BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. AK/AO-1-2/2015]

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

M/s. National Oilwell Varco Inc.

M/s. Plaudler Inc.

In the matter of

M/s. GMM Pfaudler Limited

FACTS OF THE CASE

1. An offer document (letter of offer) was filed by M/s. National Oilwell Varco Inc. **(**Acquirer) along with the persons acting in concert (PAC) M/s. Pfaudler Inc. (hereinafter together referred to as the '**the Acquirers**/ **Noticees/ you'**) to acquire upto 38,00,550 shares of face value of Rs. 2/- each representing 26% of the diluted voting equity share capital of M/s. GMM Pfaudler Limited (hereinafter referred to as **'the company/ target company')**. The public announcement for the same was made on February 22, 2013 and the shares of the Company were listed on Bombay Stock Exchange Ltd. (hereinafter referred to as **'BSE')**.

2. On perusal of the letter of offer, SEBI observed that Noticees in the past had violated the provisions of Regulation 13(2)(e) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, (hereinafter referred to as **'Takeover Regulations, 2011'***)* while making a public announcement to the shareholders of the company**.**

3. Based on the aforesaid information with respect to the violation of Takeover Regulations, 2011, Adjudication proceedings under Chapter VI-A of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **'SEBI Act'**) were initiated against the Noticees under Section 15H (ii) of SEBI Act to inquire into and adjudicate the alleged violation of the provision of Regulation 13(2)(e) of the Takeovers Regulations, 2011.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed as the Adjudicating Officer vide Order dated August 16 2013 under Section 15-I of the SEBI Act read with rule 3 of SEBI Rules to inquire into and adjudge under Section 15H(ii) of the SEBI Act for the alleged violation of Regulation 13(2)(e) of the Takeovers Regulations committed by the Noticees.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notices (hereinafter referred to as **'SCNs'**) Ref. No. EAD-6/AK/VRP/30733/2 and EAD-6/AK/VRP/30733/2013/3, each dated November 28, 2013 were issued to the Noticees under rule 4(1) of SEBI Rules communicating the alleged violations of Takeover Regulations, 2011 by the Noticees.

6. On perusal of the letter of Offer, SEBI observed that there was a Merger Agreement which was entered into by and between M/s. Robbins & Myres, Inc. (hereinafter referred to as the **'RM'**), M/s. Raven Process Crop (hereinafter referred to as the **'Raven'**), a wholly owned subsidiary of Robbins & Myres, Inc (RM) and M/s. National Oilwell Varco Inc. **(**Acquirer). The Merger Agreement was contracted on August 8, 2012 and completed and implemented on February 20, 2013. The Offer was triggered on account of the Merger Agreement, pursuant to which the Noticees acquired the entire

share capital of RM. RM holds the entire share capital of M/s. Robins & Myers Holdings, Inc. (hereinafter referred to as the **'RM Holdings'**), which in turn holds the entire share capital of PAC M/s. Pfaudler Inc., which in turn holds 51% of the voting share capital of the company. The public announcement (hereinafter referred to as the **'PA'**) in respect of the Merger Agreement ought to have been issued within four Working Days from August 8, 2012. However, it was observed that the PA as contemplated under Regulation 13(2)(e) of the Takeover Regulations was actually made on February 22, 2013. Therefore, it was observed that there was delay in making the PA by approx. six and half months. Thus, it was alleged that the Noticees had failed to comply with provisions of Regulation 13(2)(e) of the Takeover Regulations, 2011 within the stipulated time. The Noticees were, therefore, called upon to show cause as to why an inquiry should not be initiated against it and penalty be not imposed under Section 15H(ii) of the SEBI Act for the alleged violation.

7. M/s. J. Sagar Associates (hereinafter referred to as '**the Authorized Representatives/ AR'**) vide letter dated December 26, 2013 on behalf of the Noticee M/s. National Oilwell Varco Inc. informed that the underlying issues in the SCN and the alleged violations contained therein were subject to the Consent Application No. 2753 of 2013 pending with SEBI since April 25, 2013. However, subsequently the ARs vide their email dated March 05, 2014 informed that they had decided not to proceed with the consent settlement. Accordingly, the Consent Application No. 2753 of 2013 was disposed as withdrawn. The SCN sent to the Noticee M/s. Pfaudler Inc. at 2711, Centervilla Road, Suite 400, City of Wilmington 19808, County of New Castle, United States of America (USA) address was returned undelivered. Subsequent to the same, the SCN was sent at the alternate address provided by the company viz. 1209, Orange Street, Wilmington, County of New Castle 19801 and was delivered to the Noticee M/s. Pfaudler Inc.

8. The ARs on behalf of the Noticees M/s. National Oilwell Varco Inc**.** (hereinafter referred to as '**Noticee No. 1'**) and M/s. Pfaudler Inc. (hereinafter referred to as **'Noticee No. 2'**) vide letter dated March 25, 2014 *inter alia* submitted as follows:

8.1. That the target Company is a subsidiary of Noticee No.2;

8.2. That Noticee No. 2 is a company incorporated in the United State of America (USA), which holds equity share constituting 52.06% of the voting share capital of the Target Company. Out of 52.06%, Noticee No.2 already held 51% of the total voting share capital of the Target Company prior to the Offer;

8.3. That Robbins & Myers Holdings, Inc, a company incorporated in the United States of America is the holding company of the Noticee No.2. Robbins & Myers Inc, a Company incorporated in the United State of America is the holding company of Robbins & Myers Holdings, Inc;.

*8.4. That Noticee No.1 had entered into an agreement inter-alia with Robbins & Myers Inc. on August 8, 2012 for the acquisition of the entire share capital of Robbins & Myers, Inc ('**Underlying Agreement').** As on February 20, 2013 the transactions contemplated under the Underlying Agreement were completed and accordingly the Noticee No. 1 became the holding company of Robbins & Myers, Inc, which in turn would continue to be the holding company of the Noticee No. 2 through Robbins & Myers Holdings, Inc. Therefore Noticee No.1 had indirectly acquired 51% of the voting share capital of the Target Company held by Noticee No.2;*

*8.5. That the transaction under the Underlying Agreement ('**Transaction'**), thus, constituted an indirect acquisition by Noticee No. 1 of 51% of the voting rights held by Noticee No. 2 in the Target Company, thereby triggering an obligation to make an Offer under Regulations 3(1) and 4 read with Regulation 5(1) of the Takeover Regulations, 2011;*

*8.6. That the Underlying Agreement was contracted on August 8, 2012 ('**Contracted date**') and closed on February 20, 2013. The Underlying Agreement was intimated to the Target Company, which in turn, intimated to BSE on August 23, 2012. A formal public announcement was made by the Noticees on February 21, 2013;*

8.7. That all compliance obligations under the Takeover Regulations, 2011 relating to the Offer were made on time including the public dissemination of the underlying transaction through the Target Company. Therefore, the only question is whether the form and manner was non-compliant;

8.8. That the detailed public announcement for the Offer was published on February 27, 2013 in terms of Regulation 13(4) of the Takeover Regulations, 2011;

8.9. That in the instant case, the public announcement for the Offer was required to be made within 4 working days from the Contracted Date i.e. August 14, 2012. On August 23, 2012, the Underlying Agreement was intimated to the Target Company, which in turn intimated BSE about the Transaction and consequently, such information was in the public domain on August 23, 2012. Accordingly,

there was a delay of 5 working days in informing the public about the proposed transaction;

8.10. *That though the intimation made by the Target Company to the stock exchanges was not in the specific format of the public announcement, but, the intent and spirit of mandatory public announcement was complied with by disclosing the information about the Underlying Agreement to the public on August 23, 2012 through the Target Company;*

8.11. *That the Offer was an indirect offer in terms of Regulation 5 of the Takeover Regulations. As such the detailed public statement in case of indirect offers is required to be published only once the underlying transaction is completed. In light of this, it is submitted that the technical delay in making the formal public announcement under Regulation 13(2) (e) is of no material consequence. That since the underlying intent of making a public announcement was fulfilled by intimating to BSE on August 23, 2012, the delayed public announcement made on February 21, 2013 was merely a procedural formality and as such the delay in such formality must not be viewed as anything but a venial and technical lapse. Thus, the Offer was indeed implemented in full and formal compliance with the prescribed timelines and the imposition of a penalty is not warranted given that the Underlying Agreement was disclosed to the public months before the public announcement in prescribed format was made by the Noticees;*

8.12. *That there is no question of any gain or advantage that has accrued to the Noticees, no loss has been caused to any investor as a result of the delayed disclosures of the acquisition and there have been no instances in past where any regulatory action has been initiated against the Noticees;*

8.13. *That the **Hon'ble Supreme Court in Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar (AIR 1994 SC 1728)** has observed that "There is nothing in Regulation 18 to indicate that without strict compliance with some rigidly prescribed from, the transaction must fail to achieve its purpose. The subservience of substance of a transaction to some rigidly prescribed form required to be meticulously observed, savors of archaic and outmoded jurisprudence.";*

8.14. *That in the past, SEBI had taken a lenient view in similar cases i.e. cases where there was a delay in the making of a public announcement, but, other aspects of the offer were in compliance with the Takeover Regulations;*

8.15. *That in **Re. Suresh Kumar Poddar**, the Adjudicating Officer by its Order dated February 11, 2009 had levied a penalty of Rs. 50,000 for delay of 8 years in making a public announcement. Moreover, there was lapse in making of 3 public announcements for 3 different acquisitions and a combined public announcement was made after a lapse of 8 years from the trigger dates. However, since there was no loss to investors, the same was taken into account in levying the penalty;*

8.16. *That rather than the form, the essence of a provision must be taken into account and as such in the instant case, the purpose of the Regulation had been adequately served;*

8.17. That the Noticees did not gain any unfair advantage, nor, was there any case of an investor-grievance. The conduct of the Noticees has always been in the interest of investors.

9. Vide their aforesaid reply dated March 25, 2014, the Noticees *inter alia* also requested for an opportunity of personal hearing so as to explain the entire background and the facts at hand and provide more perspective behind the role and conduct of the Noticees to demonstrate that no regulatory intervention at all is warranted. Accordingly, an opportunity of hearing was granted to the Noticees on May 28, 2014 vide hearing notice dated May 13, 2014 in the interest of natural justice and in terms of rule 4(3) of the SEBI Rules. The ARs appeared on behalf of the Noticees and reiterated the submissions made vide reply dated March 25, 2014. Further the ARs referred to the following Orders issued by the Adjudication Officers in cases involving delay in making public announcement:

9.1. ***Adjudication Order dated January 20, 2014 in respect of Mr. Vilas Valunji & Ors. in the matter of M/s. Vybra Automet Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 5,00,000/- for violation of Regulation 14(1) of* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, (hereinafter referred to as **'Takeover Regulations, 1997'***);*

9.2. ***Adjudication Order dated January 11, 2013 in respect of Ms. Sonal Somani in the matter M/s. Hasti Finance Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 6,00,000/- for violation of Regulation 11(1) read with 14(2) of Takeover Regulations, 1997;*

9.3. ***Adjudication Order dated August 23, 2012 in respect of Mr. Paresh Vasani in the matter M/s. Circuit Systems (India) Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 50,000/- for violation of Regulation 10 read with 14 of Takeover Regulations, 1997;*

9.4. ***Adjudication Order dated July 19, 2010 in respect of M/s. Hyderabad Bottling in the matter M/s. Kakatiya Industries Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 5,00,000/- for violation of Regulation 11(1) read with 14(1) of Takeover Regulations, 1997;*

9.5. ***Adjudication Order dated January 15, 2013 in respect of Mr. Bimal Kumar Agarwal in the matter Associated Cereals Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 2,00,000/- for violation of Regulation 11(1) read with 14(2) of Takeover Regulations, 1997;*

9.6. ***Adjudication Order dated February 11, 2009 in respect of Mr. Suresh Kumar Poddar in the matter M/s. Mayur Uniquoters Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 50,000/- for violation of Regulation 11(1) read with 14(1) of Takeover Regulations, 1997;*

9.7. ***Adjudication Order dated March 20, 2014 in respect of M/s. Luharuka Commotrade Pvt. Ltd. in the matter of M/s. Comfort Fincap Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 10,00,000/- for violation of Regulation 10 read with 14(1) of Takeover Regulations, 1997;*

9.8. ***Adjudication Order dated May 31, 2011 in respect of M/s. Surana Industries Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 1,00,000/- for violation of Regulation 11 (2) read with 14(2) of Takeover Regulations, 1997.*

10. The ARs further submitted they would make further submissions regarding the mitigating factors involved in the case. Accordingly, the ARs vide letter dated June 10, 2014 submitted a note on submissions *inter alia* submitting as follows:

10.1. The relevant facts of the matter -

10.1.1. That the Underlying Agreement was executed on August 8, 2012;

10.1.2. That a press release was issued on August 09, 2012 bringing out the transactions in the Underlying Agreement into the public domain;

10.1.3. That the target Company made a public announcement to the stock exchange on August 23, 2012;

10.1.4. On February 20, 2013 the transactions contemplated under the Underlying Agreement were completed;

10.1.5. On February 21, 2013, the Noticee No. 1 made the public announcement in the format specified.

10.2. That the Takeover Regulations, 2011 require that information about an indirect acquisition to be brought into the public domain immediately. This was done by:

10.2.1. Press release of August 9, 2012; and

10.2.2. Statement to the stock exchange by the Target Company on August 23, 2012.

10.3. That the formal announcement in specified format was made on February 21, 2013 by the Acquirer.

10.4. That all other compliances with the Takeover Regulations, in the case of an indirect acquisition not attracting Regulation 5(2) are triggered only upon completion of the Underlying Agreement and full and formal compliance with every requirement was effected;

10.5. That there was nothing to be gained by not making the announcement in the specified form on August 09, 2012, when the entire world was put on notice with a press release on that very date;

10.6. That the Noticees were unaware of the requirement to do so in a specified form by August 16, 2012. They intimated the Target Company instead. The Target Company intimated the stock exchanges on August 23, 2012, which represents substantial compliance since all the contents of the information in the public announcement have been set out in that intimation;

10.7. That there has therefore been substantial compliance with a delay of a mere five working days, that too if the press release of August 9, 2012 is to be fully ignored;

10.8. That on engaging Indian counsel and advisors, the announcement was once again made in the specified format;

10.9. That there was no gain to be made by delaying. Under the Takeover Regulations, 2011 (unlike under the Takeover Regulations, 1997 on the subject) the price computation is to be effected in any event from the date on which the Underlying Agreement is executed and interest is payable thereon at 10%. This was done;

10.10. That there was no loss caused to anyone at all;

10.11. That there was substantial compliance by bringing into the public domain the disclosures required to be contained in the public announcement;

10.12. That the facts of the case are superior to the case of Mr. Suresh Kumar Poddar, in which the Adjudication Officer vide an order dated February 11, 2009 had levied a penalty of Rs. 50,000 (Rupees fifty thousand only) for delay of eight years in making three public announcement;

10.13. That in the case of Mr. Suresh Kumar Poddar, the following were the mitigating factors considered by the Adjudication Officer before passing the Order:

10.13.1. That the public announcement dated January 23, 2006 was made voluntarily by the Acquirers when they came to know that their aforesaid acquisitions have triggered Regulation 11(1) of Takeover Regulations, 1997, in the years 1997, 1998 and 2002;

10.13.2. That all three trigger dates were considered while determining the offer price, and the highest price amongst the three, i.e. 18.85 per share was offered to the shareholders;

10.13.3. That interest at the rate of 15% per annum on the price amounting to Rs. 23.03 per share taking the first trigger date as the base was also paid;

10.13.4. That though the offer was made to acquire 10,00,000 shares representing 20% of the voting share capital of the Acquirers, the

response from the public was only to the extent of 4,09,579 shares representing 8.19% of the voting capital of acquirers;

10.13.5. That there was no change in control of the target company either because of the aforesaid three acquisitions or after the open offer;

10.13.6. That there was no complaint from investors/shareholders for failure to make the open offer;

10.14. That since the delay in substantial compliance in this case is just one day (August 9, 2012 press release) or five working days (Target Company`s announcement of August 23, 2012), no penalty deserves to be imposed. Even if one were to only take the announcement in the specified form made on February 21, 2013 as the benchmark, the delay is merely 6 months and that too only in form (because in substance, compliance had been effected as early as August 2012).

CONSIDERATION OF ISSUES

11. I have carefully perused the written submissions of the Noticees, the submissions made at the hearing and the documents available on record. It is observed that the allegation against the Noticees is that they have failed to make Public Announcement (PA) in terms of Regulation 13(2)(e) of the Takeover Regulations, 2011.

12. The issues that, therefore, arises for consideration in the present case are:

12.1. Whether pursuant to M/s. National Oilwell Varco Inc**.** entering into a merger agreement *inter-alia* with M/s. Robbins & Myers Inc. on August 8, 2012, which resulted in indirect acquisition of 51% of Voting share capital of the Target Company held by M/s. Pfaudler Inc., the Noticees viz. M/s. National Oilwell Varco Inc. **(**Acquirer) along with M/s. Pfaudler Inc. as person acting in concert (PAC) violated the provision of Regulation 13(2)(e) of Takeover Regulations, 2011?

12.2. Does the violation, if any, as aforesaid, attract monetary penalty under Section 15 H(ii) of SEBI Act?

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

FINDINGS

13. Before moving forward, it is pertinent to refer to the provisions of Regulations 3(1), 4 and 5(1) read with Regulation 13(2)(e) the takeover Regulation, which reads as under:

Substantial acquisition of shares or voting rights.
3. (1) No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these Regulations.

Acquisition of control.
4. Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these Regulations.

Indirect acquisition of shares or control.
5. (1) For the purposes of Regulation 3 and Regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these Regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company.
(2)----------
Timing.
13. (1) The public announcement referred to in Regulation 3 and Regulation 4 ***shall be made in accordance with Regulation 14 and Regulation 15****, on the date of agreeing to acquire shares or voting rights in, or control over the target company.*

(2) Such public announcement,—

a) .....
b) .....
c) .....
d) .....
e) in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-Regulation (2) of Regulation 5 are met, may be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the

date on which the intention or the decision to make the primary acquisition is announced in the public domain;

f) *.....*

14. The first issue for consideration is whether the Noticees viz. M/s. National Oilwell Varco Inc **(**Acquirer) along with M/s. Pfaudler Inc. as person acting in concert (PAC) were required to make Public Announcement under Regulation 13(2)(e) of Takeover Regulations, 2011 due to the indirect acquisition of shares of the target company through merger agreement entered into on August 8, 2012 by M/s. National Oilwell Varco Inc**.** *inter-alia* with Robbins & Myers Inc.

15. Under Regulation 3(1) of Takeover Regulations, 2011, no acquirer, together with persons acting in concert with him, can acquire twenty-five per cent or more of the shares or voting rights in a target company, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with the Regulations. Also, I note that under Regulation 4 of the Takeover Regulations, 2011, no acquirer can acquire, directly or indirectly, control over a target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with the Regulations. Further, as per Regulation 5(1) of the Takeover Regulations, 2011, for the purposes of Regulation 3 and Regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under the Regulations, is considered as an indirect acquisition of shares or voting rights in, or control over the target company.

16. I note from the submissions made before me that the target Company is a subsidiary of M/s. Pfaudler Inc., a company incorporated in the United State of America (USA), and

which already held 51% of the total voting share capital of the Target Company prior to the Offer. Further that M/s. Robbins & Myers Holdings, Inc, a company incorporated in the United State of America is the holding company of M/s. Pfaudler Inc. And M/s. Robbins & Myers Inc, again a Company incorporated in the United State of America, in turn, is the holding company of M/s. Robbins & Myers Holdings, Inc. Hence, when M/s. National Oilwell Varco Inc**.** entered into an agreement with M/s. Robbins & Myers Inc. on August 8, 2012 for the acquisition of the entire share capital of M/s. Robbins & Myers Inc., it has resulted in an indirect acquisition of the target company since M/s. Pfaudler Inc., a 100% subsidiary of Robbins & Myers Inc. held 51% of the target company.

17. I further note that under Regulation 13(2)(e) of the Takeover Regulations, 2011, in case of indirect acquisition of shares or voting rights in, or control over the target company, where none of the parameters referred to in sub-Regulation (2) of Regulation 5 are met, the public announcement referred to in Regulation 3 and Regulation 4 is required to be made in accordance with Regulation 14 and Regulation 15 of the Takeover Regulations, 2011 at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain.

18. I note from the letter of Offer that the parameters referred to in sub-Regulation (2) of Regulation 5 were not met. It is further noted from the submissions made by the AR on behalf of the Noticees vide letter dated March 25, 2014 and from a perusal of the copy of the formal public announcement made by the Noticees on February 21, 2013 that the Underlying Agreement was contracted on August 8, 2012. Further from the copy of the press release issued by Robbins & Myers and annexed to the aforesaid reply, it is noted that the press release was issued on August 09, 2012 bringing out the intention or the decision to make the primary acquisition into the public domain. The public announcement under Regulation 13(2)(e) with respect to the indirect acquisition of the

shares of the target company by the Noticees was required to be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted *i.e. August 08, 2012* and the date on which the intention or the decision to make the primary acquisition is announced in the public domain *i.e. August 09, 2012*. Thus, it is observed that the public announcement was required to be made by the Noticees within 4 working days from the Contracted Date August 08, 2012 i.e. by August 14, 2012.

19. The AR on behalf of the Noticees have submitted that on August 23, 2012, the Underlying Agreement was intimated to the Target Company, which in turn, intimated BSE about the transaction, hence, there was a delay of 5 working days in informing the public about the proposed transaction. I note from the documents annexed to the written submissions dated March 25, 2014 that the company informed BSE vide letter dated August 23, 2012 regarding the press release received from Robbins & Myers Inc. informing that Robbins & Myers Inc. and National Oilwell Varco Inc**.** had entered into an agreement for the acquisition of the entire share capital of Robbins & Myers Inc.

20. The AR on behalf of the Noticees vide the aforesaid letter has *inter alia* further stated that though the intimation made by the Target Company to the stock exchanges was not in the specific format of the public announcement, but, the intent and spirit of mandatory public announcement was complied with by disclosing the information about the Underlying Agreement to the public on August 23, 2012 through the Target Company.

21. Firstly, though the word *'public announcement'* has not been defined in the Takeover Regulations, however, it has a specific connotation and cannot mean a mere intimation of acquisition to the general public. I note that as per Regulation 13(1) of the Takeover Regulations, 2011, the public announcement referred to in Regulation 3 and Regulation 4 is required to be in accordance with Regulation 14 and Regulation 15. Under Regulation 15(1), the contents of such public announcement have been described which

inter alia includes offer size, offer price, mode of payment of consideration, conditions as to minimum level of acceptances, if any, etc.

22. Hence, I note from the above that the public announcement as per Regulation 13(2)(e) of the Takeover Regulations, 2011 is the announcement of the open offer by the acquirer, primarily disclosing his intention to acquire shares of the target company from the existing shareholders, thereby giving an opportunity of exit to the public shareholders at a specified price during a specified time and not a mere intimation of acquisition to the general public. For any delay, the acquirer is required to pay interest on the amount. The shareholders may, on the basis of the disclosures contained therein and in the letter of offer, either continue with the target company or decide to exit from it.

23. I further note from a perusal of the letter dated August 23, 2012 sent by the target company to BSE that the same was disclosure made by the target company under clause 36(7) of the listing agreement and not public announcement referred to under the Takeover Regulations, 2011. Further from the copy of the said letter dated August 23, 2012 sent by the target company to BSE, it is noted that the intimation to the stock exchange about the acquisition too was not by the acquirer, but, by the target company. Further the disclosure as such by the target company under clause 36(7) of the listing agreement, in turn, too was based on communication from M/s. Robbins & Myers Inc. and not from the acquirers. I note here that as regards acquisition of control, Regulation 4 of Takeover Regulations, 2011 states that no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these Regulations. Thus, I note that the Takeover Regulations in the first place has put the onus of public announcement on the acquirer, and not on the target company, and rightly so, as public announcement does not merely involve intimation of acquisition to the public shareholders, but, an announcement of open offer by the acquirer for acquiring shares disclosing the size of the offer, the offer price,

mode of payment of consideration, conditions as to minimum level of acceptances, if any, etc.

24. From the BSE website, I note that it was only on February 22, 2013 that M/s. National Oilwell Varco, Inc. (Acquirer) and M/s. Pfaudler Inc., in its capacity as a *person acting in concert* (hereinafter referred to as 'PAC') with the Acquirer had *inter alia* informed to the equity shareholders of the target company viz. GMM Pfaudler Ltd., about the acquisition of 38,00,550 fully paid up equity shares of face value of Rs. 2/- each, representing 26% of the fully diluted voting equity share capital of the Target Company, under Regulations 3(1) and 4 read with Regulation 5(1) of the Takeover Regulations, 2011. Besides, I note that the letter of offer also *inter alia* states that the public announcement as contemplated under Regulation 13(2)(e) of the Takeover Regulations was actually made on February 22, 2013.

25. Thus, it is concluded that the Noticees M/s. National Oilwell Varco, Inc. as the acquirer and M/s. Pfaudler Inc., as PAC with the acquirers, for the first time made the public announcement about the indirect acquisition only on February 22, 2013. I further note that the AR on behalf of the Noticees vide letters dated March 25, 2014 and June 10, 2014 have admitted that the acquirer made the public announcement on February 21, 2013. In view of all of the above, I conclude that the Noticees violated the provision of Regulation 13 (2) (e) of the Takeover Regulation, 2011 and there was a delay in making the public announcement by approx. six and half months even going by the admission made by the Noticees.

26. I note further that where the acquirers had altogether failed to make any public announcement or made such announcement with a delay, SEBI has been consistently directing such acquirers to make public announcements and pay interest for the delayed period. However, I also note that together with the same, SEBI has been further been taking a consistent stand of initiating adjudication proceedings under Section 15 H(ii) of the SEBI Act in such cases after the completion of the open offers. It may be pertinent to

note here that payment of interest is the compensation paid to the shareholders due to their losing an exit opportunity at the right time and is not a penalty on the acquirers. Some of such cases are listed below:

26.1. ***M/s. Titan International Inc.*:** M/s. Titan International Inc., as a result of a overseas offer had indirectly triggered Regulation 13 (2) (e) of SEBI (Substantial Acquisition of Shares and Takeover), Regulations, 2011 (hereinafter referred to as '**Takeover Regulations, 2011'**), with respect to its holding in the target company M/s. Wheels India Ltd., and that by virtue of the same, M/s. Titan International Inc. was obliged to make a public announcement of an open offer on or before August 17, 2012, but, it was actually made only on December 13, 2012. The price offered to the public shareholders of M/s. Wheels India Ltd. pursuant to the open offer made on December 13, 2012 had factored in the interest component payable on the offer price for the period of delay. Subsequent to the same, I find that M/s. Titan International Inc. vide its letter dated February 04, 2013 had made an application in terms of SEBI Circular No. EFD/ED/Cir-1/2007 dated April 20, 2007 and amendment to the said circular dated May 25, 2012, proposing to settle through a consent order, any anticipated proceedings for the delay in compliance of the provisions of Regulation 13(2)(e) of Takeover Regulations, 2011. The same was settled vide Consent Order dated September 12, 2013.

26.2. ***Mr. Vilas Valunji, Mr. Partha Debnath and Mr. Janardhan Shriniwas Purandare in the matter of M/s. Vybra Automet Ltd*.:** In this case, I note that the acquirer Mr. Vilas Valunji along with the persons acting in concert Mr. Partha Debnath and Mr. Janardhan Shriniwas Purandare held 14.49% of the paid-up capital of M/s. Vybra Automet Ltd. (hereinafter referred to as VAL). They entered into a Share Purchase Agreement with the promoters of VAL on April 02, 2010 to acquire 13.89% of the paid up capital of VAL, thereby triggering Regulation 14(1) of SEBI (Substantial Acquisition of Shares and Takeover), Regulations, 2011 (hereinafter referred to as '**Takeover Regulations, 1997'**). The public announcement to acquire 20% of the voting share capital of VAL was made on May 10, 2010 i.e. with a delay of 32 days and interest @ 10% p.a. was paid.

Subsequent to the same vide Order dated June 27, 2013, adjudication proceedings under Section 15 H (ii) of the SEBI Act for the alleged violation of Regulation 14(1) of the Takeover Regulations were initiated against the acquirers.

27. In the extant matter, I find that the Offer Price of the Open Offer made to the shareholders of the target company by M/s. National Oilwell Varco Inc. as the acquirer and M/s. Pfaudler Inc., as PAC with the acquirers, had been enhanced by an interest component of Rs. 4.67 per equity share, which was calculated from August 8, 2012 and February 27, 2013, being the date of the detailed public statement in relation to the Offer.

28. In view of all of the above, I am convinced that it is a fit case for imposing monetary penalty under section 15H(ii) of SEBI Act, 1992. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".* Further in the matter of Ranjan Varghese v. SEBI (Appeal No. 177 of 2009 and Order dated April 08, 2010), the Hon'ble SAT had observed *"Once it is established that the mandatory provisions of Takeover Code was violated the penalty must follow*.

29. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15H(ii) of the SEBI Act on the Noticees for the contravention of Regulation 13(2)(e) of the Takeover Regulations, 2011, which reads as under:

"Penalty for non-disclosure of acquisition of shares and takeovers

15H. *If any person, who is required under this Act or any rules or Regulations made thereunder, fails to-*

(i) …….

(ii) make a public announcement to acquire shares at a minimum price; or

(iii) ……..

(iv) ……..

he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher."

30. While determining the quantum of monetary penalty under Section 15H(ii), I have considered the factors stipulated in Section 15-J 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."

31. In view of the charges as established, the facts and circumstances of the case and the judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the factors referred in Section 15-J of SEBI Act and stated as above. Under Section 15-I of the SEBI Act, the adjudicating officer has to give due regard to certain factors which have been stated as above while adjudging the quantum of penalty. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of violation by the Noticees. Further from the material available on record, it is not possible to ascertain the exact monetary loss to the investors on account of such violation by the Noticee. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. Thus, the cornerstone of the Takeover Regulations is investor protection.

32. The ARs have *inter alia* submitted that there is neither any gain nor advantage that has accrued to the Noticees, nor, any loss that was caused to any investor as a result of the delayed disclosures of the acquisition. In this context, I note that ***the Hon'ble Securities Appellate Tribunal (SAT) in the matter of Komal Nahata Vs. SEBI (Date of judgment- January 27, 2014)*** has observed that:

"Argument that no investor has suffered on account of non disclosure and that the AO has not considered the mitigating factors set out under Section 15J of SEBI Act, 1992 is without any merit because firstly penalty for non compliance of SAST Regulations, 1997 and PIT Regulations, 1992 is not dependent upon the investors actually suffering on account of such non disclosure."

33. The AR has also submitted that the Noticees did not gain any unfair advantage, nor, was there any case of an investor-grievance. In the matter, I note that in ***Appeal No. 78 of 2014 of Akriti Global Traders Ltd. Vs. SEBI, the Hon'ble Securities Appellate Tribunal (SAT) vide Order dated September 30, 2014*** *has observed that:*

"… Argument of appellant that the delay was unintentional and that the appellant has not gained from such delay and therefore penalty ought not to have been imposed is without any merit, because, firstly, penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay"

In view of the same, the argument put forth by the Noticees that they have not caused any loss to any investor, nor, gained any unfair advantage is not relevant for the given case.

34. I, however, note here that the proposed size of the open offer made by the Noticees to the equity shareholders of M/s. GMM Pfaudler Ltd. (the target company) was Rs. 33,65,38,720.50 *(38,00,550 shares representing 26% of the fully diluted voting share capital at a price of Rs. 88.55)* and the delay in making the public announcement was for by *approx. six and half months.* I find that this delay in making the public announcement

by the Noticees has resulted in denying the statutory right of the shareholders of the target company to exit through open offer mechanism at the respective point of time.

35. I find that Section 15 H(ii) of SEBI Act provides for imposition of monetary penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher, if any person, who is required under the Act or any rules or regulations made there under, fails to make a public announcement to acquire shares at a minimum price. The term 'fails' includes failure to make the public announcement within the stipulated time and thus includes delayed announcement made, if any. Here I find it necessary to look for the meaning of the words which the Parliament has used in the enactment and give fair and reasonable interpretation to the text.

36. In the context, I find that the Hon'ble Supreme Court of India in K. P. Verghese Vs. Income Tax Officer, Ernakulam & another (1981) 3 SCC 173 observed as under while dealing with interpretation on statutory provisions:

"*The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed by Lord Denning, it would be idle to expect every statutory provision to be drafted with devine prescience and perfect clarity. We can do no better than to repeat the famous words of Judge Learned Hand when he said:*

..."it is true that the words used, in another literal sense, are the primary and ordinarily less reliable source of interpreting and meaning of any writing; be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"

37. Further I note that the ARs on behalf of the Noticees have relied upon the following Orders issued by the Adjudication Officers in cases involving delay in making public announcement:

37.1. ***Adjudication Order dated January 20, 2014 in respect of Mr. Vilas Valunji & Ors. in the matter of M/s. Vybra Automet Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 5,00,000/- for violation of Regulation 14(1) of Takeover Regulations, 1997;*

- On perusal of the said Adjudicating Order, I note that in this case the acquirer Mr. Vilas Valunji along with the persons acting in concert Mr. Partha Debnath and Mr. Janardhan Shriniwas Purandare held 14.49% of the paid-up capital of M/s. Vybra Automet Ltd. (hereinafter referred to as VAL). They entered into a Share Purchase Agreement with the promoters of VAL on April 02, 2010 to acquire 13.89% of the paid up capital of VAL, thereby triggering Regulation 14(1) of Takeover Regulation, 1997 and the Public Announcement was made with a delay of 32 days, wherein the Adjudicating Officer had imposed a penalty of Rs. 5 lacs based on the facts and circumstances of the said case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC and the delay in making the public announcement is of approx. six and half months.

37.2. ***Adjudication Order dated January 11, 2013 in respect of Ms. Sonal Somani in the matter M/s. Hasti Finance Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 6,00,000/- for violation of Regulation 11(1) read with 14(2) of Takeover Regulations, 1997;*

- On perusal of the said Adjudicating Order, I note that the said case pertains to the alleged violation of Regulation 11(1) read with 14(2) of Takeover Regulation, 1997, whereby promoters holding had gone up from 28.15% to 37.13% pursuant to Ms. Somal Somani, one of the promoters of M/s. Hasti Finance Ltd. acquiring 14,40,000 equity shares of M/s. Hasti Finance Ltd. pursuant to conversion of warrants into

equity shares, which entitled the promoter to exercise more than 5% of the voting rights in a financial year and the Adjudicating Officer had imposed a penalty of Rs. 6 lacs based on the facts and circumstances of the said case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

37.3. ***Adjudication Order dated August 23, 2012 in respect of Mr. Paresh Vasani in the matter M/s. Circuit Systems (India) Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 50,000/- for violation of Regulation 10 read with 14 of Takeover Regulations, 1997;*

- On perusal of the said Adjudicating Order, I note that Mr. Paresh Vasani was the promoter of M/s. Circuit Systems (India) Ltd. and was allotted 20,00,000 shares by way of preferential allotment on March 31, 2010, due to which the shareholding of Mr. Paresh Vasani had increased from 5.40% to 16.87% of the paid-up capital, hence by virtue of the said acquisition, he had triggered Regulation 10 read with 14(1) of the Takeover Regulation and the Adjudicating Officer had imposed a penalty of Rs. 50,000/- based on the facts and circumstances of the said case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

37.4. ***Adjudication Order dated July 19, 2010 in respect of M/s. Hyderabad Bottling Company Ltd. in the matter M/s. Kakatiya Industries Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 5,00,000/- for violation of Regulation 11(1) read with 14(1) of Takeover Regulations, 1997;*

- On perusal of the said Adjudicating Order, I note that M/s. Hyderabad Bottling Company Ltd. (hereinafter referred to as **'HBCL')** as a promoter group company of Kakatiya Textiles Ltd. (hereinafter referred to as **'KTL'**) had failed to make public

announcement when the voting rights held by HBCL in KTL increased from 16.30% to 55.16% during January 2002, due to allotment of preference shares and subsequent accretion of voting rights , thereby resulting in violating the provisions of Regulation 11(1) read with Regulation 14(1) of Takeover Regulation, 1997 by HBCL. I further note that prior to amendment of SEBI Act w.e.f. October 29, 2002, the maximum penalty under Section 15H(ii) of SEBI Act for failure to make a public announcement to acquire shares at a minimum price could not exceed Rs. 5 lacs and it is this maximum penalty of Rs. 5 lacs prevalent at the relevant point of time that has been imposed by the Adjudicating Officer for failure to make public announcement.

37.5. ***Adjudication Order dated January 15, 2013 in respect of Mr. Bimal Kumar Agarwal in the matter M/s. Associated Cereals Ltd. wherein the Adjudicating Officer had imposed a penalty of Rs. 2,00,000/-*** *for violation of Regulation 11(1) read with 14(2) of Takeover Regulations, 1997;*

- On perusal of the said Adjudicating Order, I note that in the matter of M/s. Associated Cereals Ltd. (hereinafter referred to as **'ACL'**), the shareholding of Mr. Bimal Kumar Agarwal had increased from 0.17% to 4.133% due to *inter-se* transfer of 10,000 shares (4.17%), whereby he had acquired more than 2% of the voting rights, and hence, was required to make public announcement within four days which he had failed to do. I further note that Shri Bimal Kumar Agarwal had acquired the shares through *inter se* transfer on June 30, 1997 i.e. just a few months after the notification of Takeover Regulations in February 20, 1997. Besides, when the Takeover Regulations came into existence, the creeping acquisition limit was set at 2% of the voting rights, which was substituted by 5% by SAST (Amendment) Regulations, 1998 with effect from October 1998 and later substituted to 10% by SAST (Amendment) Regulations, 2002 with effect from October 2002. The Adjudicating Officer had imposed a penalty of Rs. 2,00,000/- based on the facts and circumstances of the said case. The facts and circumstances

of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

37.6. ***Adjudication Order dated February 11, 2009 in respect of Mr. Suresh Kumar Poddar in the matter M/s. Mayur Uniquoters Ltd.*** *wherein the Adjudicating Officer had imposed a penalty of Rs. 50,000/- for violation of Regulation 11(1) read with 14(1) of Takeover Regulations, 1997;*

- In the case of Mr. Suresh Kumar Poddar, I note that the public announcement dated January 23, 2006 was made voluntarily by the Acquirers when they came to know that their acquisitions had triggered Regulation 11(1) of the Takeover Regulations in the years 1997, 1998 and 2002. Adjudication proceedings were, however, initiated vide Order dated May 02, 2006 against the acquirers under Section 15H (ii) of the SEBI Act for the alleged violation of Regulation 11(1) read with 14(1) of the Takeover Regulations committed by the acquirers. In the said case, however, there was no change of control either because of the three acquisitions or after the open offer. The Adjudicating Officer had imposed a penalty of Rs. 50,000/- based on the facts and circumstances of the said case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

37.7. ***Adjudication Order dated March 20, 2014 in respect of M/s. Luharuka Commotrade Pvt. Ltd. in the matter of M/s. Comfort Fincap Ltd. wherein the Adjudicating Officer had imposed a penalty of Rs. 10,00,000/-*** *for violation of Regulation 10 read with 14(1) of Takeover Regulations, 1997;*

- In the matter of M/s. Comfort Fincap Ltd., I note that M/s. Luharuka Commotrade Pvt. Ltd., who was a part of the promoter group of the company, had acquired 36,68,500 shares through preferential allotment on March 14, 2011 consequent to which the shareholding of M/s. Luharuka Commotrade Pvt. Ltd. had individually

increased from 0% to 45.65%, thereby triggering Regulation 10 read with Regulation 14(1) of Takeover Regulations, 1997, whereby the Adjudicating Officer had imposed a penalty of Rs. 10 lacs based on the facts and circumstances of the case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

37.8. ***Adjudication Order dated May 31, 2011 in respect of M/s. Surana Industries Ltd.(hereinafter referred to as 'SIL') wherein the Adjudicating Officer had imposed a penalty of Rs. 1,00,000/-*** *for violation of Regulation 11 (2) read with 14(2) of Takeover Regulations, 1997;*

- I note that the Noticees of the said case viz. Shri G.R. Surana, Ms. Alka Surana, Shri Vijayraj Surana, Shri Shantilal Surana, Ms. Vasantha Surana, Ms. Saraladevi Surana, Shri Dineshchand Surana and Ms. Chandanbala Surana (hereinafter referred to as **'Noticees of SIL'**) were the promoters and collectively holding 64.85% of the total equity capital of the target company before February 28, 2010. All of them were allotted 8,75,000 shares each of SIL on February 28, 2010 upon conversion of warrants allotted to them on August 29, 2008, thereby their total shareholding had increased to 71.28%, thus, triggering Regulation 11(2) read with Regulation 14(2) of the Takeover Regulations, 1997. The Noticees of SIL were required to make public announcement by February 23, 2010, whereas they made public announcement only on June 26, 2010 i.e. with a delay of approx. four months. In the matter, the Adjudicating Officer had imposed a penalty of Rs. 1 lac on each of the 8 promoter notices of SIL based on the facts and circumstances of the case. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC and the delay in making the public announcement is of approx. six and half months.

38. Further, as regards the matters referred to by the Noticees as above, I note that nothing is brought on record to show that facts in the so referred cases are similar to the facts in the extant case, except that the said cases too involve delay in making public announcement. However, I note that circumstances and the facts of the said eight cases referred by the AR are otherwise different to the facts of the extant case as has been brought out above in detail. Further, I note that the penalties that have been imposed in the said eight cases, in itself, range from Rs. 50,000/- to Rs. 10 lacs based on the facts and circumstances of each case.

39. I note further that the AR has submitted that in the past, SEBI had taken a lenient view in similar cases i.e. cases where there was a delay in the making of a public announcement, but, other aspects of the offer were in compliance with the Takeover Regulations. In the matter, I note here that the AR has again highlighted that the facts of the extant case are superior to the case of Mr. Suresh Kumar Poddar in the matter M/s. Mayur Uniquoters Ltd., wherein there was lapse in making of 3 public announcements for 3 different acquisitions and a combined public announcement was made after a lapse of 8 years from the trigger dates, and the Adjudicating Officer had imposed a penalty of Rs. 50,000/- for violation of Regulation 11(1) read with 14(1) of Takeover Regulations, 1997. As has been already brought out in the preceding para, in the said case, I note that the Adjudicating Officer had considered the fact that there was no change in the control of the target company either because of the three acquisitions in the years 1997, 1998 and 2002 or after the open offer, as one of the mitigating factors in addition to other facts and circumstances of the said case, while deciding the quantum of penalty. The facts and circumstances of the extant case are different and involve indirect acquisition by the acquirer of control over the Target Company and 51% voting share capital held by the PAC.

40. Also, assuming that lower penalty has been imposed based on the facts and circumstances of that case, it does not automatically imply that same lower penalty need to be imposed in the extant case. The determination of penalty in the extant case

would depend upon the facts and circumstances of the extant case. In the matter, I would like to refer to the ***Order of the Hon'ble Securities Appellate Tribunal (SAT) in the matter of Hybrid Financial Services Limited Vs. SEBI (Appeal No.119 of 2014 and Order dated June 12, 2014)***, wherein SAT had observed as follows:

"……. argument that penalty imposed on appellant is excessive compared to penalty imposed in the case of M/s. Kamalakshi Finance Corporation Ltd. (supra) and Gupta Carpet International Ltd. is also without any merit, because, firstly, nothing is brought on record to show that facts in that case are similar to the facts in the present case. Secondly, assuming that excessive relief is granted by SEBI in some cases, it does not mean that in all other cases similar reliefs should be granted especially when the Regulations prescribe stringent action for non compliance of disclosure provisions which are mandatory….."

41. In view of the same, I conclude that the aforesaid orders of the Adjudicating Officers referred to by the AR cannot become the yardstick for imposing penalty in the extant case. Besides, it is well established rule of law that the decision of one court is not binding on another court of same judicature. In the case ***of N.R. Papers and Board Ltd. vs. Dy. CIT (1998) 234 ITR 733 (Guj)***, the Court has observed that:

"decisions of other High Courts have great persuasive value, but, if it becomes impossible to agree with, or, if there are no reasons and only pronouncement of legal principles, the court is free to give its own reasons not coinciding with conclusion reached by another court in graphic language. It is said that the decisions of any High Court are after all not intended to be gag order for other High Courts and do not have the effect of freezing judicial thinking on the points covered by them".

41.1. In case, however, comparisons based on past precedents are to be made, I find that the extant case is more akin to the case of M/s. Titan International Inc., wherein M/s. Titan International Inc. as a result of a overseas offer had indirectly triggered

Regulation 13 (2) (e) of Takeover Regulations, 2011 with respect to its holding in the target company M/s. Wheels India Ltd., and that by virtue of the same, M/s. Titan International Inc. was obliged to make a public announcement of an open offer on or before August 17, 2012, but, had actually made the same only on December 13, 2012, i.e. with a delay of almost four months. I find that M/s. Titan International Inc. had settled any anticipated proceedings for the delay in compliance of the provisions of Regulation 13(2)(e) of the Takeover Regulations, 2011 by remitting a sum of Rs. 19,31,340/- towards the settlement charges.

42. Further, I find that the ARs have also referred to the ***Order of the Hon'ble Supreme Court in Vasudev Ramchandra Shelat v. Pranlal Jayanand Thakar (AIR 1994 SC 1728),*** wherein the Court has observed that:

"There is nothing in Regulation 18 to indicate that without strict compliance with some rigidly prescribed form, the transaction must fail to achieve its purpose. The subservience of substance of a transaction to some rigidly prescribed form required to be meticulously observed, savors of archaic and outmoded jurisprudence."

43. From perusal of the said judgment relied upon by the Noticee, I note that the case referred above deals with respect to transfer of property rights in shares under the Companies Act and the Transfer of Property Act and not under the SEBI Act. Even otherwise, while making comparisons, I find that the context in which the above has been observed by the Court needs to be looked into. It has been brought out that in case of a gift, the more general provision of regulation which states as follows will apply–

the instrument of transfer of any share in the company shall be executed by or on behalf of both the transferor and transferee. The transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

44. In the said case, I find that the Court noted that both the donor and the donee had signed the gift deed document under two headings respectively: *"giver of the gift"* and *"accepter of the gift".* Hence the Court observed that since the broadly indicated requirements of the regulation were also complied with by the contents of the gift deed, it is immaterial that the gift deed deals with a number of items so long as the requirements of regulation 18 are fulfilled.

45. Unlike the same in the extant case, I note that since the primary objective of the public announcement to be made under Regulation 13(2)(e) of the Takeover Regulations, 2011 i.e. giving an opportunity of exit to the public shareholders of the company at a specified price during a specified time was not fulfilled by the Noticees, it cannot be argued that the broadly indicated requirements of the Takeover Regulations, 2011 were complied with in view of the target company making disclosure to the stock exchange under clause 36(7) of the listing agreement. In fact, it has been brought out in detail in the preceding paras of the Order as to how disclosure made by the target company to the stock exchange under clause 36(7) of the listing agreement cannot serve the objective of public announcement to be made by the acquirer under Regulation 13(2)(e) of the Takeover Regulations, 2011. Thus, I note that the facts of the aforesaid case of *Vasudev Ramchandra Shelat Vs. Pranlal Jayanand Thakar* referred by the AR too are not comparable with the facts of the extant case, and it stands established that the Noticees M/s. National Oilwell Varco Inc. as the acquirer and M/s. Pfaudler Inc., as PAC with the acquirers for the first time made the public announcement about the indirect acquisition only on February 22, 2013 i.e. with a delay of approx. six and half months.

46. I note that the shareholders are entitled to receive interest for the delay involved in receiving the payment of the consideration amount, for the period from the date on which it became due till the date on which the actual payment is made. Thus, I note that the liability to pay interest is a part and parcel of the legal liability to pay compensation upon delay in making an open offer.

47. I further believe that investor confidence in the securities market can be sustained largely by ensuring investors protection. It, thus, becomes imperative to impose monetary penalty also, in addition to the directive to pay interest in cases of default. I find that Chapter VI-A of the SEBI Act provides for Penalties and Adjudication. In particular, Sections 15A to Section 15 HB are in the form of mandatory provisions imposing penalty in default of the provisions of the SEBI Act and Regulations.

48. I note here that the ARs have stated that Noticees were unaware of the requirement to do so in a specified form by August 16, 2012. They intimated the Target Company instead. *Ignorantia legis neminem excusa*, that is to say, ignorance of law is not an excuse. Ignorance of law of the state does not exclude any person from the penalty for the breach of it, because every person is bound to know the law, and is presumed so to do. If any individual should infringe the law of the country through ignorance or carelessness, he must abide by the consequences of his error; it is not competent of him to aver in a Court of Justice that he was ignorant of the law of the land, and Court of Justice is not at liberty to receive such a plea. The Noticees ought to have been aware of the regulatory requirements required to be complied pursuant to entering into the merger agreement and cannot claim ignorance of law to avoid liability. I do not, therefore, find this argument of the AR on behalf of the Noticees tenable.

49. The AR, I find, has *inter alia* further submitted that the target company intimated the stock exchanges on August 23, 2012, which represents substantial compliance since all the contents of the information in the public announcement have been set out in that intimation act. The ARs have stated that since the underlying intent of making a public announcement was fulfilled by intimating to BSE on August 23, 2012, the delayed public announcement made on February 21, 2013 was merely a procedural formality and, as such, the delay in such formality must not be viewed as anything, but, a venial and technical lapse. Further that the imposition of a penalty is not warranted given that the

Underlying Agreement was disclosed to the public months before the public announcement in prescribed format was made by the Noticees.

50. As stated earlier, it is once again reiterated that public announcement as envisaged under Regulation 13(2)(e) of Takeover Regulations, 2011 does not mean a mere intimation of acquisition to the general public. It is the announcement of the open offer by the acquirer, primarily disclosing his intention to acquire shares of the target company from the existing shareholders, thereby giving an opportunity of exit to the public shareholders at a specified price during a specified time and not a mere intimation of acquisition to the general public. In fact, I find that the penalty provision under Section 15H (ii) of the SEBI Act also specifically refers to failure to: "*make a public announcement to acquire shares at a minimum price" (Emphasis supplied)*. Besides, failure to make public announcement to acquire shares at a minimum price is a serious matter, and cannot be considered a mere "technical" lapse, even if the transaction is otherwise in compliance, since the shareholders/ investors were deprived of an exit opportunity at the relevant point of time.

51. The provisions of penalty for non-compliance of the mandate of the SEBI Act are with an objective to have an effective deterrent to ensure better compliance of the provisions of the SEBI Act and Regulations, which is crucial for SEBI in order to protect the interests of investors in securities. I further note that Act has not included *mens rea* or deliberate or willful nature of the default as a factor to be considered by the Adjudicating Officer in determining the quantum.

ORDER

52. After taking into consideration all the facts and circumstances of the case, I impose Penalty of **Rs. 25 lacs/- (Rupees Twenty five lacs only)** under Section 15H(ii) on the **Noticees viz. M/s. National Oilwell Varco Inc.** (Acquirer) **and M/s. Plaudler Inc**., Person Acting in Concert (PAC) with the Acquirer**,** which will be commensurate with the violations committed by the Noticees for violation of Regulation 13(2)(e) of the Takeover Regulations, 2011. The Noticees shall be **jointly and severally liable** to pay the said monetary penalty.

53. The Noticees 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 Mr. V S Sundaresan, Chief General Manager, Corporation Finance Department, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

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

Date: January 30 , 2015 **Anita Kenkare**

Place: Mumbai **Adjudicating Officer**