

**BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. AK/AO- 74-75/2014]**

**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
Shri Rasesh Kanakia (PAN: AABPK3454F)
Shri Himanshu Kanakia (PAN: AASPK5262C)

In the matter of

M/s. Cinemax India Limited

FACTS OF THE CASE

1. A letter of offer was made by M/s. Cine Hospitality Private Limited and M/s. PVR Limited as the Acquirer and PAC respectively, to acquire upto 72,80,000 fully paid up equity shares of Rs 5/- each at an offer price of Rs. 203.65 /- per equity share (representing 26% of the total paid-up equity share capital and voting rights) of M/s. Cinemax India Limited (hereinafter referred to as '**the Company**'). The public announcement of the same was made on November 29, 2012 and the shares of the company are listed at National Stock Exchange of India Ltd. (herein after referred to as '**NSE**') and Bombay Stock Exchange Ltd. (herein after referred to as '**BSE**').
2. While examining the letter of offer document of the Acquirer to acquire the shares of the Company, it was observed that the seller promoters of the Company, Shri Himanshu Kanakia and Shri Rasesh Kanakia have both failed to comply with the provisions of Regulation 31(2) read with 31(3) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (hereinafter referred to as '**Takeover Regulations, 2011**') within the stipulated time. Based on the aforesaid information with respect to the non-

compliance 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, 1992**') were initiated against Shri Himanshu Kanakia and Shri Rasesh Kanakia (hereinafter collectively referred to as '**the Noticees**') under Section 15 A (b) of SEBI Act, 1992 to inquire into and adjudicate the alleged violation of the aforesaid provisions of the Takeover Regulations, 2011.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as the Adjudicating Officer on November 26, 2013 under section 15-I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**SEBI Rules**') to inquire into and adjudge under Section 15A (b) of the SEBI Act for the alleged violation of the Takeover Regulations, 2011 committed by the Noticees.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. A common Show Cause Notice (hereinafter referred to as '**SCN**') Ref. No. EAD-6/AK/VG/2807/2014 and EAD-6/AK/VG/2808/2014 dated January 27, 2014 was issued to the Noticees under rule 4(1) of SEBI Rules communicating the alleged violation of Takeover Regulations, 2011 as detailed below. A copy of the status of compliance document as admitted by the concerned Noticees and detailed below was also sent along with the SCN.

Name of promoters	Regulations/ Sub-regulation	Due date for compliance	Actual date of compliance	Delay in compliance (days)
Himanshu Kanakia	31 (2)/31(3)	01/11/2012	07/11/2012	6
Rasesh Kanakia	31(2)/31(3)	06/11/2012	07/11/2012	1

Delay in compliance by the seller promoters (Himanshu Kanakia and Rasesh Kanakia)

5. The Noticees were called upon to show cause as to why an inquiry should not be initiated against it and penalty be not imposed under Section 15 A(b) of the SEBI Act for the alleged violations.
6. Vide letter dated February 7, 2014, the Noticees requested that they be granted a personal hearing in the matter. Accordingly, vide notice of hearing dated February 18, 2014, the Noticees were granted an opportunity for personal hearing before me on March 4, 2014. The Noticees were also advised to file their replies to the SCN, if any, at the earliest. Thereafter, vide individual letters dated February 24, 2014, the Noticees filed their submissions in reply to the SCN, stating therein:
 - i. That the Noticees admit that there was a delay in making disclosures and the non compliance as mentioned in the SCN in respect of the release of encumbrance on the shares of the Company was inadvertent and without any intention to conceal any information or gain any advantage;
 - ii. That the delay in disclosure was in respect of release of encumbrance and not of pledge of shares and hence the intention was not to conceal anything which will misguide investors or the public at large;
 - iii. That no unfair benefit was attained by the Noticees nor was any harm caused to investors or public at large due to the delay;
 - iv. That during the period when the encumbrance was released, the Noticees were busy in complying with various other requirements relating to the relisting of equity shares of the Company and hence there was an inadvertent delay;
 - v. That the delay of 6 days/ 1 day is not material/ major in nature and the Noticees request that the same be condoned;
 - vi. The delay in making disclosure happened for the first time since the listing of the shares of the Company, and is not repetitive in nature.
7. Thereafter, a personal hearing was held on March 04, 2014 and Mr. Jatin Shah, Authorized Representative (AR) of the Noticees appeared on their behalf and made the

submissions. The AR reiterated the submissions made in the replies dated February 24, 2014. The AR was *inter alia* advised to submit copies of the filings made under Regulation 31(2) read with (3) of the Takeover Regulations, 2011 to the stock exchange/s and company as well the details about the pledge.

8. Vide individual letters dated March 12, 2014, the Noticees submitted as follows:

Shri Himanshu Kanakia

- i. Shri Himanshu_Kanakia submitted the number of shares pledged, when and to whom they were pledged, and reason for the pledge, as well as the number of shares that were released from pledge, when they were released and the reason for the same.

The same are as follows:

Sl. No.	Date of creation of pledge	Name of the Parties to whom the shares were pledged	Number of shares pledged	Reasons for pledge	Date of reporting to the Company	Date of reporting to the Stock Exchange
1	15/03/2011	Pinkhem Investments Co. Pvt. Ltd.	24,00,000	Security for loan	22/03/2011	28/03/2011
2	06/05/2011		4,00,000		11/05/2011	12/05/2011
3	14/12/2011		52,000		22/12/2011	22/12/2011

Sl. No.	Date of Release of Shares	Name of the Parties to whom the shares were pledged	Number of shares released	Reasons for releasing of shares	Date of reporting to the Company	Date of reporting to the Stock Exchange
1	13/09/2011	Pinkhem Investments Co. Pvt. Ltd.	13,00,000	Repayment of loan	20/09/2011	22/09/2011
2.	19/10/2012		15,52,000		06/11/2012	06/11/2012 submitted on 07/11/2012

- ii. Shri Himanshu_Kanakia also stated that there were no past non compliances of SEBI Act and Regulations by him, and no action had been taken by SEBI against him in the past.

Shri Rasesh Kanakia

- i. Shri Rasesh Kanakia submitted the number of shares pledged, when and to whom they were pledged, and reason for the pledge, as well as the number of shares that were released from pledge, when they were released and the reason for the same.

The same are as follows:

Sl. No.	Date of creation of pledge	Name of the Parties to whom the shares were pledged	Number of shares pledged	Reasons for pledge	Date of reporting to the Company	Date of reporting to the Stock Exchange
1	18/04/2011	Everest Flavours Ltd.	10,00,000	Security for loan	21/04/2011	29/04/2011

Sl. No.	Date of Release of Shares	Name of the Parties to whom the shares were pledged	Number of shares released	Reasons for releasing of shares	Date of reporting to the Company	Date of reporting to the Stock Exchange
1	25/10/2012	Everest Flavours Ltd.	10,00,000	Repayment of loan	07/11/2012	07/11/2012

- ii. Shri Rasesh Kanakia also stated that there were no past non compliances of SEBI Act and Regulations by him, and no action had been taken by SEBI against him in the past.

CONSIDERATION OF ISSUES

9. I have carefully perused the written submissions of the Noticees and the documents available on record. It is observed that the allegation against the Noticees is that they did not comply with the provisions of Regulation 31(2) read with (3) of the Takeover Regulations, 2011 within the stipulated time.
10. The issues that, hence, arise for consideration in the present case are :
- Whether the Noticees did not comply with the provisions of Regulation 31(2) read with (3) of the Takeover Regulations, 2011 within the stipulated time?
 - Do the violations, if any, attract monetary penalty under Section 15 A(b) of SEBI Act?

- c. 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

11. Before moving forward, it is pertinent to refer to the relevant provisions of the Takeover Regulations, 2011, which read as under:

Disclosure of encumbered shares.

31 (1) ...

(2) *The promoter of every target company shall disclose details of any invocation of such encumbrance or release of such encumbrance of shares in such form as may be specified.*

(3) *The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the creation or invocation or release of encumbrance, as the case may be to,—*

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office.

12. The issue for consideration is whether the Noticees did not comply with the provisions of the Regulation 31(2) read with (3) of the Takeover Regulations, 2011 within the stipulated time. As per Regulation 31(2) read with (3) of the Takeover Regulations, 2011, the Noticees were required to disclose within seven working days from the creation or invocation or release of encumbrance, as the case may be, to the concerned stock Exchanges where the shares of the Company were listed, as well as the target company at its registered office, the details of such encumbrance or release of such encumbrance. With regard to the aforesaid compliances, the Noticees in their submission have stated that the lapses/delay in compliance of making disclosures have occurred due to inadvertence and were unintentional. I note that the Noticees have admitted to the delay in complying with the provisions of Regulation 31(2) read with (3) of the Takeover Regulations, 2011.

13. I, thus, find from the submission of the Noticees that it is established without doubt that the Noticees did not comply with the provisions of Regulation 31(2) read with (3) of the Takeover Regulations, 2011 within the stipulated time. The respective number of days of non-compliance in respect of each financial year has been enumerated in the table at Para (4) above.
14. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that *"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."*
15. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15A(b) of the SEBI Act, which reads as under:
- Penalty for failure to furnish information, return, etc.***
15A.*If any person, who is required under this Act or any rules or regulations made thereunder,—*
(b) to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.
16. While determining the quantum of monetary penalty under Section 15 A(b), 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.”

17. 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. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of such default by the Noticees. Further from the material available on record, it may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticees. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who may be affected by the change in control. The Regulation seeks to achieve fair treatment by *inter alia* mandating disclosure of timely and adequate information to enable shareholders to make an informed decision and ensuring that there is a fair and informed market in the shares of companies affected by such change in control. Correct and timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so results in preventing investors from taking well-informed decision. Thus, the cornerstone of the Takeover Regulations is investor protection.
18. As per Section 15A(b) of the SEBI Act, the Noticees are liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Further, under Section 15-J 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 such non-compliance 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 non-compliance by the Noticees.

However, 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.”

In view of the same, the argument put forth by the Noticees that there was no loss caused to any investor due to the delayed disclosures made by the Noticees, is not relevant for the given case.

19. In addition to the aforesaid, I am also inclined to consider the following mitigating factors while adjudging the quantum of penalty: a) the paid-up capital/ market capitalization of the Company at the relevant point of time; b) the trading volumes of the Company's shares on the exchange, where the shares were listed, during the relevant period; and c) the number of occasions in the instant proceeding that the Noticees have violated the relevant provisions of the Takeover Regulations.
20. The paid up capital of the Company was 2,80,00,000 shares of Rs. 5/- each aggregating Rs. 14,00,00,000/-. I note from the letter of Offer that the equity shares were not frequently traded on the stock Exchanges. I find that that Shri Himanshu Kanakia did not comply with the provisions of Regulation 31 (2) read with 31 (3) of the Takeover Regulations, 2011 within the stipulated time on one occasion in the year 2012 and that the delay was of 6 days. Further, Shri Rasesh Kanakia did not comply with the provisions of Regulation 31 (2) read with 31(3) of the Takeover Regulations, 2011 within the stipulated time on one occasion and that the delay was of 1 day.
21. As promoters of a listed company, the Noticees had a responsibility to comply with the disclosure requirements in accordance with their spirit, intention and purpose. Delayed compliance with

disclosure requirements by the promoters of a listed company undermines the regulatory objectives and jeopardizes the achievement of the underlying policy goals. I further note that the Noticees have themselves submitted that the delay in disclosure was in respect of release of encumbrance and not of pledge of shares. Thus, I find that the Noticees were well aware of the requirement of disclosure of encumbered shares under the Takeover Regulations, 2011. I have, however, taken note of the fact that the delay was 6 days in respect of Shri Himanshu Kanakia and 1 day in respect of Shri Rasesh Kanakia.

ORDER

22. After taking into consideration all the facts and circumstances of the case, I impose a penalty of Rs.2,00,000/- (Rupees Two Lakh only) on Shri Himanshu Kanakia and a penalty of Rs.1,00,000/- (Rupees One Lakh only) on Shri Rasesh Kanakia under Section 15 A(b) of SEBI Act, 1992, which will be commensurate with the violations committed by them.
23. 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 Shri 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.
24. 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: **May 13, 2014**

Place: **Mumbai**

Anita Kenkare
Adjudicating Officer