BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

ADJUDICATION ORDER NO. PKB / AO-8 / 2011

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

In respect of

M/s. Helios and Matheson Information Technology Ltd.

PAN: AAACE0805A

In the matter of

M/s. Helios and Matheson Information Technology Ltd.

I. BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") conducted investigation into the alleged irregularity in the trading in the shares of M/s. Helios and Matheson Information Technology Ltd. (hereinafter referred to as "Noticee") for the period February 2005 to September 2006 (hereinafter referred to as "Investigation Period").

2. On the conclusion of investigation by SEBI, Adjudication Proceedings under section 15I of the SEBI Act, 1992 (hereinafter referred to as "Act") were initiated in respect of the Noticee.

3. Shri Sura Reddy was appointed as the Adjudicating Officer vide Order dated June 29, 2007 to inquire into and adjudicate under sections 15HA and 15HB of the Act and section 23 E of Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "SCR Act"), the alleged violation of provisions of Regulations 3(a), 3(d) and 4(2)(k) of the SEBI (Prohibition of

Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as "PFUTP Regulations") and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as "PIT Regulations") and Clause 36 of the Listing Agreement.

4. Pursuant to transfer of Shri Sura Reddy, the undersigned was appointed as the Adjudicating Officer vide Order dated December 10, 2008.

II. SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice (hereinafter referred to as "SCN") dated March 18, 2008 was issued to the Noticee under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as "Adjudication Rules") and Rule 4(1) of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005, calling upon the Noticee to show cause why inquiry should not be held against the Noticee for the alleged violations.

6. The SCN was duly received by the Noticee. The acknowledgement of receipt of the same by the Noticee is available on record. No reply was received from the Noticee. Therefore, Notice of Inquiry dated April 23, 2009 was issued to the Noticee vide which it was accorded an opportunity of personal hearing on May 11, 2009 by which time, the Noticee was also advised to send its reply.

7. Vide letter dated April 29, 2009, the Noticee acknowledged the receipt of the Notice of Inquiry and submitted that it had not received the SCN and hence, could not reply to the same and requested a copy of the SCN to enable them to file reply at the earliest.

8. Vide letter dated May 4, 2009, the Noticee authorized Mr. P. Manoj Kumar, General Manager to collect the copy of SCN. Vide letter dated May 6, 2009, the Noticee acknowledged the receipt the SCN and requested

to grant 30 days time to send reply as the contents of the notice are also subject matter of litigation and also set another date thereafter for hearing.

9. Vide letter dated June 6, 2009, the Noticee requested for granting of 4 weeks time to send their reply. Vide letter dated July 3, 2009 the Noticee replied to the SCN and the same has been dealt with while arriving at the Findings in the subsequent paragraphs.

10. Vide Notice of Inquiry dated October 7, 2009 the Noticee was given an opportunity of personal hearing which was scheduled on October 23, 2009. Vide letter dated October 19, 2009 the Noticee requested for rescheduling of the hearing preferably in the second week of November, 2009. This request of the Noticee was accepted and vide Notice of Inquiry dated October 23, 2009, the hearing was rescheduled to November 13, 2009. Vide letter dated November 9, 2009 the Noticee submitted that it had filed for consent in the instant matter. Subsequent to the rejection of the consent application of the Noticee, vide Notice of Inquiry dated March 30, 2010, the Noticee was given an opportunity of personal hearing which was scheduled to be held on April 6, 2010.

11. Vide letter dated April 2, 2010 the Noticee requested for adjournment of the hearing. This request of the Noticee was accepted and vide Notice of Inquiry dated April 7, 2010, the Noticee was given one last opportunity of personal hearing which was scheduled to be held on April 20, 2010. Vide email dated April 20, 2010 the Noticee informed us that they had filed the revised consent application and in view of the same, requested to keep the Adjudication proceedings in abeyance and enclosed the copy of their letter dated April 16, 2010 acknowledged by SEBI on April 19, 2010. Vide this Noticee submitted that they have filed the revised consent Application and hence, requested to keep the hearing in abeyance. However, vide email dated April 20, 2010 the Noticee was advised to attend the hearing scheduled on April 20, 2010 and as two opportunities of hearing had already been provided to the Noticee subsequent to the rejection of the consent Application of the Noticee, no further opportunity

of hearing would be granted. Vide letter dated April 20, 2010 the Noticee assured that their representatives would be appearing for the hearing and reiterated their request for keeping the hearing in abeyance and requested for giving another date for the hearing. Mr. P Manoj Kumar and Ms. Sheetal Bhatkalkar, Authorized Representatives of the Noticee appeared for the hearing held on April 20, 2010. When asked if they wished to submit anything in relation to the Proceedings apart from their reply dated July 3, 2009, they submitted that *"We are not aware of the matter."*

12. As the representatives of the Noticee were not aware of the matter, to provide a meaningful opportunity to the Noticee, one last opportunity of personal hearing was scheduled on June 7, 2010. Mr. G.K.Muralikrishna, Managing Director of the Noticee, Mr. T.S.Sridharan and Mr. Prasad Vijayakumar, General Counsel of the Noticee and Mr. Vinay Chauhan, Advocate, Corporate Law Chambers India appeared for hearing on June 7, 2010. The submissions made vide letter dated July 3, 2009 were reiterated with a liberty to make further written submissions by June 29, 2010. The Noticee filed their additional submissions vide letter dated June 28, 2010. These submissions have been dealt with while arriving at the Findings in the subsequent paragraphs.

III. ISSUES FOR CONSIDERATION

13. On perusal of the SCN and Noticee's submissions, I have the following Issues for consideration, viz.,

> ISSUE 1: Whether the Noticee has violated provisions of Regulations 3(a), 3(d) and 4(2)(k) of PFUTP Regulations and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT Regulations and Clause 36 of the Listing Agreement?
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> ISSUE 2: Whether the Noticee is liable for monetary penalty under sections 15HA and 15HB of the Act and section 23 E of SCR Act?

ISSUE 3: What quantum of monetary penalty should be imposed on the Noticee, taking into consideration the factors mentioned in section 15J of the Act?

IV. FINDINGS

14. On careful perusal of the material available on record, I proceed to discuss the Issues for Consideration and my findings are recorded as under:

ISSUE 1: Whether the Noticee has violated provisions of Regulations 3(a), 3(d) and 4(2)(k) of PFUTP Regulations and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT Regulations and Clause 36 of the Listing Agreement?

15. The provisions of Regulations 3(a), 3(d) and 4(2)(k) of PFUTP Regulations and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT Regulations and Clause 36 of the Listing Agreement read,

SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relation to Securities Market) Regulations, 2003

Prohibition of certain dealings in securities

3. *No person shall directly or indirectly –*

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.

4. Prohibition of manipulative, fraudulent and unfair trade practices

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely : –

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

Schedule II, Code of Corporate Disclosure Practices for Prevention of Insider Trading read with Regulation 12 (2) of SEBI (Prohibition of Insider Trading) Regulations, 1992,

Clause 2.1 - Price sensitive information shall be given by listed companies to stock exchanges and disseminated on a continuous and immediate basis.

Listing Agreement

Clause 36 - "……..The Company will also immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information. The material events may be events such as:

…….

(5) Litigation/dispute with a material impact

The Company will promptly after the event inform the Exchange of the developments with respect to any dispute in conciliation proceedings, litigation, assessment, adjudication or arbitration to which it is a party or the outcome of which can reasonably be expected to have a material impact on its present or future operations or its profitability or financials.

(7) Any other information having bearing on the operation/performance of the company as well as price sensitive information, which includes but not restricted to;

i) Issue of any class of securities.

ii) Acquisition, merger, de-merger, amalgamation, restructuring, scheme of arrangement, spin off or selling divisions of the company, etc.

……..

The above information should be made public immediately."

16. The SCN stated that the Noticee had made various favourable corporate announcements during the Investigation Period i.e. issue of bonus shares, dividend, and declared favourable un-audited quarterly results etc. besides the announcement of acquiring 3 entities of vMoksha Technologies Pvt. Ltd. (hereinafter referred to as "vMoksha"). It was further alleged that the Noticee did not disclose/announce with regard to profitability of vMoksha companies to the exchange.

17. On the basis of press release dated May 11, 2005 of the Noticee and the announcement made to the exchanges, it was noted that the Noticee had stated that the acquisition of the 3 vMoksha companies was complete in an all cash deal of 19 million dollars which included the earn out for meeting certain financial targets.

18. The Noticee had submitted to SEBI that the advisors and mandate holders for the sellers, PWC, structured the transaction in such a way that sellers

would subscribe to redeemable preference shares of the Noticee redeemable at the end of 18 months from the date of allotment and the Noticee would effect payment for sold shares by wire transfer and by demand draft as envisaged in clause 2.2.1 of the Share Purchase Agreement (hereinafter referred to as "SPA"). As per the SPA it was decided that the Noticee would pay a consideration of Rs. 1877.77 per share to vMoksha and payment to vMoksha, Mauritius would be made by remittance through wire transfer through normal banking channels and payment to other sellers namely, Tapan Garg and Madhuri Garg would be by way of demand drafts payable in India for a cumulative amount of INR 62.5164 crore for the 100% acquisition of the sale shares within 20 days from the date of execution of the agreement. The sale also included the subsequent subscription of zero coupon redeemable preference shares in the Noticee company by vMoksha. The Noticee had also agreed to pay in cash or equivalent redeemable preference shares of the Noticee company in the event of vMoksha achieving certain target turnovers. In the Subscription Agreement which is a part of the SPA it is specified that vMoksha, Madhuri Garg and Tapan Garg had agreed to subscribe to 84,05,520 preference shares of the Noticee company for an aggregate price of Rs. 63.0414 crores. The subscription price would be paid by the abovementioned investors to the Noticee simultaneously on receipt of wire transfer funds from the Noticee under the SPA.

19. Therefore, it was alleged that during the course of verification of announcements the Noticee had not stated the entire facts in the press release; that the sellers would subscribe to preference shares as subsequent leg of the deal was not disclosed in the press release. The general understanding of a shareholder that could be gathered from the announcements of the Noticee was that the Noticee was purchasing a company by paying cash from its general reserves. The issue of preference shares of vMoksha, which was prima facie willfully withheld from shareholders, for the specific purpose of buying the company from the seller negates all connotations of a "cash deal."

20. Few articles were published in newspapers i.e. The Financial Express titled "The Flip Side of the Great Indian IT Story" dated February 13, 2006 and in The Indian Express 'Getting Curioser' dated February 19, 2006 which raised doubts about the possible failure of the acquisition of vMoksha by the Noticee in a $19 mn cash deal and the absence of any intimation of the same to the stock exchanges.

21. Prior to the publication of above said newspaper articles, the last disclosure was made on May 12, 2005 wherein the Noticee had informed that all the procedural formalities for acquisition of the 3 vMoksha companies were completed and the consideration for the deal was USD19 million. However as per the SPA, it was observed that Clause 4 specifies that the completion shall take place on a date to be mutually agreed upon by both the parties on compliance of certain other clauses in the agreement but such date would not be later than 120 days from the signing of the SPA. It was observed that the Noticee had prima facie, misled investors by stating that the deal was complete whereas the deal was not complete in entirety and was still subject to compliance of certain conditions**.**

22. Further, the Noticee had not informed the Stock exchange about the interim developments such as that the Noticee's attempt to acquire 3 vMoksha companies had not materialized in the stipulated time period i.e. within 120 days as specified in the SPA and the judicial proceedings. The investors and the general public were kept in the dark during the interim period. On expiry of 120 days of signing of the SPA the Noticee should have made announcement whether the deal was completed or not because as per the SPA there was no provision whereby the deal could have been kept alive, if not completed, unless a new SPA was agreed to and signed by both the parties.

23. Several news articles too appeared in the various newspapers during the examination period. On analyzing these announcements and news, it was noted that a news article was not informed to the Exchange quoting

"Helios & Matheson scout for foreign buy" which appeared in Economic Times on 14/01/2006. Clarification was sought by SEBI on the issue of non intimation of the above to the stock exchanges. The Noticee replied that it had not intimated the stock exchanges because the Noticee was then only in the process of identifying suitable proposals and no concrete decisions had been taken that could be informed to the stock exchanges. Subsequently, when a healthcare company, A Consulting Team Inc., USA was acquired in March 2006 the same was intimated to the stock exchanges.

24. The Noticee submitted that on June 30, 2005 a sum of USD 13,395,484 was remitted to vMoksha Technologies Ltd., Mauritius (INR 58.37,75,193) from their current account through State Bank of Mauritius, Chennai as payment for 306,665 shares and the balance was paid into the savings accounts in India in rupee equivalent to the other two sellers, namely Mr. Madhuri Garg (INR 4,66.19,778) and Mr. Tapan Garg (INR 19,036) as payment for 24,490 and 10 shares respectively. The Noticee also submitted that as detailed in the SPA, PWC was mandated to obtain FIPB approval prior to receiving the application money for redeemable preference shares and remittance of consideration payable to the sellers. As per the terms of FIPB approval and in compliance of Press note no 9, application money for redeemable preference shares was received and the payment for the sale of shares was made. This was also reflected in the Noticee's Annual Report (2005-06) under the heading "advance for investment in the shares of vMoksha."

25. The Noticee submitted that the SPA was definitive in nature. As per clause 3.13 (-2 para), the sellers, the company (vMoksha Technologies Pvt Ltd., India), and the confirming parties cannot rescind the said agreement once the same was signed. Only, the Noticee was empowered to waive or postpone any of the conditions precedent mentioned in the SPA. The Noticee submitted that the transfer of USD 13,395,484 to the Noticee were effected pursuant to the approval received from the Foreign Investment Promotion Board as application money for subscription to redeemable

preference shares. Preference shares were to be allotted upon release of vMoksha shares from the escrow and till such time, the money received is treated as application money and no allotment of shares is made.

26. Further, a loan availed by vMoksha, was taken against demand Promissory Note and Loan Agreement, supported by Board Resolution of vMoksha under appropriate power to borrow and lien letter for pledge of proceeds by the Noticee and a personal guarantee of Mr. V. Ramachandiran, Chairman and Mr. G.K. Muralikrishna, MD of the Noticee. The Noticee stated that vMoksha Mauritius along with Tapan Garg and Madhuri Garg, the sellers, were required to subscribe to the preference shares to start with for which a comfort in the form of a personal guarantee was given for enabling vMoksha Mauritius to raise that loan initially. The proceeds of the loan were remitted to the Noticee immediately after sanction as application money for subscription to redeemable preference shares by vMoksha, Mauritius. Hence, it was considered appropriate to extend a personal guarantee. The loan has since been repaid by vMoksha Technologies Ltd. Mauritius and there is no outstanding as on date. The entire transaction is covered by the terms and conditions set out in the SPA and the Subscription Agreement. It has also been reflected in the Noticee's Annual Report (2005-06) under the heading "advance received towards the subscription of Redeemable Preference Shares"

27. Further, according to the SPA, the consideration was to be paid by the Noticee to vMoksha within 20 working days from the date of execution of the SPA. The SPA was executed on May 11, 2005 and payment was made on June 30, 2005 i.e. after a delay of almost one month. The Noticee should have ordinarily initiated the transaction by effecting payment and received it back as contribution to preference shares. Further, the press announcements following the deal were silent on the preference shares, which in effect, would have destroyed the hue of an all-cash deal from the announcement.

28. Further, the International Financial Services Ltd., a leading management company incorporated in Mauritius and licensed by the Financial Services Commission (FSC) to provide advisory and management services for international businesses, also pointed out in a letter to vMoksha that the whole incident was unusual.

29. From the above, I find that the allegations against the Noticee are that it failed to make announcements/disclosure with regard to the following price sensitive information viz.,

a. That the Noticee had not stated the entire facts in the press release dated May 11, 2005 and disclosure dated May 12, 2005; that the sellers would subscribe to preference shares as subsequent leg of the deal. It appears from the announcements of the Noticee company that it was purchasing a company by paying cash from its general reserves. However, the deal was structured in such a way that sellers would subscribe to redeemable preference shares of the Noticee's company for an equivalent amount of the sale price and the sellers would in turn wire back the same amount to the Noticee towards subscription to preference shares. The issue of preference shares, which was allegedly willfully withheld from shareholders, for the specific purpose of buying the company from the seller negates all connotations of a "cash deal."

b. In the disclosure dated May 12, 2005 the Noticee had informed that all the procedural formalities for acquisition of the 3 vMoksha companies were completed. However as per Clause 4 the SPA, it is observed that the completion shall take place on a date to be mutually agreed upon by both the parties on compliance of certain other clauses in the agreement but such date would not be later than 120 days from the signing of the SPA. The Noticee had prima facie, misled investors by stating that the deal was complete whereas the deal was not complete in entirety and was still subject to compliance of certain conditions.

c. The Noticee had not informed the Stock exchange about the interim developments such as its attempt to acquire 3 vMoksha companies had not materialized in the stipulated time period i.e. within 120 days as

specified in the SPA and the judicial/arbitration proceedings which started in relation to the same. The investors and the general public were kept in the dark during the interim period.

30. Now I deal with the Noticee's submissions made vide letter dated July 3, 2009. The Noticee has submitted that the SCN deals exclusively with issues related to acquisition of vMoksha entities which is subject matter of arbitration before a judicial forum and that the very same issues which are raised in the Notice are being agitated in arbitration. The Noticee further submitted that an opinion is sought to be formed on the basis of a complaint from one Rajeev Sawhney, who is a party to the dispute with the company and Principles of natural justice require that a regulatory body maintains its neutrality till the dispute is resolved in an appropriate legal forum and SEBI's involvement in the matter at this juncture is likely to bias and impair its case in the pending arbitration proceedings. The Noticee also requested that the proceedings under reference be kept in abeyance till the legal issues are decided since the matter is sub-judice. In this regards I note that the Present Proceedings only dwell on allegations concerning violation of securities laws under the ambit of SEBI and therefore, do not interfere with any other disputes pending elsewhere. Moreover, the present Proceedings only places reliance on all information provided to the Noticee and the present Proceedings have been initiated against the Noticee pursuant to investigation conducted by SEBI.

31. Further, the Noticee submitted that

i. *Without prejudice to the aforesaid it is submitted that, in your notice under Rule 4(1) of SEBI (Procedure For Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 & 4(1) of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005, you have stated that you have been appointed as Adjudicating Officer vide order of SEBI dated June 29, 2007, a copy of which is annexed with the Notice. On a perusal of the said appointment Order, it is noticed that adjudication has been ordered against us for violation of provisions of SEBI Act, FUTP Regulations & Insider Trading Regulations and SCRA. However it is noted that the Hon'ble Member has exercised the powers conferred upon him under section 19 of the SEBI Act, 1992 r/w 15-I of the Act and Rule 3 of SEBI (Procedure For Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules 1995.*

ii. *It is respectfully submitted that delegation of the powers of SEBI in terms of section 19 of the Act is available to SEBI for exercising its powers and functions under the SEBI Act as is evident from the section itself.*
For ready reference section 19 is extracted below:

"The Board may by general or special order in writing delegate to any member, officer of the board or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions ***under this Act*** *(except the powers under section 29 as it may deem necessary." (emphasis supplied)*

iii. *Therefore the power available to appoint the Adjudicating Officer by Whole Time Member is applicable only to the alleged violation of provisions of SEBI Act, FUTP Regulations & Insider Trading Regulations as recorded in the order and it cannot extend to adjudication in respect of any violation of provisions of SCRA. Adjudication under SCRA is a different channel which cannot be substituted by the provisions of SEBI Act.*

iv. *It is also seen that the appointment has been made in terms of section 15-I of the SEBI Act and Rule 3 of SEBI (Procedure For Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules 1995. It is reiterated that the power under section 15-I and said Rule 3 is not available to the adjudication in respect of any violation of the provisions of the SCRA or the rules and regulations made thereunder.*

v. *It is also noticed that you have issued a Notice under section 4(1) of the Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 2005, though you have not been empowered to issue such a Notice, as the member's decision based on which you are purportedly acting, enables you to exercise power only under the SEBI (Procedure for holding inquiry and imposing penalties by adjudicating officer) Rules, 1995. For this reason also your notice is beyond jurisdiction and therefore cannot be proceeded with.*

32. In this regard, I note that the aforesaid contentions raised by the Noticee are of technical nature only. SEBI has the power to appoint Adjudicating Officer to adjudicate under section 23E of SCR Act. In the present case, the Appointment Order appoints the Adjudicating Officer to adjudicate the alleged violation of the Noticee under section 23E of SCR Act also and the same has been duly spelt out in the SCN and all principles of natural justice have been adhered to. Therefore, in view of the above, I find that the contentions raised by the Noticee are only technical in nature and do not impact the present Proceedings on merit.

33. The Noticee further submitted that *"With regard to the observations in para 2 of the Notice, it is submitted that the same is a matter of record therefore we have no comments to offer. However, we may point out that we have not been provided with the copy of the investigation report, which is in gross violation of principles of natural justice."* In this regard, I note that the present Adjudication Proceedings place reliance on only those material which have been provided to the Noticee and the SCN has spelt out all the allegations against the Noticee and it is on the basis of the SCN and submissions of the Noticee, that the undersigned has arrived at the Findings, therefore, under no circumstance has there been any violation of principles of natural justice.

34. Further, the Noticee has submitted that:

i. It is denied that the Notice had made various company favourable corporate announcements (i.e. issue of bonus shares, dividend, and declared favourable un-audited quarterly results etc. besides the announcement of acquiring 3 entities of vMoksha) during the relevant period, as alleged. The alleged announcements were made at different times in consonance with and in compliance with the provisions of the Listing Agreement.

The allegation of making the "favourable corporate announcements" is a bald allegation devoid of any substance. Nothing has been brought on record to show as to how the favourable corporate announcements were unwarranted or were contrary to factual position. Absence of specificity disenables us to fully meet the said allegation.

ii. We did not disclose/announce with regard to profitability of vMoksha entities to the exchange, since the effect of the working of vMoksha entities under the SPA was only futuristic. The said group only had the potential growth but was not effective at that stage calling for any announcement in that regard.

iii. The fact that we did not include the revenue or profits of vMoksha entities in our financial results also reinforces our contention that the announcements made by us at the relevant time were not favourable but were made in the ordinary course of business. Had it been so, we would have disclosed the profitability of vMoksha entities in our financial results as projected by the Sellers and promoters of vMoksha entities. The fact that we did not do so fortifies our contention that all the announcements/declarations made by us truly and correctly reflected the financial state of affairs of the company.

iv. It is denied that we had not stated the entire facts in the press release or that we had willfully withheld from shareholders the proposed issue of preference shares to the sellers of vMoksha entities with the specific purpose of buying the company from the Sellers or that the deal was not a cash deal as alleged. All the relevant details pertaining to the transactions were disclosed.

Here it may be appreciated that it is not required to disclose everything, and it is also difficult to make a disclosure regarding all the clauses of the agreement in a press release. We were of bonafide belief that since the proposed issue of preference shares was only taken as a protection by way of re-investment of the price in the company for 18 months, and in order to ensure that the representations and warranties are fully complied by the Sellers, it was not warranting explicit disclosure. Whatever was found to be of consequence, as per Company's bonafide belief and understanding at the relevant time, was disclosed appropriately. In this context it may be highlighted that the alleged non disclosure was not suppression of material fact with ulterior motive as sought to be insinuated.

v. *It may be also pointed out that the transaction agreements were approved by the Board of Directors of both companies and advance notice of the board meeting of our company was given to the Stock Exchanges. Mr. G.K. Muralikrishna, Managing Director, was authorized to take such steps as was necessary to complete the transactions including the convening of an Extraordinary General Meeting and obtaining the approval of the shareholders for issue of redeemable preference shares. At the Extraordinary General Meeting held on 20.07.2005, issue of redeemable preference shares was approved by the Shareholders which was duly intimated to the Stock Exchanges. Thus, it could be seen that we had made necessary disclosure to the stock exchange/ shareholders and no portion of the deal was sought to be withheld from the investors and shareholders.*

vi. *As per our understanding, the acquisition in question was a cash deal. The acquisition was based on SPA with the sellers and the confirming parties. As per clause 2.2.1 of the SPA,*

"2.2.1

H&M shall pay a consideration computed at the rate of Rs. 1,887.77 per share to the SELLERS. Payment to vMOKSHA MAURITIUS will be made by H&M by remitting by wire transfer through normal Banking Channels and payment to the other SELLERS namely TG and MG shall be by way of Demand Drafts payable in India to the SELLERS for a cumulative amount of Indian Rupees 62.5164 crores for the 100% acquisition of the Sale Shares in the Company within 20 working days from the date of execution of this Agreement."

From the above it is abundantly clear that it is a cash deal and admittedly the remittance towards sale consideration was also made on 30.06.05 by wire transfer as stipulated in the SPA.

vii. *It may be pointed out that at the relevant time there was no need for us to convey any incorrect impression to the investors, as alleged. It may be appreciated that there was nothing for us to gain by "willfully withholding" the proposed issue of preference shares to vMoksha entities. As stated hereinbefore, issue of preference shares to vMoksha entities was nothing but a provision for safeguarding the interests of the company and for ensuring the smooth continuity in the operations of vMoksha entities in accordance with*

the terms and conditions of the SPA and the representation and warranties post acquisition by us."

35. The Noticee vide its letter dated June 28, 2010 further submitted that:

(a) Willful withholding of disclosure regarding – subscription of preference shares by Sellers

i. *The case under reference is not that a disclosure has not been made, but the question has been raised regarding adequacy of the same. At the relevant time we had, based on our bonafide understanding disclosed everything what we considered was relevant and warranted a disclosure. It may be appreciated that extent of disclosure required in a given case is highly subjective and would vary based on the perception of every corporate and no hard and fast formula can be prescribed for that. The test is the authenticity and accuracy of the material furnished and not mere adequacy or inadequacy.*

ii. *We had not "willfully withheld" anything as alleged. "Willful" connotes that deliberate / intentional attempt was made by us with some ulterior objective / oblique motive. There is nothing on record to substantiate as to how the inadequacy of disclosure as alleged was willful, deliberate or intentional and what was the motive behind the same. There was no ulterior motive involved in not disclosing the subsequent leg of the transaction in the form of issuance of redeemable preference shares to the Sellers. There was nothing to be gained by us by not disclosing to the shareholders, the subsequent leg of the transaction, since the same was for the benefit of the shareholders and the company only. The issuance of redeemable preference shares to the Sellers, as a part of the deal was insisted since :*

(a) the same would lead to reinvestment of amounts by the Sellers in our company as protection and for due compliance of the representations and warranties made by the sellers in the SPA.

(b) the same would also ensure that there was seamless integration of the vMoksha companies with our company; and

(c) ensure durability of interest of the Sellers in the company.

iii. *Thus, the said subscription was insisted in order to protect the interest of the company and its shareholders and no fault can be found with the same. Further, the redemption period was only 18 months.*

iv. *It may be appreciated that why would somebody try to suppress a fact which is in no way going to either affect the deal or the decision of the shareholders to go ahead with the transaction.*

v. *In any event the allotment of redeemable preference shares could not have been made by us, without seeking approval from the shareholders. Admittedly, in the EGM held on July 20, 2005 the shareholders of the company had approved the issuance of redeemable preference shares.*

Further, admittedly, we have also received the subscription amount of Rs.63,04,14,007 from the respective Sellers, which continues to be reflected in our books as advance towards application money for issuance of redeemable preference shares. Further, the consideration for acquisition of vMoksha companies is also shown at Rs.65,02,50,007 as advance.

vi. *Allegation has been made in the SCN, that the subsequent leg of the transaction in the form of issuance of shares to the Sellers was not disclosed, since it would have negated that the deal in question was a cash deal and that an impression was sought to be created that we were making the acquisition by paying cash from our general reserves (refer Para 7 SCN).*

vii. *The said allegation is misplaced and completely contrary to factual position on record. The deal in question was a cash deal, same is also borne out by the contents of the Share Purchase Agreement entered into between the parties which specifically provided that we were to pay to the Sellers consideration at the rate of Rs 1887.77 per share to the Sellers (refer Clause 2.2.1. of SPA). Admittedly, the sale consideration amounts (being Rs. 63,04,14,007) have actually been paid by us to the respective Sellers on June 30, 2005, through Banking channel and same is also borne out by our books. Further, even the Preference shares were meant to be redeemed for cash within 18 months.*

viii. *With regard to creation of impression that we were making the acquisition by paying cash from our general reserves it is denied that we had tried to create any such impression. Based on our bonafide understanding of the terms of the agreement that we had entered into with the Sellers, we had disclosed that the deal was a cash deal. We had neither conveyed that we are paying cash from the general reserves nor was there any such need for us to do so. It may be appreciated that it is not always necessary that a company will enter into cash deals only if it has requisite amount in its general reserves. In a given case a company may also tie up cash by raising loans from banks etc., should there be any mismatch of funds. Therefore, the suggestion is based on mere surmises and conjectures.*

ix. *It may be noted that, it is not a case where the company is making losses and it is trying to convey something contrary to factual position by painting a rosy picture about its financial position in order to mislead the investors and make quick gains. The details of our financial position were already in public domain. We give below our financial position over the years 'at a glance' :*

Financial Year	*Profits (in Rs.)*	*Netowned funds*
2009 (18 months)	*30,02,62,405*	*207,50,86,439*
2008	*45,77,11,997*	*178,94,51,498*
2007	*44,59,24,752*	*99,27,41,962*
2006	*26,80,97,715*	*66,57,53,978*
2005	*12,64,40,119*	*43,18,80,867*
2004	*4,56,92,564*	*32,25,53,050*

need for us to create an impression which was not borne out by the factual position on the ground."

36. The perusal of communication made by the Company to the Stock Exchanges clearly brings out that there was emphasis on the factor that it was a cash deal. It is interesting to note the contents of the communication made to the Stock Exchanges by the Noticee, which states as below:

" By this transaction, we are investing cash 19 mn dollars, and therefore it is a big statement about our commitment and seriousness to build scale, capabilities and international presence.

The Share Purchase Agreement was signed today by Helios & Matheson and vMoksha's officials after completion of all procedural formailities. The all-cash deal was closed at USD 19 million and includes earn-out for achieving targeted financial milestones over a two-year period." *(Emphasis supplied)*

37. However, the perusal of Share Purchase Agreement and Subscription Agreement entered into between the Noticee and vMoksha clearly brings out that it was not a cash deal and there was no cash investment of 19 million dollar. The following clauses of the Share Purchase Agreement and Subscription Agreement are to be seen in this regard.

"Clause no. 2.2.1 of Share Purchase Agreement

*H&M shall pay a consideration computed at the rate of Rs. 1,887.77 per share to the SELLERS. Payment to vMOKSHA MAURITIUS will be made by H&M by remitting by wire transfer through normal Banking Channels and payment to the other SELLERS namely TG and MG shall be by way of Demand Drafts payable in India to the SELLERS for a cumulative amount of Indian Rupees 62.5164 crores for the 100% acquisition of the Sale Shares in the Company within 20 working days from the date of execution of this Agreement. However, the parties have agreed to procure information from the Foreign Investment Promotion Board (FIPB) and/or Reserve Bank of India (RBI) within 7 working days of the signing of this Agreement that **this sale transaction and the subsequent subscription of Zero Coupon Redeemable Preference shares in H&M by the SELLERS** shall not require any prior approval from FIPB and/RBI and that its covered under the automatic route under the prevailing guidelines. The Parties have jointly requested Price Waterhouse Coopers Pvt Ltd., the advisor of the SELLERS, who have accepted such request to seek such confirmation from the FIPB/RBI and it is anticipated that this will be procured within 7 working days from the date of execution of the Agreement."*

(Emphasis supplied)

"Clause 2.2. of Subscription Agreement

Agreement to Subscribe and Issue & Allot: Subject to the terms and conditions hereof, on the date of closing, the Company will issue and allot to the INVESTORS, and the INVESTOR agrees to subscribe for 84,05,520 (eighty four lakhs five thousand five hundred and twenty) of H&M's Preference Shares at the price set out for an aggregate price of Rs. 63.0414 crores (Subscription Price) as indicated in the schedule. ***The Subscription price shall be paid by wire transfer by the INVESTORS to H&M simultaneously on receipt of wire transfer funds from H&M under the Share Purchase Agreement dated 11 May 2005."***

(Emphasis supplied)

38. From the harmonious reading of the above referred clauses of these Agreements, it can be noted that the deal was not a cash deal and there was not a cash investment of 19 mn dollars as claimed by the Noticee in its communication to the Stock Exchanges.

39. From the above discussion, I find that the information given by the Noticee is not accurate and is incomplete. The payment may be made by Noticee in cash and the preference shares may be redeemed in cash but at the time of making the announcement, the deal was not an all cash deal because calling it a cash deal would make the investors presume that no other conditions stand attached to the deal. However, that is not the situation in the present case. Even if the subscription to the preference shares was insisted to protect the interest of investors, it does not render the incomplete and inaccurate disclosures complete and correct.

40. Therefore, this is not case where the defense that 'not everything can be disclosed' can be used because the Noticee has disclosed incorrect/incomplete information as it reveals a wrong picture of the whole deal to the investors. The allegation against the Noticee on this count is that it has made a wrong/incomplete disclosure which was misleading in nature. Non disclosure is one thing and wrongful/incomplete disclosure another. Therefore, I don't accept Noticee's explanations as when an announcement by a listed company is made, it should be very careful of the language so used and the disclosure should be complete in all respect enabling the investors to make informed

investment decisions. And definitely, in any case, the disclosure should not convey the incorrect details. The question is not only regarding the adequacy of the disclosure but also about the authenticity of the disclosures made by the Noticee. The disclosure was not accurate and was incorrect and also incomplete.

41. Its Noticee's own submissions that "*We were of bonafide belief that since the proposed issue of preference shares was only taken as a protection by way of re-investment of the price in the company for 18 months, and in order to ensure that the representations and warranties are fully complied by the Sellers, it was not warranting explicit disclosure.*" From the fact that its Noticee's own submissions that the issue of preference shares was to ensure compliance at least for 18 months, it can be noted that the subscription to the Preference Shares by the Sellers was the integral part of the Agreement to Purchase vMoksha companies and omitting to mention about the same definitely affected the ability of the investors to take informed investment decisions.

42. It would defeat the purpose of PIT Regulations if the Companies don't make proper and true disclosures, as along with liberty comes responsibility and if the Companies are allowed to exercise adequate freedom to choose what has to be mentioned in the Public announcement, the same has to be responsibly used and the Company should at least not create a delusion in the minds of the investors. Therefore, the Noticee's explanations that "*Whatever was found to be of consequence, as per Company's bonafide belief and understanding at the relevant time, was disclosed appropriately. In this context it may be highlighted that the alleged non disclosure was not suppression of material fact with ulterior motive as sought to be insinuated*" can't be accepted. Furthermore, I don't find the explanations of the Noticee satisfactory as factually what the Noticee has stated is wrong and it gives a wrong impression to investors. The deal was definitely not an all cash deal because the consideration paid to sellers was again retained in the company as money towards the proposed issue of

preference shares and this was an integral part of the deal and this definitely negates the deal as an all cash deal.

43. Now I deal with the Noticee's submissions that

i. *With regard to observations in **para 9 & para 17(ii)** of the Notice, it is denied that we have misled the investors by stating that the deal was complete as alleged. The charge solely proceeds on the basis of Clause 4 of the SPA. In this context it is submitted that Clause 4 of SPA has to be interpreted in the context of surrounding facts and circumstances concerning the deal. Clause 4 of SPA has to be read in harmony with Clause 3.13. As per clause 3.13 (2nd para), the Sellers, the company (vMoksha technologies Pvt Ltd., India), and the confirming parties cannot rescind the said agreement once the same was signed. Only, we were empowered to waive or postpone any of the conditions precedent mentioned in the SPA. The said clause quoted is extracted hereinbelow:*

ii. *It is however agreed that the SELLERS and/or the COMPANY (i.e vMoksha Technologies Pvt. Ltd, India), PROMOTER, CONFIRMING PARTIES cannot rescind this Agreement, except as stated elsewhere herein, on signing and shall only take all steps to honour the terms and conditions agreed in this Share Purchase Agreement. However, H&M, could at its option waive or postpone any of the Condition Precedents (CP's) mentioned herein above and proceed for Completion."*

iii. *It is clear from the above that once the SPA is signed, the Sellers cannot rescind the contract and can only take such steps to honour the terms and conditions. 120 days time is provided in the SPA for Sellers to comply with conditions precedent relating mainly to settling inter-company transactions within vMoksha group and furnishing of account statements, Audited Balance Sheet etc. by the sellers and confirming parties. We reiterate that we had the sole privilege to waive or defer the Condition Precedents. When Clause 4 is read in harmony with Clause 3.13, it would be clear that 120 days was the time limit set for the sellers and not for the agreement. Further, it may be noted that the 'effective date" has been fixed as 11th May 2005, the date on which the agreements were signed.*

iv. *Based on the aforesaid, we had inter alia disclosed that the deal is complete. The relevant share certificates with executed transfer deeds were deposited in Escrow along with the resignation letters of vMoksha directors (Sellers) and the purchase consideration has been remitted. All that remained was to convene a board meeting of vMoksha entities to induct our nominees into the board and approve the transfer of shares to us. The Sellers had 120 days to complete such a simple formality. Due to internecine quarrel between promoters of vMoksha entities about which we were kept in the dark, the Sellers delayed convening the board meeting while assuring us all along that steps are being taken to complete the task.*

v. *In the circumstances, it cannot be alleged that we had made disclosures in order to mislead the investors. It is reiterated that we have not made any misleading disclosures, as alleged. Further, at the relevant time we did not*

have the slightest indication that the events would take such a turn, wherein the Sellers would not comply with the remaining procedural obligations and that there would be internecine disputes amongst the Sellers and that they would keep us in the dark, while parallelly assuring us their commitment to perform their obligations. "

44. The Noticee vide letter dated June 28, 2010 has further submitted that:

*i. It may be noted that on May 11, 2005 three separate agreements were executed between the parties viz. Share Purchase Agreement ("**SPA**"), Subscription Agreement ("**SA**") for subscribing to the redeemable preference shares by Sellers & Escrow Agreement ("**ESA**") .*

ii. In terms of ESA, M/s Pricewaterhouse Coopers Pvt. Ltd., and Khaitan & Co., were to be the Escrow agents and were to keep in their custody inter-alia various documents viz., the Share Transfer Deeds, Share Certificates held by the Sellers with regard to vMoksha companies. Further, as per Clause 4 read with Clause 3.1.3 of the SPA, Sellers cannot rescind the agreement and they were to take steps to honour the terms and conditions and conditions precedent and that we as Purchasers could at our option waive or postpone the time for performance of the conditions precedent for completion. Admittedly, the shares of vMoksha entities are deposited in Escrow along with the signed transfer deeds and resignation letters of vMoksha directors (Sellers) and the purchase consideration has been remitted. Thus the deal was complete.

iii. Post execution of the SPA on May 11, 2005, the only thing left was payment of consideration by us to the Sellers and the transfer of the consideration amount back to us by the Sellers towards application money for subscription of redeemable preference shares which has been completed as approved by the FIPB. Thereafter, the requirements were the convening of the Board meeting by the Sellers for the purpose of approving the transfer of shares in our favour (lying with the Escrow Agents), acceptance of resignation of directors and induction of our representatives on the Board of vMoksha companies. Admittedly the transaction was complete. At the relevant point in time, given the conduct of all the parties to the acquisition; we did not anticipate any roadblock in the performance of the said actions.

iv. It was against this backdrop and based on our bonafide belief that we had announced that the acquisition of vMoksha companies was complete. Further, it may also be appreciated that there was nothing to be gained by us by misleading the investors as alleged. Admittedly, post the disclosure all the actions which were to be performed at our end for completing the acquisition were performed immediately. We immediately paid the consideration amounts to the Sellers on June 30, 2005 (the date of receipt of approval from FIPB). The Sellers also paid the subscription amount as application money for subscribing to the redeemable preference shares. Further the Sellers also had deposited the Share Certificates of vMoksha companies documents with the Escrow Agents.

v. Save and except the holding of board meeting for approving the transfer of shares in our favour and induction of our representatives on the board,

virtually nothing consequential remained. In substance they were only ministerial acts to be performed by the parties. The same did not happen due to internecine dispute between the Sellers (Pawan Kumar & Rajeev Sawhney)."

45. The allegation against the Noticee is that in the disclosure dated May 12, 2005, the Noticee has informed that all the procedural formalities for acquisition were completed, while it was not so. In this regards it would be worthwhile to examine the disclosures made by Noticee on May 12, 2005 & the provisions of the Share Purchase Agreement. I find the Noticee has made the following disclosure :

"Helios & Matheson Information Technology Ltd. today announced that **it has completed the acquisition of all three vMoksha companies**, vMoksha Technologies Inc. USA, vMoksha Teechnologies Pte Limited, Singapore and vMoksha Technologies Private Limited, Bangalore" *(emphasis supplied).*

46. From the above it is very clear that Noticee disclosed that acquisition of all the three vMoksha companies has been completed. Now let us examine the clauses of the Share Purchase agreement providing for completion of deal to ascertain whether the deal was complete when the announcement was made. Clause no. 4 of Share Purchase Agreement provides as below:

" **Completion**

Completion shall take place on the date to be mutually agreed between the parties, after complying with Clauses 2.2.1 and 2.2.2 of this Agreement at the office of the COMPANY. In any event, Completion shall not be later than 120 days from the date of signing of the Share Purchase Agreement or any extended period as agreed to by the Escrow agents, PricewaterhouseCoopers Private Limited and Khaitan & Co."

Clause 2.2.1 of the Share purchase agreement provides as below:

"H&M shall pay a consideration computed at the rate of Rs. 1,887.77 per share to the SELLERS. Payment to vMOKSHA Mauritius will be made by H&M by remitting by wire transfer through normal Banking

Channels and payment to the other SELLERS namely TG and MG shall be by way of Demand Drafts payable in India to the SELLERS for a cumulative amount of Indian Rupees 62.5164 crores for the 100% acquisition of the Sale Shares in the Company within 20 working days from the date of execution of this Agreement. However, the Parties have agreed to produce a confirmation from the Foreign Investment Promotion Board (FIPB) and/or Reserve Bank of India (RBI) within 7 working days of the signing of this Agreement that this sale transaction and the subsequent subscription of Zero Coopon Redeemable Preference Shares in H&M by the SELLERS shall not require any prior approval from the FIPB and/or RBI and that it is covered under the Automatic route under the prevailing guidelines. The Parties have jointly requested PricewaterhouseCoopers Private Limited, the advisors of the SELLERS, who have accepted such request to seek such confirmation from the FIPB/RBI and it is anticipated that this will be procured within 7 working days from the date of execution of this Agreement".

47. In view of the above, it is very clear that the deal was to be completed after complying with Clauses 2.2.1 & 2.2.2 of the agreement. The clause 2.2.1 provides about payment of consideration, which happened on June 30, 2005 only as per the own submission of the Noticee. I find that the clause 4 of the SPA clearly states that the completion of the Agreement would be on a date mutually agreed between the parties and shall not be later than 120 days from the date of signing of SPA. Moreover a deal can not be termed as completed without exchange of consideration.

48. The Noticee's submissions regarding clause 3.13 is not of help as the question is not if the sellers can or can't rescind the Agreement but was whether the deal got completed as per the agreement. I agree with the Noticee that the Agreement came into effect on the date of signing of the Agreement but at the same time, there were certain conditions precedent for completion of the SPA which was to take place as per clause 4 of SPA. Therefore, when the Agreement stipulates the conditions for completion, then the Noticee should not have announced the deal of acquisition to be

complete, without complying with those conditions. The impression that investors would get is that nothing remains for the deal of acquisition to be completed. However, this was not the case.

49. The Noticee submits that "*. Based on the aforesaid, we had inter alia disclosed that the deal is complete. The relevant share certificates with executed transfer deeds were deposited in Escrow along with the resignation letters of vMoksha directors (Sellers) and the purchase consideration has been remitted. All that remained was to convene a board meeting of vMoksha entities to induct our nominees into the board and approve the transfer of shares to us. The Sellers had 120 days to complete such a simple formality. Due to internecine quarrel between promoters of vMoksha entities about which we were kept in the dark, the Sellers delayed convening the board meeting while assuring us all along that steps are being taken to complete the task. In the circumstances, it cannot be alleged that we had made disclosures in order to mislead the investors. It is reiterated that we have not made any misleading disclosures, as alleged. Further, at the relevant time we did not have the slightest indication that the events would take such a turn, wherein the Sellers would not comply with the remaining procedural obligations and that there would be internecine disputes amongst the Sellers and that they would keep us in the dark, while parallelly assuring us their commitment to perform their obligations*", and "*Post execution of the SPA on May 11, 2005, the only thing left was payment of consideration by us to the Sellers and the transfer of the consideration amount back to us by the Sellers towards application money for subscription of redeemable preference shares which has been completed as approved by the FIPB. Thereafter, the requirements were the convening of the Board meeting by the Sellers for the purpose of approving the transfer of shares in our favour (lying with the Escrow Agents), acceptance of resignation of directors and induction of our representatives on the Board of vMoksha companies. Admittedly the transaction was complete. At the relevant point in time, given the conduct of all the parties to the acquisition; we did not anticipate any roadblock in the performance of the said actions.*"

50. From the above, I find that the Noticee has claimed that very few obligations were left only for the parties to perform, which is not correct. The biggest obligation to be completed was on the part of the Noticee i.e.

the payment of consideration which happened only on June 30, 2005 . In such a case, how could the deal be said to be completed when the SPA in clause 4 gives conditions precedent to the completion which includes payment by the Noticee to the seller. Hence I find that the Noticee had made a incorrect disclosure on May12, 2005 by calling that the deal of acquisition of vMoksha was complete.

51. Further, the Noticee has submitted that

i. *With regard to observations in **para 10 & para 17(iii)** of the Notice, it is denied that we had not informed the stock exchange about the interim developments regarding acquisition of vMoksha entities not materializing and that we had kept the investors and general public in dark as alleged. It is submitted that on 11th May 2005 when the SPA was signed it was a completed deal. With the shares of vMoksha entities duly deposited in Escrow along with the resignation letters of vMoksha directors (Sellers) and the purchase consideration having been remitted, it was indeed a completed transaction.*

ii. *In view of the fact that we had completed all our obligations under the agreement within 120 days of signing the SPA and since Rajeev Sawhney had all along agreed and at no point of time had ever expressed his reservations on the deal and in fact, had approved the transaction at a Board meeting of vMoksha, Mauritius, held on 19.05.2005 and continued to express his willingness to hand over the company as late as December 2005, we did not have any reason to believe that the transaction has failed or that there is a necessity to inform the Stock Exchanges. By his mail dated 20.07.05, Rajeev Sawhney had implored Pawan Kumar (the promoter) to complete the deal forthwith. On 19.11.2005, i.e, even after the expiry of the 120 days, Rajeev Sawhney in his mail to us, accepted the decision of the Advisors and has confirmed that he was signing off wholeheartedly. Other mails dated 20.12.2005, 24.12.2005, from Rajeev Sawhney to us were on similar lines expressing his total approval to the deal.*

iii. *Further, the Board of Directors of vMoksha Technologies, India, themselves had stated in their Annual Report dated 28.10.2005 for the year ended 31.03.2005 under sl no B(11) in "Notes to Accounts" under the heading 'Subsequent Events-Takeover by Helios & Matheson' the signing of the share purchase and other related agreements with us and also the fact that we would acquire 100% of the stocks of the company (vMoksha) which is extracted below **[Annexure 4]**:*

"The company, together with certain of its affiliates, parent company in Mauritius and the individual shareholders in the company has signed a Stock Purchase Agreement with Helios and Matheson Information Technology Limited [H&M], whereby H&M would be acquiring 100% of the stock of the company, together with 100% of the stock of its affiliated companies vMoksha Technologies Inc., USA and vMoksha Technologies Pte. Ltd., Singapore

As per the agreements signed, the operations would be restructured such that vMoksha India will first acquire 100% of the stock of vMoksha Technologies Inc., USA and vMoksha Technologies Pte. Ltd., Singapore while selling the stock it holds of vFortress Network Security Pvt. Ltd.

Following the structure, as above, H&M would purchase 100% of the stock of the company. Subject to regulatory clearances as may be required, these transactions and the final sale to H&M are expected to be completed during the financial year 2005-06.

H&M is a 14 year old IT Services organization, headquartered in Chennai with offices in Bangalore, USA and Singapore. H&M is listed on the Indian stock exchanges since 1999. H&M's range of service offerings is most comprehensive and spans the entire software services lifecycle from application development and integration to application life cycle management. Currently with a team of over 700 people, H&M has a strong client focus with certified quality processes and a global delivery model. The company's ability to manage large client relationships, extensive industry specific knowledge and experience, and deliver excellence are some of its important differentiators. The combination of vMoksha with H&M would add to the strengths of both organizations and yield a stronger organization with greater depth in expertise and client relationships to leverage for future growth."

They had also stated that the transactions are expected to be completed during the financial year 2005-06. The annual report has been filed with the Registrar of Companies, Karnataka, reflecting the aforesaid. When the Sellers' directors themselves confirm to the existence of the purchase transaction by a statutory disclosure, as late as October 2005 and filed the same with the Registrar of Companies in December 2005, we did not have any reason to believe otherwise and inform the Exchanges. Therefore, after performing our obligations in letter and spirit, we were waiting for compliance by the Sellers/confirming parties.

iv. *It was only on 30th January 2006, that we came to know that Rajeev Sawhney in total violation of the agreements signed by him and other Sellers earlier, had entered into a Memorandum of Understanding with Pawan Kumar for acquiring Pawan Kumar's/relatives' shares in vMoksha, India and committed breach of the agreements.*

v. *As a follow up to this, we, in response to an electronic message dated 31.01.2006 from PWC, the Advisors to the Sellers, requesting for release of the vMoksha shares kept in Escrow, to the Sellers, strongly objected to the same and requested for performance of the contractual obligations vide our Email dated 06.02.2006. However, the said letter was intentionally returned undelivered by PWC. We were shocked to learn that Rajeev Sawhney and Pawan Kumar, in total disregard to the share purchase and other agreements, had entered into a Memorandum of Understanding between them on 28.01.2006 whereby Pawan Kumar agreed to sell his/relatives' stake in vMoksha even though he/his family received the purchase consideration for the sale of shares in terms of the SPA.*

vi. *Immediately, we initiated Arbitration proceedings initially appointing an Arbitrator and later on approached the Hon'ble High Court of Madras for appointment of an arbitrator which was duly informed to the Stock Exchanges in February 2006. We also initiated interim measures before the Hon'ble High Court. Thereafter, we pursued the arbitration matter vigorously. Hon'ble Mr. Justice K. Venkataswami, Judge, Supreme Court [Retd.] was appointed as the Arbitrator in the matter. Arbitration proceedings were conducted over a period of two years spread over 34 sittings. The final sitting was held on 28.06.2008. The Hon'ble Arbitrator after detailed hearings presented before him by the Learned Advocates of both the sides posted the matter for pronouncement of Award on 29.09.2008. Unfortunately, just 3 days before the Award pronouncement date, Mr. Justice K. Venkataswami passed away on 26.09.2008. There has been an inordinate delay in getting the consent from one of the promoters, Mr. Pawan Kumar and his family [Sellers] for the appointment of another arbitrator. We have already taken requisite legal steps for appointment of a new arbitrator and the matter is before the Hon'ble High Court of Madras. Copies of various mails/correspondence cited above are enclosed as* ***Annexure 5****. It was in the backdrop of the aforesaid peculiar circumstances, wherein the Sellers after receiving the consideration and remitting the monies towards advance for preference shares, lodging shares of vMoksha entities in Escrow with PWC, and assuring us at all points of time their keenness to perform their obligations, we did not make any interim announcements regarding the deal. Given the conduct of the Sellers, at the relevant time, we could not have made an announcement that the transaction had gone sour. Admittedly, when we became aware about the sinister designs of the Sellers, in terms of reneging from performing their obligations in terms of SPA, we immediately made a disclosure to the stock exchanges. Further, we also initiated arbitration proceedings, which clearly indicate our bonafides in the whole matter."*

52. The Noticee vide letter dated June 28, 2010 made further submissions that:

"***(c) Interim developments not informed to the stock exchanges***

i. *The charge is based on the news paper reports which appeared in the papers on February 13, 2006 & February 19, 2006 raising doubts about the possible failure of the acquisition and the absence of any intimation from our side to the stock exchanges (refer Para 8 of SCN).*

ii. *In this context it is submitted that the payment of consideration to the Sellers and the receipt of monies as application towards subscription of redeemable preference shares from Sellers was complete on June 30, 2005. Thereafter, only action was left from the end of Sellers i.e. of holding of board meeting for approving the transfer of shares in our favour and induction of our representatives on the board. Post making of the payment towards subscription amount the Sellers never stated that they do not want to go ahead with the deal. The deal was alive at all times and the Sellers kept assuring their commitment towards the deal. Same is amply borne out by several communications received by us from the Sellers on various occasions.*

*iii. In this context we are setting out herein below the sequence of events as have transpired in the matter till date:**(Annexure–A, page Nos.1 to 32)***

53. In view of the above, I find that as the deal was not complete as on May 11, 2005 when the Noticee announced that it has been completed, the Noticee should have immediately communicated to the Stock Exchanges regarding the problems in completion of the deal, no sooner it has emerged as the investors were still living under the impression that the all cash deal was complete. Now the issue is whether Noticee communicated immediately after the first sign of problems in the completion of deal came to the knowledge of the Noticee.

54. From the sequence of events, I find that the Noticee intimated the Stock Exchange on 13.02.2006 that arbitration proceedings have been initiated with regard to Share Purchase Agreement and arbitrator has been appointed. I also find that prior to that correspondence has been exchanged between Noticee and seller for the completion of the deal. It is very difficult to say precisely on the basis of material available on record when the Noticee should have made disclosure about problem in the deal; hence I tend to give benefit of doubt to Noticee.

55. Further, the Noticee stated that

1. It is denied that we have violated provisions of 3(a), 3(d) and 4(2)(k) of FUTP Regulations or clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of Insider Trading Regulations or Clause 36 of the Listing Agreement as alleged In this context:

(i) It is denied that we have indulged in fraudulent and unfair trade practices relating to securities as alleged. Nowhere in the Notice it has been demonstrated as to how we have indulged in fraudulent and unfair trade practices relating to securities. It is denied that we have either directly or indirectly bought or sold or otherwise dealt in securities in a fraudulent manner. Admittedly, we have not dealt in our securities.

(ii) It is denied that we have either directly or indirectly engaged in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities in contravention of the provisions of the Act or the rules and the regulations made there under.

(iii) It is denied that we had issued any advertisement which was misleading or contained information in a distorted manner and which may influence the decision of the investors.

(iv) It is denied that we have not given price sensitive information to the stock exchanges and not disseminated the same on a continuous and immediate basis.

(v) It is denied that we have not complied with the provisions of the Listing Agreement and that we have not immediately informed the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information including (a) pertaining to litigations & (b) pertaining to issue of any class of securities etc.

2. *It is submitted that an inquiry is justified only if there is a prima facie contravention of the provisions of law, that since there is no prima facie finding, of any violations of the law backed up with material in support, no inquiry is justified. The Notice therefore is unwarranted.*

3. *Since we have not violated the provisions of provisions of 3(a), 3(d) and 4(2)(k) of FUTP Regulations or clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of Insider Trading Regulations or Clause 36 of the Listing Agreement and we have not indulged in any fraudulent and unfair trade practices relating to securities market, imposition of penalty under section 15HA & 15 HB of SEBI Act or section 23 E of SCRA is not warranted.*

4. *It is further submitted that, in the facts and circumstances of the case, we have not made any disproportionate gain or gained unfair advantage. Further, we have also not caused any loss to investors or group of investors. We may also point out that the promoters of our company have continued to maintain their shareholdings in the company and there has been absolutely no change during the relevant period from March 2005 and thereafter till date. An extract of their holdings is given in the following table.*

Date of holding	***Shares held***	***Remarks***
31.03.2005	*4427840*	*No change*
31.03.2006	*8855680*	*Increase due to 1:1 bonus in Oct 2005*
31.03.2007	*8855680*	*No change*
31.03.2008	*8855680*	*No change*
31.03.2009	*8855680*	*No change*

Thus, not even a single share has been sold by the promoters in the last 4 years. "

56. I don't accept the aforesaid explanations of the Noticee in view of my findings in the proceedings paragraphs. In view of the aforesaid, I find that by making wrongful and incomplete disclosures the Noticee has engaged in such an act, practice, course of business which would operate as fraud or deceit upon any person in connection with any dealing in or

issue of securities of the Noticee which are listed on the stock exchange. The announcements by the Noticee in question is definitely misleading and contains information in a distorted manner and which may influence the decision of the investors and hence is in contravention of the law. The Code of Corporate Disclosure Practices for Prevention of Insider Trading as stated in schedule II read with Regulation 12 (2) of PIT Regulations requires that price sensitive information should be given by listed companies to stock exchanges and disseminated on a continuous and immediate basis. The Listing Agreement also requires the companies to immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information.

57. Therefore, I find that the Noticee stands in violation of provisions of Regulations 3(a), 3(d) and 4(2)(k) of PFUTP Regulations and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT Regulations.

ISSUE 2: Whether the Noticee is liable for monetary penalty under sections 15HA and 15HB of the Act and section 23 E of SCR Act, 1956?

58. The provisions of section 15HA of the Act read,

"Securities and Exchange Board of India Act, 1992
Penalty for fraudulent and unfair trade practices.
Section 15HA - If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher".

In view of violation of provisions of Regulation 3(a), 3(d) and 4(2)(k) of the PFUTP Regulations, the Noticee is liable for monetary liability under section 15HA of the Act.

59. The provisions of section 15HB of the Act read,

Securities and Exchange Board of India Act, 1992
Penalty for contravention where no separate penalty has been provided.
15HB. *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no*

separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.

In view of the violation of provisions of clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT regulations, I find that the Noticee is liable for monetary liability under section 15HB of the Act.

ISSUE 3: What quantum of monetary penalty should be imposed on the Noticee, taking into consideration the factors mentioned in section 15J of the Act?

60. Section 15J of the Act prescribes the factors to be taken into account by the Adjudicating Officer while adjudging the quantum of penalty under section 15-I, the provisions of which read,
"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."

61. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of the default of the Noticee. Further, the amount of loss caused to an investor or group of investors also cannot be quantified on the basis of the available facts and data. Even though the exact monetary loss to the investors can not be computed, such inaccurate and incomplete disclosures by a listed company tend to mislead gullible investors and place them in a precarious position. Such a misleading disclosure always erodes investor confidence in the market and totally defeats the process of disclosure regime which is one of the most important pillars of the Indian Securities Market. It is of utmost importance that a sense of fair play be maintained in the market so

that innocent investors do not find themselves at the receiving end and ought to be protected from any kind of fraud in the market.

62. Considering the facts and circumstances of the case and the material available on record and the violation committed by the Noticee, I find that penalty of ₹ 25,00,000/- (Rupees Twenty Five Lakh only) under section 15HA of the Act and ₹ 25,00,000/- (Rupees Twenty Five Lakh only) under section 15HB of the Act on M/s. Helios and Matheson Information Technology Ltd. would be commensurate with the violation committed by the Noticee.

V. ORDER

63. Considering the facts and circumstances of the case, in terms of the provisions of Sections 15HA and 15HB of the Act and Rule 5(1) of the Adjudication Rules, I hereby impose a penalty of ₹ 50,00,000/- (Rupees Fifty Lakh only) on M/s. Helios and Matheson Information Technology Ltd. for violation of provisions of Regulation 3(a), 3(d) and 4(2)(k) of the PFUTP Regulations and clause 2.1 of the Code of Corporate Disclosure Practices for Prevention of Insider Trading of Schedule II read with Regulation 12(2) of PIT regulations.

64. The penalty shall be paid by way of demand draft drawn 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 shall be forwarded to Shri S. Ramann, OSD, ISD, Securities and Exchange Board of India, Plot No. C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

65. In terms of the provisions of Rule 6 of the Adjudication Rules, copies of this Order are being sent to the Noticee and to SEBI.

DATE: JANUARY 31, 2011 **P. K. BINDLISH**

PLACE: MUMBAI **ADJUDICATING OFFICER**