

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**  
**CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER**  
**FINAL ORDER**

**Under Sections 11(1), 11(4) and 11B of the Securities and Exchange Board of  
India Act, 1992**

**In the matter of United Spirits Ltd.**

**In re SEBI (Prohibition of Insider Trading) Regulations, 1992**

**In respect of:**

<b>S.No.</b>	<b>Name of the Entity</b>	<b>PAN</b>
1.	Poonam Haresh Jashnani	ADUPJ8724H
2.	Varun Haresh Jahnani	AIGPJ8710L
3.	Haresh Parmanand Jashnani	AAJPJ7020L
4.	Nishat Shailesh Gupte	AQDPG4932E

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**Background**

1. Relay B.V (hereinafter referred to as “**Relay/ Acquirer**”) together with Diageo Plc (hereinafter referred to as “**Diageo**”) as the Person Acting in Concert (hereinafter referred to as “**PAC**”) made a public announcement on April 15, 2014, before market opened, to acquire upto 3,77,85,214 fully paid up equity shares of face value of ₹ 10/- each of United Spirits Limited (hereinafter referred to as “**USL / Target Company**”), constituting 26% of the total fully diluted voting equity share capital of USL at a price of ₹ 3,030/- per offered share aggregating a total consideration of ₹ 1,14,48,91,98,420 (approx. ₹ 11.44 thousand crore).
2. SEBI observed that after the public announcement was made, the price of the scrip

of USL surged from ₹ 2,557 (previous close price - April 11, 2014) to ₹ 2,853 (closing price on April 15, 2014) in a single trading day, registering an increase of 11.57%. SEBI initiated an investigation to ascertain whether trading in the scrip of USL by certain entities was based on Unpublished Price Sensitive Information (hereinafter referred to as “**UPSI**”) and was thus in violation of the provisions of the Securities and Exchange Board of India, Act 1992 (hereinafter referred to as the “**SEBI Act**”) and SEBI (Prohibition of Insider Trading) Regulations, 1992, (hereinafter referred to as the “**PIT Regulations**”) during the period January 01, 2014 to April 17, 2014 (hereinafter referred to as the “**investigation period**”).

### **Show Cause Notice**

3. The investigation focused on the trading activity of Smt Poonam Haresh Jashnani (hereinafter referred to as the “**Poonam**”) in the derivative contracts of USL in April 2014 i.e., before and after the public announcement. Consequent to the investigation, a show cause notice dated March 29, 2017 (hereinafter referred to as “**SCN**”) was served on Smt Poonam, Shri Haresh Parmanand Jashnani (hereinafter referred to as the “**Haresh**”), Shri Varun Haresh Jashnani (hereinafter referred to as the “**Varun**”) and Shri Nishat Shailesh Gupte (hereinafter referred to as the “**Nishat**”) in the extant matter. The SCN *inter alia* alleged as follows:
  - 3.1. The open offer announcement by Relay and the PAC on April 15, 2014 to acquire up to 3,77,85,214 fully paid up equity shares of USL constituting 26% of the total fully diluted voting equity share capital of USL at a price of ₹ 3,030/- is considered as price sensitive information (hereinafter referred to as “**PSI**”) in terms of PIT Regulations.
  - 3.2. From the chronology of events as submitted by the Manager to the Offer, HSBC Securities & Capital Markets (India) Private Limited (hereinafter referred to as “**HSCI**”) and JM Financial Institutional Securities Limited (hereinafter referred to as “**JMFL**”), Relay and Platinum Partners (Diageo’s Indian legal counsel), it is noted that the PSI related to the Open Offer had come into existence on March

12, 2014 after Platinum Partners received preliminary instructions from Diageo regarding the Open Offer. The PSI was published when the corporate announcement of the Open Offer was made to the Exchanges on April 15, 2014 before the market opened. Thus, it is observed that the period of UPSI would be March 12, 2014 to April 14, 2014.

3.3. As per the replies to the queries from SEBI, Managers to the Offer, Relay, USL and Platinum Partners submitted that Shri Nishat, Global Business Development Manager of Diageo among others was privy to the Offer till the date of the Public Announcement / was involved in the discussions with the Manager(s) to the Offer / was aware of the Offer till the date of the Offer or till the date of the public announcement / was in possession of the PSI prior to the public announcement.

3.4. It was also revealed during investigation that Shri Nishat was related to Smt Poonam, Shri Haresh and Shri Varun. Shri Nishat (an insider), husband of Smt Menka Haresh Jashnani, is the son-in-law of Smt Poonam and Shri Haresh and brother-in-law of Shri Varun. Thus, Smt Poonam, Shri Haresh and Shri Varun (relatives of a connected person) are deemed connected persons in terms of Regulation 2(h)(vi) of PIT Regulations. Therefore, the entities Smt Poonam, Shri Haresh and Shri Varun are insiders in terms of Regulation 2(e)(i) of PIT Regulations by virtue of them being deemed to have been connected with the company (through Shri Nishat, Global Business Development Manager-Diageo) and were reasonably expected to have access to UPSI in respect of securities of USL.

3.5. During the UPSI period, Noticees, except Shri Nishat, had traded only in 2 symbols on NSE, viz. McDowell – N and NIFTY. Prior to the UPSI period, i.e from January 01, 2014 to March 12, 2014, the trades of the aforesaid 3 Noticees were observed only on 2 days, viz. March 10 & 11, 2014, in the symbol of McDowell – N. However, the trade quantity was insignificant in comparison to

their trades during the UPSI period. Further, the trade quantity post UPSI was also insignificant in comparison to their trades during the UPSI period. The said 3 Noticees had not traded in F & O segment of BSE during the investigation period.

3.6. The trading pattern of all 3 Noticees were similar in nature and were primarily concentrated in the symbol of McDowell – N (i.e. USL derivative contract). Further, none of the Noticees had traded in the cash or F&O segment during the period April 2012 to March 10, 2014. Also, the holding period of the option contracts were barely 3 weeks (during the UPSI period) for majority of the contracts. Smt. Poonam (A/c No. 016200100012532, Saraswat Bank) transferred funds (₹ 18.40 lakhs) received from Religare Securities Ltd. as a part of futures settlement proceeds pertaining to the trades in the symbol of McDowell-N to Shri Haresh (A/c No. 016200100012563, Saraswat Bank) on May 09, 2014. After receipt of the said funds, Shri Haresh transferred the entire funds to the bank account of his daughter Smt. Menka Haresh Jashnani, w/o Shri Nishat who is an insider.

3.7. In light of the above and on the basis of the connection with the insider, trading pattern and fund flow, it is alleged that Smt. Poonam, Shri Haresh and Shri Varun have indulged in insider trading activity in USL on the basis of UPSI relating to the open offer for acquisition of shares of USL by Relay together with Diageo as PAC and thus are alleged to have violated Regulations 3(i) & 4 of PIT Regulations, 1992 read with Regulation 12 of PIT Regulations, 2015 and Sections 12A (d) and (e) of SEBI Act.

3.8. It is noted that the Noticees, Smt. Poonam, Shri Haresh and Shri Varun have made wrongful gains of approximately ₹ 45.44 lakh, ₹ 29.24 lakh and ₹ 26.18 lakh respectively by trading on the basis of UPSI in the scrip of USL.

- 3.9. It is further alleged that based on the trading pattern of Smt. Poonam, Shri Haresh and Shri Varun and the fund transfer observed from the bank account of Smt. Poonam to that of Smt. Menka Haresh Jashnani (w/o Shri Nishat) coupled with the fact that Shri Nishat is an insider, that the Noticees, Smt. Poonam, Shri Haresh and Shri Varun were trading on the basis of the UPSI communicated to them by Shri Nishat. Thus, it is alleged that Shri Nishat has violated Regulations 3(ii) of PIT Regulations, 1992 read with Regulation 12 of PIT Regulations, 2015.
4. Smt. Poonam, Shri Haresh, Shri Varun and Shri Nishant were called upon to show cause as to why directions under Sections 11(1), 11(4) and 11B of the SEBI Act including disgorgement of wrongful gain, jointly and severally, should not be issued against them for the aforesaid alleged violations under SEBI Act and PIT Regulations.

**Reply & Hearing**

5. In response to the SCN, Smt. Poonam, Shri Haresh and Shri Varun, vide their letters dated April 11, 2017 authorized M/s Joby Mathew and Associates, Advocates (hereinafter referred to as “AR-1”) as their authorized representative in the extant matter. AR-1 vide its letter dated April 17, 2017 requested for copy of certain documents in the matter along with an opportunity of inspection. Shri Nishat also vide his letter dated April 26, 2017, requested for copy of certain documents in the matter along with an opportunity of inspection.
6. Vide letter dated April 25, 2017, AR-1 was advised to conduct the inspection of documents in the matter on May 5, 2017 and collect the documents sought in the matter at the time of inspection. AR-1 vide its letter dated April 26, 2017 requested to postpone the scheduled inspection after June 7, 2017 as its clients were out of town. Vide letter dated May 4, 2017, AR-1 was informed that its request was considered and AR-1 was advised to conduct the inspection of documents in the matter on May 19, 2017.

7. Shri Nishat was informed vide letter dated May 15, 2017 to conduct the inspection of documents in the matter on June 1, 2017 and collect the documents sought in the matter at the time of inspection.
8. AR-1 again vide its letter dated May 16, 2017 requested to adjourn the scheduled inspection to any date after June 6, 2017 due to unavoidable circumstances. In response to the same, vide an email dated May 19, 2017, AR-1 was advised to conduct the inspection on June 8, 2017 in the matter.
9. Shri Nishat vide his letter dated May 25, 2017 authorised Shri Apurv Gupta, Shri Ayush Agarwal and Shri KC Jacob of Corporate Law Chambers India (hereinafter referred to as “**AR-2**”) to conduct inspection on his behalf. On the day of scheduled inspection, Shri Ayush Agarwal conducted the inspection and photocopy of documents as requested by him, were provided to him. Further, vide an email dated June 1, 2017, Shri Nishat was advised to submit a reply to the SCN on or before June 15, 2017. In response to the same, Shri Nishat vide his email dated June 6, 2017 requested for eight weeks’ time to file a reply to the SCN as coordination (he is based in London) and perusal of voluminous data will take some time. Shri Nishat was advised vide an email dated June 7, 2017 to submit the reply in the matter on or before June 30, 2017.
10. AR-1 conducted inspection in the matter on June 8, 2017 and photocopy of documents as requested by it, were provided to the AR-1. AR-1 was further advised vide an email dated June 15, 2017 to submit a reply in the matter on or before June 30, 2017. Vide its letter dated June 28, 2017, AR-1 requested for copy of all the email correspondence between SEBI, NSE, BSE and banks and further requested for 4 weeks’ time to submit a reply to the SCN. In response to the said request of AR-1, vide email dated July 6, 2017, AR-1 was advised to be more specific in its request with respect to the dates of email correspondences.
11. Shri Nishat also vide his letter dated June 28, 2017 requested for certain email correspondences that SEBI had with other entities in the matter. Vide an email dated

July 7, 2017, Shri Nishat was provided with the documents sought by him and certain documents which were part of the ongoing investigation, were not provided to him. Some of the other documents requested by him were already provided to him at the time of inspection, however, the same were once again provided to him. Further, he was advised to submit a reply to the SCN on or before July 18, 2017.

12. AR-1 vide its email dated July 10, 2017 provide a list of specific documents required by the AR-1 to submit a reply to the SCN and also requested for 4 weeks' time to submit a reply to the SCN. In response to the same, vide an email dated July 11, 2017, AR-1 was provided with the documents which were not part of the ongoing investigation. Some of the documents requested by AR-1 were already provided to it, however, the same were once again provided to AR-1. Further, AR-1 was advised to submit a reply to the SCN on or before July 25, 2017.
13. Shri Nishat vide his email dated July 17, 2017 and AR-1 vide its letter dated July 21, 2017 requested for 3 weeks' time to submit a reply to the SCN. Vide an email dated July 19, 2017, request of Shri Nishat was acceded to and he was granted time till August 8, 2017 to submit a reply to the SCN.
14. AR-1 vide its letter dated July 24, 2017 made preliminary submissions in the matter as follows:
  - 14.1. Its clients have not been provided with all the documents and records that are relevant to the matter and which have been relied upon by SEBI. The refusal of SEBI to provide its clients with the documents and records which have been relied on by SEBI is not only in violation of the Principles of Natural Justice, but also in violation of the decision/order of the Hon'ble Supreme Court of India (hereinafter referred to as "SC") in the matter of *PriceWaterhouse Coopers vs. SEBI*.
  - 14.2. Based on the statement of Platinum Partners, the Indian Counsel of Diageo, SEBI has come to the conclusion that the PSI came into being on March 12, 2014. However, neither the said SCN nor the documents and records made available show when Shri Nishat, the then Global Business Development Manager (M&A) of Diageo

came to be in possession (or was deemed to have come into possession) of the PSI.

14.3. Furthermore, neither the said SCN nor the documents and records made available show when, how and in what manner, the PSI was communicated to its clients by Shri Nishat, if at all.

14.4. It may be noted that merely being a deemed connected person/insider is not sufficient to draw an inference that its clients' trades during the period March 12, 2014 to April 14, 2014 were done on the basis of the PSI.

14.5. It is noted for the trades done by Shri Haresh in McDowell- N during the period March 12, 2017 to April 14, 2014, the strike price of the contracts for the dates March 25, 2014 to April 11, 2014 is shown as ₹ 5,700/- to ₹ 5,900/-. To the best of the knowledge of its clients, the Options Contracts of McDowell - N never had these strike prices - whether before, during or after the said alleged UPSI period.

14.6. Furthermore, the total "Brought forward long qty." as on April 14, 2014 is shown as 2,87,450 which is totally erroneous since our said client never had this long position in McDowell-N options at any given time before or during or after the said alleged UPSI period.

14.7. Furthermore, the public announcement regarding the Open Offer was displayed on the websites of BSE Limited and the National Stock Exchange of India Limited on April 15, 2014 at 8:40 am i.e. prior to market hours. Thus, the PSI ceased to be unpublished from 8:40 am on April 15, 2014. It is observed therein that the period of UPSI would be from March 12, 2014 to April 14, 2014. Yet, the trades of Shri Haresh on April 15, 2014 have been erroneously included. Similar submissions are also made for Shri Varun and Smt. Poonam.

14.8. It is noted that the trades of its clients on March 10 and 11, 2017 i.e. trades prior to the said alleged UPSI period have also been included while computing alleged profits. Even if it is assumed, but not admitted that its clients were deemed connected persons, their trades prior to March 12, 2014 cannot be considered to



compute alleged purported made on the basis of alleged insider trading. Furthermore, fresh positions taken on April 21, 2014 after public announcement on April 15, 2014 are also included in the calculations of profit. Further, profit and loss of strike price 3000 are not included.

15. Shri Nishat vide his email dated August 8, 2017 requested for another 2 weeks' time to submit a reply in the matter as his counsels were yet to finalise the reply in the matter.
16. Considering the facts and circumstances of the case, Noticees were granted an opportunity of hearing in the matter on October 4, 2017 vide hearing notice dated August 21, 2017. The said hearing notice was sent to the Noticees via email also.
17. Shri Nishat vide his letter dated August 22, 2017 submitted a reply to the SCN denying the allegations levelled therein and *inter alia* made the following submissions:

17.1. It is submitted that SEBI does not have the jurisdiction to issue any SCN or to pass any directions/orders in relation to anything that is not done in the territory of India. He is also not a person associated with the Indian securities market and does not fall within the jurisdiction of SEBI. It is pointed out that SEBI's jurisdiction is limited to the territory of India.

17.2 The SCN is silent on when he became aware of the alleged UPSI. This is a vital question of fact which SEBI has not even bothered to establish.

17.3. SEBI claims to have relied on information provided by Managers to the Offer, Relay and Platinum Partners to arrive at the date of the USPI coming into existence. Yet, as the record shows, each of these entities have provided different dates and SEBI has conveniently picked the earliest (the date provided by Platinum Partners) while ignoring the information provided by others. No explanation has been provided for why the version of Platinum Partners has been accepted over the information provided by the others. None of this can point to when he became

aware of the purported UPSI.

17.4. He has been alleged to have communicated the alleged UPSI to Smt. Poonam, Shri Haresh and Shri Varun but there is nothing in the SCN to show as to: (a) When did he come in possession of the alleged UPSI?; (b) What is the specific UPSI that he is alleged to have communicated to Smt. Poonam, Shri Haresh and Shri Varun?; (c) When did he communicate UPSI to Smt. Poonam, Shri Haresh and Shri Varun?; (d) How the UPSI has been communicated to Smt. Poonam, Shri Haresh and Shri Varun?; (e) What is the version of Smt. Poonam, Shri Haresh and Shri Varun?; (f) Whether SEBI has recorded the statement of Smt. Poonam, Shri Haresh and Shri Varun in this regard etc.?

17.5. At present, he is working with Credit Suisse, London as an Investment Banking Vice President. His job profile requires him to work with various corporates in the consumer and retail sector so as to provide them advice on various issues regarding the sector. Prior to joining Credit Suisse in September 2015, he worked at Citigroup as a Beverages Equity Research Analyst. He had worked with Diageo PLC in London as a Global Business Development Manager from October 2011 to February 2015. He is a qualified Chartered Accountant from the Institute of Chartered Accountants of Scotland and has a LLB in Laws degree from the London School of Economics and Political Sciences.

17.6. His primary role in Diageo was to provide financial analysis to his line manager and execute public and private market transactions on his instructions following the decision made by the Management or Board of Diageo. In his role, he reported to the Director of Business Development who in turn reported to the Head of Global Business Development. The Head of Global Business Development reported to the Chief Financial Officer (with Chief Financial Officer being the only person in this chain being a member of Management and also a Board Member).

17.7. As far as he can recall and understand from perusal of details/information available in the public domain, it was in the year 2012 that Diageo had signed a deal to acquire majority stake in USL. As per the broad contours of the deal, Diageo had intended to acquire a 53.4% shareholding through a series of transactions. Approximately 27.4% stake was to be acquired by way of a combination of preferential allotment and stake of Promoters and the balance of 26% shareholding through a mandatory open offer. However, due to pricing of the mandatory tender offer at ₹ 1,440 and the prevailing market price being broadly in line with this, hardly any shares were tendered and Diageo could not reach its desired shareholding of above 50% in USL. In fact, Diageo could only acquire 25.02% shareholding in USL of which 7% shareholding remains subject to litigation to this date.

17.8. Post the failure of the first tender offer in May 2013, Relay and Diageo at the first available opportunity, started pursuing various options including acquiring additional stake in USL by buying additional 3.76% shareholding through open market purchase so as to utilise the opportunity available for creeping acquisition limit before the conclusion of financial year ending March 31, 2014.

17.9. It was therefore clear from the initial announcement in 2012 and subsequent actions of Relay and Diageo that the company wanted nothing but a majority stake (shareholding of more than 50%) in USL as India had potential to become one of Diageo's largest markets and could be the biggest contributor to its global growth ambitions. It was *inter-alia* because of these reasons, following the failure of Diageo to achieve a 50% shareholding, it was anticipated and widely reported in media (national and international) that another open offer would be in the offing soon. It was also clear that if Diageo, (whose market capitalisation at that time stood anywhere around GBP 50 billion) wanted to increase its stake to majority in USL by

purchasing shares of the public shareholders from the open market, pricing may not be much of an issue.

17.10. In the aforesaid circumstances, it is clear that the prospect and possibility of an open offer was already in public domain and cannot in itself be considered an UPSI. The Noticee submitted media links showing that there was hardly any information related to the open offer, which was not in the public domain.

17.11. It is therefore, clear that while there was lot of speculation in the media regarding the forthcoming open offer, the specific details pertaining to its precise timing, size and price was not available prior to April 15, 2014.

17.12. The information in question finally came into existence when Diageo announced its second open offer on April 15, 2014 at an offer price of ₹ 3,030/- per share.

17.13. In the disclosures made by Managers to the offer and Relay, it clearly states that it was only on April 14, 2014 (evening Amsterdam / London time) that a meeting of the transaction committee of Relay and the sub-committee of Diageo took place where it was decided to launch an open offer to the public shareholders of USL. Accordingly, a public announcement was made on April 15, 2014 in India along with a Regulatory Information Service filing in London to comply with SEBI and Financial Conduct Authority regulations respectively. Therefore, it is clear that the UPSI originated only on April 14, 2014 and was announced with immediate effect under the applicable laws. It is a matter of record that prior to April 14, 2014 only a formation of sub-committee and sub-delegation of authority of the Board of Relay and Diageo had taken place.

17.14. From the documents available on record, it is clear that till April 14, 2014, there was no decision regarding open offer timing, size and price. In this context, it may be noted that even:

17.14.1. As per the letter dated July 10, 2014 from HSCI, it is quite evident that it was only on the evening of April 14, 2014 that the (a) quorate meeting of the Transaction Committee of the Acquirer was held in Amsterdam that approved the launching of open offer; and (b) quorate meeting of CEO and CFO of PAC was held in London that approved the launching of the open offer.

17.14.2. As per the letter dated July 11, 2014 from JMFL, it is also quite evident that it was only on the evening of April 14, 2014 that (a) further round of discussions between representatives of Diageo and its financial advisors took place; and (b) respective Transaction Committees of Relay and Diageo decided to launch an open offer to the public shareholders of USL and public announcement was made on the morning (India time) of April 15, 2015.

17.14.3. As per the letter dated May 11, 2015 from Relay, it is quite evident that it was only on the evening of April 14, 2014 that the Transaction Committees of Relay decided to launch an open offer to the public shareholders of USL and public announcement was made on the morning (India time) of April 15, 2015.

17.14.4. As per the letter dated August 1, 2016 from Platinum Partners, it has been stated that it was on April 13-14, 2014 that discussions were held with Diageo in relation to finalising of documents for the open offer.

17.15. In this context, it may also be noted that in response to SEBI's query regarding details of due-diligence, Relay has responded that there was no due-diligence conducted either by Relay or Diageo in connection with the open offer, and that it was only on April 13-14, 2014, it had discussions with financial advisors just prior to the public announcement. Platinum Partners, too, have also referred to these dates as to when they had "*Discussions with Diageo in relation to finalizing documents for the open offer.*"

17.16. It may be appreciated that prior to April 14, 2014, there was no certainty whatsoever that Relay and Diageo will come out with open offer. Same was in the realm of a potential possibility and nothing beyond it. Merely setting up a sub-committee of Diageo and transaction committee of Relay to meet on a future undefined date to consider and if thought appropriate, launch a potential open offer cannot be construed to be UPSI. What is relevant is the due consideration and decision that could impact the price. Further, for any particular information to be price sensitive, same has to have some degree of certainty and finality. For instance, in the matter under reference, open offer would have become price sensitive information only once the date of open offer, price of shares in the open offer, size of open offer etc. were considered and finalised. Bereft of these details, as was the situation prior to April 14, 2014, cannot be interpreted as UPSI in any manner. Any such interpretation is fraught with serious consequences which may result in even a preliminary discussion on any subject as price sensitive and therefore may have serious ramifications. Businesses function in a continuous mode of volatile situations and operate in a dynamic world, which require consideration of various options at any given point of time and consideration of any such option cannot be looked upon with certainty till such time, the event is imminent and all the requirements and approvals to execute such a decision has been secured. It may be noted that in the absence of key ingredients (viz. timing, price and offer size etc.), it is not possible to take an investment call by anybody.

17.17. Admittedly, the letter dated August 1, 2016 written by Platinum Partners to SEBI, specifically states that with regard to their discussions with Diageo in respect of open offer that information supplied by them is "*to the best of our recollection*". Clearly, the information provided by them is tentative and not certain and could not be relied upon blindly. Further, in light of specific and express submission of:

- HSCI that the meeting of Board of Directors took place on March 19, 2014 "*to*

*consider" and "if thought appropriate" to "launch a potential open offer";*

- JMFL that the meeting of Board of Directors took place on March 19, 2014 to discuss *"the strategy with respect to its investment in USL "*;
- Relay that the meeting of Board of Directors took place on March 19, 2014 to *"discuss potential transactions to be entered into by Relay to acquire shares in USL";*

Strangely, the Investigating Officer has rejected the version of three entities viz. HSCI/JMFL/Relay, as to the date of arising of alleged UPSI, and conveniently cherry picked the date stated by Platinum Partners in its letter, which too was only based on the recollection of the signing partner and therefore cannot be taken as a reliable date.

17.18. The UPSI came into existence only on April 14, 2014 and he had also become aware of the same on evening of April 14, 2014. Therefore, in context of said UPSI, he became insider only with effect from evening of April 14, 2014 and not any time before that. In so far as he being in possession of PSI prior to public announcement is concerned, it is submitted that prior to April 14, 2014, he was not aware of the UPSI pertaining to open offer made by Relay and Diageo. It is reiterated that prior to April 14, 2014, the information regarding potential open offer etc. was in the realm of conjecture and in any event the same was already in public domain since the time first open offer had failed to receive the number of desired shares/shareholders. The UPSI as contemplated under PIT Regulations is UPSI which is of some definitive character and not some speculative information bereft of any crucial details. Reason being, if a person has to trade on the basis of UPSI, then the UPSI has to be of a certain nature as opposed to being half-baked, loose or vague information.

17.19. In so far as letters written by JMFL / HSCI / Relay / USL / Platinum Partners are concerned, based on same it cannot be concluded that he was in possession of the PSI prior to the public announcement. Said conclusion is based on mere surmises and conjectures and is without any credible basis.

17.20. It is denied that Smt. Poonam, Shri Haresh and Shri Varun are his "*relatives*" as alleged. The term "*relative*" has been defined under Regulation 2(i) of PIT Regulations to mean "*a person, as defined in section 6 of the Companies Act, 1956*". Smt. Poonam, Shri Haresh and Shri Varun do not fall within the definition of "*relative*". As the said persons, are not "*relatives*", as contemplated under PIT Regulations, they cannot be deemed connected persons in terms of Regulation 2 (h) (vi) of PIT Regulations, as alleged. Further they also cannot be insiders under Regulation 2(e)(i) as alleged, as they are not deemed connected persons - which is the basis of treating them as insiders. Since the whole foundation of the SCN in this context is totally flawed, the further allegation that by being "*relatives*", Smt. Poonam, Shri Haresh and Shri Varun were "*reasonably expected to have access to UPSI in securities of USL*" also collapses.

17.21. With regard to the impugned fund transfer, it is submitted that an amount to the tune of around ₹ 19 lakh was transferred by Shri Haresh on May 9, 2014 just prior to the planned visit by him and his wife Smt. Poonam to London. Smt. Poonam visited UK on May 20, 2014 and was there till July 10, 2014 while Shri Haresh was in UK from May 28, 2014 to July 10, 2014. The amount was transferred on May 9, 2014 ahead of their visit so that the funds can be utilised for the purpose of incurring various expenditure *inter-alia* such as sight-seeing, travelling, meals and shopping during their stay in London for a period of around two months. In this regard, it may be noted that they had incurred an approximate cost of £8,000 (equivalent to ₹ 8,24,000/- based on the then prevailing conversion rate) for shopping as per the details provided by my wife and review of the credit card statements (copy of the credit card statements with relevant costs highlighted are attached) and expenditure of approximately £7,500 (equivalent to ₹ 7,72,500/- based on the then prevailing conversion rate) for living/food/conveyance and travel expenses (for 52 days and 44 days for Smt. Poonam and Shri Haresh respectively). Therefore, based on the above details, it is clear they have had incurred a total cost of at least ₹ 16 lakh as their own personal expenses towards the visit and it is for this purpose the funds were



transferred ahead of their visit to UK.

17.22. He became aware about the open offer on April 14, 2014. Therefore, he could not have communicated the same to Smt. Poonam, Shri Haresh and Shri Varun on March 10, 2014 (date for first transaction in the shares of USL) as alleged.

17.23. Without prejudice, even if it is assumed that information regarding potential open offer which was under consideration and subject to host of imponderables, is PSI then also he became aware of the same only on March 19, 2014. As on March 19, 2014, no insider, including him, could have stated with any degree of certainty as to whether the open offer will at all be launched in the near future also or not, and even if it is launched, then what would be the date, price and size of the open offer. As on March 19, 2014, the launching of open offer was anybody's guess. Therefore, no insider could have communicated anything to anybody, save and except that open offer could potentially be launched. The said eventuality was in any event there in public domain since a long time as borne out various media reports etc. Therefore, as on March 19, 2014 there was nothing based on which any tippee could have traded or taken a call with regard to trading.

17.24. In case of trading data for Shri Haresh, there was a net sell position of 1,625 (1,07,100 - 1,08,725) of underlying shares of USL as on closing of April 11, 2014, during the UPSI period as specified by SEBI itself, which shows that he had a net sell position. Similarly, in case of the trading positions taken by Smt. Poonam and Shri Varun, there are lot of sell positions and not buy positions alone, which clearly shows that these entities did not have any UPSI, otherwise they would not have sell positions but will take only buy positions since the UPSI was of the positive nature.

17.25. The trading pattern does not show that Smt. Poonam, Shri Haresh and Shri Varun had any prior UPSI of the open offer announcement as otherwise they would not have sold any long positions in the USL. The trading data clearly shows that the

selling started as early as March 18, 2014. Evidently, any person or entity, who is in possession of UPSI will not liquidate the positions much before the event has even begun to take shape. From the trading details of Smt. Poonam, Shri Haresh and Shri Varun, it is evident that they were doing both - i.e. buying and selling options, prior to April 14, 2014 as opposed to only buying. Since the alleged UPSI is of positive nature, it completely rejects the alleged theory of insider trading.

17.26. The whole theory of insider trading as alleged by SEBI in the SCN is based on circumstantial evidence. The Hon'ble Courts have consistently laid down that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances (Reference: *State of Goa vs. Sanjay Thakkaran and another* (2007) 3 SCC 755). In the matter under reference, nothing of the sort is there. Entire allegations are speculative and only based on surmises and conjectures.

18. In response to the hearing notice, the Noticees had confirmed their attendance vide letter / email dated August 28, 2017. However, vide an email dated September 14, 2017, Noticees were informed that the hearing which was scheduled on October 4, 2017 has been postponed.

19. AR-1 vide its letter dated December 4, 2017 submitted a reply on behalf of its clients, Smt. Poonam, Shri Haresh and Shri Varun reiterating its submissions made in its preliminary reply to the SCN and *inter alia* submitted as follows:

19.1. Shri Haresh is a textile chemist by qualification. Shri Haresh had been trading in shares and other securities since the 1980s. He used to carry out even Vyaj Badla trades till around 1999-2000, when these were stopped by SEBI. In and around 2000, Manghandas Jayramdas, a partnership firm in which Shri Haresh was

one of the partners and which firm traded in textiles till 2000, opened a trading account with Satco Securities and Financial Services Pvt. Ltd. Manghandas Jayramdas mostly traded in Futures and Options.

19.2. As a result of the wrongful and illegal act of Satco Securities and Financial Services Pvt. Ltd, Manghandas Jayramdas and Haresh Jashnani HUF suffered financial losses and faced litigation in respect of amounts due and payable by them to their creditors. On account of the same, the firm stopped trading in 2005. In and around 2006, several Insolvency Petitions were filed by creditors of Manghandas Jayramdas against the firm and against Shri Haresh as partner of the firm; as a result of which, Shri Haresh could not open a trading account or trade in securities until dismissal of the Insolvency Petitions in July 2008. In December 2012, Shri Haresh opened a trading account with Religare Securities Limited. As mentioned earlier, suits were filed by the creditors of Manghandas Jayramdas against the firm and against Shri Haresh as a partner since 2006. These suits came up for hearing in 2012 and since he had to attend the hearings, brief advocates etc.; Shri Haresh traded only in small quantities till March 2013 and he did not trade till March 2014. Many of the suits were settled out of Court by 2014 and therefore, Shri Haresh was able to resume trading by March 2014.

19.3. In and around October 2007, Shri Varun opened a trading account with Market Creators Limited, and started trading in Futures and Options; in April 2010, he closed this account and opened another one with Religare Securities Limited. In March 2009, Smt. Poonam opened a trading account with Religare Securities Limited.

19.4. By the beginning of 2014, the market expected Diageo and Relay, to acquire more shares either through market purchase or through another open offer in order to protect their existing investment in USL and hence, the open offer by Diageo and

Relay in April 2014 did not come as a surprise to anyone who was conversant with the developments relating to USL. Various reports in the media at the relevant time favoured an open offer since a market acquisition had limits on the quantity and price. Therefore, information that an open offer was to be made would not *per se* have been PSI. Rather, it was information regarding the details of the offer i.e. the offer price, the quantity and the date of announcement of the offer that would have been price sensitive. If at all, a decision by Diageo / Relay not to make an open offer would have impacted the price of the scrip.

19.5. Its clients started purchasing Options on USL shares from March 10, 2014 and collectively, by March 11, 2014, they had purchased a total of 33,000 options. Even as per the said SCN, the PSI came into being on March 12, 2014 when Platinum Partners purportedly received "*preliminary instructions*" from Diageo relating to the Open Offer. Thus, it is clear that a substantial quantity of options contracts was purchased by its clients even prior to the coming into existence of the said alleged PSI.

19.6. Shri Nishat joined Diageo in 2011 and to the best of its clients knowledge, he was with Diageo when they made their first acquisition and open offer in 2012-13. Its clients, did not trade in the shares or future or options of USL during the said period despite Shri Nishat being in the employment of Diageo. Therefore, the allegation that its clients trades in 2014 were based on UPSI obtained from Shri Nishat is a mere surmise and conjecture and not based on any documents, records or other reliable evidence.

19.7. If, as erroneously alleged, its clients had knowledge of the impending Open Offer:-

- They would have bought equity shares and not derivative contracts.
- Even if they did not have the money to purchase a substantial equity shares of

USL on a delivery basis and chose to buy derivative contracts, they would have, in the first instance, chosen to buy Futures Contracts and not Options Contracts because they would not have had to pay Options Premium, which is high at the start of the Option Period.

- Even in Options contracts, they would have bought April Expiry Contracts and not March expiry contracts since the Open Offer would have been announced in April 2014.
- If at all they had bought March Expiry contracts, they would rollover the same to April Expiry.
- Again, in the case of March Expiry Options, they would have bought At the Money Options i.e. with a strike price at and around the price of the underlying scrip - i.e. strike price around 2500 since the price of USL scrip was at ₹ 2,466.60 on March 10, 2014, the date of purchase of Options by its clients.

Instead, its clients did the following:

- They purchased 33,000 Deep Out of the Money European Call Options contracts with a strike price of 2,700. These were March 2014 Expiry European Options and could be exercised only on expiry date unlike American Options, which could be exercise at any time and were expiring on March 27, 2014.
- They further purchased 2,38,250 March Expiry Contracts at strike prices of ₹ 2,600/-, ₹ 2,700/- and ₹ 2,800/- on various dates between March 12, 2014 and March 21, 2014. They sold 2,71,250 of these contracts (including the 33,000 contracts purchased prior to the PSI coming into existence) during the said period. In fact, some of the contracts were bought and sold on the same day i.e. traded intraday.

The aforesaid behavior of its clients in selling the March Options Contracts much before the expiry date, rather than rolling over the contracts to the next month of April 2014, when the Open Offer took place, and in trading in the contracts rather

than holding on to them clearly shows that they did not possess the said alleged PSI at the time of purchase or sale of the aforesaid Options Contracts.

19.8. Furthermore, its clients purchased March Options and April Options by paying premium and other costs. If our clients were in possession of UPSI, they would have purchased only April Options and NOT March Options since Out of the Money contracts have only "Time value" - their "Intrinsic Value" is "0" and their value declines with time and therefore, these are "Depreciating Assets". It is pertinent to note that eventually March 2014 Contracts of Strike price 27000CE & 2800CE did expire worthless. The aforesaid clearly indicates that its clients traded in Options contracts of USL based on available market information including historical data daily price movement alone and not based on the PSI as falsely alleged or otherwise.

19.9. Its clients submit that their purchase of the aforesaid Options Contracts was based on sound and tested trading strategies that was rooted in the basic principles of options, trading. In this regard, the following may be observed:

- Two important factors that a purchaser of a Deep Out of the Money contract would look for are (1) Time Value of the Contract and (2) Implied Volatility or sensitivity of the Option's price to changes in the volatility in the price of the underlying asset (expressed as Vega). Together these 2 factors constitute the extrinsic value of the contract. As mentioned earlier, intrinsic value of DOMO Contracts is zero. For this reason, "Out of the Money" contracts are significantly cheaper to purchase than "In the Money" or "At the Money" and they offer better leverage to a trader as and when they exhibit volatility.
- At the beginning of any series of Options Contracts, the impact of Vega is negligible since there is substantial time for the contract to expire; therefore, the maximum impact of volatility is midway between start and expiry of the contracts. Its clients purchased the aforesaid 33,000 Deep Out of the Money

contracts on March 10 and 11, 2014 which is almost midway between the start and end of the March expiry contracts.

- Volatility was expected in the price of USL's scrip on account of market reports relating to the developments in USL and acquisition of the company by Diageo/Relay and the Options Contracts on USL exhibited sensitivity to the price of the underlying scrip.
- The encouraging values of Delta i.e. the ratio of the change in price of the options contract to the change in price of the underlying asset for the Deep Out of the Money contracts at the time of their trading was another factor that determined its clients' decision to purchase/trade in the aforesaid Options Contracts in and around the middle of the Options Period.

19.10. It is pertinent to note that the April 2014 contracts with strike price 2800CE expired at a loss of the premium and April 2014 contracts with strike price 2900CE and 3000CE expired "worthless."

19.11. It is pertinent to note that the said letter from Platinum Partners does not say that preliminary instructions from Diageo regarding the open offer on March 12, 2014 included details of the proposed open offer including offer price, quantity or announcement date. The record relied upon by SEBI and the chronology set out in the SCN further show that the offer price and other details were determined much later. Furthermore, such a preliminary instruction, if at all, would have been received by Platinum Partners aftermarket hours on March 12, 2014 (India time) considering the time difference of 5:30 hours between Mumbai and London. Hence the observation of SEBI that the UPSI came into existence on March 12, 2014 (Mumbai local time), is erroneous.

19.12. Relay has stated that it was on March 19, 2014 that the Board of Directors (of Relay) met and discussed potential transactions to be entered into by Relay, to acquire shares in USL and sub delegated certain powers and authority to a

transaction committee. They have further stated that the decision to launch an open offer was taken in a meeting of the transaction committee held on April 14, 2014. This information has been confirmed by the Merchant Bankers. Thus, the idea of a second open offer was for the first time considered (but not decided) by the Board of Relay in its meeting held on March 19, 2014. In facts and circumstances of the case that existed in March, 2014, the information that Relay was considering an open offer would not have been PSI. The details of the open offer were decided by the transaction committee of the Board of Relay on April 14, 2014.

19.13. Its clients are not related to any person or entity as set out in clauses (i) to (v) of sub regulation (h) of Regulation 2 of the PIT Regulations; therefore, the finding that they are deemed connected persons as defined in Regulation 2 (h) (vi) of the PIT Regulations is erroneous, false and unsustainable.

19.14. As far as USL is concerned, Shri Nishat cannot be considered as a Connected Person as defined under Regulation 2 (c) of PIT Regulations since he was never a Director or Employee of USL, nor did he had any professional relationship with USL. Therefore, for this reason also, our clients cannot be deemed connected persons under Regulation 2 (h) (vi) as far as USL is concerned on the basis of their relationship with Shri Nishat as falsely alleged in the SCN or otherwise.

19.15. SCN does not disclose how and in what manner its clients could be reasonably expected to have access to UPSI in respect to securities of USL.

19.16. It may be noted that on March 12, 2014, its clients purchased Options well before offices opened in London between 9:15 am to 3:10 pm IST i.e. 3:45 am to 9:40 am London time. Even if it is assumed, but not admitted that instructions were given by Diageo / Relay to Platinum Partners on March 12, 2014, the same would have been given only after offices opened in London i.e., earliest at 10 am London



time, 3:30 pm IST. Therefore, the purchase of 43,250 Options contracts on March 12, 2014 cannot be considered as having been based on the said alleged UPSI.

19.17. The allegation in SCN that in comparison to the UPSI period, the trades of its clients in the pre UPSI Period were insignificant is misplaced and erroneous. Its clients submit that Open Positions rather than total traded quantity ought to have been considered. It may be noted that prior to the UPSI period that is January 1, 2014 to March 12, 2014, the total Open Positions in McDowell-N across all its clients was 76,250. Therefore, the Open Positions during the pre UPSI period were not at all insignificant when compared to the UPSI Period (41,500). It is also pertinent to note that if, as alleged, its clients had access to the UPSI, they would have held on to the purchased contracts rather than sell them.

19.18. The clients purchased more of the options contracts of USL after March 12, 2014 because the settlement price of the contracts was falling and the "risk-reward ratio" prompted them to obtain more contracts at a lower price to offset the fall in the price of the contract. SEBI has failed to consider this explanation for the increase in purchase and sale of the options contracts.

19.19. In the said alleged "post UPSI" period, trades of its clients in options of USL were not significant because: -

- Once an acquirer announces an open offer, the price of the scrip does not vary by much during the period when the offer remains open since arbitragers enter the scrip and seek to maintain the price until the offer closes. Consequently, there will not be much scope for trading in the scrip or in derivative contracts on such scrip and a prudent trader in options of such scrips will wait till the "premium" on the underlying shares on account of the open offer disappears.
- In the present case, the open offer opened on June 06, 2014 and closed on June 19, 2014 and the price movements of the underlying script scarcely moved.

- There was a significant discount in the pricing of Futures contracts compared to spot prices of USL which converged to the futures rate on closing of tendering of open offer shares on June 19, 2014.
- Trading in Out of the Money Options during this period would not have been fruitful as the intrinsic value is "0" of the said contracts and it would not have changed until the open offer closed; hence volatility of the contracts would have been low and the time decay would have eroded the option premium day by day till it rendered the option worthless on expiry. Thus, trading – in these contracts in these circumstances will not usually be rewarding.
- They were travelling out of India.

19.20. It is denied that during the relevant period i.e. UPSI period and post UPSI period, the trades of its clients were concentrated in the symbol of McDowell-N. In fact, in terms of value, its clients' trades in NIFTY futures and options exceeded those in the symbol McDowell-N.

19.21. It is not clear what adverse inference is sought to be drawn against its clients on account of the "holding period" of the options being "barely" three weeks during the UPSI period. Since, the market expected Diageo/Relay to acquire more shares before the expiry of the Financial Year i.e. March 31, 2014, and the USL scrip was to be included in the Nifty 50 from March 28, 2014, a prudent trader would have bought options of USL, expiring in March 2014. In fact, Diageo/Relay would have to had to purchase the shares on or before March 27, 2014 to get the shares before March 31, 2014. Similarly, the Index based funds would streamline their portfolio by the addition of the USL in their portfolio by March 28, 2014.

19.22. In view of the above, it is quite logical that the Options purchased by its clients in March 2014 had March 27, 2014 as the expiry date. Furthermore, options are considered to be "Depreciating Assets" unlike Equity, Option contracts are much more complex instruments, wherein the premium pricing in "Out of the Money"

Contracts consist of only "Time Value" since the intrinsic value is "0" and the Time Decay accelerates as one gets closer to expiration and eventually they may expire worthless as in the present case.

19.23. Shri Haresh had transferred an amount of ₹ 15.70 lakh to the account of Smt. Poonam between April 04, 2014 to April 09, 2014 and subsequently Smt. Poonam has transferred an amount of ₹ 18.40 lakh thereafter on May 09, 2014, and therefore, no adverse inference may be drawn on account of such transfers.

19.24. Regarding the transfer of funds from Shri Haresh to his daughter Smt. Menka Jashnani on May 9, 2014, it is submitted that since neither Shri Haresh nor his wife had a credit card or an internationally accepted debit card and since they were travelling alone, they did not want to carry international currency in large quantities. Therefore, in order to meet their expenses while in London and the UK, Shri Haresh transferred a sum of around ₹ 19 lakh to his daughter on May 9, 2014 i.e. prior to his travel, so that she could be compensated for the expenses incurred on their behalf while in London.

19.25. It may be noted that the tabulations of profit of its clients includes profit made on purchase transactions prior to the alleged UPSI and post alleged UPSI period amounting to ₹ 30,00,762.50 across all its clients. Without prejudice to the aforesaid submissions and without admitting to any irregularity before, during or after the said alleged UPSI period, these profits cannot anyway be termed as illegal and therefore, ought not to have been included in the tabulation of profit by NSE and/or SEBI.

19.26. It may be noted that the profit made in March contracts was made 25 days prior to the PSI was published and eventually all March contracts expired worthless. Typically, in insider trading, the insider would make a profit or avoid loss after the PSI is published. The clients made profits well before the PSI was published. *Per se*,

this indicates that its client's trades were not based on the UPSI as falsely alleged or otherwise.

20. Noticees were granted an opportunity of hearing in the matter on February 27, 2018 vide hearing notice dated January 25, 2018. However, due to official exigencies, the said hearing was postponed. Noticees were granted a fresh opportunity of hearing on December 6, 2018 in the matter which was later advanced to November 13, 2018. The Noticees were informed regarding the same vide an email dated September 27, 2018. In response to the same, AR-1 and Shri Nishat vide their letter dated October 26, 2018 and email dated October 30, 2018 requested to adjourn the scheduled hearing. Their request was acceded to and they were granted another opportunity of hearing on January 8, 2019. Shri Nishat vide his email dated December 24, 2018 again requested to adjourn the scheduled hearing. Considering the facts and circumstances of the matter, his request was acceded to and he was granted a final opportunity of hearing on January 23, 2019.

21. At the time of hearing Shri Haresh appeared in person. Further, Shri P.N. Modi, Shri Joby Mathew and Shri NP Lashkari appeared as authorized representatives of (hereinafter referred to as “**ARs**”) for Smt. Poonam, Shri Varun and Shri Haresh. The ARs reiterated the submissions made in the reply submitted in response to the show cause notice and *inter alia* submitted as follows:

- The information regarding Relay together with Diageo acquiring 26% of the total fully diluted voting equity share capital of USL cannot be termed as PSI as the same was in public domain. There were various reports and newspaper articles which were reporting about the impending acquisition along with a tentative price of acquisition.
- Market had already discounted the possibility of open offer, therefore open offer per se is not PSI.
- USL was to be included as one of the stocks of Nifty 50 from March 28, 2014 onwards, so the price of the scrip was bound to increase.

- Idea of second open offer was considered for the first time on March 19, 2014 by the Board of Relay which sub delegated certain powers and authority to a transaction committee. Decision to launch the open offer taken on April 14, 2014.
- Collectively the entities had bought 33,000 options before March 12, 2014.
- The trading strategy of selling March Option Contracts much before expiry date rather than rolling them over to the next month and trading in contracts rather holding them as shares, shows the normal trading behavior of the entities who do not have access to UPSI.
- Shri Nishat was with Diageo even at the time of its first acquisition of USL but the entities did not trade during that period.
- Shri Nishat was neither a Director nor an employee of USL, therefore, the entities cannot be said to be deemed to be connected with the company.
- Fund transfer was done by the entities to meet the expenses in United Kingdom as Smt. Poonam and Shri Haresh were travelling to meet their daughter and grandson.

In the context of the Noticees submission that the transfer was for holiday expenses, the ARs were advised to submit past and future fund transfer made by Smt. Poonam and Shri Haresh to their daughter, on or before February 14, 2019.

22. Shri Somasekhar Sundaresan, Shri Abhishek Venkatraman, Shri Vinay Chauhan and Shri K C Jacob appeared for the hearing as ARs of Shri Nishat. The ARs reiterated the submissions made in the reply submitted in response to the SCN and *inter alia* submitted as follows:

- The IR is silent on the role played by the entity in the public announcement. Who played what role and in what point of time has not been dealt in the report. It is a big assumption to make that everyone knew everything at all point of time.
- There was a lot of speculation in the media regarding the forthcoming open offer.
- The specific details pertaining to open offer's timing, size and price was not

available before April 15, 2014.

- The Noticee was not aware of the UPSI prior to April 14, 2014.
- Smt. Poonam, Shri Haresh, Shri Varun are not the relatives of the Noticee as defined under Section 6 of Companies Act, 1956. Further, the Noticee is not aware of the trading / investments made by them.
- Fund transfer was to cover the travel and living cost of Smt. Poonam and Shri Haresh during their visit to London.

The ARs were advised to make additional submissions, if any on or before February 14, 2019.

23. Subsequent to the hearing, Smt. Poonam, Shri Varun and Shri Haresh reiterated its earlier submissions and *inter alia* made the following additional written submissions:

23.1. The SCN states that UPSI period was from March 12, 2014 on the basis of the statement of Platinum Partners, Diageo's lawyers that they had received some preliminary instructions from Diageo and had discussions with them during the period March 12, 2014 to April 12, 2014. This statement is very vague and devoid of material particulars:

- does not disclose what exactly happened from March 12, 2014 to March 19, 2014 (the 1st date in everyone else's disclosures);
- does not disclose what the discussions were and with whom - important to note that there is no reference to Nishat;
- considering that they were Diageo's lawyers, in the absence of particulars, at best, it can be assumed that Diageo sought their opinion as to whether an open offer was permissible in law and if so, what documentation would be

required - the SCN cannot be based on lacuna of information;

- without prejudice to the above, Platinum Partners would have received preliminary instructions only after market hours on March 12, 2014 (due to the 5 ½ hours difference in time between London and India) and therefore, trading on March 12, 2014 cannot be alleged to have been done on the basis of UPSI.

23.2. The Public Announcement of the Open Offer was made on April 15, 2014. Hence, the options purchased by Shri Haresh, Smt. Poonam and Shri Varun prior to April 11, 2014 and expiring on March 27, 2014 are not relevant to any charge of insider trading. Only trades in options expiring in April 2014 i.e. options purchased on April 11, 2014 were relevant to the charge of insider trading.

- It may be noted that a buyer of an Options Contract pays the premium to the seller; on expiry of the contract, the seller has to pay the buyer the difference between the strike price and the market price. If, Shri Haresh, Smt. Poonam and Shri Varun had the UPSI, logically, they would have purchased options contracts with lower strike prices since that would have got them a higher return on expiry. Instead, they purchased options with range of higher strike prices. This clearly shows that they did not have the UPSI.
- In value terms the Purchase and Sales in the options of USL across all noitcees during the period of UPSI ( March 12, 2014 to April 14,2014) is as below:

Particulars		
	Gross Buy Value	Gross Sale Value
	In ₹	In ₹
Poonam Jashnani	19,63,050	29,73,119
Haresh Jashnani	15,20,556	27,43,369
Varun Jashnani	18,23,402	20,58,813
<b>Total in ₹</b>	<b>53,07,008</b>	<b>77,75,301</b>

23.3. Haresh's trading strategy was to buy Out of the Money Call Options in the 2nd week of the month when premiums usually decline and then to square off/sell before the last week of the month when the options expire - this would fetch him a small profit on account of the price/premium volatility.

23.4. Shri Haresh, Smt. Poonam and Shri Varun traded prior to, during and after the UPSI period - they bought and sold options of McDowell N during this period - no insider would have done so.

23.5. The open offer period was from June 6, 2014 to June 19, 2014 - during this period prices fell sharply and they were expected to fall further - yet, Shri Haresh, Smt. Poonam and Shri Varun traded in June and July expiry contracts i.e. long after the Public Announcement - again shows that Haresh did not base their trades on UPSI.

23.6. From the trading activity of Smt. Poonam in the scrip of USL vis-a-vis other scrips across the market during the UPSI period as well as prior to and after the UPSI period, it is noted that during the UPSI period the sale amount is far in EXCESS of the Purchase amount by ₹ 10,10,068 in the scrip of MCDOWELL-N. She bought during the UPSI period Contracts of Nifty valued at ₹ 1,55,26,885 which constitute 88.78% of the total purchase across all scrips during the UPSI period. She sold during the UPSI period Contracts of Nifty valued at ₹1,92,17,602 which constitute 86.60% of the total sales across all scrips during the UPSI period. Similar trading activity is also of Shri Haresh and Shri Varun.

23.7. It may be noted that Shri Haresh had previously also transferred an amount of ₹ 9.24 lakh to his daughter on September 13, 2003.

24. Vide a letter dated February 28, 2019, Shri Nishat submitted an affidavit reiterating his earlier submissions and *inter alia* made the following submissions:



24.1. The sequence of events to the best of my recollection is set out below:-

- On April 13, 2014, Shri Vinay Tanna (Director of Business Development), his line manager asked him to join him and the Diageo legal team (Shri David Berry and Shri Antonio Chan) in discussions that were held between April 13-14 with Platinum Partners, the legal advisors and JM Financial and HSBC, the Merchant Bankers, to explore the legal and regulatory considerations of a potential voluntary tender offer (hereinafter referred to as “VTO”).
- Given the legal and regulatory nature of the discussions on April 13-14, 2014, he had no input to offer during these meetings.
- On the evening of April 14, 2014, he was informed by Shri Vinay Tanna that the Board of Directors of Diageo and Relay had considered and decided to launch a VTO the following day on April 15, 2014.
- It was at this point he was asked to carry out the following financial analysis that was to be included in the public announcement based on the offer price of ₹ 3,030/- and proposed offer size of 26% of USL shareholding:-
  - Profitability based transaction multiple
  - Earnings Per Share accretion/dilution for Diageo
  - Premium of offer price to historical data points

24.2. At no time he was involved in or aware of any due diligence carried out by Diageo. In fact, Diageo has in its letter dated May 11, 2015 to SEBI, sent months after I had left the organization, confirmed that no due diligence was conducted.

24.3. Prior to the evening of April 14, 2014, he had no knowledge and awareness of any models and/or simulations that were undertaken by Diageo and/or Relay to assess the financial implications or pricing ranges of the VTO. Once he was roped in on the evening of April 14, 2014, he would have worked on some models and analysis for the specified price point of the VTO and provided those inputs to my line manager Shri Tanna. With respect to the VTO, he believes that Shri Tanna was

reporting to Ms. Deirdre Mahlan, designated as Chief Financial Officer at the time, who in turn reported to Shri Ivan Menezes.

25. In view of the deposition made in the affidavit more particularly, *"... During the alleged UPSI period, between March 12, 2014 to April 14, 2014, I had no role in providing materials or participating in discussions that are said to have been held by the respective Boards / Transaction Committees of Diageo and Relay. Prior to the evening of April 14, 2014, I had no knowledge and awareness of any models and / or simulation that were under taken by Diageo and / or Relay to assess the financial implication or pricing ranges of the VTO. Once I was roped in on the evening of April 14, 2014, I would have worked on some models and analysis for the specified price point of the VTO and provided those inputs to my line manager Mr. Tanna..."*, SEBI advised Diageo India Pvt. Ltd., vide letter dated June 14, 2019 and the Lead Managers vide letters dated June 18, 2019, to verify and state, after checking their email statements and all other records available in their file, the correctness of aforesaid statements of Shri Nishat and further state the earliest stage, role and point in time the open offer information was handled by him.

26. In response to SEBI's letter, the Acquirer, Relay B.V. vide its letter dated June 25, 2019 submitted as follows:

*"In response to your request, we understand that Mr. Nishat Gupte was involved in discussions in relation to the potential acquisition of further shares in USL by the Diageo group, including by way of launching an open offer, and which proposal was considered by the board of directors of Relay at its meeting held on March 19, 2014, approximately a month prior to the public announcement made by Relay and Diageo on April 15, 2014. In addition to discussions within the Diageo group, Mr. Gupte was also involved in discussions with the external advisors who were engaged in connection with the possible transaction. "*

27. HSBC vide its letter dated June 28, 2019 submitted as follows:

*"1. Basis the search performed on email archives of key team members of HBSC Securities and Capital Markets (India) Private Limited ("HSCI"), it can be inferred that Shri Nishat Gupte was a party to the preliminary discussions (in September 2013) between HSCI and Diageo PLC around potential stake enhancement by Diageo PLC in United Spirits Limited, which was ahead of appointment of HSCI as Manager to the Offer.*

*2...*

*...*

*iii. We have identified earliest communication of 16 September 2013 between HSCI and client' team where Shri Nishat Gupte was copied on e-mail.*

*iv. Subsequently, email exchange dated 30 September 2013 between HSCI and client' team indicates discussion around potential stake enhancement by Diageo PLC in United Spirits Limited and one of the potential options being discussed was 'Open Offer'.*

*...*

*vi. Shri Nishat Gupte was one of the core team members representing Diageo PLC and was closely involved in the correspondence between HSCI and Diageo PLC during preliminary discussions and in the transaction lifecycle."*

28. JMFL vide its letter dated July 24, 2019 submitted as follows:

*"...*

*Copy of the email dated September 3, 2013 sent by an official of JMFL to Mr. Gupte which contains the working draft of the presentation on "Plan B", wherein various*

*options of enhancing shareholding of Diageo in United Spirits Limited, including an open offer, are referred. The copy of said email and the relevant extract from the presentation is attached and marked as Annexure IV.”*

29. Based on the above submissions, it was inferred that Shri Nishat had knowledge and awareness of models and/or simulations that were undertaken by Diageo Plc. and/or Relay B.V to acquire further shares in USL including open offer, at least from September 3, 2013. The said inference was communicated to Shri Nishat vide letter and email dated August 1, 2019, to obtain his response. Further, he was advised to file his response, within 10 days from the receipt of the email. Based on the requests of Shri Nishat, he was granted time till September 5, 2019 to submit his response to SEBI's email dated August 1, 2019. Vide his email dated Shri Nishat *inter alia* submitted as follows:

29.1. At the outset, it is submitted that the process adopted by SEBI in the present proceedings, wherein Investigation Department is gathering documents at this juncture (i.e. Post completion of investigations, Post issuance of Show Cause Notice, Post conclusion of hearing), is totally unknown to and contrary to, the provisions of law. If the same process is to be continued, then the whole concept of Adjudication, post completion of Investigation, would become redundant. Further, it would turn into a never ending exercise as SEBI's Investigations can go on endlessly and in parallel along with Adjudication.

29.2. None of the entities with whom SEBI has now corresponded have stated what the contents of the discussions since September 2013 involved, when the contents moved to the next logical state and whether the discussions involved consideration of the size of the open offer or the timing of the open offer, or most importantly, the pricing for the open offer. These are the parameters that would be involved in assessing models and simulations relating to the open offer.

29.3. Now, it is evident that these entities, in fact have made replies consistent with his position of fact. They have indeed stated that the discussions involved exploring various options for Diageo to increase its stake in USL including by way of a preferential allotment. The mere fact that one of the many options considered was an open offer, an open offer that likelihood of which was well reported in the public domain, would not become UPSI. Further, that by no means would mean that there came into existence cogent models or simulations for likely contours and parameters of an open offer.

29.4. It may be noted that the emails referred to in JMFL's letter dated July 24, 2019 are exploratory in nature, which *inter alia* included various stake building options. Same has also been confirmed by JMFL in its letter dated July 5, 2019 and further again confirmed in its letter dated July 12, 2019, wherein it has *inter alia* stated that the preliminary discussions between JMFL and Diageo prior to March 12, 2014 were exploratory in nature.

29.5. It may be further noted that JMFL in their letter dated July 24, 2019 are only providing correspondence following completion of the first open offer and not correspondence in relation to the VTO that was announced on April 15, 2014 which they have dealt with separately in their letter dated July 5, 2019. This fact can be substantiated by reference to the question asked by SEBI in its letter dated July 18, 2019 which is as follows.

***Question: "...to provide the earliest stage, role and point in time when Shri Nishat Gupte was aware/involved with **your relationship as Manager** to the Offer (subsequent to the 1<sup>st</sup> offer made by Relay B V and Diageo PLC in the captioned script), in any manner whatsoever, whether formal and/or informal, directly and/or indirectly (including as cc in emails, telephonic logs etc.) **with the Offer relating to the Public Announcement dated April 15, 2014...** ');***

***JMFL's response in their letter dated July 24, 2019: "...we are enclosing the copies of the emails as retrieved by us (subsequent to the completion of the first open offer made by Relay B V and Diageo PLC in the captioned scrip on May 13, 2013)..."***

29.6. Without prejudice to the aforesaid, with regard to emails shared by JMFL the following should be noted-

(i) Email from him on July 31, 2013 clearly talks about preferential allotment and has nothing to do with an open offer that eventually was conceptualised later and was announced on April 15, 2014

(ii) The aforesaid email dated July 31, 2013, was replied to by officials of JMFL on August 2, 2013 in the form of Plan B wherein they have compared 'preferential allotment' vs 'creeping' workings This has nothing to do with the open offer that was later announced on April 15, 2014.

(iii) Subsequently, on September 3, 2013, JMFL has sent a presentation for Plan B jointly prepared by JMFL and Bank of America Merrill Lynch. This pitch presentation provides only general information on stake enhancement options in USL based on publicly available information.

(iv) Plan B resulted in creeping acquisitions by Diageo and Relay that were executed on November 28, 2013 and February 4, 2014 at the prevailing market price of USL on these respective dates. These creeping acquisitions have been disclosed by JMFL in their letter dated July 11, 2014.

29.7. Admittedly, neither the letter from JMFL nor the correspondence (from JMFL and BAML) includes any UPSI nor does it include any reference to any models and/or simulations with respect to the open offer that was announced on April 15, 2014. These are all pitches by merchant bankers to seek mandates, which developed

over time into consideration and assessments of various options and that can by no stretch be regarded as UPSI. The rationale for a decision of disposing of these proceedings without any adverse finding, is on par with the rationale adopted by SEBI vide its order dated January 31, 2018 in the case of 63 Moons, in which the publicly discussed news reports about existing of proceedings was rightly considered to be "generally available information" and therefore not UPSI - in much the same way, in this case, the likelihood of a possible open offer was in the public domain and there was nothing about it that made it UPSI. The feedback from Relay, HSCI and JMFL do not at all controvert the position that I was not privy to or aware of models and simulations about the open offer in September 2013, since they only state the well-stated position that the possibility of an open offer was on the table in the public eye.

29.8. Before dealing with the contents of HSCI's letter dated June 28, 2019, he would like to highlight the following-

(1) It may be noted that the first instance when there is communication from Diageo to HSCI as to identifying potential advisors/managers to a potential tender offer was on March. 12, 2014. Same is borne out by the email of Mr Vinay Tanna (Corporate Finance M&A Director, Diageo) placed on record by JMFL in their letter dated July 5, 2019. This is also consistent with the replies of JMFL and Platinum Partners (annexed along with the SCN).

(ii) It may further be noted that HSCI was officially appointed as joint-manager only in April 2014. HSCI in their letter dated July 10, 2014 which is annexure A in the SCN have also confirmed that they have not provided any merchant banking services to Diageo for 3 years prior to the open offer announced on April 15, 2014.

(iii) In their letter dated June 25, 2019, HSCI have stated that the key team members

involved in the transaction have since left the organization and their response is limited to emails available on record This is critical to understand the context of the email exchange prior to March 12, 2014.

29.8. I submit that in September 2013, HSCI, on their own accord (completely unsolicited) had approached the Global Business Development department of Diageo to make a pitch and to market their services and propose different stake building options. In this backdrop HSCI had vide its email dated September 16, 2013, *inter alia* marketed a "10 for 10" strategy for an open offer. This was promptly responded to on September 16, 2013 and September 20, 2013 by Mr Vinay Tanna whereby he summarily dismissed as enviable the HSCI "10 for 10" strategy i.e. a 10% premium on current market price would deliver a 10% incremental shareholding. He further **dismissed the practicality of launching an open offer** by clearly stating *"I have no doubt that execution is very good but relying on this is not sufficient reason to believe that a tender offer is likely to work particularly as it limits flexibility. By the way when we last did a tender offer, we undertook a line by line analysis of the shareholders and a detailed research on their past behaviour and concluded that our tender offer which at 30% premium to undisturbed price (24 September 2012 when announced we were in talks) was a spectacular failure"*.

29.9. Subsequently, on September 30, 2013, HSCI had then submitted a general marketing presentation, whereby they had provided various potential stake enhancement options ( viz. Creeping acquisition VTO, Preferential Allotment Mandatory Open Offer) based on publicly available information as can be observed from the disclaimer on last page of the presentation which states that "information and opinion contained in the presentation are based on publicly available information and legal and regulatory regime applicable at the time of making the presentation, which are subject to change from time to time ".



29.10. The said HSCI presentation on various potential stake enhancement options, was clearly a marketing presentation, which was given by them very much prior to their appointment as 'Manager' in April 2014 and was only for the purpose of pitching their services to Diageo based on publicly available information. The said marketing presentation, admittedly, does not include any models and/or simulations with respect to the VTO that was announced on April 15, 2014.

29.11. It is Relay's own submission that as on March 19, 2014 they had merely sub-delegated the authority to consider and if thought appropriate acquire further shares in USL by the Diageo group, including by way of launching an open offer at a future undefined date. The said position of Relay, is totally consistent with the submissions made by him in his reply dated August 22, 2017 wherein at Para 31-(ix) he had stated as follows:

*"I reiterate that I became aware of the Relay and Diageo coming out with open offer only on April 14, 2014. Prior thereto, as stated in earlier paras, my awareness about Relay and Diageo coming out with potential open offer dates back to March 19, 2014. The said awareness was very limited and restricted and that too that Relay and Diageo were to consider at a future undefined date whether it should come out with open offer or not and if thought appropriate it would launch a potential open offer. The said situation was riddled with many imponderables via how to increase the stake in USL, what is the best mode of increasing stake such as rights issue, preferential issue of shares or warrants, open offer and what would be the most ideal time for the same. Based on the awareness that Relay and Diageo may consider at a future undefined date whether it should come out with open offer or not, cannot be construed that there existed any PSI. It is reiterated that mere consideration about launching of potential open offer if deemed appropriate by Relay and Diageo cannot be construed to be unpublished price sensitive information. Merely holding discussions without any*

*finality in a matter is not price sensitive information and does not tantamount to taking a decision: What is relevant is the final decision that could impact the price? Sensitivity is relatable to the final decision and not to anything else. Further, for any particular information to be price sensitive, same has to have some degree of certainty...”*

29.12. From the combined analysis of the letters/emails, it is clear that the said letters/emails relate to various merchant banks providing potential stake enhancement options for Diageo to increase its shareholding in USL. They were doing this as it was publicly known that Diageo had an intention to increase its shareholding in USL after failure of the first tender offer. This sort of pitching and exploratory discussion activity is carried out in normal course of business by all merchant banks and there is nothing unusual or abnormal about the same. To market their services, it is general practice that merchant bankers provide such perspectives free of cost and without any formal engagement with the hope that they are hired to execute such a transaction if the company were ever to decide to go ahead with any of the options. It is globally recognised by regulators that such exploratory discussions between merchant banks and business development departments is not to be construed as price sensitive and is in fact discussion in the normal course of business. Because, there is huge element of uncertainty involved in the same, in the sense that the exploratory discussions are subject to various imponderables (viz. regulatory, market, financials, management and board decisions etc.).

29.13. In fact, the documents/evidence which has now been brought on record by Investigation Department SEBI, clearly substantiate his claim that UPSI never existed on March 12, 2014. In this regard, I wish to draw your attention to the email submitted by JMFL as an annexure to their letter dated July 5, 2019 which is in response to SEBI letter dated June 18, 2019. The email was sent by Mr. Vinay Tanna

(Corporate Finance M&A Director, Diageo) on March 12, 2014 at 6:39 pm to various officials of Platinum Partners, HSCI, JMFL and cc marked to Diageo officials including him. The email is reproduced herewith:

*"Gentlemen,*

*This is to introduce you formally in the context of the above project. I have spoken to the lead in each firm on respective roles etc., my immediate request is that collectively you catch up soonest to ensure that Sunil/Amit are familiarized with some of the challenging regulatory issues that we have discussed over the recent weeks. Going forward Sunil / Amit will join us on regular calls dealing with regulatory/legal matters. "*

29.14. As can be seen this is the first occasion where potential advisors were introduced as a team to a Project referred to as 'Project Cape'. To the best of my knowledge/recollection, at this stage the potential advisors were asked to co-ordinate with each other to discuss the legal and regulatory feasibility of a potential tender offer. This clearly indicates that a set of potential advisors was put together for the first time on March 12, 2014 and only asked to consider legal and regulatory issues faced by the company during that time. To the best of his memory, the questions that were being discussed at this stage were:

- Whether a potential open offer under Regulation 3 (2) of the SEBI (SAST) Regulations was possible?
- Whether other Promoters of USL (i.e. UB Group and affiliates) could tender their shares in a potential open offer?

29.15. It may be noted that in the SCN dated March 29, 2017 at paragraph 7 it has *inter alia* been stated that "*From the chronology of events provided in para 4, the PSI related to the open offer has come into existence on March 12, 2014 after Platinum Partners received preliminary instructions from Diageo regarding the open offer*".

This conclusion is erroneous as can be seen from this email which has been brought on record now by JMFL that was also received by Platinum Partners on March 12, 2014 at 6:39pm. It is clear that there was no certainty of open offer on this date. Based on the email from Mr Vinay Tanna on March 12, 2014, it can be clearly inferred that on this date no UPSI existed and it was an exploratory discussion with potential advisors that was initiated at this stage to ascertain whether an open offer was even possible. There is no reference to the key points that could be termed as price sensitive. This clears the discrepancy that UPSI existed from March 12, 2014 which was attributed to the vague submission made by Platinum Partners.

**Findings and Consideration**

30. I have perused the SCN, written and oral submissions and other materials available on record. On perusal of the same, the following issues arise for consideration.

- i. *Whether the announcement of open offer is PSI in terms of PIT Regulations?*
- ii. *If the first issue is determined in the affirmative, whether the PSI was unpublished?*
- iii. *If the PSI was unpublished, what was the period of UPSI?*
- iv. *Whether the Noticees are 'insiders' in terms of PIT Regulations?*
- v. *If the answer to the aforesaid question is in affirmative, whether the Noticees have violated the applicable provisions of PIT Regulations and SEBI Act?*
- vi. *If the answer to the aforesaid question is in affirmative, whether the Noticees have made any ill-gotten gains and if so, are they liable for disgorgement. Further, do other directions, if any, need to be issued against the Noticees?*

31. Before proceeding to deal with the aforesaid issues, I would like to deal with the submission of Shri Haresh, Smt. Poonam and Shri Varun that principles of natural justice have been not followed in the extant matter as they were not provided with documents which have been relied upon by SEBI. From the records, it is noted that

the Noticees had carried out inspection of all the relied upon documents on June 8, 2017. Pursuant to which, photocopies of documents as sought by them were provided to them. Subsequently, Noticees again sought certain documents vide their email dated July 10, 2017. In response to the same, vide an email dated July 11, 2017, Noticees were given itemised reply with respect to each document sought by them as to which documents were already provided to them (photocopy of investigation report, email dated November 11, 2016), the documents which were being provided to them pursuant to the request (emails dated May 13, 2015, July 15, 2015, etc.) and the documents which were not provided to them as they were part of the ongoing investigation and the same were also not relied upon to issue the SCN (emails dated May 21, 2015, July 8, 2015 etc.). Thus, from the aforesaid it is noted that all the documents which were relied upon to issue the SCN have been provided to the Noticees. Here, I would like to refer to the observation of Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**Hon'ble SAT**") in the matter of *Mayrose Capfin Pvt. Ltd. vs. SEBI* decided on March 30, 2012 wherein the Hon'ble SAT observed as follows:

*"...The principles of natural justice require that the inquiry officer should make available such document and material to the delinquent on which reliance is being placed in the inquiry. It is not necessary for the inquiry officer to make available all the material that might have been collected during the course of investigation but has not been relied upon for proving charge against the delinquent. No prejudice can, therefore, be said to have been caused to the appellant on this count."*

32. Further, with respect to the reliance placed by the Noticees on the order of Hon'ble SC in the matter of *PriceWaterhouse Coopers vs. SEBI*, I note that SAT in its order of *Shri B Ramalinga Raju et. al. vs. SEBI* dated May 12, 2017 has observed as follows:

*"...Fourthly, Apex Court in case of Price Waterhouse has specifically recorded that the directions given in that case are general directions given as and by way of*

*clarifications without going into the merits of the case. Therefore, directions given in the facts of Price Waterhouse cannot be said to be the ratio laid down by the Apex Court applicable to all other cases."*

33. In light of the finding that relied upon documents have been inspected and provided to the Noticees and the observation of Hon'ble SAT in *Shri B Ramalinga Raju et. al. vs. SEBI* matter, it is held that in the circumstances of the extant matter, the reliance placed by the Noticees in the matter of *PriceWaterhouse Coopers vs. SEBI* is misplaced.
34. Shri Nishat has also raised a preliminary objection that post conclusion of hearing, the Investigation Department is still gathering documents which is totally unknown and contrary to the provisions of law. In this regard it is noted that the trigger for collecting further information was necessitated by the claim made by Shri Nishat in the form of an affidavit which required quasi-judicial assessment and hence led to collecting of further information. It may be noted that the information collected post hearing was made available to Shri Nishat for his reply on the same and thus principles of natural justice were followed.
35. In order to perform the functions of the Board as mentioned in Section 11 of the SEBI Act, the board may take such measures as it thinks fit as mentioned in Sections 11(1) and 11(2) of the SEBI Act. The said measures include calling for information mentioned under various heads Sections 11(2) (i),(ia),(ib) and (la) of SEBI Act. The Board also has additional powers under Section 11(3) of SEBI Act specific powers of Civil Court as mentioned under the said section while exercising the powers under clause (i) or clause (ia) of sub-section (2) or sub-section (2A).
36. Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and Section 11B of SEBI Act, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take

any measures, either pending investigation or inquiry or on completion of such investigation or inquiry mentioned in sub section 11(4) of SEBI Act.

37. The calling for information under Section 11(2) (ia) of SEBI Act can be exercised by the Board if in the opinion of the Board, the information is relevant to any investigation or inquiry by the Board. It is noted that the Board can exercise the powers of calling for information either when conducting an investigation or while conducting enquiry under Sections 11(4) and 11B of the SEBI Act (hereinafter referred to as “enquiry”). The powers of the Board can be delegated by general or special order in writing to any member, officer of the Board or any other person under Section 19 of the SEBI Act. On cumulative reading, it becomes clear, the enquiry powers can be exercised at various stages of the enquiry in consonance with powers delegated under Section 19 of the SEBI Act.

38. The quasi-judicial proceedings being part of one of the stages of enquiry, the powers available while conducting enquiry continue to be available for exercise at the stage of quasi-judicial proceedings. There is no rigid, hide-bound, pre-determined procedure envisaged under SEBI Act for conducting an enquiry. The procedure so designed has to suit the requirements of the case and has to be so designed which embodies the principles of natural justice, whenever action is taken affecting the rights of parties. The following findings of Hon’ble Supreme Court of India in the matter of *Liberty Oil Mills vs Union of India & Others* (1984) SCC 465 are noteworthy:-

*“There can be no tape measure of the extent of natural justice. It may and indeed it must vary from statute to statute, situation to situation and case to case.”*

39. Further, the perusal of aforesaid provisions of SEBI Act indicate the proceedings before the Board are predominantly inquisitorial in nature. The interpretation that once quasi-judicial proceedings have been initiated, the power to seek

information while conducting enquiry ceases to exist is contrary to the scheme of SEBI Act and securities laws.

40. Needless to say, any information received pursuant to such exercise of power can be used against the person against whom the quasi-judicial proceedings have been initiated only after giving him reasonable opportunity to make his submissions, if the information gathered points to *prima facie* violation of the provisions of securities laws. In view of the above position of law, I am of the view that in quasi-judicial proceedings, while conducting enquiry, so long the Principles of Natural Justice have been followed, there is no legal bar on the Competent Authority to rely on the information collected post hearing for arriving at a finding relevant to the matter particularly when the trigger for collection of information is pursuant to the claim made by the Noticee in the form of an affidavit. Therefore, I do not find any merit in the contention of Shri Nishat.

41. I now proceed to deal with the issues as enumerated earlier.

***Issue No. 1-*** *Whether the announcement of open offer is PSI in terms of PIT Regulations?*

42. The following is noted from the public announcement dated April 15, 2014 issued by JMFL and HSCI, for and on behalf of Acquirer and PAC:

“ ...

**1. Offer Details**

***Size:*** *The Acquirer and the PAC hereby make this Offer to the Public Shareholders to acquire up to 37,785,214 fully paid up equity shares of face value of ₹ 10.0 (Rupees Ten only) each of the Target Company (“Offer Shares”), constituting 26% of the total fully diluted voting equity share capital (as of the 10th working day from the closure of the tendering period for the Offer) (“Voting Share Capital”) of the Target Company*



at a price of ₹ 3,030 (Rupees Three Thousand and Thirty) per Offer Share ("**Offer Price**") aggregating to total consideration of ₹114,489,198,420 (Rupees One Hundred Fourteen Billion Four Hundred Eighty Nine Million One Hundred Ninety Eight Thousand Four Hundred Twenty) ("**Offer Size**"), subject to the terms and conditions mentioned in this Public Announcement and in the detailed public statement ("**DPS**") and the letter of offer ("**LoF**") that are proposed to be issued in accordance with the SEBI (SAST) Regulations.

**Price / Consideration:** The equity shares of the Target Company are frequently traded in terms of SEBI (SAST) Regulations. The Offer Price of ₹3,030 (Rupees Three Thousand and Thirty) per Offer Share is in accordance with Regulation 8(2) of the SEBI (SAST) Regulations.

..."

43. Thus, from the above, it is noted that the public announcement made on April 15, 2014 had the relevant information regarding open offer size, timing and price amongst other information as mandated under Regulation 15 (1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

44. The Noticees have submitted that information and possibility of an open offer was already in public domain and cannot be *per se* considered as a PSI. Rather, it was information regarding the details of the offer i.e. the offer price, the quantity and the date of announcement of the offer that would have been price sensitive. In this regard, the following provision of PIT Regulations is noted:

*Regulation 2 (ha) of PIT Regulations read as under:*

*(ha) "price sensitive information" means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.*

45. As on the date of the public announcement, the Acquirer was holding 28.78% of the voting share capital of the Target Company. The public announcement was made pursuant to the decision and intention of the Acquirer and the PAC to increase the shareholding of the Acquirer in the Target Company by additionally acquiring up to 26% of the voting share capital under the open offer, which together with the existing shareholding of the Acquirer in the Target Company, would result in the Acquirer holding up to 54.78% of the voting share capital. Thus, the acquisition of the offer shares by the Acquirer in the open offer, assuming full acceptance, would give the Acquirer a majority stake in the Target Company which is a material information relating to the Target Company.

46. Further, the following is noted from the trading of the scrip of the Target Company:

<b>Date</b>	<b>Open (₹)</b>	<b>High (₹)</b>	<b>Low (₹)</b>	<b>Close (₹)</b>	<b>No. of shares</b>	<b>No. of trades</b>
11/04/2014	2,604.95	2,604.95	2,537.35	2,557.00	67,793	9,919
15/04/2014	2,812.70	2,940.55	2,812.70	2,853.15	2,67,559	30,307

BSE Ltd. had disseminated the public announcement on its platform at 08:01:13 am. From the above table, it is noted that the scrip opened at ₹ 2,812.70 from the previous day closing price of ₹ 2,557.00, reached a high of ₹ 2,940.55 and closed at ₹ 2,853.15, which is 11.57% higher in comparison to the previous closing price. Moreover, the number of trades executed in the scrip also increased by 205.54%.

47. From the above, it is observed that not only the information of the Acquirer acquiring a majority stake in the Target Company is a material information, the announcement had also materially affected the price of the securities of the Target Company, though the definition of price sensitive information requires only the likely impact on the price of the security.

48. The submission of the Noticees that possibility of an open offer / information that an open offer was to be made would not *per se* be a PSI, is not the correct reading of the SCN. On a perusal of the SCN, it is noted that the SCN unequivocally states at paragraph 6 that “*the open offer announcement of HSCI & JMFL on behalf of Relay and the PAC on April 15, 2014 is considered as PSI in terms of PIT Regulations*”. In other words, as per the SCN, the announcement of open offer by Relay and Diageo is the PSI and not the prospect and possibility of the open offer. Furthermore, any entity / person making the public announcement is obligated to include certain specified information as mandated under Regulation 15 (1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 which *inter alia* includes name and identity of the acquirer and persons acting in concert with him, the offer price, offer size and offer period. Bereft of the details as mentioned in the aforesaid provision, the public announcement will not be legally tenable. Therefore, the act of announcement of open offer and the details / particulars mentioned therein cannot be seen / treated separately, rather, it is the whole process vide which the intention / decision of the acquirer with relevant details is made known to the public at large. Thus, the open offer announcement along with the details of Acquirer and PAC, size of the offer, timing and the offer price is the price sensitive information

49. Noticees have further, submitted that for any particular information to be price sensitive, same has to have some degree of certainty and finality. In this regard, it is noted that the elements of absolute certainty and finality, are extraneous to the provision of Regulation 2 (ha) of PIT Regulations. The requirement under the said Regulation is that the information should be such that if published, it is likely to materially affect the price of the scrip. Without prejudice to the aforesaid finding, it is noted that it cannot be said with 100% certainty what will be the information before the public announcement is actually made as there is still room for the Acquirer to change / modify his decision till the time his decision has been publicly announced. The certainty of information can only be measured in terms of

probability/degree of certainty of its execution which in the given case, as seen from the email dated March 12, 2014, the wheels for the process of crystallising the information were set in motion by formally introducing the various professionals / members of *Project Cape* with each other by the PAC. Therefore, even on this count the submission of the Noticees that there has to be certainty and finality to the information, is not acceptable as absolute certainty and finality is not envisaged under Regulation 2 (ha) of PIT Regulations.

50. In view of the above, it is concluded that the open offer announcement issued by HSCI and JMFL on behalf of Relay and Diageo, as discussed above was PSI in terms of Regulation 2 (ha) of PIT Regulations.

**Issue No. 2-** *If the first issue is determined in the affirmative, whether the PSI was unpublished?*

51. Shri Nishat has submitted that it was anticipated and widely reported in media (national and international) that another open offer would be in the offing soon. Thus, the prospect and possibility of an open offer was already in public domain and cannot in itself be considered an UPSI. In this regard, it would be relevant to refer to the definition of “unpublished” as defined under PIT Regulations. Regulation 2 (k) of PIT Regulations defines “unpublished” to mean “*information which is not published by the company or its agents and is not specific in nature. Explanation.— Speculative reports in print or electronic media shall not be considered as published information.*” As seen from the definition of “unpublished”, media reports are speculative in nature. Hence, any report published in media with respect to acquisition of shares of USL by the Acquirer which has not been published by USL/Relay/ Diageo cannot be treated as published. Further as per Regulation 2 (k) of PIT Regulations, even if the media report is published by the Company, it would still be deemed as “not published” if the information was not specific in nature. It is not the case of the Noticees that the specific details of the open offer announcement

was in public domain. Therefore, the submission of Shri Nishat that PSI was in public domain and cannot in itself be considered an UPSI, is not acceptable.

**Issue No. 3-** *If the PSI was unpublished, what was the period of UPSI?*

52. The IR observes that the PSI related to open offer had come into existence on March 12, 2014 after Platinum Partners received preliminary instructions from Diageo regarding the open offer. Therefore, as per the IR, the period of UPSI would be March 12, 2014 to April 14, 2014, considering the corporate announcement of the open offer was made to the Exchanges by managers to the offer on April 15, 2014.

53. Shri Nishat has stated that the SCN is silent on when he became aware of the alleged UPSI. Noticees have also submitted that the Investigating Officer has rejected the version of three entities viz. HSCI/JMFL/Relay, as to the date of arising of alleged UPSI, and conveniently cherry picked the date stated by Platinum Partners in its letter, which too was only based on the recollection of the signing partner and therefore cannot be taken as a reliable date. Further, the Noticees have submitted that the statement of Platinum Partners is very vague and devoid of material particulars, for the following reasons:

- does not disclose what exactly happened from March 12, 2014 to March 19, 2014 (the 1st date in everyone else's disclosures);
- does not disclose what the discussions were and with whom - important to note that there is no reference to Shri Nishat;
- considering that they were Diageo's lawyers, in the absence of particulars, at best, it can be assumed that Diageo sought their opinion as to whether an open offer was permissible in law and if so, what documentation would be required - the SCN cannot be based on lacuna of information;
- without prejudice to the above, Platinum Partners would have received

preliminary instructions only after market hours on March 12, 2014 (due to the 5 ½ hours difference in time between London and India) and therefore, trading on March 12, 2014 cannot be alleged to have been done on the basis of UPSI.

54. As per the Noticees, it is only in the evening of April 14, 2014, the PSI came into existence when the Transaction Committee of the Acquirer in Amsterdam and the meeting of CEO and CFO of PAC held in London, approved the launching of open offer.

55. With respect to Shri Nishat's submission that the SCN is silent on when he became aware of the PSI, I note that the SCN has laid down the chronology to establish the period when the PSI came into existence and when it was published. Further, based on the response of JMFL, HSCI, Relay, USL and Platinum Partners, who all have submitted that Shri Nishat, Global Business Development Manager of Diageo among others was privy to the offer till the date of the Public Announcement / was involved in the discussions with the Manager(s) to the Offer / was aware of the Offer till the date of the Offer or till the date of the public announcement / was in possession of the PSI prior to the public announcement, the SCN had alleged that Shri Nishat was in possession of the UPSI. Therefore, considering that he was involved in the discussions of the acquisition of shares of USL till the date of the public announcement coupled with the chronology of events which shows that the allegation is to the effect that PSI came into existence at least on March 12, 2014 and Shri Nishat was in possession of PSI till the date of public announcement from March 12, 2014, if not before it. Thus, the submission of Shri Nishat that SCN is silent on his awareness of UPSI is incorrect.

56. Moreover, from the email correspondences, following is noted:

56.1. Email dated July 31, 2013 from Nishat to JMFL – *“Atul- can you share with me the updated cost associated with a preferential allotment compared to any other*

*route. Also it would be helpful for Vinay and me to receive an update every other week on share price movement and a couple of lines commentary for significant movements.”*

In response to the aforesaid email, JMFL vide its email dated August 2, 2013 to Shri Nishat with the subject “Plan B” had shared with him PAA analysis (PAA vs Creeping workings).

Thus, from the aforesaid, it can be seen that various options for share consolidation were being explored by the Acquirer and PAC and in this context, Shri Nishat had advised the Manager to the Offer to keep him abreast with the share price movement including any significant movements therein.

56.2. Email dated August 30, 2013 from Nishat to JMFL and Platinum Partners – On the perusal of said email, it is noted that Shri Nishat is outlining the agenda for the meeting to be held in the week of 9 September. The topics which Shri Nishat advised the Manager to the Offer and to the Legal Counsel to address were overall recommendation for share consolidation, value implications of price range, share price sensitivity, division of responsibility amongst teams, legal form of the proposed structure including a detailed step plan / timing for the activities to be carried out and Q&A for Investor Relations purposes. Thus, it can be seen that Shri Nishat was leading and guiding a team of experts / professionals which was exploring in detail the viability of various options from all the perspectives (price, sensitivity and legal) to consolidate the shareholding of the Acquirer in the Target Company.

In response to the aforesaid email, JMFL vide its email dated September 3, 2013 had sent a working draft of the consolidated presentation on Plan B for review to Shri Nishat.

56.3. Subsequent to the aforesaid emails, email correspondences dated September

20, 22 and 30, 2013 with HSCI, the other Manager to the Offer to which Shri Nishat was also a party / privy shows that discussions were taking place on valuation, shareholder analysis and various options including tender offer available to Diageo.

56.4. It is noted from Shri Nishat's submission that the various discussions that took place subsequent to the failure of first open offer, lead to creeping acquisitions on November 28, 2013 and February 4, 2014. Seeing the aforesaid submission in light of the email dated March 12, 2014 from Shri Vinay Tanna to the team of "*Project Cape*" addressed to Manager to the offer (2 in nos.) and the Legal Counsel wherein he is formally introducing all the team members and is also requesting JMFL and Platinum Partners to familiarise HSCI team members with the various regulatory / legal matters that the rest of the "*Project Cape*" team have been discussing over recent weeks indicates that from February 4, 2014 onwards momentum was steadily building and strategy of the Acquirer to consolidate its shareholding in USL was getting more and more crystallised towards launching another open offer.

57. Thus, from the aforesaid discussions, it can be further held that he was part of the core team that was representing Diageo / PAC in the transaction to consolidate shareholding of the Acquirer in the Target Company and was guiding the team since the beginning of the transaction lifecycle which led to creeping acquisitions and open offer. Moreover, reading the email dated March 12, 2014 shoaws that there is a strong preponderance of probability that in the weeks leading upto March 12, 2014, the strategy of launching another open offer was gaining momentum and a team "*Project Cape*" was formally put together to delineate each firms respective role and to consider various regulatory / legal issues. The various events prior to March 12 2014 were in fact giving more and more certainty and the nature of discussions moved towards the crystallisation of the UPSI on March 12, 2014. Therefore, at least as on March 12, 2014, the UPSI had come into existence. Shri Nishat being part of the core team of "*Project Cape*" who was in possession of



information at various stages became in possession of UPSI from March 12, 2014 onwards till its public announcement.

58. With respect to Noticees submission that SEBI has cherry picked the date stated by Platinum Partners, following is noted:

- As already noted in the preceding paragraphs, Shri Nishat was part of the core team which was working on the strategy of open offer to consolidate the shareholding of the Acquirer in the Target Company in the weeks leading upto March 12, 2014.
- The query raised by SEBI with respect to the chronology of events was raised to Mangers to the Offer, Acquirer and Diageo's Legal Counsel. Since the query was directed to individual entities and they have a very specific role to play in the open offer, it is not necessary that the Acquirer / PAC, would have approached them simultaneously. Moreover, the Acquirer and therefore Shri Nishat is a common factor in all of these matters as he was part of the core team which was handling all the strategy discussions post first open offer.
- The following is noted from the extract of the meeting of the Board of Directors of the Acquirer dated March 19, 2014 :

*"IT WAS NOTED THAT discussions have been **ongoing** in relation to certain potential transactions to be entered into by the Company to acquire equity shares in United Spirits Limited...*

*IT WAS RESOLVED to approve to proceed with the strategy outlined in the **pre-circulated paper** in relation to the potential transactions and consistent with that strategy provide to ... (the "Transaction Committee") the delegated powers and authority (with the ability to sub-delegate), to consider and approve executing the steps set out below:*

- *To consider and if thought appropriate, to approve or to delegate authority (with the authority to sub-delegate), the Company, together with Diageo plc and any other Diageo group companies acting as parties in concert, launching a potential open offer to the public shareholders of United Spirits Limited (“Open Offer”), in terms of the Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as amended (“SEBI (SAST) Regulations”). The Open Offer price would be set in accordance with the SEBI (SAST) Regulations.*

...

- *To consider and if thought appropriate, to approve or to delegate authority (with the authority to sub-delegate), RBV making further purchases of equity shares in United Spirits Limited during the period of the Open Offer, apart from and in addition to any equity shares tendered by public shareholders and acquired by RBV in the Open Offer.*

“

From the aforesaid minutes, it is noted that discussions with respect to the acquisition of shares of USL were **ongoing** i.e. even before March 19, 2014 and based on that a paper was **pre-circulated** before the said Board Meeting on the strategy. The focus of the strategy can be gathered from the subsequent bullet points which lays emphasis on acquiring the shares through open offer in terms of SAST Regulations and acquisition of shares by the Acquirer during the period of open offer. To take the crystalized strategy forward in conformity with the legal requirements / obligations under SAST Regulations, the PAC has approached its Indian legal counsel, Platinum Partners. The same is also in line with the submission of Platinum Partners. Being legal counsel, the discussions have to be with respect to the various obligations of the Acquirer and the PAC under SAST Regulations in matters of open offer.

59. Moreover, as noted from the email dated March 12, 2014 by Shri Vijay Tanna,

Corporate Finance M&A Director of Diageo to the Manager to the Offer and to the Indian Legal Counsel that prior to that email, he had already spoken to the lead in each firm which *inter alia* included their respective roles in the team, “*Project Cape*” and the various discussions that he had with them over recent weeks with respect to various challenging regulatory / legal matters. Further, as noted in preceding paragraphs, from February 4, 2014 onwards, momentum was steadily gaining towards open offer as a viable option to consolidate the shareholding of the Acquirer in the Target Company, throws light on the discussions that Shri Vijay Tanna was having with JMFL and Platinum Partners which would be centered around the regulatory and legal challenges pertaining to an open offer.

60. In view of the above, it is held that the submission of the Platinum Partners that preliminary instructions and discussions were held with PAC from March 12, 2014 onwards, is credible. The same as discussed in preceding paragraph is very specific in nature pertaining to the consolidation of the shareholding of the Acquirer in the Target Company via open offer route and the said discussion was held with Diageo / PAC.
61. Noticees have also submitted that in response to SEBI’s query, Relay has responded that there was no due-diligence conducted either by Relay or Diageo in connection with the open offer and that it was only on April 13-14, 2014, it had discussions with financial advisors just prior to the public announcement. Platinum Partners, too, have also referred to these dates as to when they had “*Discussions with Diageo in relation to finalizing documents for the open offer.*”
62. With respect to the aforesaid submission of the Noticees, it is observed that it is not legally sound as a due diligence certificate has to be submitted by the Merchant Banker with every letter of offer.
63. Moreover, as seen from the chronology of events, the PAC first approached its Indian

legal counsel, Platinum Partners on March 12, 2014 with its preliminary instruction, subsequent to which the Boards of the Acquirer and the PAC met to discuss the strategy on March 19, 2014 and March 27, 2014 and finally the entire process / discussions regarding open offer was concluded on April 14, 2014. Furthermore, as seen from the email dated March 12, 2014 of Diageo that discussions with respect to potential open offer including the challenging regulatory / legal matters related to it which were conducted, were being formalised among officials of Diageo, JMFL and Platinum Partners over weeks preceding that email date. Thus, it can be seen that before making the public announcement on April 15, 2014, more than a month long exercise (starting with weeks before March 12, 2014 and culminating on April 15, 2014) was undertaken focusing on various details / particulars and obligations, both financial and regulatory / legal of the open offer which was to acquire up to 37,785,214 fully paid up equity shares of face value of ₹10.0 each of the Target Company, constituting 26% of the total fully diluted voting equity share capital of the Target Company at a price of ₹ 3,030 per offer share aggregating to total consideration of ₹ 114,489,198,420. Seen in the light of the chronology of events and the offer size *per se*, the submission of Platinum Partners that discussions were held during April 13-14, 2014 with the PAC to finalise the documents for open offer, shows that the discussions and strategy planning was going on much prior in time. Further, as discussed in the preceding paragraphs, only upon public announcement, it can be said that the information has absolutely crystallised and irrevocably final as prior to the announcement, it may undergo modifications / changes.

64. Shri Nishat has submitted that JMFL in its correspondence with SEBI has stated that emails pertaining to various stake building options were exploratory in nature and similarly emails of HSCI were general marketing presentation. The submission of Shri Nishat is acceptable as it is not the case of SEBI that the Acquirer and PAC had decided to come out with another open offer immediately after the failure of first open offer. Rather, the point that is being made by referencing the email

correspondence with JMFL and HSCI is that Shri Nishat was part of the core team and was involved in the discussions / strategizing relating to enhancement of equity stake of Acquirer and PAC in USL from a very early stage (contrary to his claim in the affidavit) in the transaction cycle where various acquisition methods were discussed including open offer. Shri Nishat being a member of the core team was party to all the communications specifically regarding price and share valuation. The same can be seen from the email dated July 31, 2017 wherein he is advising the Manager to the offer, JMFL to send him an update every other week on the share price movement and a couple of lines commentary for significant movements.

65. It has been submitted by Shri Nishat that JMFL's letter dated July 24, 2019 does not provide correspondence in relation to the VTO announced on April 15, 2014 as it has been dealt separately in its letter dated July 5, 2019. The submission of the Noticee is without any merit. Firstly, July 24, 2019 letter is in addition to the letter dated July 5, 2019, hence is in continuation of it. Secondly, the correspondence attached with the letter dated July 24, 2019 centers around exploring various feasible alternatives available to the Acquirer along with PAC to consolidate its shareholding in USL including an open offer.
66. Shri Nishat's submissions with respect to email dated July 31, 2013 and September 3, 2013 claiming that the emails had nothing to do with open offer but were pertaining to preferential allotment and information on stake enhancement options in USL, have been considered. I note that in response to the email dated July 31, 2013 which was from Shri Nishat, JMFL vide its email dated August 2, 2013 had sent a presentation which discussed the cost associated with two of the modes of acquisition of shares i.e. preferential allotment vis-à-vis creeping acquisition which only helped in narrowing down the alternatives available to the Acquirer and PAC for a major consolidation of shareholding in the Target Company. It cannot be said that these correspondences have nothing to do with the open offer as it showed the

viability of the aforesaid 2 modes of acquisition of shares keeping in my mind the objective of the Acquirer and PAC to have a majority stake in USL. Pursuant to the said emails, Shri Nishat had himself sent an email dated August 30, 2013 to Platinum Partners and JMFL to come up with an overall recommendation to achieve the share consolidation including price range and timing of the activities. More importantly this shows the active role played by Shri Nishat in steering / giving direction as to the manner in which the discussions / agenda have to be shaped to accomplish the objective of the Acquirer and PAC including the details about the pricing and timing of various options. It is further added that the reliance on the aforesaid emails are not being placed to establish that discussions on second open offer started, right after the failure of first open offer, rather the reliance is placed on the said emails to demonstrate that Shri Nishat was part of the core team and was actively involved in all the discussions pertaining to exploring various options to consolidate the shareholding of the Acquirer in USL from the very beginning contrary to his claim in his affidavit.

67. Shri Nishat's submission that Plan B resulted in creeping acquisitions by the Acquirer and PAC is not entirely correct. Plan B was the result of the guidance provided by Shri Nishat vide his email dated August 30, 2013 which was to achieve the share consolidation in the Target Company and one of the method which was discussed therein was Creeping Acquisitions. However, the same did not result in achieving the overall objective of the Acquirer and PAC to have a controlling stake in the Target Company, the other alternatives including open offer which was discussed in the said Plan B were still active / being considered.
68. The submission of Shri Nishat that correspondence of JMFL pitches to seek the mandate does not present the whole picture. The emails dated July 31, 2013 and August 30, 2013 show that JMFL was making representations as sought by Diageo and was in response to the queries raised by Diageo.

69. The submissions of Shri Nishat with respect to the correspondences of HSCI have been considered. In this regard, as discussed in preceding paragraph, irrespective of whether, it was a pitch by HSCI to market its service or the same was made prior to their appointment as Manager to the Offer, it demonstrates the level of involvement Shri Nishat had subsequent to the first open offer to enable the Acquirer and PAC to increase its stake in the Target Company. Not only was he receiving regular updates on price movement of the scrip of the Target Company including significant movements (email dated July 31, 2013), he was also setting the agenda for the meetings and steering it towards an outcome (email dated August 30, 2013). He was also involved in the discussions with other market participants (HSCI) with respect to evaluation of options for share consolidation in the Target Company. As per Shri Nishat's own submission the outcome of the various discussions that took place subsequent to first open offer, led to creeping acquisitions on November 28, 2013 and February 4, 2014. Seeing this in light of the Board Meeting which was held on March 19, 2014 wherein potential open offer was discussed, it can be reasonably inferred that post February 4, 2014, the idea of second open offer was gaining momentum which was one of the routes being discussed for achieving share consolidation in the Target Company by the core team of Diageo which included Shri Nishat.

70. The submission of Relay vide its letter dated June 25, 2019 that, *"In addition to discussions within the Diageo group, Mr. Gupte was also involved in discussions with the external advisors who were engaged in connection with the potential transaction"* only goes on to show that Shri Nishat's involvement in the transactions relating to potential acquisition of further shares in USL was much prior in time than April 14, 2014.

71. Shri Nishat's submission with respect to email dated March 12, 2014 claiming that potential advisors were put together for the first time on March 12, 2014, has been

considered. On a perusal of the said email it is noted that challenging regulatory issues with respect to potential tender offer was being discussed among officials of Diageo, Platinum Partners and JMFL over **recent weeks** preceding March 12, 2014. This only goes to show that the idea of second open offer was being seriously considered amongst advisors and the PAC, prior to March 12, 2014. Secondly, the officials of HSCI who were not part of the aforesaid discussions that took place in weeks preceding March 12, 2014, were to be made familiar with the regulatory challenges pertaining to the potential open offer.

72. The submission of Shri Nishat that potential advisors were asked to consider legal and regulatory issues for the first time only on March 12, 2014 is not borne out from the facts of the case. As can be seen from email dated August 30, 2013 from Shri Nishat to JMFL and Platinum Partners, they were advised to ensure that their overall recommendation to achieve consolidation of shares in USL should take into consideration all the legal implications and regulatory challenges. In response to the said email, a working draft on Plan B was sent to him on September 3, 2019. The said Plan B included key regulatory and other considerations impacting the options and timelines for the Acquirer. Various options like primary infusion, secondary purchases and other options like merger, stock repurchase were explored in detail with parameters of pricing, time for execution, regulatory approvals etc. Thus, it can be seen that with the aim to consolidate the shareholding of Acquirer in the Target Company, the efforts / work had begun as early as July 31, 2013 where the option of preferential allotment was explored vis-a-vis other options and the said effort led to 2 creeping acquisitions in the month of November, 2013 and February, 2014. And as noted from email dated March 12, 2014 and from the minutes of the Board Meeting dated March 19, 2014 of the Acquirer that discussions on potential transactions to acquire equity shares of USL were ongoing subsequent to the creeping acquisition and strategy paper was being pre-circulated prior to the Board Meeting based on which the Transaction Committee was given the authority to



consider launching potential open offer. Thus, as stated in preceding paragraphs, from February 4, 2014 onwards, after second creeping acquisition, momentum of the strategy was steadily being directed towards open offer and the option of launching second open offer was taking root.

73. Shri Nishat has claimed that the email dated March 12, 2014 referred to an exploratory discussion with respect to the possibility of potential open offer and thus clears the discrepancy that UPSI existed from March 12, 2014 which was attributed to the vague submission made by Platinum Partners. I, on the contrary, find that the email strengthens the submission of Platinum Partners. It is Noticee's own submission that the said email is about the open offer. It has already been found in preceding paragraphs that as per the email, regulatory / legal matters pertaining to the potential open offer had already been discussed in previous weeks. Discussion surrounding potential open offer subsequent to the creeping acquisition on February 4, 2014 and bringing HSCI formally on board to take part in the said discussions, demonstrates that in the weeks leading to March 12, 2019, the idea that second open offer is a viable option to consolidate shareholding in USL was taking root firmly and therefore, various particulars related to it including regulatory / legal issues were being crystallised in all seriousness.

74. The submission of the Noticees that the preliminary instruction, if at all, would have been received by Platinum Partners aftermarket hours on March 12, 2014 (India time) considering the time difference of 5:30 hours between Mumbai and London, is not supported by any evidence. The email dated March 12, 2014 from Diageo to various officials of Platinum Partners, JMFL and HSCI is related to the formal introduction of officials of various advisors to the open offer to each other, as part of the team "*Project Cape*" and a request to other team members to ensure that the officials of HSCI are made aware of the discussions that took place over previous weeks. The said email cannot be read as a preliminary instruction to the Platinum

Partners, who as noted from the email, were already part of the discussions related to regulatory / legal issues pertaining to the open offer. The relevant extract of the said email is reproduced below:

*"I have spoken to the lead in each firm on respective roles etc, my immediate request is that collectively you catch up soonest to ensure that Sunil/Amit are familiarized with some of the challenging regulatory issues that we have discussed over the recent weeks."*

From the aforesaid extract of the email, it is observed that Shri Vinay Tanna had already spoken to each firm on their respective roles and Platinum Partners partner being one of the firms, it is clear that the role of Platinum Partners was already discussed prior to sending of the email. Thus, Platinum Partners had received instructions from Diageo, prior in time to the email dated March 12, 2014 of Shri Vinay Tanna based on which they were already having discussions with Diageo.

75. It is observed from the records that the PSI was published when the public announcement of the open offer was made to the Exchanges by JMFL and HSCI on behalf of the Acquirer and PAC, on April 15, 2014, before the market opened.

76. In light of the aforesaid discussions, it is held that the period of UPSI is from March 12, 2014 to April 14, 2014.

**Issue No. 4** - *Whether the Noticees are 'insiders' in terms of PIT Regulations?*

77. Before I delve into the legal position, the statutory provision is to be kept in view. The relevant provision is as under:

*2 (e) "insider" means any person who,*

- (i) *is or was connected with the company or is deemed to have been connected with the company and who is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company, or*
- (ii) *has received or has had access to such unpublished price sensitive information.*

78. From the aforesaid provision, it is clear that in order to be termed as an insider as stipulated under Regulation 2 (e) of PIT Regulations, one has to satisfy either of the sub-clauses. In the extant matter as noted from the IR, the Acquirer and the Managers to the Offer have stated that Shri Nishat, was one of the employees of the PAC who was aware of the offer till the date of public announcement. Shri Nishat has submitted that based on the letters written by JMFL / HSCI / Relay, it cannot be concluded that he was in possession of the PSI prior to the public announcement. In this regard, it has already been concluded in the preceding paragraphs that post February 4, 2014 the strategy for consolidation of shareholding of the Acquirer in the Target Company was increasingly crystallising in favour of open offer and by March 12, 2014 UPSI has come into existence and that Shri Nishat was a part of the core team from the beginning of the transaction cycle, till the public announcement that was working on the consolidation of shareholding of the Acquirer and PAC in the Target Company on behalf of PAC. This leads to the conclusion that he had access to UPSI.

79. Shri Nishat has also submitted that he cannot be considered as a Connected Person as defined under Regulation 2 (c) of PIT Regulations since he was never a Director or Employee of USL, nor did he have any professional relationship with USL.

80. In this context, I refer to and rely upon the decision of Hon'ble SAT in *Mr. V. K. Kaul vs. The Adjudicating Officer* dated October 8, 2012

*“The decision taken by Solrex to purchase shares of the target company is not a*

*decision in public domain and known only to insiders of Solrex. Hence it is a price sensitive information for Solrex. Regulation 2(e) defines 'insider' to mean any person who, (i) is or was connected with the company or is deemed to have been connected with the company and who is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company or; (ii) has received or has had access to such unpublished price sensitive information. It needs to be appreciated that the clause makes a distinction between 'the company' and 'a company'. When it refers to 'the company, the reference is to the company whose Board of Directors is taking a decision and when it refers to 'a company', the reference is to a company to which the decision pertains..."*

*"We are, therefore, of the view that the term price sensitive information used in regulation 2(ha) is wide enough to include information relating directly or indirectly to 'a company'. The Solrex had decided to purchase shares of the target company. Here, Solrex is 'the company' and target company is 'a company'. The decision of Solrex to purchase shares of the target company is likely to materially affect the price of securities of the target company. Only the insiders of Solrex are aware about this decision of the company. If the insiders of Solrex are allowed to trade in the shares of the target company ahead of purchase of shares by Solrex, surely the trading will be on the basis of insider information..."*

81. The above decision clearly throws light on who can be the insiders in a scenario when an acquisition/purchase is made by one company in another company. In case where the acquisition is through agreement between the Promoters/shareholders of the Target Company and the Acquirers, the fact of acquisition is known to the Acquirers as well as the Target Company. Therefore, in such a scenario, insider would also include those connected with the Target Company and those who are or were connected with the Acquiring company/PAC or are deemed to have been connected with the Acquiring company/PAC. In the case of a hostile takeover, the

Acquirer / PAC would have the inside information relating to their takeover bid and thus persons connected with the Acquirer / PAC will be insiders for the purposes of that transaction. In the present case Shri Nishat, is not only an officer of Diageo but also was the Global Business Development Manager (M&A) of the PAC. The fact that he was Global Business Development Manager (M&A) puts him the position where he is reasonably expected to have access to unpublished price sensitive information in relation to the acquisition of shares in the Target Company. Therefore, Shri Nishat falls within the definition of insider by virtue of being connected person on this score alone. The fact that Shri Nishat was involved from the very beginning till the public announcement points to the evidence that he was not only reasonably expected to have access to the unpublished price sensitive information but there is a strong preponderance of probability that he was in fact in possession of UPSI. Therefore, it is held that Shri Nishat is an insider in terms of Regulation 2 (e) (i) of PIT Regulations as he was connected with the company, Diageo and was reasonably expected to have access to the UPSI of USL as it pertained to the proposed acquisition of USL by Diageo.

82. Alternatively, it can be argued that considering Diageo / PAC along with the Acquirer was consolidating its shareholding in USL and by virtue of this fact, they had a temporary business relationship with USL. I note that Diageo / PAC is a juristic entity, the discussions on its behalf as noted in preceding paragraphs were led by the core team which included Shri Nishat since the very beginning, post the failure of first open offer. It was Shri Nishat who was asking for regular updates on price movement, who was setting the agenda for the meetings regarding consolidation of shareholding and giving specific instructions to the Manger to the offer and to the Legal Counsel and it was he who was a part of the core team that was evaluating various options available for the Acquirer based on several parameters (pricing, timing, regulatory / legal challenges etc.). Thus, he was intricately involved in the entire transaction life cycle of consolidation of shareholding of the Acquirer and PAC

in the Target Company. Thus, by virtue of him being part of the core team of "*Project Cape*" which was working on the potential open offer, Shri Nishat also had a temporary business relationship with USL in respect of the said open offer.

83. Moreover, the term "business relationship" has to be interpreted broadly. It is a well recognized rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. A construction should be adopted that advances rather than suppresses this object. The purpose of insider trading regulations is to prohibit trading by which an insider gets advantage by virtue of his access to price sensitive information as the same distorts the level playing field for the investors transacting in the market and undermines investors' confidence. Business relationship from a particular transaction point of view (in the given case, consolidation of shareholding of the Acquirer in the Target Company) means connection that exists among all the entities involved in the transaction. In the instant matter, a team by name of "*Project Cape*" was specifically formed for the acquisition of shares in the Target Company which indicates that the said team had a temporary business relationship with the Target Company.

84. It has already been held that Shri Nishat had access to the UPSI. Therefore, even in terms of Regulation 2 (e) (i) of PIT Regulations, it is held that Shri Nishat is an insider as he was connected with the company, Diageo and was reasonably expected to have access to the UPSI of USL as it pertained to the proposed acquisition of USL by Diageo.

85. Shri Nishat has denied that Smt. Poonam, Shri Haresh and Shri Varun are his "relatives" as alleged. The term "relative" has been defined under Regulation 2(i) of PIT Regulations to mean "a person, as defined under Section 6 of the Companies Act, 1956". Smt. Poonam, Shri Haresh and Shri Varun do not fall within the definition of "relative". As the said persons, are not "relatives", as contemplated under PIT Regulations, they cannot be deemed connected persons in terms of Regulation 2 (h)

(vi) of PIT Regulations, as alleged. Further they also cannot be insiders under Regulation 2(e)(i) as alleged, as they are not deemed connected persons - which is the basis of treating them as insiders. It is argued that since the whole foundation of the SCN in this context is totally flawed, the further allegation that by being "relatives", Smt. Poonam, Shri Haresh and Shri Varun were "reasonably expected to have access to UPSI in securities of USL" also collapses.

86. Section 6 of the Companies Act, 1956 states that a person shall be deemed to be a relative of another if, and only if,

(a) they are members of a Hindu undivided family, or

(b) they are husband and wife, or

(c) the one is related to the other in the manner indicated in Schedule IA.

87. The basis of the argument of the Noticee is that Smt. Poonam, Shri Haresh and Shri Varun will be relatives only when they are related in the manner as shown in the list of relatives. The argument is that the manner in which Smt. Poonam, Shri Haresh and Shri Varun are related to Shri Nishat is as Mother-in law, Father-in law and Wife's brother of Shri Nishat and the list does not feature those relationships. The examination of Schedule 1A of Companies Act, 1956 provides the lists of relatives. For instance, it includes Father, Mother, Father's father, Son's wife and Brother's wife. A perusal of the list and Section 6(c) of Companies Act, 1956 shows that one person shall be deemed to be relative of another if one is related to the other in the manner indicated in Schedule IA.

88. Serial No, 14 of the list identifies daughter's husband as relative meaning that if Shri X's daughter's husband is Shri Y then Shri X and Shri Y are relatives. Similarly, Smt. Z's daughter's husband is Shri Y then Smt. Z and Shri Y are relatives. In this case, Shri Haresh has a daughter, Smt. Menka Jashnani whose husband is Shri Nishat. Thus,

Shri Nishat is “daughter’s husband” of Shri Haresh and thus, they are relatives. In the same vein, Smt. Poonam is the mother of Smt. Menka Jashnani whose husband is Shri Nishat. Thus, Shri Nishat is “daughter’s husband” of Smt. Poonam and thus, they are relatives. Similarly, Serial No, 22 identifies sister’s husband as one of the relatives meaning that if Shri X has a sister Smt. Y who has a husband Mr. Z then Shri X and Shri Z are relatives of each other. In this case, Shri Varun has a sister Smt. Menka Jashnani whose husband is Shri Nishat. Thus, Shri Nishat is “sister’s husband” of Shri Varun and thus, they are relatives. Therefore, the fact that one side of relationship is not mentioned in the list of relatives does not have any significance as relationships come in pairs.

89. The purpose of adoption of the definition of “relatives” as defined in the Companies Act, 1956, is because such relatives are “deemed to be connected persons” to the company. The purpose of such deeming provision would be defeated, unless both the persons forming the pair of relatives is considered as relative. Unless such an interpretation is adopted, it would defeat the very basis of relationship that both the pair in the relationship are related to each other. Or else it will lead to an absurd situation where X is a relative of Y but Y is not a relative of X. Adopting the interpretation of the Noticee would defeat the regulatory requirement of categorisation of the pair of relatives as deemed to be connected to the company, is by virtue of having a relationship. Therefore, I do not find any merit in the argument that Smt. Poonam, Shri Haresh and Shri Varun are not relatives of Shri Nishat. I find that Smt. Poonam, Shri Haresh and Shri Varun are relatives of Shri Nishat as per Section 6(c) of the Companies Act, 1956 by virtue of reciprocity that is an inherent part of a relationship and are therefore deemed to be connected persons.

90. Without prejudice to the aforesaid, to consider whether, Shri Harish, Smt. Poonam and Shri Varun are ‘insiders’ or not under Regulation 2 (e) (ii) of PIT Regulations, it has to be seen whether they had received or had access to UPSI. Here I would like to



refer to the observations of Hon'ble SC in the matter of *SEBI vs Kishore R Ajmera* decided on February 23, 2016 wherein the Hon'ble Court observed as follows:

*"...It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion."*

91. In light of the aforesaid observation of Hon'ble Apex Court, I note that in matters of insider trading, direct substantive evidence will not always be present. In such situations the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded have to be taken into consideration before arriving at a conclusion. To arrive at a finding of whether Shri Harish, Smt. Poonam and Shri Varun had received the UPSI or had access to it, the following parameters have been considered:

- Trading behaviour in the scrip of USL.
- Fund flow.
- Relationship between Shri Harish, Smt. Poonam and Shri Varun and Shri Nishat.

### **Trading behaviour**

92. Noticees have submitted that they would have bought equity shares and not derivative contracts if they had access to UPSI. Even if they did not have enough money to purchase a substantial equity shares of USL on a delivery basis and chose to buy derivative contracts, they would have, in the first instance, chosen to buy Futures Contracts and not Options Contracts because they would not have had to pay Options Premium, which is high at the start of the Option Period.
93. In this regard, it is noted that trading in options gives more exposure to the trader at a lower investment than trading in equity thereby proportionately on a comparative basis the profit made by trading in options compared to equity, will be more. In the instant matter, the Noticees bought Out of the Money Options at a much lesser premium than the equity shares which enabled them to have more exposure leading them to make much more profit as a percentage of their investment than by trading in equity shares, for the same increase in the underlying asset. To illustrate, it is noted from the price data for McDowell call option during the period March 3, 2014 to March 27, 2014 that the settlement price on March 10, 2014 when the Noticees have bought the call option was ₹ 10.75 for the strike price of ₹ 2,700 when the underlying value was ₹ 2,466.60. The said call option when the Noticees sold on March 21, 2014 had a settlement price of ₹ 56.75 when the underlying value was ₹ 2648.40. Thus, the profit while trading in options increased by 428%, same would have been 7.3% if the trading was done in equity shares. Similarly for Future Contracts, the settlement price for the underlying value of ₹ 2,466.60 on March 10, 2014 was ₹ 2482.60. The settlement price had increased to ₹ 2659.16 on March 21, 2014 when the underlying had increased to ₹ 2648.40. Thus, it can be seen that proportionate increase in profit is almost equivalent while trading in Futures and Equity and is much less than the Options trading.
94. Further the fact that the Noticees preferred to buy 'out of the money options' acts

as a strong circumstantial evidence to indicate that these Noticees had confidence and belief that there was a high probability that the price of the underlying asset will be near about the strike price. The said purchase of out of the money options points to the circumstantial evidence that they had the UPSI with them.

95. Noticees have submitted that even in Options contracts, they would have bought April Expiry contracts and not March expiry contracts since the open offer would have been announced in April 2014. It is noted that considering there is more time available for the April Expiry contracts compared to March Expiry contracts, April Expiry contracts have more time value and hence are more expensive than March Expiry contracts. Further, the liquidity / no. of contracts available for April Expiry in the first couple of weeks of March would generally be lower than liquidity for March Expiry. Thus, investing in March Expiry Options would also be a logical and viable strategy when one is in possession of UPSI. It is one of the strong circumstantial evidences that unless the Noticees were in possession of UPSI, they would not have had the confidence that in all probability the value of the underlying would reach near the open offer price of ₹ 3,030 in April and thus would not have had the confidence to buy options with strike price range of ₹ 2,600 to ₹ 3,000 in March. They would have known that they could roll it over to April (when liquidity improves) if in March the value of the underlying does not reach near the strike price. In any case, as the settlement price of the March Expiry contracts towards expiry had increased manifold from the time the Noticees had bought the options, Noticees booked profit in the said contracts right away.

96. Noticees have further submitted that if at all they had bought March Expiry contracts, they would rollover the same to April Expiry. The submission of the Noticee is not acceptable as it is noted from the price data for McDowell call option during the period March 3, 2014 to March 27, 2014 that the settlement price of McDowell call option was very high during the period March 20, 2014 to March 22,

2014 in the range of ₹ 54.20 to ₹ 83.55 and there was a good opportunity to book profit which the Noticees took instead of rolling over the March Expiry contracts. As a good market price was available to the Noticee before the expiry, the Noticee has utilized the same. Therefore, the circumstance of not rolling over cannot be considered as a beneficial circumstance pointing in favour of the Noticee given the circumstance of favorable price already existing in the market for the Noticees. Furthermore, post booking profit, Noticees continued to deal in buying and selling of Out of the Money Options of McDowell which indicates that they had the confidence on the value of the underlying asset getting near to the strike prices down the line and the value of their options increasing further.

97. Noticees have submitted that in the case of March Expiry options, they would have bought At the Money Option instead of Out of Money Option European Call Option. In this regard it is noted that At the Money Option has much higher premium than the Out of Money Option. The same not only limits the exposure, but the profit made in Out of Money Option is significantly higher than At the Money Option. To illustrate, it is noted from the price data for McDowell, At the Money Option during the period March 3, 2014 to March 27, 2014 that the settlement price on March 10, 2014 when the Noticees have bought the call option was ₹ 106 for the strike price of ₹ 2,400 when the underlying value was ₹ 2,466.60. The said At the Money Option when the Noticees sold on March 21, 2014 had a settlement price of ₹ 272.70 when the underlying value was ₹ 2648.40. Thus, the value of the option while trading in At the Money Option would have increased by 157% while trading in Out of Money option (strike price ₹ 2,700) increased by 428% (Settlement price for Options with strike price of ₹ 2,700 went up from ₹ 10.75 to ₹ 56.75). Thus, the Noticees stand to make substantial profit while trading in Out of the Money Option in McDowell. Moreover, as stated in preceding paragraphs when the investor is confident that the price of the underlying asset is going to go up being in possession of UPSI, he knows that the risk of not making a profit on Out of the Money Options is low. Also, they

could take almost 10 times the exposure with the same investment (₹ 106 for 1 option at the strike price of ₹ 2,400 vs. ₹ 10.75 for 1 option at the strike price of ₹ 2,700 ).

98. With respect to European Option and American Option, it is observed that since there was enough liquidity in option trading of McDowell, there was no need to wait till the expiry or exercise the contract on expiry, as the Noticees could exit the contract by selling it in the market prior to the expiry.
99. Noticees have also submitted that they purchased March Options and April Options by paying premium and other costs. If they were in possession of UPSI, they would have purchased only April Options and NOT March Options since Out of the Money contracts have only "Time value" - their "Intrinsic Value" is "0" and their value declines with time and therefore, these are "Depreciating Assets". It is noted that because of the time value, Out of the Money contracts with March Expiry would be lower cost than Out of the Money contracts with April Expiry. Thus, it is quite logical for a person wanting to optimize return on the investment to buy March Expiry options having the confidence that the price of the shares would go up on announcement of PSI and therefore, the value of the options would go up. But if the market presents an opportunity to book profit even before expiry / rollover then it makes economic sense / prudent to do so.
100. If for a moment we were to accept the Noticee's own submission the Intrinsic Value of the Out of the Money contracts is zero, then if it is not used as a strategy by the Noticee to hedge his some other position in the underlying (equity or derivative) then there is no economic rationale for investing in it for its Time Value. However, the Noticee still dealt in Out of the Money contracts with March Expiry which indicates that Noticee's investment was driven by extraneous factors such as the confidence due to possession of UPSI.

101. The Noticees have submitted that one of the reasons for them to trade in the stock options of McDowell was the volatility in the price of the underlying asset. In this regard, it is noted that during the two financial years i.e., 2013-2014 and 2014-2015, apart from doing derivative trading in NIFTY and McDowell, Noticees have bought stock options in four scrips and sold stock options in 3 scrips. All the buying and selling in the options have been executed on the same day i.e., intra-day trades, except the scrip of State Bank of India (buy transactions was executed on 3 days and sell transactions was executed on 4 days) and number of transactions executed in a day was not more than 8 instances. In light of the same, it is noted that in a universe of approximately 200 stock options, as per Noticees trading behaviour over the period of two financial years, there was a huge concentration in only one scrip that too one in which a relative is an insider.
102. Further, the Noticees have not demonstrated their trading strategy as employed while trading in the stock options of McDowell in any other scrip's stock options. Moreover, the Noticees were buying the stock options of McDowell at the strike price range of ₹ 2,600 – ₹ 2,900 when the offer price was ₹ 3,030. This when seen in the light of the price of the underlying in the two preceding months which showed a fall in the price from ₹ 2,608.05 on January 1, 2014 to ₹ 2387.25 on February 28, 2014 which among other things shows that the performance of the stock was not very good. Thus, even if it accepted that one of the reasons for the Noticees to trade in stock options of McDowell was volatility, the same is not substantiated by their trading in any other stock options with similar volatility and even when the price of the underlying was falling, still the Noticees were bullish that the value of the underlying would reach around ₹ 2,900. The circumstances of the extant matter shows that Noticees were in possession of information which gave them the confidence to deal in Out of Money stock options of McDowell.
103. Moreover, Smt. Poonam and Shri Haresh, bought the stock options in McDowell

for the first time on March 10, 2014 while Shri Varun bought on March 13, 2014. Thus, the timing / proximity of the trades of the Noticees to the UPSI period and that they consistently had bought options with strike prices of ₹ 2,700 and ₹ 2,800 with March 24, 2014 expiry during the period March 12, 2014 to March 20, 2014, also casts a strong shadow of doubt on their trading behavior in the stock option of McDowell.

104. The Noticees have further submitted that at the beginning of any series of Options Contracts, the impact of Vega is negligible since there is substantial time for the contract to expire; therefore, the maximum impact of volatility is midway between start and expiry of the contracts. It is observed that the said statement is theoretically not correct as more the time remains for an option to expire, higher will be Vega, as time value makes up a larger proportion of the premium for longer term options and it is the time value that is sensitive to changes in volatility. In other words, options approaching expiration tend to have lower Vega's compared to similar options that are further away from expiration. Without prejudice to the aforesaid observation, even if it is accepted that theoretically the said submission is correct, it need not be true in every circumstance. To illustrate, with a strike price of ₹ 2,900, the stock option of McDowell was having a settlement price within the range of ₹ 0.25 to ₹ 1.10 in the first week of March, 2014 while in the second week of March, 2014 the settlement price was in the range of ₹ 0.05 to ₹ 0.35. There was marked change in the settlement price only from March 20, 2014 onwards.

105. It has also been submitted by the Noticees that the April 2014 contracts with strike price 2800CE expired at a loss of the premium and April 2014 contracts with strike price 29000E and 3000CE expired "worthless". With respect to April 2014 contracts with strike price 2800CE, it is noted that Smt. Poonam had bought 21,375 stock options on April 11, 2014 at ₹ 24.44 and had sold 20,375 options between the period April 15 -17, 2014, at an average price of ₹ 71. Shri Haresh had bought 8,375

stock options of April 24, 2014 expiry with strike price 2800CE on April 11, 2014 at ₹ 23.87. He had sold 5,500 of the said contracts during the period April 15 - 22, 2014 at an average price of ₹ 57.99. Shri Varun also had bought on April 11, 2014, 17,625 stock options at the strike price of ₹ 2,800 with April 24, 2014 expiry at ₹ 25.81. He had sold 15,875 options during the period April 15 - 21, 2014, at an average price of ₹ 64.19. Thus, based on the trading of the Noticees April 2014 contracts with strike price 2800CE, it is noted that Noticees have made profits while dealing in the April 2014 contracts with strike price 2800CE. (It is clarified that for the purpose of calculation of disgorgement amount, if any upon conclusion of findings the sale price will be calculated on a different parameters). Further, though some of the contracts bought by the Noticees expired worthless, but looking holistically at the trading done by Noticees in the April 2014 contracts with strike price 2800CE, strike price 29000E and 3000CE, Noticees have made substantial profits. The circumstance that the Noticees have incurred loss because of the expiry of the contract is outweighed by the multiple circumstances where they have reaped profits. Therefore, the circumstance of 'loss' given the weightage of the multiple circumstance of the 'profits' cannot have a leading effect on the conclusion that the trades were not in possession of UPSI. Thus, in this context, the fact that some of the options expired worthless is irrelevant, as the Noticees had reaped profits out of their other positions without waiting for the expiry date / rollover. Furthermore, as observed by Hon'ble SAT in *Mr. Harish K Vaid vs. The Adjudicating Officer* decided on October 3, 2012 that the quantum of trading done or the profits earned becomes immaterial in insider trading matters as the purpose of insider trading regulations is to prohibit trading by which an insider gets advantage by virtue of his access to price sensitive information.

106. With respect to the discrepancies highlighted by the Noticees in the strike price of stock options of McDowell, it is noted that the strike prices of ₹ 5,700, ₹ 5,800 and ₹ 5,900 have been inadvertently shown as trades by the concerned Noticees in the



symbol of McDowell-N instead of NIFTY. Further, the strike price of ₹ 0 pertains to the instrument type FUTSTK (Stock Futures) in the F & O Segment in the symbol of McDowell-N and is not related to Stock Options of McDowell-N. The same is accepted as an inadvertent error in the SCN.

107. In order to explain the timing of his trades, Shri Haresh has submitted that only after many suits against his firm were settled by 2014 that he resumed trading by March 2014. Though the Noticee has mentioned that several insolvency petitions were filed by the creditors against the firm in which he was a partner, he has not quantified it and has not submitted any documentary proof regarding the settlement of suits. But even if the submission of the Noticee is taken on face value, it still does not explain his concentrated / focused dealing in the options in the derivative of USL and not in the derivative of any other scrip. Further, Noticee's trading in NIFTY can be explained based on his own submission that there were reports that USL was going to be included in index and the Noticee was expecting an increase in the underlying price of USL and thus the value of the option contract of NIFTY also.

108. Noticees have contended that they have purchased more of the options contracts of USL after March 12, 2014 because the settlement price of the contracts was falling and the "risk-reward ratio" prompted them to obtain more contracts at a lower price to offset the fall in the price of the contract. The said submission of the Noticees on a standalone basis may be accepted but the trading activity of the Noticees has to be seen in the light of the fact of their concentrated / focused trading in the stock option of USL, the timing and particulars of their trades in the stock option of USL, practically no trades in other stock options of other scrips and the fact that their relative was working with the PAC which was in the process of consolidating its holding in USL. Aforesaid factors indicate that the Noticees had the confidence that the price of the underlying asset will in all probability be around the strike price and

hence the trades.

109. Noticees submission that in terms of value, trades in NIFTY futures and options exceeded those in the symbol of McDowell-N does not negate the fact that apart from NIFTY, the Noticees have singled out option contracts in McDowell-N to trade out of 200 possible option contracts, have dealt in strike price which was away from the price of the underlying asset and with an increased frequency from March 12, 2014 onwards. Such kind of focused and concentrated trading in the option contract of McDowell-N is also not backed by their normal trading behavior / pattern as discussed in preceding paragraphs. Moreover as stated earlier, it is Noticees own submission that USL was going to be included in NIFTY 50 from March 28, 2014 onwards and Noticees wanted to hold position in NIFTY options to take advantage of increase in the settlement price of NIFTY options subsequent to the inclusion of USL in the index since they had the UPSI that price of the scrip of USL was expected to increase.

110. Noticees' submission that they have traded during open offer period also when the prices fell sharply in effect to establish that they are consistent traders in the USL options, The argument presumably raises the question whether such a trading post publication of PSI, is a strong enough circumstance to conclude that the trading during the UPSI period was without having possession of UPSI. The determination of this question again depends on the other countervailing circumstances (their concentrated / focused trading in the stock option of USL, the timing and particulars of their trades in the stock option of USL, practically no trades in other stock options of other scrips and the fact that their relative was working with the PAC which was in the process of consolidating its holding in USL). The combined effect of the said circumstances which is more than countervailing, outweighs the effect that they are consistent traders based on their post publication of PSI trades, as argued by the Noticees. Therefore, this circumstance cannot support a conclusion that their trading

during UPSI period is not without being in possession of UPSI. Moreover, Noticee's trading during the open offer period has to be seen independent of their trading during UPSI period as trading subsequent to publication of PSI does not conclusively negate the allegation whether the trading done during UPSI period was done in possession of PSI or not.

### **Fund Flow**

111. It is noted from the IR that Smt. Poonam (A/c No. 016200100012532, Saraswat Bank) transferred ₹ 18.40 lakh received from Religare Securities Ltd. as a part of futures settlement proceeds pertaining to the trades in the symbol of McDowell-N to Shri Haresh (A/c No. 016200100012563, Saraswat Bank) on May 09, 2014. After receipt of the said funds, Shri Haresh had transferred the entire funds to the bank account of his daughter Smt. Menka Haresh Jashnani, w/o Shri Nishat.
112. Noticees have submitted that fund transfer was done to meet the expenses of Smt. Poonam and Shri Haresh in United Kingdom, as they were travelling to meet their daughter and grandson and that Shri Haresh had transferred a sum of ₹ 9.24 lakh to his daughter previously on September 13, 2003.
113. The submission of the Noticees is not acceptable for the following reasons:
- The proximity of transfer funds from Religare Securities Ltd. to Smt. Poonam to Shri Haresh and immediate transfer of funds by Shri Haresh to his daughter.
  - There has been no financial transaction between Shri Haresh and his daughter subsequent to her marriage in the year 2008 except the one made on May 9, 2014. Transfer of a sum of ₹ 9.24 lakh to his daughter previously on September 13, 2003, is not supported by any documentary evidence or explanation.
  - Despite having been given a specific opportunity to do so, Smt. Poonam and

Shri Haresh have not demonstrated that this was the only time that they have travelled to meet their daughter or that they have transferred funds to her, prior to some other visit to her as well.

114. From the above discussions, it is further concluded that based on the circumstances of flow of funds among the stock broker, Smt. Poonam, Shri Haresh and Smt. Menka Haresh Jashnani, w/o Shri Nishat that there is strong preponderance of probability that Noticees have traded while in possession of PSI.

**Relationship between Shri Haresh, Shri Varun and Smt. Poonam and Shri Nishat**

115. It has been held in preceding paragraph that Shri Nishat had access to UPSI and he was the son-in-law of Shri Haresh and Smt. Poonam and brother-in-law of Shri Varun. Thus, it can be said that the relationship between them was a close family connection.

116. In view of the aforesaid discussions, based on the trading behavior of the Noticees (Shri Haresh, Shri Varun and Smt. Poonam), movement of funds between stock broker to Smt. Poonam to Shri Haresh to the wife of Shri Nishat and the family relationship amongst them, there is a strong preponderance of probability that when the trades were executed by Shri Haresh, Shri Varun and Smt. Poonam in the stock options of McDowell, they were in the possession of UPSI i.e., they had received the UPSI prior to trading.

117. Consequently, Shri Haresh, Shri Varun and Smt. Poonam are insiders under Regulation 2 (e) (ii) of PIT Regulations as there is a strong preponderance of probability that they had received the UPSI.

**Issue No. 5-** *If the answer to the aforesaid question is in affirmative, whether the Noticees have violated the applicable provisions of PIT Regulations and SEBI Act?*

118. Before proceeding further, the relevant provisions are reproduced below:

**SEBI Act**

**Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.**

12A.No person shall directly or indirectly —

...

(d) engage in insider trading;

(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

**PIT Regulations**

**Prohibition on dealing, communicating or counselling on matters relating to insider trading.**

3. No insider shall—

(i) either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange when in possession of any unpublished price sensitive information;

(ii) communicate or counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities :

**Provided** that nothing contained above shall be applicable to any communication

required in the ordinary course of business or profession or employment or under any law.

**Violation of provisions relating to insider trading.**

4. Any insider who deals in securities in contravention of the provisions of regulation 3 or 3A shall be guilty of insider trading.

119. The principle of presumption of possession of PSI by insiders indicated in the case of *Rajiv B. Gandhi and Ors. v. SEBI* by Hon'ble SAT was also recognized later by Hon'ble SAT in another order in the matter of *Reliance Petro Investments Limited v. SEBI* (Hon'ble SAT's order dated December 7, 2015) in the following words "*On perusal of para 9 and 10 of the impugned order it is seen that apart from denying that the Appellant was an insider, Appellant had placed on record various documents to rebut the presumption of being in possession of UPSI at the time of purchasing shares and the Appellant had also made submission to the effect that the price sensitive information itself came into existence after the shares were purchased by the Appellant.*"

120. It has been held in preceding paragraphs that Shri Haresh, Shri Varun and Smt. Poonam, have not been able to discharge the burden of proof that their trading was not done when they were in possession of the UPSI for the following reasons:

- Proximity of their trades in the stock options of USL vis-a-vis the UPSI period.
- Lack of any meaningful trading in the stock options of other scrips.
- Their trading in NIFTY can be explained based on their own submission that USL was going to be included in the NSE index.
- Consistent buying and selling in the stock option of USL during the UPSI period

and not in any other stock option during that period.

- No plausible explanation as to why when the price of the underlying asset was falling but still the Noticees were bullish about buying the stock options of USL at the strike prices of ₹ 2,700, ₹ 2,800 and ₹ 2,900.
- Fund transfer amongst the Noticees subsequent to the trading for which their explanation has not been supported.
- Relationship between the Noticees and the access of Shri Nishat to the UPSI being part of the core team member of *Project Cape* and being involved from the beginning of transaction life cycle to consolidate the shareholding of the Acquirer and PAC in the Target Company.

121. The Noticees have placed reliance on *State of Goa vs. Sanjay Thakkaran and another* (2007) 3 SCC 755 and have submitted that the circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. I have perused the aforesaid order of the Apex Court. I note that the said order was in relation to the offences under Sections 120-B, 364, 302 and 392 read with Section 34 of the Indian Penal Code, 1860. Further, while considering the prosecution case which was based on circumstantial evidence, the Hon'ble Apex Court observed as follows;

*"... it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:*

*(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from*

*the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence..."*

122. I note that though the standard of proof under criminal law is beyond reasonable doubt when the matter is based on circumstantial evidence aforesaid tests have to be followed in respect of a criminal trial. The extant matter is a civil matter under PIT Regulations and to import the requirements of evidence in criminal case to the present case is misplaced as the degree of proof and evidence in criminal case and civil case is different. For the present matter, the parameters of appreciation of evidence on record has been laid down by Hon'ble SAT in the matter of *Dilip S. Pendse vs. SEBI* decided on November 19, 2009, wherein the Hon'ble SAT has observed as follows;

*"The charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrong doing, higher must be the preponderance of probabilities in establishing the same."*

The aforesaid observation was also reiterated in the matter of *Mr. Manoj Gaur vs. SEBI* decided on October 3, 2012 wherein it was held as follows: *"having regard to the gravity of charge of insider trading, higher degree of preponderance of probabilities is needed to bring home the charge."*

Furthermore, the Hon'ble SC in the matter of *SEBI vs Kishore R Ajmera* decided on February 23, 2016 laid down the test that has to be adopted to arrive at a conclusion based on circumstantial evidence under securities laws. It observed as follows:

*"... The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder is concerned. Prosecution under Section 24*



*of the Act for violation of the provisions of any of the Regulations, of course, has to be on the basis of proof beyond reasonable doubt.”*

123. In light of the observations of Hon’ble SC and SAT, it can be held that degree of proof required to establish a charge of insider trading is that a reasonable/prudent man would adopt to arrive at a conclusion based on preponderance of probability and not that of beyond reasonable doubt.

124. In view of the aforesaid discussions, based on the higher degree of preponderance of probability of the circumstantial evidence gathered from the timing of the trades in close proximation of the UPSI period, concentration of the trades in stock options of USL, non-material trades in any other stock options except NIFTY which itself was linked to USL, relationship between Shri Nishat and Shri Haresh, Shri Varun and Smt. Poonam and movement of the funds between stock broker to Smt. Poonam to Shri Haresh to the wife of Shri Nishat, leads to the conclusion that Shri Haresh, Shri Varun and Smt. Poonam have traded in the stock options of USL when they were in possession of UPSI.

125. The next issue that arises for consideration is, how Shri Haresh, Shri Varun and Smt. Poonam did come in the possession of UPSI. It is noted from material made available on record that Shri Nishat who is Shri Haresh and Smt. Poonam’s Daughter’s husband and Shri Varun’s sister’s husband was part of the core team who was holding discussions / strategising on the open offer on behalf of the PAC and was also involved from the beginning of transaction life cycle to consolidate the shareholding of the Acquirer and PAC in the Target Company. It has been held in the preceding paragraph that the trades of Shri Haresh, Shri Varun and Smt. Poonam show a strong preponderance of probability that they were executed when they were in possession of UPSI. Considering the close family relationship amongst Shri Nishat, Shri Haresh, Shri Varun and Smt. Poonam, it can reasonably be concluded that, it was Shri Nishat who had communicated the UPSI to them.

126. Shri Nishat has submitted that the SCN is silent on how and when the UPSI was communicated by him. In this regard, as stated earlier, in insider trading matters, direct evidence will not be available always. A reasonable inference has to be drawn from the circumstantial evidence and conduct of parties. In the extant matter, it has already been held that Shri Haresh, Shri Varun and Smt. Poonam have traded when they were in the possession of UPS. Shri Nishat, who was part of the core team of PAC which was working on the open offer and thereby had UPSI. His close relationship with Shri Haresh, Shri Varun and Smt. Poonam, the flow of funds amongst Shri Haresh, Smt. Poonam and Shri Nishat's wife, sudden and concentrated interest in the trading of options in USL and their trading pattern indicates that the UPSI was communicated by Shri Nishat. Thus, even though SCN is silent on precisely how and when Shri Nishat has communicated the UPSI, in the given facts and circumstances of the case, it can be reasonably held based on strong preponderance of probability that the UPSI was communicated by him to Shri Haresh, Shri Varun and Smt. Poonam.

127. Shri Nishat has also submitted that SEBI does not have the jurisdiction to issue any SCN or to pass any directions/orders in relation to anything that is not done in the territory of India. In this regard, I would like to refer to the observation of Hon'ble Apex Court in the matter of *SEBI vs. Pan Asia Advisors Ltd. & ANR.* decided on July 6, 2015 wherein the Hon'ble Court observed as follows:

*"71. On a reading of the above statutory provisions, we find under Section 11(1) of the SEBI Act, 1992, a duty has been cast on the SEBI to protect the interest of investors in securities and also to promote the development of the securities market as well as for regulating the same by taking such measures as it thinks fit. The paramount purpose has been shown as protection of interest of investors on the one hand and also simultaneously for promoting the development as well as orderly regulation of the security market..."*

72. Under Section 11(4)(a) and (b) apart from and without prejudice to the provisions contained in sub-section (1), (2) (2A) and (3) as well as Section 11B, SEBI can by an order, for reasons to be recorded in writing, in the interest of investors of securities market either by way of interim measure or by way of a final order after an enquiry, suspend the trading of any security in any recognized stock exchange, restrain persons from accessing the securities market and prohibiting any person associated with securities market to buy, sell or deal in securities. On a careful reading of Section 11(4)(b), we find that the power invested with SEBI for passing such orders of restraint, the same can even be exercised against “any person”. Under Section 11B, SEBI has been invested with powers in the interest of investors or orderly development of the securities market or to prevent the affairs of any intermediary or other persons referred to in Section 11 in themselves conducting in a manner detrimental to the interest of investors of securities market and also to secure proper management of any such intermediary or person. It can issue directions to any person or class of persons referred to in Section 11 or associated with securities market or to any company in respect of matters specified in Section 11B in the interest of investors in the securities and the securities market. The paramount duty cast upon the Board, as stated earlier, is protection of interests of investors in securities and securities market. In exercise of its powers, it can pass orders of restraint to carry out the said purpose by restraining any person. Section 12A of the SEBI Act, 1992 creates a clear prohibition of manipulating and deceptive devices, insider trading and acquisition of securities...

...

80. Under Section 11B while empowering SEBI to issue directions in the interest of investors, it is provided that such directions can be against any person or class of persons associated with securities market. Under Section 11C(b) it is provided that where SEBI has reasonable ground to believe that any person associated with

*securities market violated any of the provisions of the Act or Rules or Regulations or directions issued, it can order for an investigation and take action. Under Section 12A, it is specifically provided to prohibit any manipulative and deceptive devices, insider trading and substantial acquisition of securities or control by ANY PERSON either directly or indirectly. If SEBI's allegation listed out earlier as well as all the other allegations fall under Section 12A(a), (b) and (c), there will be no escape for the respondents from satisfactorily explaining before the Tribunal as to how these allegations would not result in fully establishing the guilt as prescribed under sub-clause (a)(b)(c) of Section 12A...*

*...*

*82. We are therefore convinced that having regard to the nature of allegations in the interests of investors in securities as well as the statutory obligation/duty cast upon SEBI to protect their interests, SEBI has got every jurisdiction to proceed against the respondents as well as the issuing company...*

*...*

*86. To support the contention that the SEBI Act, 1992 operates only within Indian territory, reference was made to the provisions contained in other Acts viz., IPC, FERA, FEMA, Companies Act, the Information Technology Act and the Income Tax Act. In the first place, the said reliance placed on the provisions of those enactments providing for extra territorial jurisdiction can have no impact on the action initiated by the appellant, for the simple reason that the violation complained of by the appellant is with reference to such of those provisions contained in SEBI Act, 1992 vis-à-vis the underlying shares of GDRs. Therefore, we are unable to see any violation of exercise of its jurisdiction since the underlying shares of GDR were created and dealt with as well as traded in the stock market of Indian Territory. Any act which caused any infringement in such trading of those underlying shares by*

*virtue of any malfeasance or misfeasance or misdeeds committed by any person under the Act which worked against the interests of the investors in securities and the securities market, the SEBI was entitled to proceed against such persons who are involved in any of those allegations. Therefore, the reference to those provisions contained in other enactments in our considered opinion does not cause any impediment for SEBI to proceed against the respondents in exercise of its jurisdiction under the SEBI Act, 1992.*

128. Thus, based on the above observation of the Hon'ble Supreme Court of India, it can be held that Shri Nishat is covered under the ambit of "any person" as mentioned under Section 11(4)(b) of the SEBI Act and the act of communication of UPSI by Shri Nishat is detrimental to the investors in the market as it distorts the level playing field by giving an unfair advantage to the recipient of UPSI. Therefore, taking into account the nature of violation i.e. insider trading and the statutory obligation/duty cast upon SEBI to protect investor interests, SEBI has got every jurisdiction to proceed against Shri Nishat

129. Further, Shri Nishat has contended that he is also not a person associated with the Indian securities market and does not fall within the jurisdiction of SEBI. It is observed that the category of a "person associated with the securities market", is no more *res integra*. The Hon'ble High Court of Gujarat in the case of *Karnavati Fincap Ltd. vs. SEBI* [1996] 87 CompCas 186 (Guj), had an occasion to deal with this issue and this is what the Hon'ble High Court has held:

*"... 'The words "other persons associated with the securities market" have not been defined in the Act. The question then arises whether "persons associated with the securities market" takes its colour from persons enumerated in clause (ba)? If one has to go by the literal meaning, the interpretation which restricts the meaning of "persons associated with the securities market" to the persons enumerated in clause (ba) is not acceptable. In ordinary meaning, the persons associated with the*

*securities market would include all and sundry who have something to do with the securities market. It is to be noted that the securities market in the sense is not confirmed to stock exchanges only. The words "persons associated with the securities market" are of much wider import than intermediaries. "Persons associated with" denotes a person having connection or having intercourse with the other, in the present case that "other" with whom a person is to have connection or intercourse in the securities market"...*

130. In the extant matter, it has been held that based on the connection between Shri Nishat and Shri Haresh, Shri Varun and Smt. Poonam, Shri Haresh, Shri Varun and Smt. Poonam came in the possession of UPSI and they executed trades in the derivative of USL while being in possession of UPSI. Thus, Shri Nishat is a person associated with the securities market not only because he was in possession of UPSI concerning listed company in India but also, by virtue of the fact that his communication of UPSI has enabled other three noticees to execute trade on Indian exchange. Further, Shri Nishat is associated with securities market on account of being part of the core team of Acquirer / PAC from the very beginning which was dealing with the various regulatory and legal challenges pertaining to the consolidation of shareholding of the Acquirer / PAC in the Target Company which is listed on the Indian Stock Exchanges.

131. Shri Haresh has submitted that he has operated the bank and trading accounts of Smt. Poonam and Shri Varun. Even if the submission of Shri Haresh is taken on face value, it is observed that Smt. Poonam and Shri Varun by knowingly allowing Shri Haresh to deal in their trading account and thus have played an equal role in the insider trading activity. Here, I would like to refer to the order of Hon'ble SAT in the matter of *Mahavirsingh N Chauhan and ANR vs. SEBI* decided on October 18, 2019 wherein the Hon'ble SAT has observed as follows;

*"We are of the opinion that by renting their demat account, trading account etc.,*

*the appellants were concealing the identity of the fraudster and, thus, were acting not only in concert but in connivance with the said fraudster. The appellants cannot, thus, escape from the liability of debarment and the wrongful gains made by them."*

132. I note that the purpose of the insider trading regulations is to prohibit trading by an insider who gets advantage by virtue of his access to price sensitive information and the aforesaid relevant provisions of SEBI Act and PIT Regulations makes it crystal clear that there is a total prohibition on an insider to deal in the shares of the company when in possession of UPSI. In this regard the following is noted from the Order of Hon'ble SAT in the matter of *E. Sudhir Reddy vs. SEBI* decided on December 16, 2011:

*"...A shareholder becomes an owner of the company to the extent of the value of shares held by him. He is therefore, entitled to his share in the profits earned by the company. Therefore, performance of a company is of primary importance to the investors as well as to the general public who might be interested in investing in the company. The shareholders and general public get information about the company either through the annual report or during the annual general meeting. However, persons in the company or otherwise concerned with the affairs of the company are in possession of such information before it is actually made public. The directors of the company or for that matter even professionals like Chartered Accountants and Advocates advising the company on its business related activities are privy to the performance of the company and come in possession of information which is not in public domain. Knowledge of such unpublished price sensitive information in the hands of persons connected to the company puts them in an advantageous position over the ordinary shareholders and the general public. Such information can be used to make gains by buying shares anticipating rise in the price of the scrip or it can also be used to protect themselves against losses by selling the shares before the*

*price falls. Such trading by the insider is not based on level playing field and is detrimental to the interest of the ordinary shareholders of the company and general public. It is with a view to curb such practices that section 12A of the Sebi Act makes provisions for prohibiting insider trading and the Board also framed the Insider Trading Regulations to curb such practice.”*

133. In view of the findings arrived at preceding paragraph, it is held that Smt. Poonam, Shri Haresh and Shri Varun by dealing in the securities of the Target Company when they were in possession of UPSI, have violated Regulations 3(i) & 4 of PIT Regulations, 1992 read with Regulation 12 of PIT Regulations, 2015 and Sections 12A (d) and (e) of SEBI Act. Further, Shri Nishat by communicating the UPSI to Smt. Poonam, Shri Haresh and Shri Varun, has violated Regulations 3(ii) of PIT Regulations, 1992 r/w Regulation 12 of PIT Regulations, 2015.

***Issue No. 6-*** *If the answer to the aforesaid question is in affirmative, whether the Noticees have made any ill-gotten gains and if so, are they liable for disgorgement. Further, do other directions, if any, need to be issued against the Noticees?*

134. It is noted from the IR that Smt. Poonam, Shri Haresh and Shri Varun have made wrongful gains of approximately ₹ 45.44 lakh, ₹ 29.24 lakh and ₹ 26.18 lakh respectively, by trading when in possession of UPSI in the derivative of USL.
135. Noticees have submitted that the tabulations of profit includes profit made on purchase transactions prior to the alleged UPSI and post alleged UPSI period amounting to ₹ 30,00,762.50 across all of them. In this regard, it is noted that for the purchase of stock options on March 10-11, 2014, the Noticees have sold them subsequently in March, 2014 while they were in possession of UPSI. Under Regulation 3 (i) of PIT Regulations dealing in securities when in possession of UPSI is prohibited. “Dealing in securities” has been defined under Regulation 2(d) of PIT Regulations as “... an act of subscribing, buying, selling or agreeing to



*subscribe, buy, sell or deal in any securities by any person either as principal or agent*". Thus as seen from the definitional clause, an act of selling securities is also termed as dealing in securities and the same is prohibited while the insider is in the possession of UPSI, as per Regulation 3 (i) of PIT Regulations. Since, Smt. Poonam, Shri Haresh and Shri Varun have sold the stock options bought prior to the UPSI period, during the UPSI period, while being in possession of UPSI, the same has to be considered while computing ill-gotten gains. Similarly stock options bought and sold during UPSI period and stock options bought during UPSI period and sold subsequent to publishing of PSI, will also be included while calculation unlawful gains. Further, the Noticees submission to the extent that stock options bought post UPSI period have to be excluded from the computation of profit, is acceptable. Moreover, stock options bought by Shri Varun at the strike price of ₹ 3000 have been included in revised profit calculation done in this order.

136. Without prejudice to the finding that PSI came into existence on March 12, 2014, it is noted that the submission of the Noticees that options bought on March 12, 2014 will not be taken for computation of ill-gotten gains as they were bought during Indian trading hours and there is a time gap of 5:30 hours between London and Mumbai, is not acceptable. As discussed in preceding paragraph, dealing in securities is prohibited under PIT Regulations by an insider while he is in possession of UPSI. Therefore, even if the Noticees have bought stock options on March 12, 2014 during Indian trading hours, they had sold the said options before PSI was published. Hence, for the purpose of computation of ill-gotten gains, stock options bought on March 12, 2014 will also be taken into account.

137. Noticees have further submitted that Open Positions rather than total traded quantity ought to have been considered. As noted in the preceding paragraph as per Regulation 3 (i) of PIT Regulations, dealing in securities is prohibited during the UPSI period. Thus, buying and selling of options have to be

considered for determining profit / loss, as open positions will not give an accurate picture of Noticee's trading. The same will give only the net position of the Noticee's trading. Open position has no relevance to the actual loss / profit made by the Noticee while trading in options. A situation may arise where the Noticee would have bought, for instance 10 call options at a strike price of ₹ 1,000 at a premium of ₹ 10 for a sum total of ₹ 100, expiring on a certain date and the price of the underlying asset increased before the said expiry date. The Noticee sold 9 call options at an increased premium of ₹ 15 for ₹ 135. Thus, making a profit of ₹ 35. But if the net open position is seen, then the Noticee is left with 1 call option which for some reason, he chose not to sell and let it expire worthless, thereby suffering a loss of ₹ 10, if only his open position is taken into account.

138. Thus, taking into account the buying and selling of options, Unlawful gains of the Noticees have been calculated as follows:

Unlawful gain = Number of options bought while in possession of UPSI X Closing Price on the day of UPSI becoming public - Number of options bought while in possession of UPSI X weighted average purchase price.

Closing price of various contracts of options pertaining to USL expiring on April 24, 2014, as on April 15, 2014 (date of publication of PSI) are given below:

Date	Expiry	Option Type	Strike Price	Close
15-Apr-14	24-Apr-14	CE	2700	156.65
15-Apr-14	24-Apr-14	CE	2750	108.45
15-Apr-14	24-Apr-14	CE	2800	68.9
15-Apr-14	24-Apr-14	CE	2850	33.3
15-Apr-14	24-Apr-14	CE	2900	17.3
15-Apr-14	24-Apr-14	CE	3000	7.5

Closing price of contracts expiring on March 27, 2014 have not been considered as the same would expire prior to the end of the UPSI period, i.e. April 15, 2014. Accordingly disgorgement amounts are calculated as follows:

**A. Value of options bought during UPSI period and sold subsequent to UPSI period:**

Notices have bought during UPSI period, option contracts with expiry date of April 24, 2014 and have sold the same subsequent to the UPSI period. Profits as per above mentioned formula is given below:

Date	Entity Name	Expiry Date	Strike Price (₹)	Gross Buy	Deemed Gross Sell	Buy Value (₹)	Deemed Sell Value (₹)	Profit (₹)
11-Apr-2014	POONAM	24-Apr-2014	2,700	9250	9250	393968.75	1449012.5	1055044
11-Apr-2014	POONAM	24-Apr-2014	2,750	4750	4750	145968.75	515137.5	369168.8
11-Apr-2014	POONAM	24-Apr-2014	2,800	21375	21375	522306.25	1472737.5	950431.3
11-Apr-2014	POONAM	24-Apr-2014	2,850	2750	2750	45806.25	91575	45768.75
11-Apr-2014	POONAM	24-Apr-2014	2,900	1000	1000	12625	17300	4675
11-Apr-2014	VARUN	24-Apr-2014	2,700	3750	3750	158181.25	587437.5	429256.3
11-Apr-2014	VARUN	24-Apr-2014	2,800	17625	17625	454956.25	1214362.5	759406.3
11-Apr-2014	VARUN	24-Apr-2014	2,900	33125	33125	482818.75	573062.5	90243.75
11-Apr-2014	VARUN	24-Apr-2014	3,000	3750	3750	40781.25	28125	-12656.3
11-Apr-2014	HARESH	24-Apr-2014	2700	6250	6250	253437.5	979062.5	725625
11-Apr-2014	HARESH	24-Apr-2014	2750	4375	4375	136468.75	474468.75	338000
11-Apr-2014	HARESH	24-Apr-2014	2800	8375	8375	199900	577037.5	377137.5
11-Apr-2014	HARESH	24-Apr-2014	2900	1375	1375	18818.75	23787.5	4968.75
<b>Total</b>								<b>51,37,069.15</b>

**B. Value of options bought and sold during UPSI period:**

Noticees have bought and sold following contracts during the UPSI period. Since these options contract had expired before announcement of UPSI, actual profits have been calculated as follows: Profits = Sell quantity \* Average sell price – Buy quantity \* Average Sell price. The details of the profits made are as follows:

Date	Entity Name	Expiry Date	Strike Price (₹)	Gross Buy	Gross Sell	Buy Value (₹)	Sell Value (₹)	Profits (₹)
12-14 March & 18-21, March 2014	HARESH	27-Mar-2014	2,800	28750	28750	386718.75	578550.00	191831.25
18-Mar-2014	VARUN	27-Mar-2014	2,600	3000	3000	33756.25	53350.00	19593.75
13-14 March & 18-21, March 2014	VARUN	27-Mar-2014	2,700	26500	26500	262362.50	954506.25	692143.75
13-14 March & 18-21, March 2014	VARUN	27-Mar-2014	2,800	49375	49375	363681.25	1077818.75	714137.50
12-14 March & 18-21, March 2014	POONAM	27-Mar-2014	2,800	35375	35375	397531.25	768387.50	370856.25
12-14 March & 18-21, March 2014	HARESH	27-Mar-2014	2,700	51625	51625	525212.50	1628543.07	1103330.57
12-14 March & 18-21, March 2014	POONAM	27-Mar-2014	2,700	43625	43625	444843.75	1613105.25	1168261.50
<b>Total</b>								<b>42,60,154.57</b>

**C. Value of options bought pre UPSI period and sold during UPSI period:**

Noticees have bought following option contracts before UPSI period and sold them during UPSI period. Accordingly for calculations of profits, following formula has been applied (Profits = Sell Quantity \* Average Sell Price – Buy Quantity in pre-UPSI period \* Opening price on 12 March 2014) and the details of the profits made are as follows:

Date	Entity Name	Expiry Date	Strike Price (₹)	Gross Buy	Gross Sell	Buy Value (₹)	Sell Value (₹)	Profits (₹)
10-11 March 2014	HARESH	27-Mar-2014	2,700	17000	17000	169150.00	536275.68	367125.68
	POONAM	27-Mar-2014	2,700	16000	16000	159200.00	591626.00	432426.00
Total								799551.68

139. It has already been held in preceding paragraph that the Noticees are liable for insider trading in the derivative of USL and by virtue of the said trading have made an ill-gotten gains. The quantum is as follows: Smt. Poonam – ₹ 43,96,632/-, Shri Varun – ₹ 27,04,781/- and Shri Haresh – ₹ 31,08,019/-. Hon’ble SAT had an occasion to deal with the concept of disgorgement in *Karvy Stock Broking Ltd. vs. SEBI* decided on May 2, 2008 wherein the Hon’ble Tribunal observed as under:

*“...Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so...”*

140. Taking support of the aforesaid observation of Hon’ble SAT, I note that the Noticees namely Smt. Poonam, Shri Haresh and Shri Varun have unjustly enriched themselves by their unlawful conduct and are liable to disgorge the illegal gains made by them.

141. Here, it will be noteworthy to quote the observations of Hon’ble Supreme Court of India in the matter of *Dushyant Dalal and another vs. SEBI* decided on October 4, 2017, wherein the Hon’ble Court observed as follows:

*“...16. We are of the view that an examination of the Interest Act, 1978 would clearly establish that interest can be granted in equity for causes of action from the date on which such cause of action arose till the date of institution of proceedings*

*...*

*28. We agree with the aforesaid statement of the law. It is clear, therefore, that the Interest Act of 1978 would enable Tribunals such as the SAT to award interest from the date on which the cause of action arose till the date of commencement of proceedings for recovery of such interest in equity...”*

142. Considering the above observations of the Hon’ble Supreme Court of India, I note that an appropriate rate of interest should be levied on the ill-gotten gain made by the Noticees from the date on which the cause of action arose in the extant matter. By applying the principle as recognized by Hon’ble Apex Court in the aforesaid matter in the present case, interest should be levied on the respective ill-gotten gains from the respective trading days on which they were earned by the Noticees. Thus, considering the same, in my view, it would be reasonable that interest be calculated from the last day on which the Noticee executed trades in the scrip when in possession of UPSI i.e. April 11, 2014 as noted from the IR upto the date of disgorgement.

143. Furthermore, I note that SEBI is mandated to protect the interests of investors and promote the development of and to regulate the securities market. For the purpose SEBI is empowered to take suitable measures. Healthy growth and development of securities market depends to a large extent on the quality and integrity of the market. Such a market can alone inspire the confidence of investors. Factors on which this confidence depends include, among others, the assurance the market can afford to all investors that they are placed on an equal footing and will be protected against improper use of inside information. In

equitable and unfair trade practice such as insider trading affect the integrity and fairness of the securities market and impairs the confidence of the investors. Therefore, in view of the violations committed by the Noticees, I find that the Noticees are not only liable to disgorge the ill- gotten gain made by dealing in the securities of the company when in possession of UPSI but it also becomes necessary for SEBI to issue appropriate directions against the Noticees.

**Brief summary of the findings**

144. The announcement of open offer for the shares of USL and the details / particulars mentioned therein which *inter alia* includes name and identity of the acquirer and persons acting in concert with him, the offer price, offer size and offer period as issued by HSCI and JMFL on behalf of Relay and Diageo on April 15, 2014, was price sensitive information in terms of Regulation 2 (ha) of PIT Regulations.
145. The price sensitive information reached a high level of crystallisation and certainty by March 12, 2014 when the acquisition process was formalized as noted from the email dated March 12, 2014 by Diageo. Thus the UPSI period was between March 12, 2014 to April 14, 2014.
146. Shri Nishat was part of the core team who was representing Diageo / PAC in the transaction to consolidate shareholding of the Acquirer in the Target Company, USL and was guiding the team since the beginning of the transaction lifecycle.
147. The fact that Shri Nishat was Global Business Development Manager (M&A) puts him the position where he is reasonably expected to have an access to unpublished price sensitive information in relation to that company. Therefore, Shri Nishat falls within the definition of connected person and was an insider in terms of Regulation 2 (e) (i) of PIT Regulations.

148. Shri Nishat is a relative of Smt. Poonam and Shri Haresh by way of being Smt. Poonam's and Shri Haresh's daughter's husband and Shri Nishat is also a relative of Shri Varun by way of being Shri Varun's sister's husband as per Section 6(c) of the Companies Act, 1956 by virtue of reciprocity that is an inherent part of a relationship.
149. Based on the trading behavior of Shri Haresh, Shri Varun and Smt. Poonam, movement of funds between stock broker to Smt. Poonam to Shri Haresh to the wife of Shri Nishat and the family relationship amongst them, there is a strong preponderance of probability that when the trades were executed by Shri Haresh, Shri Varun and Smt. Poonam in the stock options of McDowell, they were in the possession of UPSI i.e., they had received the UPSI prior to trading.
150. Based on the higher degree of preponderance of probability of the circumstantial evidence gathered from the timing of the trades in close proximation of the UPSI period, concentration of the trades in stock options of USL, non-material trades in any other stock options except NIFTY which itself was linked to USL, relationship between Shri Nishat and Shri Haresh, Shri Varun and Smt. Poonam and movement of the funds between stock broker to Smt. Poonam to Shri Haresh to the wife of Shri Nishat,, leads to the conclusion that Shri Haresh, Shri Varun and Smt. Poonam have traded in the stock options of USL when they were in possession of UPSI.
151. Considering the close family relationship amongst Shri Nishat, Shri Haresh, Shri Varun and Smt. Poonam, it can reasonably be concluded that, it was Shri Nishat who had communicated the UPSI to them.
152. Based on the trading while in possession of UPSI, the following ill-gotten gains have been made in the extant matter - Smt. Poonam- ₹ 43,96,632/-, Shri Varun – ₹ 27,04,781/- and Shri Haresh – ₹ 31,08,019/-.



**ORDER**

153. In the facts and circumstances of the case, I, in exercise of the powers conferred upon me under Sections 11, 11 (4) (b) and 11B read with Section 19 of the Securities and Exchange Board of India Act, 1992, hereby issue following directions:

- a) Smt. Poonam Haresh Jashnani (PAN: ADUPJ8724H), Shri Haresh Parmanand Jashnani (PAN: AAJPJ7020L) and Shri Varun Haresh Jahnani (PAN: AIGPJ8710L) shall disgorge the wrongful gain made by them i.e. Smt. Poonam – ₹ 43,96,632/-, Shri Varun – ₹ 27,04,781/- and Shri Haresh – ₹ 31,08,019/- along with simple interest @ 12% per annum from April 11, 2014 till the date of payment. They shall pay the said amount within 45 (forty five) days from the date of service of this order. In case Smt. Poonam, Shri Haresh and Shri Varun fail to make the payment within 45 days, they shall be liable to pay future interest at the rate of 12% per annum till the date of payment. Payment will be made by way of demand draft drawn in favour of “Securities and Exchange Board of India”, payable at Mumbai OR through e-payment facility\* into Bank Account, the details of which are given below:

<b>Name of the Bank</b>	<b>Branch Name</b>	<b>RTGS Code</b>	<b>Beneficiary Name</b>	<b>Beneficiary Account No.</b>
Bank of India	Bandra Kurla Branch	BKID 0000122	Securities and Exchange Board of India	012210210000008

*\* Noticees who are making e- payment are advised to forward the details and confirmation of the payments so made to the Enforcement department of SEBI for their records as per the format provided in Annexure A of Press Release No. 131/2016 dated August 09, 2016 which is reproduced as under:*

1. Case Name:	
2. Name of the payee:	
3. Date of payment:	
4. Amount paid:	
5. Transaction No:	
6. Bank Details in which payment is made:	
7. Payment is made for: (like penalties/disgorgement/recovery/settlement amount and legal charges along with order details:	

- b) The Banks, with whom the Noticees' accounts lie, are directed that no debit shall be made, without permission of SEBI, in respect of the bank accounts held, by Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani except for the purposes of compliance of this order. However, credits, if any, into the accounts maybe allowed. On compliance of the direction at paragraph 153(a), the Noticees shall apply to SEBI for an instruction to defreeze their bank accounts.
- c) The Depositories, with whom the Noticees (Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani) demat accounts lie and Registrar and Transfer Agents are directed that no debit shall be made, without permission of SEBI, in respect of the demat accounts held, by Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani except for the purposes of compliance of this order. However, credits, if any, into the accounts of Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani may be allowed under the supervision of the concerned Exchange / RTA.
- d) Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri

Varun Haresh Jahnani are also directed not to dispose of or alienate any of their assets/ properties/ securities, till such time the direction of this order is complied with.

- e) Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani shall not buy, sell or otherwise deal in the securities market in any manner whatsoever or access the securities market, directly or indirectly, for a period of seven years from the date of payment of disgorgement amount along with interest as stated in preceding paragraph. Further, Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public or any intermediary registered with SEBI for a period of seven years from the date of payment of disgorgement amount along with interest as stated in preceding paragraph. However, any outstanding position in the derivatives segment of the market should be closed within 3 months or at its expiry, whichever is earlier.
- f) Shri Nishat Shailesh Gupte (PAN: AQDPG4932E) shall not buy, sell or otherwise deal in the securities market in any manner whatsoever or access the securities market, directly or indirectly, for a period of seven years from the date of this order. Further, Shri Nishit Shailesh Gupte is also restrained from associating himself with any listed public company and any public company which intends to raise money from the public or any intermediary registered with SEBI for a period of seven years from the date of this order.

154. In case Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jahnani fail to pay the wrongful gains along with interest as directed herein within the above specified time, SEBI shall initiate recovery process under Section 28A of the SEBI Act.

155. This order shall come into force with immediate effect.
156. A copy of this order shall be served upon Shri Nishat Shailesh Gupte, Smt. Poonam Haresh Jashnani, Shri Haresh Parmanand Jashnani and Shri Varun Haresh Jashnani, Banks, Stock Exchanges, Depositories and Registrar and Transfer Agents for necessary action and compliance with the above directions. A copy of this order will also be sent to Financial Conduct Authority, London and Credit Suisse, London.
157. This order is without prejudice to any other actions that SEBI may take in accordance with securities laws.

**DATE: January 10, 2020**

**PLACE: Mumbai**

**MADHABI PURI BUCH  
WHOLE TIME MEMBER  
SECURITIES AND EXCHANGE BOARD OF INDIA**