**BEFORE THE ADJUDICATING OFFICER**

**SECURITIES AND EXCHANGE BOARD OF INDIA**

**[ADJUDICATION ORDER NO. VSS/AO- 197/2009]**

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

**In respect of**

**GAUTAM N. JHAVERI**

(PAN: ADAPJ5993J)

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## FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted investigation in the trading in the scrip of M/s Softrack Technology Exports Limited (hereinafter referred to as '**STEL / Company**') during the period from January 01, 2002 to July 31, 2002.

2. The findings of the investigation led to the allegation that Gautam N. Jhaveri (hereinafter referred to as **"GNJ/Noticee"**) had violated the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "**SAST**") and SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter to as "**PIT**") and consequently, liable for monetary penalty under section 15H(ii) and 15A (b) of the Securities and

Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**').

## APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as Adjudicating Officer vide order dated April 07, 2008 under section 15 I of the SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15H (ii) and 15A (b) of the SEBI Act.

## SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice No. EAD-5/VSS/SS/133299/2008 dated July 29, 2008 (hereinafter referred to as "**SCN**") was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15H (ii) and 15A (b) of the SEBI Act for the violation of provisions of regulations of SAST and PIT.

5. The said notice was sent through Ahmedabad Stock Exchange Limited (hereinafter referred to as **"ASE"**). The Notice was received and acknowledged by the Noticee as per the communication of ASE dated August 05, 2008. The Noticee replied vide reference No. nil dated August 20, 2008 seeking time of 45 days to furnish the reply. However, the Noticee did not reply to the said SCN.

6. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticee was granted an

opportunity of personal hearing on January 20, 2009, vide notice dated December 31, 2008 through ASE. The said hearing notice was received and acknowledged by the Noticee as per the communication of ASE dated January 21, 2009. The Noticee vide his reply dated January 07, 2009 to the hearing notice that he has already applied for the consent and keep the proceedings in abeyance till the outcome of the consent proceedings. SEBI vide its communication dated May 13, 2009 informed me that the consent application of the Noticee has been rejected and requested to restart the proceedings.

7. The last opportunity of hearing was granted to the Noticee on August 03, 2009 vide notice dated June 25, 2009 at SEBI, Western Regional Office, Ahmedabad. Mr. Anish Khardia, Authorised Representative (hereinafter referred to as **"AR"**) appeared on behalf on the Noticee on August 03, 2009 and submitted, *inter alia*, as under:

*I hereby submit documents along with the Authority letter dated August 01, 2009. I will be making further written submissions on or before August 31, 2009.*

The Noticee made further written submissions vide letter dated August 18, 2009.

## CONSIDERATION OF ISSUES AND FINDINGS

8. The issues that arise for consideration in the present case are :

a. Whether the acquisition of 35,32,688 shares representing 10.51% by the Noticee on June 13, 2002 attracted the provisions of regulation 10 of the SAST and if so, whether complied or not?

b. Does the non-compliance, if any, attract monetary penalty under section 15H (ii) of SEBI Act?

c. Whether the Noticee attracted the disclosure requirements under regulations 7(1) read with 7(2) of SAST and if so, whether complied or not?

d. Whether the Noticee attracted the disclosure requirements under regulation 13(1), 13(3) and 13(5) of PIT and if so, whether complied or not?

e. Does the non-compliance with the disclosure requirements, if any, attract monetary penalty under section 15A (b) of SEBI Act?

f. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

**Alleged violation of regulation 10 of SAST**

9. The provisions of regulation 10 of SAST reads as under:-

***10. Acquisition of fifteen per cent or more of the shares or voting rights of any company***

*No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.*

i. I find that with the acquisition of 35,32,688 shares (10.51%) on June 13, 2002, the shareholding of the Noticee increased from 5,02,312 shares (5.52%) to 40,35,000 shares (16.03) i.e., more than the threshold limit of 15% specified under regulation 10 of SAST. Therefore, the Noticee ought to have made a public announcement in terms of regulation 10 SAST. The Noticee failed to do so.

ii. I have noted the submission of the Noticee that he was holding the shares in the capacity of a Stock broker/Sub broker for and on behalf of his client in the ordinary course of business which is eligible for exemption from the applicability of provisions of regulation 10 of SAST under regulation 3 (1) (f) (i) of SAST. The Noticee has enclosed copies of documents disclosing such shareholding to the company as well as to the ASE.

iii. I have perused the copies of the forms submitted in terms of section 187-C of the Companies Act, 1956 to the Company by the Noticee. It is observed from section 187C of the Act that it makes obligatory on the holder of the shares in a company to make a declaration to the company specifying the name and other particulars of the person who holds beneficial interest in such shares. It also makes it obligatory on a person who holds beneficial interest in a share or class of share of a company to make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed. Section 187C also makes it obligatory on the beneficial owner of shares to make a declaration to the company whenever there is a change in the beneficial interest in such shares. Upon perusal of the declaration made by the Noticee under section 187-C of the Companies Act, 1956 to the company, I find the following:

| Date of declaration | Name of beneficial interest | No. of shares | Name of beneficial owner | Whether acknowledged by Company | Content |
|---|---|---|---|---|---|
| June 14, 2002 | Ankit Jhaveri | 40,35,000 | Gutam Jhaveri | Yes, dated June 14, 2002 | Mutual agreement between Rajesh and Ankit Jhaveri |

iv. Thus, I find that the Noticee held the aforesaid shares in the capacity of a stock broker on behalf of his client in the ordinary course of business which is exempt from the applicability of the provisions of regulation 10 of SAST under regulation 3(1) (f) (i) of SAST.

**Alleged violation of regulation 7(1) and (2) of SAST**

10. The provisions of regulation 7(1) and (2) of SAST reads as under:-

***7. Acquisition of 5 per cent or more shares or voting rights of a company***

*(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company to the company.*

*(2) The disclosures mentioned in sub-regulation (1) shall be made within four working days of,—*

*(a) the receipt of intimation of allotment of shares; or*

*(b) the acquisition of shares or voting rights, as the case may be.*

i. The Noticee has submitted the copies of disclosure made to the company as well as to ASE. I have carefully perused the same which bears the acknowledgment of receipt by STEL and ASE. I find from the same that he had exceeded the 5%

limit specified under regulation 7(1) on April 12, 2002 and disclosed the same on April 15, 2002 to the Company. This is in compliance with the provisions of regulation 7(1) read with 7(2) of SAST.

**Alleged violation of regulation regulation 13(1) of PIT**

11. The provision of regulation 13(1) of PIT reads as under:-

***13. Disclosure of interest or holding by directors and officers and substantial shareholders in a listed company – Initial Disclosure***

*(1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company, the number of shares or voting rights held by such person, on becoming such holder, within 4 working days of :—*
*(a) the receipt of intimation of allotment of shares; or*
*(b) the acquisition of shares or voting rights, as the case may be.*

i. The Noticee had exceeded the 5% limit specified under regulation 13(1) on April 12, 2002. The question is whether the contention of the Noticee that compliance with regulation 7(1) read with 7(2) can be considered as compliance with regulation 13(1) of PIT?

ii. On perusal of the provisions of PIT, I find that the Form A in which an entity which crosses the 5% threshold limited stipulated in regulation 13(1) of PIT had to disclose was introduced/inserted by an amendment to the PIT with effect from July 11, 2003. This means there was no specified format for making the disclosure under the said regulations prior to the said amendment. The obligation of the Noticee to make the disclosure under PIT arose when no format was in force. In such a situation, if the provisions of 7(1) of

SAST and 13(1) of PIT are compared, it would follow that the requirements under the said regulations are more or less the same. In view of this, since the Noticee had complied with the disclosure requirements under regulation 7(1) read with 7(2) of SAST, the same can be considered as deemed compliance of 13(1) of PIT, as the objective of disclosure has been met.

**Alleged violation of regulation 13(3) and 13(5) of PIT**

12. The provisions of regulation 13(3) and 13(5) of PIT reads as under:-

***Continual Disclosure***

*(3) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.*

*(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within 4 working days of :*
*(a) the receipts of intimation of allotment of shares, or*
*(b) the acquisition or sale of shares or voting rights, as the case may be.*

i. In the instant case, the Noticee had sold 13,85,192 shares constituting 2.99% of the paid up capital of the company in the following manner:

| Date | Buy | Sell | Balance | % of paid up capital | % change to paid up capital |
|---|---|---|---|---|---|
| April 12, 2002 | 25,00,000 | 0 | 25,00,000 | 7.44 | 7.44 |
| April 15, 2002 | 0 | 4,13,489 | 20,86,511 | 6.21 | -1.23 |
| April 16, 2002 | 5,000,01 | 3,77,923 | 22,08,589 | 6.57 | 0.36 |

| | | | | | |
|---|---|---|---|---|---|
| April 17, 2002 | 0 | 2,32,590 | 19,75,999 | 5.88 | -0.69 |
| April 18,2002 | 220 | 1,31,480 | 18,44,739 | 5.49 | -0.39 |
| April 19,2002 | 0 | 2,29,710 | 16,15,029 | 4.81 | -0.68 |
| **Total** | **30,00,221** | **13,85,192** | **1,22,30,867** | | |

ii. On April 12, 2002, the Noticee purchased 25,00,000 shares which constituted 7.44% of the paid up capital of the company. From April 15, 2002 to April 19, 2002, the Noticee sold 13,85,192 shares and bought 5,00,221 shares effecting a net sale of 8,84,971 shares which constitutes 2.63% of the paid up capital of the company. As a result, the change in the shareholding of the Noticee was more than the stipulated limit of 2% in the aforesaid regulation and his shareholding also fell below the stipulated level of 5%.

iii. The Noticee has submitted that since the provisions of the regulation existed at that point of time did not specify the format, he did not comply with the same. This means, the Noticee was aware of his obligation to comply with the provisions of law but did not do so as the prescribed format was not available. In the absence of any format, the Noticee could have disclosed to the company in a plain paper which would have been considered as compliance. The Noticee did not do so. I also find that during the course of investigation conducted by SEBI ample opportunities were given to the Noticee. The Noticee did not make use of them and refused to cooperate with the investigation under one pretext or the other. This issue has been dealt with by me in a separate order.

iv. Under these circumstances, the reason cited by the Noticee, i.e. lack of availability of format, cannot be accepted as a reasonable and bonafide ground for his non-compliance. I, therefore, hold that the allegation of violation of regulations 13(3) and 13 (5) of PIT stands established.

13. The provisions of section 15A (b) of SEBI Act is reproduced here under :

***15A***. ***<u>Penalty for failure to furnish, information , return etc.</u>***

*If any person, who is required under this Act or any rules or regulations made thereunder, -*
*(a)…*
*(b) to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.*

14. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216 (SC)* held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow"*.

15. In Appeal No. 66 of 2003 - *Milan Mahendra Securities Pvt. Ltd. Vs SEBI* – Order dated April 15,2005 the Hon'ble SAT has observed that, *"the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market."*

16. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15A(b) of the SEBI Act.

17. While determining the quantum of monetary penalty under section 15A (b) , I have considered the factors stipulated in section 15J of SEBI Act, which reads as under:-

> ***"15J - Factors to be taken into account by the adjudicating officer***
>
> *While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
> *(c) the repetitive nature of the default."*

18. The object of the PIT mandating disclosure of acquisition/sale beyond certain quantity is to give equal treatment and opportunity to all shareholders and protect their interests. To translate this objective into reality, measures have been taken by SEBI to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required. It may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticee. With the sale of 13,85,192 shares by Noticee, his individual shareholding had come down by 2.63% and also to less than 5%. The said sale by Noticee was also of importance from the point of view of outside shareholders / other investors as that would have prompted them to sell or buy shares. It would, however, be difficult to come to a firm conclusion as to how the general shareholders would have reacted on knowing the aforesaid transactions. By virtue of the failure on the part of the Noticee to make the necessary disclosure on time, the fact remains that the outside shareholders were deprived of the important information at the relevant point of time. The Noticee failed to

disclose the acquisition as well as the sale, both done at different points of time. This reflects the repetitive nature of default by him.

**ORDER**

19. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of Rs.2,00,000/- (Rupees Two Lakh only) under section 15A(b) of SEBI Act, 1992 on the Noticee which will be commensurate with the violation committed by him.

20. The Noticee shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Ms. Pradnya Saravade, Officer on Special Duty, Investigations Department, SEBI, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

21. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **November 18, 2009** **V.S.SUNDARESAN**

Place: **MUMBAI** **ADJUDICATING OFFICER**