

**BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
ADJUDICATION ORDER No. Order/BD/VS/2020-21/7911**

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

In respect of:

Neeraj Kumar Agarwal
(PAN: ADBPB5444R)
H-106, Rustomjee Azziano
Majiwada
Thane (W) – 400601.

**In the matter of circulation of unpublished price sensitive information (UPSI) through
WhatsApp messages with respect to Asian Paints Limited**

BACKGROUND

1. During November 2017, there were certain articles published in newspapers / print media referring to the circulation of Unpublished Price Sensitive Information (*hereinafter referred to as "UPSI"*) in various private WhatsApp groups about certain companies ahead of their official announcements to the respective Stock Exchanges. Against this backdrop, Securities and Exchange Board of India (*hereinafter referred to as "SEBI"*) initiated a preliminary examination in the matter of circulation of UPSI through WhatsApp groups during which search and seizure operation for 26 entities of Market Chatter WhatsApp Group were conducted and approximately 190 devices, records etc., were seized. The WhatsApp chats extracted from the seized devices were examined further and while examining the chats, it was found that in respect of around 12 companies whose earnings data and other financial information got leaked in WhatsApp.
2. Accordingly, SEBI carried out an investigation in the matter of circulation of UPSI through WhatsApp messages with respect to Asian Paints Ltd., to ascertain any possible violation

Adjudication Order in the matter of circulation of UPSI through WhatsApp messages – Asian Paints Ltd.,

of the provisions of the Securities and Exchange Board of India Act, 1992 (*hereinafter referred to as “SEBI Act”*) and SEBI (Prohibition of Insider Trading) Regulations, 2015 (*hereinafter referred to as “SEBI (PIT) Regulations”*) during the period March 27, 2017 to May 11, 2017 (*hereinafter referred to as “Investigation Period”*).

- It was observed that Asian Paints Limited had announced financial results for the quarter ended March 2017 on stock exchanges on 11th May 2017 (16:23:28 hours on BSE, 16:33 hours on NSE). Details of the major corporate announcements made by Asian Paints Limited, on NE, during IP and their impact on the price of the scrip are given as follows:

(Source: www.nseindia.com)

S. N.	Date-Time	Announcement/News	Price Impact/Shares Traded						Remarks
1.	11/05/2017 (16:33)	Audited Financial Results For The Year and Quarter Ended 31-03-2017	Date	O	H	L	C	No. of shares traded	The number of shares of Asian traded recorded an increase by 1.49 times i.e. 149%
			11.05.2017	1159	1178.9	1152.3	1166.45	1003768	
			12.05.2017	1170.2	1179	1127	1132.95	2500503	
2.	18/04/2017 (19:25)	Board Meeting on 18/05/2017 Asian Paints Ltd has informed BSE that the Meeting of the Board of Directors of the Company is scheduled to be held on May 11, 2017, inter alia, to consider and approve the Audited Annual Financial Results of the Company for the Corporate Financial Year ended March 31, 2017 (FY17) and declaration of Final Dividend on equity shares Further, as per the company code of conduct for Prohibition of Insider Trading, the Trading Window for dealing in the securities of the Company will closed from March 27, 2017 to May 13, 2017 (both days inclusive).	Date	O	H	L	C	No. of shares traded	The number of shares of Asian traded recorded a decrease by 0.45 times i.e. 45%.
			18.04.2017	1062.4	1068.95	1037.3	1040.45	722855	
			19.04.2017	1044	1056	1033.7	1048.9	398732	

Chronology of events pertaining to financial results of Quarter/Year ended March 31, 2017

- Vide SEBI letters dated May 24, 2018 and June 18, 2018, Asian Paints Limited was, inter-alia, asked about the detailed chronology of events w.r.t announcement of quarterly results on May 11, 2017 for QE March 2017, the details of persons involved in preparation of

financial results / having access to financial information at various stages / persons who attended the corresponding Board Meeting, details of trading window closure period etc.

5. The Company vide letters dated June 12, 2018 and June 22, 2018 provided the information's sought by SEBI. From the chronology provided by the company, it was observed that preparation of accounts had started from April 01, 2017. Asian Paints Ltd also provided the list of persons involved in preparation of financial results / having access to financial information at various stages / persons who attended the corresponding Board Meeting vide aforesaid letters dated June 12, 2018 and June 22, 2018.

(Source: Company submissions dated June 12, 2018 and June 22, 2018)

Sr. no.	Particulars	Quarter and year ended 31st March, 2017
a	An estimate of the Profit and Loss Account (P&L) of the standalone financial results of the Company for the quarter were prepared on the 1 st working day subsequent to the relevant quarter end date by certain employees forming part of the accounts team, finance function and submitted for review to the finance hierarchy. The estimate is based on actual sales for the quarter and all the other expenses like material cost, employee cost, fixed and variable overheads, inventory provisions, etc. are based on past trends and budgeted numbers. The final results could vary depending on the actual spends.	1 st April 2017
b.	The process of closure of standalone accounts was undertaken subsequent to the end of the quarter by certain employees of the accounts team forming part of the finance function. Details of the employees of the finance function and finance hierarchy, for the financial year 2016-17, were included as part of our Company Letter.	1 nd to 8 th April, 2017
c.	After completion of all activities relating to closure of accounts as mentioned in point no. (b) above, draft financial results were prepared. The same was submitted to the finance hierarchy (as stated in point no. (b) for their review and perusal.	8 th April, 2017
d.	The draft financial results (along with trail balance) were shared with the Statutory Auditors of the Company ("Statutory Auditors") for audit purposes and discussions were held with the Statutory Auditors to share an update on certain key matters relating to financials for the relevant audit period. Following were the joint Statutory Auditors for the FY 2016-17: a. BSR & Co. LLP, Chartered Accountants, Firm Registration No. 117366W/W-100018 ("BSR") b. Deloitte Haskins & Sells, LLP, Chartered Accountants, Firm Registration No. 101248W/W-100022 ("DHS")	12 th April, 2017 (BSR & DHS)
e.	The draft financial results received from all the overseas, domestic subsidiaries and joint venture companies were reviewed by the accounts team. As part of the review, variances from past trends and plans were analysed and explanations sought from the respective subsidiary and joint venture companies. Post the review, consolidated financials were prepared.	12 th April 2017 to 30 th April 2017
f.	A presentation on the financial performance of the Company, for the relevant period was prepared for submission to the Executive Council of the Company ("EC").	8 th April 2017 to 21 st April 2017
g.	The Statutory Auditors carried out an audit/limited review of the standalone financials of selected subsidiaries and consolidated financial results of the company, as applicable.	12 th April to 5 th May 2017
h.	The abovementioned presentation on review of financial performance of the Company as mentioned in point no. (f) above, for the relevant quarter was submitted to the EC, for its review.	21 st April, 2017 (for standalone and consolidated financials)

i.	The agenda for the meeting of the Audit Committee of the company ("Audit Committee"), excluding the financial results, was circulated to the members of the Audit Committee.	29 th April, 2017
j.	A presentation on review of financial performance of the Company, for the relevant quarter, was prepared for submission to members of Audit Committee. The presentation contained analysis and comments on the performance. The balance sheet, segment results and related notes to the draft financial results were prepared and shared with the finance hierarchy for their review and with the Statutory Auditors for audit, during this period.	21 st April 2017 to 5 th May 2017
k.	The draft financial results for standalone financials were prepared in the format of publication to the stock exchanges and submitted to the Statutory Auditors and the finance hierarchy.	29 th April, 2017
l.	The Agenda for the meeting of the Board of Directors of the Company (" Board "), for the relevant quarter/year end, was circulated to the members of the Board, excluding the financial results. The Company circulates the financial results. The Company circulates the Agenda notes and all related documents to the Directors electronically through a platform which ensures high standards of security and confidentiality required for circulation and storage of Board papers. Physical copy is shared upon request of Directors.	4 th May, 2017 (the Agenda included notes reviewing the performance of the Company, its subsidiary and joint venture companies)
m.	Draft financial results along with certain other items of the agenda were circulated to the members of the Audit Committee and the Chief Internal Auditor of the Company. Details of the Chief Internal Auditor of the Company for the financial year 2016-17, were included as part of our Company Letter.	5 th to 6 th May 2017
n.	Discussions were held with the Statutory Auditors to understand audit status, observations and provide clarifications, if any.	5 th to 9 th May, 2017
o.	The notes reviewing the performance of the Company, its subsidiary and joint venture companies, were circulated to the members of the Board.	4 th May, 2017 (the Agenda included notes reviewing the performance of the Company, its subsidiary and joint venture companies)
p.	On specific request of one of the Non-Executive Directors of the Company (viz., Shri Mahendra Choksi), certain additional financial information was also submitted, in a specified format, to him for his review and perusal in preparation of the upcoming Board meeting. This was done post circulation of financials to all members of the Board.	7 th May, 2017
q.	A note containing relevant financial information was prepared and shared with the Corporate Communications team of the Company (" Corporate Communications Team "), to be used for making presentation during the investors' conference. The same was done one day prior to the date of Board meeting to consider and approve the financial results.	10 th May, 2017
r.	Draft financial statements were circulated to the members of the Board	10 th May, 2017
s.	A draft of the press release document was prepared and shared with the Corporate Communications Team on the date of Board meeting, prior to the announcement to the stock exchanges.	11 th May, 2017
t.	The draft financials results in the format to be submitted to the stock exchanges, tabled at the Board meeting, were considered and approved by the Board and published on the Stock Exchanges.	11 th May, 2017

6. The definition of 'unpublished price sensitive information' as prescribed under Regulation 2(1)(n) of SEBI (PIT) Regulations, 2015 is as follows:

"unpublished price sensitive information" means any information relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price

of the securities and shall, ordinarily including but not restricted to, information relating to the following: –

- i. financial results*
- ii. dividends*
- iii. change in capital structure*
- iv. mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions*
- v. changes in key managerial personnel; and*
- vi. material events in accordance with the listing agreement*

7. From the chronology of events as tabulated in para 5 above, information relating to financial results of Asian Paints Ltd. for quarter ended March 2017 was a Price Sensitive Information (PSI), and with respect to the same, the preparation of draft preliminary financial statements started from April 01, 2017. However, trading window closed from March 27, 2017 and therefore the UPSI was observed to have come into existence on March 27, 2017. The corporate announcement of audited financial results for the quarter ended March 2017 was made to the stock exchanges on 11th May 2017 (16:23:28 hours on BSE, 16:33 hours on NSE) by Asian Paints Limited. Therefore, it was observed that the period of UPSI (unpublished price sensitive information) would be March 27, 2017 to May 11, 2017.
8. The investigation *inter alia* revealed that Mr. Neeraj Agarwal (hereinafter referred to as "Noticee") communicated the UPSI related to total income, EBITDA and PAT of Asian Paints for QE March 2017 through WhatsApp messages. From the WhatsApp chat of Shruti Vora (retrieved from her device – Apple iPhone 6s, IMEI: 355767073570777), the following chat was observed on May 09, 2017 "*Asian Paints:- total income 4416cr, ebitda 782cr, pat 480cr. Volumes growth @9.2%.*".
9. In the following table, financial figures circulated on WhatsApp pertaining to Asian Paints Ltd. are compared with actual figures disclosed subsequently on stock exchange to gauge the deviation between two sets of figures.

Abbreviations format used:

Figure1 in WhatsApp (F1W) Figure1 in Actual (F1A) Figure1 Deviation (F1Dev)

Date and time of WhatsApp message (after adding 5:30 hrs)	Figures in WhatsApp message	Date and time of disclosure on Exchange	Actual figures disclosed on Exchange	F1W	F1A	F2W	F2A	F3W	F3A	%ge Deviations observed in Figures		
										F1Dev	F2Dev	F3Dev
09/05/2017 14:53:07	total income 4416 cr, ebitda 782cr, PAT 480 cr. volumes growth @9.2%	11/05/2017 16:23:32	Income 4416.23 EBITDA 781.98 PAT 479.61	4416	4416.23	782	781.98	480	479.61	.005	0.002	0.08

Note: EBITDA is calculated as: EBITDA (Earnings before interest, tax, depreciation and amortization) = Profit from Operations before other income, finance costs, exceptional item and tax + Depreciation and amortization expense = 689.48+83.49+9.01 = 781.98 crores

* % ge deviation is calculated as per the following methodology:

%ge Deviation = (Figure in WhatsApp message-Actual Figures disclosed on exchange)*100/(Actual figures disclosed on exchange)

10. From the above table, it was observed that the financial figures of Asian Paints Ltd. were communicated through WhatsApp prior to their announcement on stock exchanges

11. The timing of the said message as per extract chat from Shruti Vora's device was 09:24:49 (outgoing message with remote part name as Sumeet Hinduja Exide Life). However, expert agency,(Helik Advisory Ltd), hired for retrieval and backup of the data from the instruments/devices seized, vide email dated March 12, 2018 informed SEBI that their forensic tools generate zero G.M.T. timing by default, so add +5.30 hours as Indian G.M.T in all the reports generated.

12. The details of communication of WhatsApp message related to Asian Paints Ltd. as observed from WhatsApp Chat retrieved from Shruti Vora's device are tabulated below:

Entity from whom Shruti Vora (SV) received the message		Date and Time of receipt of message by SV (After adding 5.30 hours)		Entities to whom SV forwarded the message		Date and Time of forwarding of message by SV (After adding 5.30 hours)	
Name	Tel. Number	Date	Time	Name	Tel. Number	Date	Time
Neeraj Agarwal*	9004089401	09/05/2017	14:53:07	Sumeet Hinduja*	9819227915	09/05/2017	14:54:49

*Note: Remote party name displayed in messages are Neeraj Antique, Sumeet Hinduja Exide Life and Sunil Kumar Sbilife, respectively.

13. It was observed from the WhatsApp chats retrieved from the Shruti Vora's device that the aforesaid message was received by her from the Noticee on May 09, 2017 at 14:53:07.

14. It was observed that the financial figures of Asian Paints (viz; total income, EBITDA and PAT) circulated through WhatsApp closely matched with those disclosed subsequently by Asian Paints on Exchanges (deviation in financial figures was within a range of 0.002% to 0.08%). Hence, the aforesaid message related to Asian Paints Ltd. was observed to fall under UPSI and such circulation of financial figures through WhatsApp was considered as communication of UPSI.

15. The Noticee who were in possession of the UPSI were termed as Insiders as per Regulation 2 (1) (g) of SEBI (PIT) Regulations, 2015, the provisions of which are furnished hereunder:

"insider" means any person who is:

- i. *A connected person, or*
- ii. *in possession of or having access to unpublished price sensitive information*

NOTE: Since "generally available information" is defined, it is intended that anyone in possession of or having access to unpublished price sensitive information should be considered as "insider" regardless of how one came in possession of or had access to such information..."

16. Therefore, it was *inter alia* alleged that the Noticee being an insider had communicated the UPSI relating to Asian Paints Ltd., to other person through Whatsapp messages.

17. Accordingly, it was alleged that the Noticee communicated the UPSI related to total income, EBITDA and PAT of Asian Paints for QE March 2017 through WhatsApp messages, which is prohibited and is in violation of the provisions of Section 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (PIT) Regulations, 2015.

APPOINTMENT OF ADJUDICATING OFFICER

18. The undersigned has been appointed as the Adjudicating Officer (*hereinafter referred to as "AO"*) vide Order dated December 26, 2019 under Section 19 read with Sub-section (1) of Section 15-I of the SEBI Act, 1992 and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (*hereinafter referred to as "SEBI Adjudication Rules"*) to inquire into and adjudge under section 15G of the SEBI Act, 1992 for the alleged violations of provisions of section 12A(d) and 12A(e) of SEBI Act, 1992 and Regulation 3(1) of SEBI (PIT) Regulations, 2015, committed by the Noticee.

SHOW CAUSE NOTICE, HEARING AND REPLY

19.A Show Cause Notice dated November 04, 2019 bearing ref No. EAD/BJD/VS/4565/1/2020 (*hereinafter referred to as 'SCN'*) was served on the Noticee under Rule 4 of the SEBI Adjudication Rules, calling upon to show cause as to why an inquiry should not be held against him in terms of Rule 4 of the SEBI Adjudication Rules read with Section 15-I of SEBI Act, 1992 and why penalty should not be imposed on him in terms of Section 15G of SEBI Act, 1992 for the aforesaid alleged violations. In reply, Noticee vide his letter dated May 15, 2020 made submissions *inter alia* stating as under:

"

1. *The nature of my job at the said broking house at the relevant time was as follows:*
 - a. *Provide directional trading calls in stocks and indices based on analysis of fundamental, technical and derivatives indicators.*
 - b. *Fundamental indicators like consensus estimates on Income, EBITDA, PAT, PE bands, EPS, Market Cap, blocks, analysis of whether actual beating consensus estimates post announcement of results, etc are taken into consideration. Keep track on the estimated results coming from broking houses, consensus estimates and HOS information and share the same with clients / other market participants;*
 - c. *Technical indicators like moving averages, supports levels, resistance levels, breakout of technical formations, historical formations etc are taken into consideration.*
 - d. *Derivatives indicators like analysis of open interest, cost of carry, implied volatilities, etc are taken into consideration.*
 - e. *Pair trades which involved buying one stock/indices and selling other stock/indices based on normalised price return analysis, ratio analysis, etc*
 - f. *Indices rebalancing which included analysis of expected changes in the Nifty and MSCI India portfolio.*
 - g. *Risk arbitrage which included analysis of any opportunity arising out of corporate actions like merger, demerger, buy backs, delisting, etc.*
2. *The allegation against me in the SCN is that I have forwarded certain whatsapp messages which "closely" match the actual results published by the Company. On the basis of this instance, it is alleged that I have communicated unpublished price sensitive information. At*

this stage itself, I would like to unequivocally communicate that I have no connection whatsoever with the Company, its Auditors or any of the employees.

- 3. I have not been given access to the full chat with Ms. Shruti Vora and only parts of the chat have been culled out and annexed to the SCN. Unfortunately, I do not possess the chats on account of the fact that my phone had changed and I have lost access to all previous chats. However, as best as my memory serves, a perusal of the chats would reflect that the same were on a wide range of conversations, typical to my job profile. Further, to the best of my memory, this message must have been forwarded to me by someone. However, in the absence of having access to my previous chats, I am unable to comment as to who would have sent me such a message. It could be a client, analysts at other firms, some colleague or some market group where I was a participant. The messages are almost 4 year old and it is impossible to now recollect who sent the message.*
- 4. You would appreciate that it is an age old practice of the securities market to discuss the outlook on various stocks and the estimated or the 'expected results', based on various parameters and the business outlook expressed by the corporates from time to time. The same is a completely legitimate practice and is not prohibited under any regulations. Analysts in different broking companies too come up with their notes on expectation of results before the actual results. Based on these notes, an average is computed to arrive at market expectations. This is the practice prevailing across the markets worldwide. The market expectation can be different from each other, depending on the number of analyst reports which they have used to compute the average. Typically, lot of such market expectations float in the market before the announcements of results.*
-*
- 5. The PIT Regulations 2015 prohibit communication of Unpublished Price Sensitive Information. It is submitted that information is a key element in the term. However, the term "information" is not defined anywhere under the PIT Regulations, 2015. It must be appreciated that considerable amount of information in the securities market is fluid and uncertain and an unduly wide meaning imposes restrictions on legitimate market practices. If viewed on a scale, the scope of possible kinds of information would start at one end with innuendo, rumour, hint and the like, rising to general information in the middle and certain information in the end. These different kinds of information may or may not amount to UPSI and should be subjected to differential treatment based on their reliability. It is submitted that none of the information available with me could ever be termed to be UPSI and the same was market gossip and not even information. The Merriam Webster Dictionary defines the term "information" as "a collection of factual knowledge about something" and states that the synonyms to the term "information" are "data, facts". On the other hand, a rumour is defined to mean "talk or opinion widely disseminated with no discernible source", "a statement or report current without known authority for its truth". What appears to have been shared was mere estimates without any specific source and therefore it can never be termed as information. It is pertinent to note that on multiple occasions, same set of estimated results were received from different persons and the same is indicative of the fact that the information was floating around in the market. It is submitted that post facto events cannot change the nature of information originally shared. The SCN and the investigation lacks any material particulars as to how did I acquire the information in the first place. It is submitted that the Company has supplied SEBI with the details of all the persons who were in possession of the UPSI. The SCN does not state that even after the investigation, it appears that there was a leak from the Company. In the absence of particulars, it can only be assumed that the investigation department must have*

investigated all the individuals to try and establish if there was a leak. In the absence of any leak of information from the Company, it can never be alleged as to whether the information was the actual result or just a guess / estimate. Merely because a guess turns out to be true cannot be labelled as violation of the PIT Regulations. It is settled law that mere conjecture cannot be the basis to make a charge under the SEBI PIT Regulations and there has to be some evidence to suggest as to how the information was sourced or could have been sourced.

6. The PIT Regulations 2015 were drafted by the Justice Sodhi Committee. The committee considered several important elements to determine as to what constitutes UPSI.
.....
7. Therefore, even the committee discussed and concluded that the source of information is a material element while making a charge of insider trading. The investigation having concluded that there was no leak from the Company, it was imperative to investigate as to how could I have ever obtained the exact financial results, which is a closely guarded secret till it is communicated to the exchanges.
8. To add further, ICICI Direct Report expected Asian Paints to report Total Income of INR 4434.5 crores, EBITDA of INR 791.3 crores and PAT of INR 484.7 crores. The copy of same has been enclosed as an annexure (please refer Page 2). All the above figures are matching closely to numbers communicated on the whatsapp as per the SCN i.e Total Income 4416 crores, EBITDA 782 crores and PAT 480 crores.

Also, Motilal Oswal expected Asian Paints to report a PAT of INR 489.1 crores. The copy of same has been enclosed as an annexure (Page 2, last paragraph).

Hence, it appears that the whatsapp message was supposed to be one of the expectations prevailing in the market at the time of forwarding. However, in the absence of having access to the messages and who sent the same to me, I am unable to comment. However, the aforesaid reports clearly show that this information was prevailing in the market much before the alleged message was forwarded by me. With so many expectations floating in the market, it is impossible to allege that the information so shared was actually UPSI. The definition of insider makes it clear that the onus is on SEBI to prove I had access to UPSI and not the other way round. The investigation cannot cherry pick a message and then allege that merely because it matched, it is UPSI and then shift the onus statutorily cast on the investigation department of SEBI.

.....

9. As regards paragraphs 8, 9, 10 and 14 of SCN, I state that the contents of WhatsApp message forwarded by me and actual results announced by the Company are not the precise but "closely matching". It is submitted that if the allegation is true that I had access to UPSI, there would be no reason for me to share closely matching numbers instead of the exact ones. It is also pertinent to note that the aforesaid reports by brokerages also showed similar numbers. The details are reproduced as under:

Particulars	As per WhatsApp / Date of Whatsapp	As announced by Co./ Date of Announcement by Co.	As per SCN

Total Income	4416 cr / 09.05.2017	4486.34 / 11.05.2017	4416.23
EBIDTA	782 cr / 09.05.2017	781.98 / 11.05.2017	781.98
PAT	480 cr	479.61	479.61

At the outset, I would like to bring to your kind attention that the data quoted in the SCN is not as per the actual quarterly financial results announced by the company.

Considering the deviation as above, it is abundantly clear that the WhatsApp message forwarded by me was mere 'expectations and estimates' of the financial results and did not have any discernible source. Assuming, but without admitting, had I known UPSI about the Total Income i.e. Rs 4486 cr, the same would have been mentioned as such and not to 4416 cr which was mentioned in the WhatsApp message. Similarly, the data about EBITDA and PAT as per the WhatsApp message and that announced by the company differ. In fact, the SCN admits that there are deviations. Thus, these undisputed facts on record with you, when considered holistically, unequivocally demonstrate that the WhatsApp message forwarded by me was an 'estimate and expectation' and not the UPSI as alleged. Consequently, I did not communicate any UPSI.

.....

Admittedly the announcement by the Asian Paints pertained to 4 sets of the financial results i.e. the financial results both stand alone and consolidated for quarter ending and year ending 31.03.2017 i.e. 4 sets of financial results. As against this, the WhatsApp message contained expectations on financials for quarter ending 31.03.2017 alone (i.e. expectation of 1 set) and not about expectations of 4 sets of results. Further, it is noteworthy that the aforesaid regulatory provision read with the Note below it, specifically provides that any information indicated therein to become an UPSI has to necessarily fulfil the criteria of "materially affect the price of the securities". The SCN does not bring out any information/ data, which leads to any inference that the information about expectations of financial results for quarter ending 31.03.2017 contained in WhatsApp was made public, let alone had materially affected the price of securities. Thus, admittedly the content of WhatsApp message was not an UPSI. Further, the SCN at paragraph 3 admits that "the number of shares of Asian Paints traded recorded an increase by 1.49 times after the UPSI was made public by the company. It is not the case in the SCN that the financials of 1 quarter ending 31.03.2017 alone to the exclusion of annual result announced by the company impacted its volume. Notwithstanding above, it is normal in the market to see a surge in volume of the scrip of any company immediately after announcement of its financial results on the Stock Exchange. It is noteworthy, that the expectations on financials about 1 quarter contained in the WhatsApp message and that announced by Asian Paints also differ and there is no allegation that the data contained in the WhatsApp message lead to any increase in price or volume. Thus, admittedly the contents of WhatsApp message were not any UPSI. I note that after the results were announced (i.e. on 12.05.2017) the price of scrip on NSE ranged between Rs.255.85 to 260 i.e. price was range-bound with barely any movement in the price of the securities.

....

...

10. As may be seen in the note appearing below the aforesaid provisions, the onus of showing that I was in receipt / possession of or had access to unpublished price sensitive information

at the time of trading would, therefore, be on the person levelling the charge i.e. SEBI. I however note that the SCN has failed to demonstrate any evidence/document that I was in receipt or in possession or had access to UPSI. Besides the SCN has failed to bring out that I had traded when in possession /having access to UPSI. I reiterate that in terms of these provisions stated at para 15 of SCN the onus to show that I possessed UPSI and Traded when in possession of UPSI rests on SEBI. Since no such information with document has been furnished by SEBI, the allegation is bad in law and deserves to be dropped. I submit that as already elaborated above in these submissions, I was not in possession of UPSI nor has traded/dealt in the scrip of Asian Paints, directly or indirectly, based on any such UPSI. In fact, I have not traded/dealt in shares of Asian Paints. Consequently, the question of communicating the UPSI to anyone else as alleged at paragraph 16 and 17, does not arise. I reiterate that thus, the SCN is bad in law and deserves to be dropped.

11. *From the foregoing, it evident that the aforesaid WhatsApp message was not an UPSI, I had not received/accessed/possessed/communicated any UPSI, had not traded / dealt in the securities of Asian Paints directly or indirectly. In view of the same, I have not violated any provision(s) of law as alleged. Consequently, there is no cause for holding any inquiry. Further, there is no case for imposing any penalty upon me under the provisions of Section 15 G of the SEBI Act.*

.....”

20. Further, opining that an inquiry needs to be held in the matter, in the interest of natural justice, an opportunity of hearing was granted to the Noticee on June 12, 2020 vide notice of hearing dated June 3, 2020. The Noticee confirming his attendance for the hearing submitted his additional reply vide his email dated June 11, 2020 *inter alia* stating as under:

“

4. I repeat and reiterate that I do not have any recollection as to who composed these WhatsApp messages and who sent the same to me. In my day to day work, I used to receive several such messages from other market participants and the same was in the nature of speculation based on estimates on what could be the possible results. Estimates are essentially opinions expressed by an individual on basis of research carried out by them. The SCN is also completely silent as to how did I get these messages. While I do not specifically recall who the sender of the message was, the general source of such information is from brokerage reports on companies, Bloomberg estimates, CNBC Polls or some other market participant collating these estimates and sending the same to me from such publicly available platforms. However, generally, the source of such information is estimates prepared by analysts working with brokerages or Bloomberg estimates.

5. Upon perusal of the Bloomberg terminal, it appears that all the estimates stated in the said WhatsApp message were in fact estimates given by brokerage house analysts. The screenshot of Bloomberg Estimates is reproduced as Annexure 1.

6. From the above, is it abundantly clear that the said estimates were done by several brokerage houses. However, I wish to repeat and reiterate that what was being circulated was mere opinion on what could be the prospective financial results and such opinion is protected speech under Article 19

of the Constitution of India. Merely because an opinion expressed turns out to be true does not mean that the said opinion suddenly changes nature and becomes insider information.

...

I repeat and reiterate that I do not have any recollection as to who composed these WhatsApp messages and who sent the same to me. In my day to day work, I used to receive several such messages from other market participants and the same was in the nature of speculation based on estimates on what could be the possible results. Estimates are essentially opinions expressed by an individual on basis of research carried out by them. The SCN is also completely silent as to how did I get these messages. While I do not specifically recall who the sender of the message was, the general source of such information is from brokerage reports on companies, Bloomberg estimates, CNBC Polls or some other market participant collating these estimates and sending the same to me from such publicly available platforms. However, generally, the source of such information is estimates prepared by analysts working with brokerages or Bloomberg estimates.

5. Upon perusal of the Bloomberg terminal, it appears that all the estimates stated in the said WhatsApp message were in fact estimates given by brokerage house analysts. The screenshot of Bloomberg Estimates is reproduced as Annexure 1.

6. From the above, is it abundantly clear that the said estimates were done by several brokerage houses. However, I wish to repeat and reiterate that what was being circulated was mere opinion on what could be the prospective financial results and such opinion is protected speech under Article 19 of the Constitution of India. Merely because an opinion expressed turns out to be true does not mean that the said opinion suddenly changes nature and becomes insider information.

....

7. While I continue to believe that I have not forwarded any UPSI - it was only a street estimate which was forwarded; I would like to request the AO to kindly consider my current financial conditions and not impose any more penalties as have already been penalised for the same alleged misconduct in other matters. I submit that the SCN does not even state that I have made any monetary gain by the alleged offence or that anyone has traded on the basis of the said communication. Therefore, the integrity of the market was not affected in any manner. The repeated penalty for the same cause of action is against the spirit of equity and good conscience.

”

21. The Noticee along with his Authorized representative Mr. Kunal Katariya, Advocate appeared through the Video Call on the date of hearing. During the hearing, the Authorized Representative reiterated the submission as made vide their Replies dated May 15, 2020 and June 11, 2020 which has been duly taken on record. Further, the Noticee also submitted a copy of the SEBI order vide email dated June 12, 2020 which is taken on record.

CONSIDERATION OF ISSUES AND FINDINGS

22. After perusal of the material available on record, the issues that arise for consideration in the present case are as under:

- I. Whether the Noticee has violated the provisions of Section 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (PIT) Regulations, 2015?***
- II. Whether the Noticee is liable for monetary penalty under Section 15G of the SEBI Act, 1992?***
- III. If so, what quantum of monetary penalty should be imposed on the Noticee?***

FINDINGS

23. On perusal of the material available on record and giving regard to the facts and circumstances of the case, I record my findings hereunder:

ISSUE I: Whether the Noticee has violated the provisions of Section 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (PIT) Regulations, 2015?

24. Before proceeding further, I find it pertinent to refer to the relevant provisions of SEBI Act, 1992 and PIT Regulations, 2015 which read as under:

Section 12 A (d) of SEBI Act, 1992

No person shall directly or indirectly engage in insider trading

Section 12 A (e) of SEBI Act

No person shall directly or indirectly 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

Regulation 3 (1) of SEBI (PIT) Regulations, 2015

No insider shall communicate, provide, or allow access to any unpublished price sensitive information, relating to a company or securities listed or proposed to be listed, to any person including other insiders except where such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations

25. After due consideration of the submission of the Noticee, I prima facie note that there is no dispute as to the communication of the information through WhatsApp messages between the Noticee as alleged. However it is the primary case of the Noticee that such information was not in the nature of UPSI and was only in the nature of market gossip, the circulation of which is a typical practice to his job profile as contended by Noticee. Further, it has been contended that he, as a part and parcel of his job, inter alia, kept *track on the estimated results coming from broking houses, consensus estimates and HOS information and shared the same with clients / other market participants*. Apart from the above, the Noticee has also made submissions stating that:

- a) no leak was established from the Insiders;
- b) without establishing a connection and without leak there cannot be UPSI;
- c) the information forwarded by him was in the nature of Estimate/Market gossip and not UPSI and the same matching with the actual numbers does not make it a UPSI;
- d) No proof of receiving the information/UPSI and no trading in the scrip by him
- e) the information that was shared through Whatsapp messages did not match with the actual quarterly financial results announced by the company
- f) there is no *mens rea* established;

26. After considering the submissions of the Noticee and the documents available on record, I note my findings on the Noticee's major submissions as under:

- i) **The information that was shared through WhatsApp did not match with that of the subsequently announced financial results of Asian Paints**

27. I note that the Noticee vide his reply dated May 15, 2020 stated that Total income as per SCN is 4486.34crs whereas in his message, the number was 4416 crs.

28.. In this regard, I note that the details with respect to EBITDA and PAT almost exactly matched with that of the WhatsApp message information. However, it is also noted that it is the figures of total income as per the Noticees' messages that matched with net sales/ revenue of Asian Paints Limited. In this regard, I find it pertinent to note that it is the general practice that the term "total income" is often stated in a common parlance/ as synonym to revenue for the ease of understanding of a layman. I also note that the Noticee and Shruti Vora to whom the information was communicated by him, shared common background i.e analyst and therefore only those figures which are critical information would be shared among themselves. I note from the disclosures at BSE Exchange as submitted that total income is reported as ₹ 4486.34 crores which is arrived at by adding other income (other than operations) i.e. 70.11 crores to the net sales (out of the operation of company) i.e. 4416.2 Crores. I am of the view that the relevant information from the analyst point of view is to ascertain income arising from the operation and accordingly the income arising from other than operations may or may not be material to assess the total income of company as they are not recurring operational nature. In view of the above, the total income has to be seen as the total income from operation i.e. net sales which is matching exactly in the matter. This is also further corroborated by the Noticee's submissions dated June 11, 2020 whereby he refers to the estimates of ICICI Direct given for the measure of "Revenue" and stated that the same matched with the figures mentioned under Total income in the Whatsapp messages. Furthermore, as noted above, all the details mentioned in the Noticees' WhatsApp message dated May 9, 2017 accurately matched with that of the subsequently announced financial results of Asian Paints where the figures corresponding to "total income" also matched exactly with that of the actual Revenue. Taking into consideration of all the above, I am of the opinion that Noticee's submission seeking benefit of doubt citing such minor technical disparities cannot be accepted, given the gravity of the alleged violation in the instant case and accordingly I note that the information forming part of the circulated WhatsApp messages by the Noticees was exactly same as that of the subsequently announced financial results.

ii) No Connection among the Noticee or with the Company and disputing the existence of UPSI without establishing leak:

29. I note from the record that Asian Paints Limited vide its letter dated August 23, 2018 and email dated June 02, 2019 submitted the chronology of events leading to the quarterly disclosure on May 11, 2017 for QE March 2017 which is noted in the prepares above. From the same, I further note that period of alleged UPSI in the matter started from April 1, 2017 i.e. the day when an estimate of the Profit and Loss Account (P&L) of the standalone financial results of the Company for the quarter were prepared which was the 1st working day subsequent to the relevant quarter end date by certain employees forming part of the accounts team, finance function and submitted for review to the finance hierarchy and existed till May 11, 2017 when the financial results were disclosed to the stock exchanges. Admittedly the message with respect to the same viz., "*Asian Paints:- total income 4416cr, ebitda 782cr, pat 480cr. Volumes growth @9.2%.*" was sent from the Noticee to Shruti Vora on May 09, 2017 at 14:53:07. While I note that the investigation has not revealed any material directing to the source of the UPSI, however I note that the significant fact is that the content of the message that was communicated between the Noticee exactly matched with that of the later announced financial results of Asian Paints. I am of the opinion that such information which was in the nature of price sensitive information and remained unpublished, was in the possession of the Noticee. I do not find merit in the submission of the Noticee claiming that, in the absence of proof of leak and the source of UPSI, the information does not stand to qualify as a UPSI. In this regard, I find it pertinent to refer to the peculiar facts and circumstances involved in the instant case where the mode of circulation of information has been by way of WhatsApp messages. I note from the record that efforts were made to track back to the source of the message; however severe technological constraints were faced in this regard owing to the end-to-end encryption of WhatsApp messages. I note that WhatsApp itself communicated to SEBI stating that WhatsApp users are protected with end-to-end encryption protocol, third parties and WhatsApp cannot read such messages or search for such messages and that WhatsApp

does not store information regarding the sender and recipient of a message, the same could not be tracked despite all the efforts due to the deletion of messages. Besides, in the instant case, the information has not been claimed as received from any direct source other than the whatsapp communications.

30. As noted above, it is not the case of the Noticee that the information shared through the WhatsApp in the instant case were generated by him through market research or by any other data and in fact, apart from denying the connection to the source, the Noticee has stated that the information was passed on generally and he was part of the chain that carried on the information. However, it is the contention of the Noticee that the information was the outcome of the estimates from the brokers which was already in the public domain. Such being the case, I deem it relevant to examine the content of the information to ascertain its nature.

31. In this regard, firstly, I peruse the following table wherein the financial figures circulated on WhatsApp pertaining to Asian Paints Ltd. are compared with actual figures disclosed subsequently on stock exchanges to gauge the deviation between two sets of figures.

Abbreviations format used:

Figure1 in WhatsApp (F1W) Figure1 in Actual (F1A) Figure1 Deviation (F1Dev)

Date and time of WhatsApp message (after adding 5:30 hrs)	Figures in WhatsApp message	Date and time of disclosure on Exchange	Actual figures disclosed on Exchange	F1W	F1A	F2 W	F2A	F3 W	F3A	%ge Deviations observed in Figures		
										F1Dev	F2Dev	F3Dev
09/05/2017 14:53:07	total income 4416 cr, ebitda 782cr, PAT 480 cr. volumes growth @9.2%	11/05/2017 16:23:32	Income 4416.23 EBITDA 781.98 PAT 479.61	4416	4416.23	782	781.98	480	479.61	.005	0.002	0.08

Note: EBITDA is calculated as: EBITDA (Earnings before interest, tax, depreciation and amortization) = Profit from Operations before other income, finance costs, exceptional item and tax + Depreciation and amortization expense = 689.48+83.49+9.01 = 781.98 crores

* % ge deviation is calculated as per the following methodology:

%ge Deviation = (Figure in WhatsApp message-Actual Figures disclosed on exchange)*100/(Actual figures disclosed on exchange)

32. While it is evident that the information related to the financial results were sensitive in nature, I note that the financial figures matched almost exactly with that circulated through the WhatsApp messages. I also find it very pertinent to note that the information relating to financial results that included Total Income, EBIDTA and PAT were not even stated in any approximate range of values but were stated as a definite amount in the messages and exactly matched with that of the subsequently announced results. In addition, I also note from the chronology of events with respect to the preparation of accounts during the UPSI period, on May 10, 2017 it is stated that a note containing relevant financial information was prepared and shared with the Corporate Communications team of the Company ("Corporate Communications Team"), to be used for making presentation during the investors' conference and the Auditors Committee meeting and the clarifications with the Statutory Audit committee was also completed a day before that. In spite of the fact that the source of leak of information could not traced back due to the technological constraints owing to deletion of whatsapp messages, in the circumstances as above, I note that it is reasonably possible that the information that was communicated by the Noticee had already come into existence on May 9, 2017, the date when the Noticee forwarded the messages to Shruti Vora and she forwarded further. In view of the above, I am of the opinion that Noticee' submission claiming that the aforesaid information did not constitute UPSI for the reason of non-establishing the leak and connection with the source is devoid of any merit.

33. Further, with respect to the main contention of the Noticee that the information constituting the whatsapp messages were the outcome of the estimates from the brokers which was already in the public domain. In support of the aforesaid contention, the Noticee has produced before me the screenshots from the Bloomberg indicating the estimates from the broker with respect to Asian Paints, which were published on Bloomberg much before the whatsapp messages were forwarded by the Noticee.

34. In this regard, I have carefully perused the aforesaid documents produced before me. The Noticee have submitted before me the several screenshot of such estimates consensus of brokerage firms appearing on bloomberg, one of which is reproduced hereunder:



35. The Noticee has submitted that the source of the information of his whatsapp messages dated May 9, 2017 was the estimates of broker firm/analysts as available on Bloomberg which was in public domain and thus could not be considered as a UPSI. He contended that such message was merely forwarded by him as received. I note from the snapshot that there were about 22 estimates of analysts of various broking firms regarding estimated Revenue of Asian Paints till May 9, 2017. I note that there was no reports attached except for the details of the analyst and the broking firm representing. As already noted, it is the primary submissions of the Noticee that the information forming part of Whatsapp was in essence arising from aforesaid estimates mentioned in Bloomberg. However, considering that there were several estimates given out by several analysts of the broker firms on

several days for Asian Paints Ltd for the quarter ending on March 2017, the onus is on the Noticee to demonstrate as to on what basis the specific estimate has been claimed to be the source distinguishing that from the rest of the estimates. Further, the Noticee has referred to the estimate from Sanjay Manyal, analyst of ICICIdirect.com dated April 10, 2017, which closely matched with his whatsapp message and was in public domain. However, I note that in the snapshot submitted by the Noticee which is reproduced above, there were as many as 13 more estimates that were published after the aforesaid estimate by ICICIdirect.com and the Noticee has not stated any basis for referring to the estimate dated April 10, 2017(one month before the date of whatsapp messages) as the source for the whatsapp messages. Similarly, the Noticee has referred to the estimates of Kotak dated April 4, 2017 and Prabhudad Lilladher Pvt Ltd dated April 06, 2017 for the EBIDTA and PAT informations respectively. I am of opinion that if Noticee had in fact relied upon any specific research estimates or his forwarded messages had originated the information from such estimates, it should be demonstrable, verifiable trail of well documented and laid down process in consonance with the job profile or description. In the instant case, I note that Noticee was associated with the broking firm carrying out the task as submitted by him vide his reply noted above. However, I note that Noticee had submitted totally unrelated estimates in Bloomberg without any demonstrable and verifiable trail of events for relying on any specific research report. I note that Noticee has failed to demonstrate the basis in above lines and merely produced some estimates which were appearing in Bloomberg. If Noticee had relied upon such estimates, it would have been communicated only to clients of its broker as part of his job and not to share with other unconnected entities.

36. From all the above, I am of the opinion that the submissions of the Noticee that the information shared through the whatsapp messages was of generally available nature by referring to the estimates consensus of broker firms on Bloomberg as the source is far-fetched and clearly an afterthought. Therefore, based on the facts above, the information communicated to Shruti Vora which inturn was forwarded to a closed group through whatsapp by the Noticee which accurately matched with the subsequently announced results ought to have originated from the closed group of people.

iii) The information shared was of the nature of Market Gossip and not UPSI

37. The Noticee has also argued that the details forming part of his messages was not an information and that was in the nature of Market Gossip as noted above. I note that the said submission is in effect contending that the information was in the nature of an unsubstantiated gossip that was being forwarded as speculation or rumours. The Noticee has contended that such information was of the same nature that were published in the newspaper or broking houses estimating/speculating the results of the public companies and that the same were being shared over WhatsApp due to the advancement of technology. Further that it is a common practice that the analysts of various brokerage houses come out with a preview report and estimate the results across all coverage companies and such estimations are based on several factors which are used by the entire trading community/active investors to plan their trades. In light of the aforesaid contention by the Noticee before me, I primarily note that the information of the nature of HOS that is published in the newspaper or by the brokerage houses estimating the results are in the public domain and there is generally no disparity in the access to such information. However, such information when being circulated among a closed group as in the instant case, such group and the people forming part of the information communication chain alone become privy not only to the content of the information, but also to the knowledge of very existence of such information. Further, as submitted by the Noticee himself, it is a common practice that the broking houses arriving at an estimate on results based on various parameters. I am of the opinion that such information generated as above by the brokerage houses may not constitute UPSI even if the same subsequently matches with the result announced. However, in the instant case before me, the information communicated by the Noticee is neither being claimed as arising from the market research nor was it the estimates/predictions of Noticee himself. In fact, the Noticee has stated that such information was received by him from a third party and the same was forwarded by him further.

38. At this juncture, it is pertinent to note that the investigation in this case was initiated pursuant to the news article published in Financial Chronicle (sourced from Reuter's article by Mr. Rafael Nam) dated November 17, 2017 whereby it was reported that unpublished financial results of some major Companies were posted in private whatsapp group prior to Companies announcements stock exchanges. In this regard, Shruti Vora vide her email and letter dated May 09, 2019 had stated that she was part of the Reuters Trading India Platform which comprised of various analysts, fund managers and traders of the reputed brokerage firms/fund houses and the member of the said group had formed a whatsapp group which she had admittedly was part of. Therefore, the Noticee forwarding to a person who had always been an active participant in the whatsapp groups of the nature reported in the aforementioned News article in the facts and circumstances of the cases gives a reasonable scope of his connection with such closed group.

39. Further, considering the fact that the shared information matched exactly with the subsequently published financial results, the submissions of the Noticee that such information was in the nature of Market/Street Gossip would be to say that the financial results of the said company had already become public and being discussed openly among the general investors. In the absence of any document or evidence on record to signify such fact even remotely, I am not inclined to accept such a contentious argument by the Noticee that the access to accurate financial results was available to larger public in the form of Gossip. Further, in the instant case, a few closed set of people including the Noticee were in possession of such UPSI and they alone had been privy to the information albeit all of them could not be tracked back due to the constraints, due to deletion of whatsapp messages, as stated above. With regard to the communication of the messages by the Noticee, I have also perused the job profile of the Noticee during the period the messages were communicated which are as under:

Noticee:

- a. *Provide directional trading calls in stocks and indices based on analysis of fundamental, technical and derivatives indicators.*
- b. *Fundamental indicators like consensus estimates on Income, EBITDA, PAT, PE bands, EPS, Market Cap, blocks, analysis of whether actual beating consensus estimates post announcement of results, etc are taken into consideration. Keep track on the estimated*

- results coming from broking houses, consensus estimates and HOS information and share the same with clients / other market participants;*
- c. Technical indicators like moving averages, supports levels, resistance levels, breakout of technical formations, historical formations etc are taken into consideration.*
 - d. Derivatives indicators like analysis of open interest, cost of carry, implied volatilities, etc are taken into consideration.*
 - e. Pair trades which involved buying one stock/indices and selling other stock/indices based on normalised price return analysis, ratio analysis, etc*
 - f. Indices rebalancing which included analysis of expected changes in the Nifty and MSCI India portfolio.*
 - g. Risk arbitrage which included analysis of any opportunity arising out of corporate actions like merger, demerger, buy backs, delisting, etc.*

40. From the above, it is evident that Noticee was not required to share such information to various other unconnected entities as a part of his job description prior to the announcement of results. I am of the opinion that the circumstances and arrangement as observed above, where the source of the information could not be traced back due to deletion of the messages in whatsapp by sender, gives a scope for transmission of UPSI through a chain of forward messages to various other entities/ closed groups thereby granting an undue advantage to them.

41. In view of the gravity of consequences arising out of such sharing of information among the closed groups through WhatsApp or social media platform, I am not inclined to give any benefit of doubt in favour of the Noticee by treating the information as market gossip as claimed by the Noticee.

42. The Noticee has also vehemently argued that the information claiming to be in the nature of Gossip had never been used by anyone to make monetary gains and no evidence has been placed to establish the same. In this regard, as already noted, due to the technological challenges, the trail of the messages could not be made out so as to identify the actual source or the complete list of persons who were part of the communication trail and therefore it is not entirely acceptable that no gain was made by any investor being privy to such information shared through WhatsApp messages. Due to the same, I am also not inclined to accept Noticee's submission that the information lacked the credibility of the source and hence cannot be qualified as a UPSI. Furthermore, irrespective of the factors whether the information was originated from the Noticee or that the person to whom the

messages was forwarded by the Noticee, the charge against the Noticee sustain to be considered as the same is concerned with whether the Noticee was in possession of UPSI and had shared it further. At this stage, I note that I am primarily of the opinion that it is against the interest of the investors to encourage any sharing of sensitive information within a closed group to the exclusion of general public especially when the source of such information cannot be traced back. If the same is allowed to continue in the pretext of sharing of market gossip as stated by the Noticee, the insiders having access to the UPSI would be granted themselves with an unfettered mode of transmitting such information without having to be concerned about being tracked back to the source of the information. Considering the extent of impact, such UPSI involving financial results hold on the price of the securities, I am of the opinion that a lenient view cannot be warranted so as to consider such information qualifying to be an UPSI as a mere market/street gossip.

43. Further, in the established facts of the case, the Noticee who is reasonably expected to be well acquainted with the working of the securities market and the nature of sensitive information that an unpublished financial results cannot claim ignorance of the nature of information. I am of the opinion that such category of persons who are well aware of the sensitive nature of UPSI has an ethical obligation on their part to inform the regulators in case of coming across an accurate details regarding UPSI from a suspicious source rather than taking care of the interest of their acquaintances by forwarding the same. However, in the instant case, I note that admittedly there have been several communications which happened frequently with respect to the financial results of the companies between the personals who are closely associated with the market. I note that the Noticee in all probability must have observed that some of the information she received had very closely matched with the subsequently announced financial results. Especially considering that he was not aware of the source of the UPSI that he had received, it was to alarm the Noticee or give raise to a suspicion on the source of the information. Surprisingly, it has not been the case and the Noticee had chosen to accept the information and further communicate the same ignoring the material nature of the information.

iv) No breach of law on the part of the Noticee

44. In this regard, I note that the Noticee has been alleged to have violated the provisions of Sections 12A(d) and 12A(e) of the SEBI Act, 1992 and Regulation 3 of the PIT Regulations, 2015. While Section 12 (d) and (e) inter alia prohibits any person from communicating any material or non-public information to any other person, in a manner that is in contravention of the provisions of SEBI Act or the Rules or the regulations made thereunder. In addition, Section 3(1) of the PIT Regulations, 2015 prohibits any insider from communicating any unpublished price sensitive information, relating to a company or securities listed or proposed to be listed, to any person including other insiders except where such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations. In this connection, I also refer to the provisions of Regulation 2 (1) (g) of SEBI (PIT) Regulations, 2015, which state as under:

“insider” means any person who is:

- iii. *A connected person, or*
- iv. *in possession of or having access to unpublished price sensitive information*

NOTE: Since “generally available information” is defined, it is intended that anyone in possession of or having access to unpublished price sensitive information should be considered as “insider” regardless of how one came in possession of or had access to such information...”

45. In view of the aforesaid charges against the Noticee, I analyse the facts to ascertain whether the following essential requirements are established or not:

- a) Whether the information constituted UPSI?
- b) Whether the Noticee was an insider within the definition under Regulation 2(1)(g) of the PIT Regulations, 2015?
- c) Whether the Noticee being an insider further communicated the UPSI?

a) Whether the information constituted UPSI

46. Firstly, it is the contention of the Noticee that the information forming part of the WhatsApp messages were generally available and was in the nature of market gossip/rumour. In this regard, as already opined above, I do not find that the information

stated in the WhatsApp messages qualify to be regarded as market gossip in the instant case and the information published on Bloomberg could not be reasonably accepted as the source for the Noticee whatsapp messages. The Noticee has contended that merely the fact that the results exactly matched cannot be enough to allege the information to be a UPSI, when he himself was not the originator of message as well. The Noticee further argued that the information in the instant case was generally available and thus could not be treated as UPSI. In this regard, referring to the report of High-Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 under the Chairmanship of Mr. Justice N K Sodhi (hereinafter referred to as “**Justice Sodhi Committee Report**”) the Noticee submitted that even the committee discussed and concluded that the source of information is a material element while making a charge of insider trading and that in the instant case, his receiving of information has not been established to be from any person connected to Asian Paints and therefore information cannot be treated as receipt of UPSI.

47. In this regard, I note that the committee deliberating upon the issue of what information constitutes UPSI and what is to be regarded as generally available information and how the information of same nature may be UPSI in some case and generally available in others recorded various illustrations which the Noticee has presented before me in contending that the information in his case is of generally available nature and not UPSI. In this regard, I note that UPSI is essentially an information that is not generally available but on becoming generally available materially affects price of securities. The committee laying down the principles on how such general availability needs to be ascertained stated that any information that is accessible to the public on non-discriminatory basis would qualify to be generally available. Further, in the light of facts of the instant case, I also find it relevant to refer to the following paragraphs of the Report:

“26. The Committee deliberated upon how one should understand —non-discriminatory access and it was felt that one should not over-stipulate how this should be understood since that could risk narrowing the scope of that term. For example, a research report that is priced for purchase and is made available to all clients of a stock broker would be considered non-discriminatory inasmuch as any client of the broker or any class of clients of a broker having

a certain risk profile may acquire that research report. Merely because the report is priced and needs to be purchased would by itself mean that access to it is non-discriminatory? However, if one were to find extraordinary and peculiar structures such as pricing a research report at a level not in line with market practice such that only some identified persons may be able to acquire it and hope to rely on it by way of ostensible non-discriminatory access, it would not be non-discriminatory. Therefore, whether some information is available on a non-discriminatory basis would be a question of fact to be answered adopting the standard of a reasonable man.

....

29. While these principles are also backed by the provisions containing the prohibition on communication of UPSI and the inducement of communication of UPSI in Regulation 3, it is important to also articulate how the concepts of –generally available information and –unpublished price sensitive information|| are intended to be understood.

30. A piece of research work that is available on a discriminatory basis but is based entirely on generally available information would not change the character of the research work from being –generally available|| to being –UPSI. The Committee is conscious that generally available information well analyzed by an insightful mind would not be transformed into UPSI. Therefore, the regulation explicitly provides that conclusions, deductions and analyses of generally available information too would be regarded as generally available information.

.....

33. To conclude, whether or not a piece of information is generally available or is unpublished would necessarily be a mixed question of fact and law. A bright line indicating the types of matters that would ordinarily give rise to UPSI are listed to give illustrative guidance. It could well also be possible that information from such events could be routine in nature and consistent with a long history. Information about the repetition of the same event on predictable lines would not render it to be UPSI unless deviated from. For example, the declaration of dividend at the same rate at which a company has declared dividend for the several years as per publicly stated dividend policy.

”

48. In this regard, while I note that whether or not a piece of information is generally available or is unpublished would necessarily be a mixed question of fact and law, the statement that the information was an outcome of the research does not by itself make it generally available. I note that the test to ascertain an information to be UPSI or not is its non-discriminatory nature of availability. In the instant case, the Noticee while referring to one of the estimates of ICICIdirect.com published on Bloomberg which matched with his information related to Total income claimed that the information was already generally available. However, as noted in the preparas, he has failed to exhibit how one specific estimate (that matched his information) out of several estimates published on Bloomberg in one month before the sharing of his whatsapp message made the whatsapp information already generally available. As already noted, I am of the opinion that such argument without any explanation on the nexus between his message and the aforesaid ICICIdirect.com estimate published on Bloomberg is clearly farfetched, afterthought and does not merit consideration in his favour. Further, the Noticee has not placed before me any evidence to indicate that the information was derived from any research work of his own or any other specific report. Furthermore, as stated at paragraph 26 of the Committee Report, an illustration where a research work that is priced at *a level not in line with market practice such that only some identified persons may be able to acquire it* was opined to be of discriminatory nature. Therefore even if the information is said to be have been formed based on the research, firstly the research should have been based on the generally available information and secondly the research work should have been accessible on a non-discriminatory basis. However, in the instant case, even if the information is to be accepted as based on the research, there is no evidence brought on record by the Noticee to show that the research information emerged based on the generally available information. Further, the said information has been circulated between the closed groups of entities including the Noticee through the WhatsApp messages which by its very nature make it a discriminatory access to the selected few. Therefore the information in this case fails the test to be called generally available information as contended by the Noticee.

49. Furthermore, I cannot ignore the fact that such information have been shared with a closed set of people and the general public had no knowledge of such information being shared

on the WhatsApp platform to even have any access to the same. Further, the Noticee being financially literate personal who has been associated with the securities market by holding significant position noted at paras above, it was well within a reasonable expectation out of him to be triggered alarm when the information that were being circulated through WhatsApp messages so accurately matched with the subsequently announced actual figures of the company, even if such occurrence happened with respect to selected few messages out of several messages as stated by the Noticee. However, the Noticee has allowed himself to continue to be an instrument in the chain of communication of such sensitive information through WhatsApp messages. From the summary of aforesaid findings, I am of the considered view that the messages about the financial results were circulated prior to the official announcement made by the Companies, is UPSI. In my opinion, the disclosure of this information violates the rule of parity of information and perpetuated information asymmetry. The prohibition against insider trading helps in ensuring fairness, achieving information symmetry and ultimately market efficiency.

b) *Whether the Noticee is an insider within the definition under Regulation 2(1) (g) of the PIT Regulations, 2015?*

&

c) *Whether the Noticee being an insider further communicated the UPSI?*

50. I note that Regulation 2(1)(g) of the PIT Regulations, 2015 *inter alia* envisages that any person who is in possession of UPSI is regarded as an insider. Further, the note to the said provision also clarifies the legislative intent of the said provision by stating that such person is to be considered an insider regardless of how the UPSI has come into his/her possession. Therefore, once information is established to be a UPSI, anybody who is in possession of such information will be an insider.

51. In his defense against being alleged as the insiders in the instant case, the Noticee has based his contentions on the argument that the information contained in the WhatsApp messages were in the nature of market rumor/gossip and hence cannot be regarded as UPSI and thus he did not act as insider in the instant case. However, from the conclusions arrived in the

preparas of this Order, it has already been noted that the financial results that were part of the WhatsApp messages constituted UPSI as on May 9, 2017 for the reasons mentioned above. Further from the admitted fact that Noticee had forwarded the said message to Shruti Vora, it is imperative that the Noticee was in possession of UPSI and consequently he is considered as insider with respect to the UPSI he possessed.

52. Further with respect to the circulation of the aforesaid UPSI by the Noticee, it is contended by the Noticee that despite the information being forwarded to Shruti Vora and subsequently to other entities, there is no evidence as to anyone has traded on the basis of the UPSI. In this regard, I note that the Regulation 3(1) of PIT Regulations, 2015 prohibits communication of UPSI from an insider in any mode. I note that the regulation does not exempt the person from the guilt of communicating merely on the fact that no trades had taken place based on the UPSI thus communicated. The main problem in case of dissemination of information through WhatsApp is the end to end encryption system of transfer of information because of which the data cannot be accessed by third party except receiver and sender. Furthermore, I again take note of the fact that the technological constraint arising in the peculiar facts and circumstances of circulating messages through WhatsApp, the complete trail of messages could not be discovered though the message was admittedly circulated among several market associated personals. Therefore, I am of the opinion that in order to safeguard the interest of the investors and the integrity of the securities market, one cannot import a liberal interpretation of the aforesaid provision so as to warrant the Noticee, who has been involved in the circulation of UPSI on a routine basis over the WhatsApp, with a benefit of doubt. Considering the same, as evident from the record, the Noticee being an insider for having the UPSI in possession on May 9, 2017 had forwarded such UPSI through WhatsApp messages to Shruti Vora. In view of the same there is no reasonable doubt in concluding the Noticee as an insider under the provisions of Regulation 2 (1) (g) of SEBI (PIT) Regulations who as in possession of UPSI and that he communicated the same further.

53. In light of the facts concluded above, I find it relevant to note that the Hon'ble Supreme Court has been consistently of the view that what cannot be done directly, cannot be done

indirectly. I note that in *Jagir Singh v. Ranbir Singh* (MANU/SC/0097/1978 : 1979 AIR 381), the Hon'ble Supreme Court has held that what cannot be done directly, cannot be allowed to be done indirectly as that would be an evasion of the statute. The Supreme Court has held that it is a well-known principle of law that the provisions of law cannot be evaded by shift or contrivance, and that the objects of a statute cannot be defeated in an indirect or circuitous manner. (As per Abbott C.J. in *Fox v. Bishop of Chester* (1824) 2 B & C 635 "To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined"). I also note that the same principle is also enshrined in Section 12A of the SEBI Act, which *inter alia* states that no person shall directly or indirectly engage himself with communicating the UPSI when being in possession of the same.

54. In view of the all the above, I conclude that the Noticee is liable for violation of the provisions of Sections 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (PIT) Regulations, 2015.

ISSUE II: Whether the Noticee is liable for monetary penalty under Section 15G of the SEBI Act, 1992?

55. A basic premise that underlines the integrity of securities market is that persons connected with the market conform to the standards of transparency, good governance and ethical behavior prescribed in securities laws and do not resort to fraudulent and deceptive activities like insider trading. Such activities are detrimental to the interests of the investors as well as the securities market. No person can be allowed to enrich himself/herself by way of wrongful or ill-gotten gains or avoidance of potential loss made on account of such activity. SEBI has been entrusted with the important mandate of protecting investors and safeguarding the integrity of the securities market. In this regard, necessary powers have been conferred upon SEBI under the securities laws. The SEBI (PIT) Regulations have put in place a framework for prohibition of insider trading in securities. The prohibitions provided in the Regulations ensure a level-playing field in the securities market and safeguard the interest of investors and integrity of securities market.

I am of the view that the object and spirit of the SEBI (PIT) Regulations would get defeated if the alleged violators of the said Regulations are not made to face the consequences.

56. Further, in spite of the similar *modus operandi*, I note that the cause of action arising in the instant case in respect of which, the Noticee is held guilty is not associated with the cause of action of other matters that the Noticee has pleaded before me as being already imposed penalties for.

57. It is established from the findings that the Noticee being an insider had communicated the UPSI relating to Asian Paints Ltd., to other person through WhatsApp messages, which is in violation of the provisions of Sections 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of SEBI (PIT) Regulations, 2015, for which the Noticee is liable for monetary penalty under Section 15G of the SEBI Act which reads as under.

Penalty for insider trading

15G.If any insider who,—

- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; or*
- (ii) communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or*
- (iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information,*

shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

ISSUE III: If so, what quantum of monetary penalty should be imposed on the Noticee taking into consideration the factors mentioned in Section 15J of SEBI Act?

58. While determining the quantum of penalty under Section 15G of the SEBI Act, 1992, it is important to consider 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.”*

59. I note that on the basis of data available on record, it is difficult, in cases of such nature, to quantify exactly the disproportionate gain or unfair advantage enjoyed by the Noticee and the consequent losses suffered by the investors. Further the amount of loss to an investor or group of investors also cannot be quantified on the basis of available facts and data. Even though the monetary loss to the investors cannot be computed, unauthorized circulation of UPSI such as financial results holds a scope to pose a greater threat to the integrity of the market. The technological advancements may also equip the manipulators with innovative ways to flout and bypass the regulations that are put in place to protect the interest of the innocent investors. Today, developments in technology, information flow and access to markets have enabled new market structures to evolve and impact the way in which market manipulation occurs and new methods of market manipulation have emerged. The instant case before me is one such example where the information constituting UPSI has been circulated through WhatsApp messages, which conveniently wipes out any trace of the insider leaking the UPSI when the messages are deleted and manages to reach the selected group of targets. Such acts which are essentially in the form of making UPSI available on a discriminatory basis, if legitimized in the garb of routine sharing of market

gossips/rumors will compromise the confidence of the market, as this kind of activity has a serious impact on the price of the securities where the limited set of people having access to UPSI stand to gain at the expense of the innocent gullible investors. I am of the opinion that the peculiar nature of such communication of UPSI as in the instant case has to be strictly dealt with, in order to curb and discourage any future attempts at the same.

ORDER

60. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995, I hereby impose a penalty of ₹15,00,000/- (Rupees Fifteen Lakhs only) on the Noticee viz., Mr. Neeraj Kumar Agarwal in terms of the provisions of Section 15G of the Securities and Exchange Board of India Act, 1992 for the violation of Sections 12 A (d) & 12 A (e) of the Securities and Exchange Board of India Act, 1992 and Regulation 3 (1) of SEBI (Prohibition of Insider Trading) Regulations, 2015.

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

ENFORCEMENT → Orders → Orders of AO →PAY NOW

62. The Noticee shall forward said Demand Draft or the details / confirmation of penalty so paid to the “The Division Chief, EFD-1, DRA-II, SEBI, SEBI Bhavan, Plot No. C -4 A, “G” Block, Bandra Kurla Complex, Bandra (E), Mumbai -400 051”. The Noticee shall provide the following details while forwarding DD/ payment information:

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

e) Transaction Number

63. In the event of failure to pay the said amount of penalty within the timelines as mentioned in Paras above, recovery proceedings may be initiated under Section 28A of the Securities and Exchange Board of India Act, 1956 for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties.

64. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995, a copy of this order is being sent to Mr. Neeraj Kumar Agarwal (Noticee) and also to the Securities and Exchange Board of India, Mumbai.

Date: June 15, 2020

Place: Mumbai

B J Dilip
Adjudicating Officer