48. With respect to charge under section 11 C(2) to read with 11 C (3) of SEBI Act 1992, Noticee 2 admitted that there has been a delay in responding to the summons dated March 28 2014. However this delay is on account of circumstances pertaining to liquidation of ZIL and the appointment of official liquidator. The summons was received on the evening of March 28, 2014 with deadline to submit voluminous documents on or before March 29, 2014. This timeline was wholly unreasonable and hence Noticees 1 and 2 could not comply with the time period stipulated therein. Delay in complying with summons dated August 26 2014 was an account of ZIL going into liquidation and official liquidator

having taken over the management and affairs of ZIL. Despite the company going into liquidation, Noticees 1 and 2 managed to obtain all information from the official liquidator and submit the same to SEBI in December 2014. Further no prejudice has been caused to SEBI due to this delay as the SCN has been issued almost 3 years after Noticees 1 and 2 submitting these documents in December 2014. In support of their contentions, the Noticees submitted order of Bombay High court dated September 2 2014, minutes of meeting of official liquidator dated September 10 2014, September 19 2014, September 20, 2014 and a letter dated October 24 2014 of Noticee number 1 to official liquidator seeking inspection.

49. Noticees also submitted that in the matter of Geodesic Limited, SEBI filed an affidavit before the Bombay High court stating that complaints received by SEBI in connection to the non-redemption of FCCB and siphoning of FCCB proceeds do not come within the purview of SEBI and fall within the purview of Reserve Bank of India and the Ministry of Corporate Affairs. The misuse or misappropriation of FCCB proceeds may constitute a violation of FEMA Act, Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations 2004, the RBI Master Circular on external commercial borrowings and trade credits. The stand taken by SEBI in ZIL matter is contrary to the stand that SEBI has taken in the Geodesic affidavit.

50. With regard to utilisation of sale proceeds by ZIL, Noticee 1 and 2 submitted that there is no charge of SEBI that any of the entities to whom payment has been made are either directly or indirectly controlled or owned by them or that the various entities to whom payment have been made have in turn paid back those moneys either to Noticee 1 or 2 or any other entities owned or controlled by them.

51. Shareholders of ZIL have, at the annual general meeting held on March 29, 2014, unanimously approved and ratified all the actions and decisions of its board of directors in relation to the manner in which sale proceeds of MSD business was applied. While issuing the SCN, SEBI has completely ignored the resolutions

unanimously passed by the shareholders of ZIL. Further, since the ratification relates back to the date of the original decision, there is no basis for SEBI to contend that the Noticees have either misled the shareholders of ZIL or applied the sale proceeds of the MSD business for purposes other than what was agreed upon in the shareholders resolution dated January 29, 2011. In support of this contention, Notices have referred to judgements in the case of Shri Parmeshwari prasad Gupta vs Union of India reported in 1973 2 SCC 543, Maharashtra State Mining Corporation versus Sunil s/o Pundikaro Pathak reported in 2006 5 S CC 96 and National Institute Of Technology and ors versus Pannalal Chaudhari and ors reported in AIR 2015 SC 2846.

52. Noticees submitted that delay vitiates the entire present proceedings. All alleged violations are of the year 2011. The present SCN was issued only on December 11, 2017. Even the debarment of 2 years under the final order dated March 14, 2018 of the Ld. WTM has expired. On this ground alone the present proceedings ought to be dropped.

53. Noticees reiterated that there has been no asset stripping or any siphoning off as incorrectly assumed. It is now an admitted fact that no funds or assets of the Company have been taken / received by the Noticees. The assumption that money transferred to any of the wholly owned subsidiaries of the Company / ZIL amounts to any siphoning off or any misuse of the funds is untenable, since they were effectively under the same ownership and management and even their accounts were consolidated into the accounts of ZIL;

54. With regard to the default, Noticees submitted that ZIL had the funds for and was ready to repay the first tranche of the FCCB's due in September 2011 but did not have enough to also immediately repay the FCCB's which were due only in August 2012. The FCCB holders / trustees were however adamant, and therefore the funds were used for the purposes of the company and its wholly owned subsidiaries.

55. The delay in some disclosures to the stock exchanges was an inadvertent oversight caused by the tremendous pressure on the company at that time. In any event, all the relevant information was in the public domain in view of the proceedings in the Hon'ble High Court.
56. The 6 days delay in the receipt of the sale proceeds was an unexpected, unexplained and unintentional on the part of the buyer of the MSD Business to remit the funds to ZIL. Noticee Nos. 1 and 2 had no control over this delay of 6 days and had never even anticipated the same.
57. The bondholders / trustees &/or their advisors were extremely aggressive and hostile. It would appear that they thought that adopting coercive tactics like filing complaints with the stock exchange and SEBI and filing the suit and winding up petition in the Hon'ble High Court would pressurize the Noticees into succumbing to their unreasonable demands. If the bondholders / trustees had settled by accepting payment of the 1st tranche of the bonds and giving time to repay the second tranche, ZIL would have been able to give a full refund with interest to the FCCB holders. However, they decided to demand and insist upon their "pound of flesh" and refused to be reasonable, rational or practical.
58. Noticee 5, 7 and 8 referred to the order of Whole Time Member Shri Mahalingam wherein it was held that there is inadequate evidence to implicate promoters of the company including the Noticees.
59. Noticee 5 submitted that she has never been involved in the management of the affairs of ZIL or Zenith Dubai nor has been on the board of directors nor been an officer/ manager. Noticee has never received any compensation or payment from ZIL or its subsidiaries. Noticee was not the beneficiary or recipient of any payments made by ZIL or Zenith Dubai. Noticee was merely a shareholder in ZIL holding a total of 5,21,224 equity shares of ZIL.

60. Noticee 7 submitted that it has been merely nowhere mentioned in the SCN without any specifics as to how the Noticee is a party to any of the alleged violations. Noticee was never involved in the management of the affairs of ZIL or Zenith Dubai. The Noticee has never had any representation on the Board of ZIL or any of its subsidiaries nor has it been involved in the management of its affairs. Noticee was not the beneficiary or recipient either directly or indirectly of any payments made by ZIL or Zenith Dubai. Noticee has never been represented on the board of ZIL. Noticee was merely a shareholder in ZIL holding a total of 2,65,077 equity shares of ZIL.

61. Noticee 8 submitted that it has been included in the current proceedings solely on the basis that its majority shareholder and CEO is the daughter of Noticee number 2 (Managing Director of ZIL). Noticee is an independent company formed in 2005 and is engaged in the business of sales distribution and service of LED TV and flat panel displays. Noticee has been merely mentioned in the SCN without any specific as to how it is a party to any of the alleged violations. Noticee was never involved in management of the affairs of ZIL or Zenith Dubai nor has been on the board of directors of either of these companies. There is nothing in the SCN or in the documents furnished by SEBI to the contrary. Noticee was merely a shareholder in ZIL holding a total of 15,00,000 equity shares of ZIL.

62. As the Noticees 5, 7 and 8 never had any role to play in the management of ZIL, were never a board member, officer/manager of ZIL, or represented on the Board of ZIL, the Noticees cannot be held responsible for any violation of Section 12 A (b) and (c) of SEBI Act, Regulations 3 (a), (c) and (d) of PFUTP Regulations, Clauses 21 and 36 of the listing agreement or the breach of Clause 2.1 read with 7.0 of the Code Of Corporate Disclosure Practices For Prevention Of Insider Trading provided in Schedule II read with regulation 12 to of SEBI PIT Regulations.

63. I note that Noticees 1 and 2 had filed an application for Settlement on May 9, 2018. Their settlement application was rejected on October 15, 2019.

64. In the light of the allegations contained in the SCN, the Noticees' submissions and relevant material available on record, I now proceed to decide the case on merits.

CONSIDERATION OF ISSUES AND FINDINGS

65. The issues that arise for consideration in the instant matter are:

Issue No. I Whether the Noticees violated Section 12 A (b) and (c) of SEBI Act, Regulations 3 (a), (c) and (d) of PFUTP Regulations, Clauses 21 and 36 of the Listing Agreement read with Section 21 of SCRA, Clause 2.1 and Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12 (2) of the PIT Regulations.

Issue No. II If yes, whether the violations by the Noticees would attract monetary penalty under Section 15A(a), 15HA and 15HB of SEBI Act and Section 23A of SCRA as applicable for the aforesaid violations?

Issue No. III If yes, what would be the monetary penalty that can be imposed upon the Noticees taking into consideration the factors stipulated in Section 15J of the SEBI Act read with Rule 5(2) of the Adjudication Rules and Section 23J of the SCRA read with Rule 5(2) of the SCRA Adjudication Rules?

Issue No. I **Whether the Noticees violated Section 12 A (b) and (c) of SEBI Act, Regulations 3 (a), (c) and (d) of PFUTP Regulations, Clauses 21 and 36 of the Listing Agreement read with Section 21 of SCRA, Clause 2.1 and Clause 7.0 (ii)**

**of Code of Corporate Disclosure Practices for Prevention of
Insider Trading provided in Schedule II read with regulation
12 (2) of the PIT Regulations.**

66. Noticees have submitted that delay vitiates the entire present proceedings as all alleged violations are of the year 2011, but the present SCN was issued only on December 11, 2017. Even the debarment of 2 years under the final order dated March 14, 2018 of the Ld. WTM has expired. I note in this regard that SEBI had taken action against ZIL and its directors as early as March 25, 2013 when an ex parte ad interim order was passed. This was followed by a confirmatory order on April 11, 2014. Subsequently, detailed investigation was carried out and upon completion of the detailed investigation, adjudication proceedings were initiated by appointing an adjudicating officer on May 18, 2017. SCN was issued on December 11, 2017. Upon issuance of SCN, the Noticees applied for settlement. Their settlement application was rejected on October 15, 2019. The current proceedings have continued subsequent to rejection of the settlement application. Thus, I find the submission by the Noticees on delay to be not acceptable.

67. I note from the reply of the Noticees and the order of Whole Time Member dated March 14, 2018 that the Noticees 3, 4 and 6 have passed away on 28 March 2017, 09 January 2018 and 28 May 2015 respectively. Copies of death certificate of Noticees 4 and 6 were also submitted.

68. I note that the Hon'ble Supreme Court's Order in the case of *Girija Nandini vs. Bijendra Narain Choudhury (AIR 1967 SC 2110)* has stated that in case of personal actions, i.e. the actions where the relief sought is personal to the deceased, the right to sue will not survive to or against the representatives, and in such cases the maxim "*actiopersonalismoritur cum persona*" (personal action dies with the death of the person) would apply. Therefore, the Adjudication Proceedings initiated against Noticees 3, 4 and 6 will not survive and are liable to be abated without going into the merits of the case.

69. It is alleged in the SCN that ZIL failed to fulfil its obligation under clause 21 of the listing agreement by not fixing and notifying the exchanges at least 21 days in advance, the redemption date and the amount payable on redemption of FCCBs and by not issuing cheques to the FCCB holders so as to reach them before the date of redemption. It is also alleged that ZIL failed to disclose the information of default in redemption of FCCBs and the pending litigation in violation of Clause 36 of the Listing Agreement and Clause 2.1 read with Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12(2) of the PIT Regulations.

70. In this regard, Noticees 1 and 2 have submitted that clause 21 of Listing Agreement is not applicable to FCCBs as the requirement of clause 21 is to issue cheque to debenture holders and redemption of FCCB is done by the authorised dealer and not via cheques. Further there is full compliance with clause 36 as ZIL informed BSE in announcement dated September 26, 2011 regarding sale of MSD business and in announcement dated October 13, 2011 informed of default on FCCBs and that ZIL was in negotiations with bondholders for repayment. There is no factual basis even prima facie for alleging a violation of Schedule II dealing with Code of Corporate Disclosure Practices for Prevention of Insider Trading as it is not SEBI's case that there has been any insider trading by the Noticees 1 and 2.

71. Clause 21 of the Listing Agreement states that *"The Company will fix and notify the Exchange at least twenty-one days in advance of the date on and from which the interest on debentures and bonds, and redemption amount of redeemable shares or of debentures and bonds will be payable and will issue simultaneously the interest warrants and cheques for redemption money of redeemable shares or of debentures and bonds"*. It has been argued by the Noticees that this clause is not applicable to FCCBs as FCCB redemption is not done by cheque. Without going into the applicability of the clause to FCCBs, I note ZIL did not make any disclosure regarding redemption date and the same is not disputed by the Noticees.

72. As per Clause 36 of the Listing Agreement, *“the Company will also immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information. The material events may be events such as...(5) **Litigation/dispute with a material impact:** The Company will promptly after the event inform the Exchange of the developments with respect to any dispute in conciliation proceedings, litigation, assessment, adjudication or arbitration to which it is a party or the outcome of which can reasonably be expected to have a material impact on its present or future operations or its profitability or financials.*

73. In this regard, I note that ZIL informed SEBI vide letter December 10, 2011 that they were in negotiations with the FCCB holders to extend the time for redemption of FCCBs while the trustees on behalf of the FCCB holders filed a suit against ZIL for recovery on October 21, 2011 and also filed a winding up petition against ZIL on December 21, 2011. The litigations are thus admitted and not disputed by the Noticees. I note that Noticees in their submissions have not disputed non-disclosure of the litigations to the stock exchange.

74. The aforesaid disclosure obligations apply to the company ZIL which was obligated to make the disclosures under the Listing Agreement and the Code of Corporate Disclosure Practices for Prevention of Insider Trading. However, I note that these obligations do not attach to the Noticees 1 and 2, or to the other directors i.e Noticees 5, 7 and 8 in their individual capacity. Hence, violation of Clause 36 of the Listing Agreement and Clause 2.1 read with Clause 7.0 (ii) of Code of Corporate Disclosure Practices for Prevention of Insider Trading provided in Schedule II read with regulation 12(2) of the PIT Regulations by Noticees 1, 2, 5 7 and 8 is not established.

75. It has been submitted by Noticees 1 and 2 that the primary allegations in the SCN are against ZIL and SCN should have included ZIL as Noticee and if any adverse

order is to be passed against any of the Noticees, such order shall first be passed against ZIL and not the Noticees as per the findings recorded in the order dated March 14, 2018. In this regard, I note that ZIL is under liquidation and in terms of Section 446 of Companies Act, 1956, ***“when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.”*** Given that Official Liquidator has been appointed by the Hon’ble High Court of Bombay, adjudication proceedings were not initiated against ZIL. Having said that, the contention by the Noticees 1 and 2 that their liability can be determined only if SCN is issued against ZIL is unacceptable as obligations placed by law on the Noticees are specific to them in their capacity as directors/ promoters of ZIL.

76. The charges against the Noticees are that in their capacity as promoters/ directors of ZIL, they failed to use the sale proceeds of MSD business for the purpose authorised by the shareholders, and have taken away the assets of ZIL either for their own benefit or for that of the entities owned and controlled by them without authority of shareholders resulting default in repayment of FCCBs and consequent loss to shareholders/investors as a result of a sharp price fall in the scrip of ZIL, because of the misconduct of the promoters/directors. Further, ZIL remained fastened with the liability to pay back the FCCB holders leading to further financial burden on the shareholders' wealth in ZIL.

77. It is not contested by the Noticees 1 and 2 that the shareholders of ZIL at its Extra Ordinary General Meeting held on January 29, 2011 approved and authorized the Board of Directors of ZIL to raise money for repayment/redemption of FCCBs in one or more of the following methods:

"To borrow moneys from Domestic markets and/or through External Commercial Borrowings up to an amount not exceeding Rs. 1500 crores.

To sell and /or lease the business and/or divisions including the subsidiaries (wholly and partly) of the company and for that purpose to issue debt securities/ bonds, etc, in the domestic or international markets, as permitted by law so as to redeem/ re-pay the outstanding Foreign Currency Convertible Bonds which would come for re-payment / redemption in August, 2011 and August 2012.

78. Considering that the FCCBs were due for maturity in August 2011, it was incumbent upon the company to provide for funds for repayment. The Noticees cannot claim that the intention for raising funds for redemption was not clear merely because the bond holders had the option of deciding to convert their bonds into equity shares. Since the conversion was only an option, it was clear that ZIL had to provide funds for FCCB redemption and the shareholder resolution was for raising funds to meet FCCB redemption. The resolution also clearly authorised sale and/or lease of business and/or divisions, which implies that at the time of framing the resolution, there was already the idea or thought of sale of a business/ division.

79. ZIL, on September 26, 2011, informed the BSE that "*the Company have spun-off one Division of its Business known as MSD Division to M/s. Zenith Monitoring Services Pvt. Ltd., Mumbai, which will be a subsidiary of Zenith RMM LLC, by way of an Asset Purchase Agreement. However, Zenith Infotech Ltd., is going to be a major shareholder*". It was also stated that Noticee 2 will be on the Board of Zenith RMM. These facts have not been denied by the Noticees 1 and 2.

80. ZIL received a total consideration of USD 54.7 million for the sale of MSD business, out of which an amount of USD 6 million was kept in the Escrow account. Of the remaining amount of USD 48,712,391 received, USD 21,712,411 was received in the Citibank EEFC a/c No. 0350609288 of ZIL and USD 26,999,980 was received in the Standard Chartered account No. 01-2069905-01 of Zenith Infotech (FZE), Dubai (Zenith Dubai) on 27/09/2011, a wholly owned subsidiary of ZIL, based in Dubai. While ZIL owned 95% of the assets sold during the period 01/04/2010 –

30/09/2011, only 44% of the gain on sale of MSD was appropriated to ZIL, while the subsidiaries which owned only 5% of the assets sold during the year were appropriated 56% of the gains arising out of the sale of MSD. These facts are also not denied by the Noticees 1 and 2.

81. I note that on September 26, 2011, ZIL did not make complete disclosures regarding the asset sale and the appropriation of proceeds between ZIL, the listed company and its wholly owned subsidiaries. I also note that despite the asset sale made based on the shareholder resolution of January 29, 2011 authorising raising of funds to meet FCCB redemption, ZIL still defaulted on the FCCB repayments. These facts are not disputed by the Noticees. In their defence, Noticees have stated that due to a 6 day delay in receiving funds from the sale of MSD Business, the bondholder's triggered default and cross default clauses. However, no reason has been given for the 6 day delay which triggered the default. Noticees have only stated that the 6 days delay in the receipt of the sale proceeds was an unexpected, unexplained and unintentional on the part of the buyer of the MSD Business to remit the funds to ZIL and that Noticee Nos. 1 and 2 had no control over this delay of 6 days and had never even anticipated the same.

82. It is pertinent to note that whereas the 2006 FCCB repayment date was September 21, 2011, the Asset Purchase Agreement (APA) for sale of MSD Business was signed only on September 23, 2011. Hence, the buyers alone cannot be blamed for delay in remitting the funds when the APA itself was signed after the due date of repayment.

83. From the facts on record and as discussed above, it is clear that Noticee 1 and 2, being the promoters and Chairman and Managing Director of ZIL respectively, are responsible for the actions taken by ZIL as regards the shareholder resolution, disclosures made to BSE, sale of the MSD Business, as well as the terms of sale, whereby a disproportionate amount of funds was transferred to Zenith Dubai, a wholly owned subsidiary. It is also clear from facts on record that ZIL defaulted on

FCCB repayments of USD 33 million despite selling the MSD Business for USD 54.7 million.

84. Regarding the sale proceeds of MSD Business, Noticee 1 and 2 in their submissions have explained the higher proportion of payments to Zenith Dubai by quoting the US and Indian Asset Purchase Agreements. In this regard, I note that ZIL and the Noticees 1 and 2 were signatories to the agreements and were party to agreeing to the terms wherein USD 34.4 million was paid to Zenith Dubai. Being fully aware of the date when FCCB repayment liability became due, the Noticees were unable to ensure availability of funds for repayment despite making a sale of assets worth more than the amount due. The fact that the amount due increased substantially due to triggering of 2007 FCCB repayments due to cross default clause is a subsequent development to the initial default of 2006 FCCB repayment.
85. From the facts mentioned above, I find that the sale of the MSD Business was conducted by Noticee 1 and 2 along with ZIL, ostensibly for repayment of FCCBs, as informed to shareholders and investors. However, the Noticees and ZIL concluded the APA 2 days after the 2006 FCCB became due on September 23, 2011. They then did not inform investors of default in repayment of FCCBs till a news item appeared on the default and the stock exchange sought clarification from the company on October 13, 2011. Meanwhile, the trustees of the holders of FCCBs viz., BNYM Issued Notice of Default in respect of the 2006 FCCBs on September 27, 2011. BNYM Issued a notice of Cross Default to ZIL on September 30, 2011 alleging occurrence of a Cross Default in relation to the 2007 FCCBs pursuant to Clause 11 of 2007 FCCBs. This information was informed to the stock exchange only after a news item appeared on October 13, 2011, thus giving a misleading impression to investors regarding repayment of the FCCBs and the ability of ZIL to continue as a viable business and going concern. I further note that despite making a sale of MSD Business in terms of the shareholder approval, ostensibly for repayment of FCCBs, the company defaulted due to the manner in which the sale was executed. Not only was a disproportionately higher amount

paid to Zenith Dubai, the funds were subsequently used for purposes other than FCCB repayment.

86. Noticees have submitted that there is no evidence that they personally benefitted on account of utilization of sale proceeds, and there is no charge of SEBI that any of the entities to whom payments have been made are directly or indirectly controlled by them. In this regard, I take note of the detailed explanation given by the Noticees on utilization of funds and note that the funds were used for purposes other than FCCB repayment after default and consequent litigation. Hence, without going into the issue of whether the Noticees 1 and 2 benefitted from the proceeds of sale of MSD Business, I note that the sale of the MSD Business was carried out in a manner which resulted in default on FCCB repayment and consequent litigation, and damaged the interests of the company and its investors. Subsequent to the default and litigation, the company lost value and went into liquidation. It could not even continue as a going concern.

87. Regarding the contention of the Noticees that they did not engage in any act connected with 'dealing in securities' or 'trading in securities', I note that their actions seriously adversely affected the trading in securities of ZIL and caused loss to the investors who purchased securities of ZIL under the impression that it was a going concern with ability to repay the FCCBs. The Noticees have argued that they held 65% of the shareholding and also suffered on account of price fall. Against this, 35% public investors suffered loss in value. 35% public shareholding cannot be considered insignificant and represents 44,52,527 shares held by public shareholders who may have purchased or held on to ZIL shares on the basis of misleading information regarding its ability to repay FCCBs. Hence, I find that actions of Noticees 1 and 2 in failing to make appropriate disclosures regarding the default, and giving a misleading impression regarding repayment of FCCBs by selling the MSD Business directly related to dealing in securities by investors and shareholders who were misled and defrauded. Fraud is defined in Regulation 2(c) of the PFUTP Regulations as a knowing misrepresentation of the truth or

concealment of material fact in order that another person may act to his detriment. The actions of Noticee 1 and 2 along with ZIL in making selective disclosures, giving misleading information or not making disclosures related to eventual default by ZIL as brought out in preceding paras make it clear that they knowingly misrepresented the truth and concealed material facts, to the detriment of investors of ZIL thereby defrauding the investors.

88. Disclosing required information to shareholders and making complete and adequate disclosures to the stock exchange including on ability to repay FCCBs or failure to repay FCCBs lie squarely within the domain of SEBI. Hence the contentions by the Noticees 1 and 2 on jurisdiction of SEBI with regard to utilization of FCCB proceeds and redemption of FCCBs are not relevant for establishing the role of Noticees and ZIL in misleading and defrauding investors of ZIL regarding repayment of FCCBs by ZIL.

89. As far as post facto ratification by shareholders of the use of sale proceeds of MSD Business is concerned, the ratification cannot make good the misleading information or impression created regarding the ability of the company to repay FCCBs, nor can it undo the loss caused to investors due to erosion of value after the FCCB defaults. The ratification took place on March 29, 2014, more than 2 years after the default in FCCB repayments and consequent utilisation of sale proceeds of MSD Business for other purposes. The ratification pertains to utilisation of funds. Such a ratification cannot address or rectify the concealment or misrepresentation by ZIL regarding its ability to repay FCCBs, the default in repayment and consequent litigation. The ratification of fund utilization cannot make good the default on FCCB repayments or the erosion of value of the company.

90. In view of the above, I find that Noticee 1 and 2 misled the investors of ZIL regarding the ability to repay FCCBs and concealed information of default and consequent litigation till it was reported in the media, thereby defrauding investors

and causing loss in shareholder value and hence violated Section 12 A (b) and (c) of SEBI Act and Regulations 3 (a), (c) and (d) of PFUTP Regulations.

91. Noticee No. 2 is alleged to have contravened Section 11C(2) read with Section 11C (3) of the SEBI Act by failing to reply to the summons issued vide dated March 28, 2014 and August 26, 2014. In this regard, Noticee 2 admitted that there has been a delay in responding to the summons dated March 28, 2014. However, Noticee 2 explained the delay to be on account appointment of official liquidator and receipt of summons on the evening of March 28, 2014. Delay in complying with summons dated August 26 2014 is also explained on account of ZIL going into liquidation and official liquidator having taken over the management and affairs of ZIL. Noticees 2 further submitted that he managed to obtain all information from the official liquidator and submit the same to SEBI in December 2014. In support of his contentions, the Noticees submitted order of Bombay High court dated September 2 2014, minutes of meeting of official liquidator dated September 10 2014, September 19 2014, September 20, 2014 and a letter dated October 24 2014 of Noticee number 1 to official liquidator seeking inspection. As the Noticee made reasonable efforts to comply with the summons and has adequately explained the delay in responding to summons and Noticee complied with the summons at a later date, I find that the charge of violation of Section 11C(2) read with Section 11C (3) of the SEBI Act is not established.

92. From the replies of Noticees 5, 7 and 8, I note that they never had any role to play in the management of ZIL, were never a officer/manager of ZIL, or represented on the Board of ZIL. From the SCN, I note that there is no material on record to show the role played by the Noticees 5, 7 and 8, in the actions of ZIL related to various disclosures or the sale of MSD Business. Hence, I find that the charges of violation of Section 12 A (b) and (c) of SEBI Act, Regulations 3 (a), (c) and (d) of PFUTP Regulations by the Noticees 5, 7 and 8 are not established.

Issue No. II **If yes, whether the violations by the Noticees would attract monetary penalty under Section 15A(a), 15HA and 15HB of SEBI Act and Section 23A of SCRA as applicable for the aforesaid violations?**

and

Issue No. III **If yes, what would be the monetary penalty that can be imposed upon the Noticees taking into consideration the factors stipulated in Section 15J of the SEBI Act read with Rule 5(2) of the Adjudication Rules and Section 23J of the SCRA read with Rule 5(2) of the SCRA Adjudication Rules?**

93. As it has been established that Noticee 1 and 2 violated Section 12 A (b) and (c) of SEBI Act and Regulations 3 (a), (c) and (d) of PFUTP Regulations, I am of the view that it warrants imposition of monetary penalty under Section 15HA of the SEBI Act text of which is reproduced as under:

Penalty for fraudulent and unfair trade practices.

15HA *If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.*

94. While determining the quantum of penalty under Section 15HA (of the SEBI Act), the following factors stipulated in Section 15J of the SEBI Act, have to be given due regard:

- a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
- b) the amount of loss caused to an investor or group of investors as a result of the default;
- c) the repetitive nature of the default.

95. I note that the price of ZIL on BSE which was around Rs.200 in August 2011 fell to Rs.93.25 on October 13, 2011 when news report of default appeared and hit the lower circuit continuously for the next few days till it reached Rs. 52 by end of October and below Rs.40 by December 2011 when the winding up petition was filed after the default on FCCB repayments. The loss caused to investors in ZIL during this period was thus immediate and significant. The actions of the Noticees were such as to undermine the faith of investors in listed companies by eroding investor wealth through fraudulent actions. The company had 35% public shareholders holding 44,52,527 shares as of end September and December 2011. The cumulative loss of value to these shareholders over the period August to December 2011 amounts to more than Rs.70 crores. While the material on record does not bring out any personal gain which may have accrued to the Noticees in carrying out acts which resulted in the aforesaid violation, the facts of the case do bring out the gravity of the consequences of violations by the Noticees.

96. Therefore, taking into account the facts and circumstances of this matter, I am of the view that a penalty of Rs.70,00,000/- (Rupees Seventy lakhs only) upon the Noticees No. 1 and 2 each under Section 15HA of SEBI Act will be commensurate with the violations committed by the Noticees.

ORDER

97. After taking into consideration all the facts and circumstances of the case, in exercise of powers conferred upon me under Section 15I (2) of the SEBI Act read with Rule 5 of the Adjudication Rules, I hereby impose the following penalty of upon the Noticees as under.

Noticee No.	Name of the Noticee	Violations	Penalty Amount
1	Rajkumar Saraf	Under Section 15HA for violation of Section 12 A (b)	Rs.70,00,000/- (Rupees Seventy lakhs only)

2	Akash Rajkumar Saraf	and (c) of SEBI Act and Regulations 3 (a), (c) and (d) of PFUTP Regulations	Rs.70,00,000/- (Rupees Seventy lakhs only)
Total Penalty			Rs.1,40,00,000/- (Rupees One crore forty lakhs only)

98. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of “SEBI - Penalties Remittable to Government of India”, payable at Mumbai, OR through online payment facility available on the SEBI website www.sebi.gov.in on the following path, by clicking on the payment link

ENFORCEMENT → Orders → Orders of AO → PAY NOW

99. The Noticees shall forward said Demand Draft or the details / confirmation of penalty so paid to the Enforcement Department – Division of Regulatory Action – I of SEBI. The Noticees shall provide the following details while forwarding DD/ payment information:

- a. Name and PAN of the entity (Noticee)
- b. Name of the case / matter
- c. Purpose of Payment – Payment of penalty under AO proceedings
- d. Bank Name and Account Number
- e. Transaction Number

100. Copy of this Adjudication Order is being sent to the Noticees and also to SEBI in terms of Rule 6 of the Adjudication Rules.

DATE: JULY 28, 2020

PLACE: MUMBAI

MANINDER CHEEMA

ADJUDICATING OFFICER