BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. VSS/AO-07/2008]

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

TRANSGENE BIOTEK LIMITED

(PAN. AABCT3840P)

FACTS OF THE CASE IN BRIEF

1. The shares of Transgene Biotek Limited (hereinafter referred to as **"TBL/ company/ Noticee"**) are listed on Bombay Stock Exchange (hereinafter referred to as **"BSE"**) and Hyderabad Stock Exchange (hereinafter referred to as **"HSE"**). SEBI conducted an investigation into the affairs relating to buying and selling and dealing in the shares of TBL. The investigation covered the period from November 26, 2005 to December 21, 2005. During the said investigation period, the shares of TBL were traded at BSE only.

2. The investigation conducted by SEBI revealed that the Noticee had not made necessary disclosures to stock exchanges with regard to certain transactions of Dr. K Koteswara Rao, Promoter cum Chairman and Managing Director of TBL. The details in this regard are given below: -

    a. On December 19, 2005, Dr. K Koteswara Rao, Promoter cum Chairman and Managing Director of TBL, sold 1,00,000 shares of TBL which was informed by him to the Noticee as per regulation 13(4) and 13(5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **"SEBI (PIT)"**). As per regulation 13(6) of SEBI (PIT) the Noticee should have informed the stock exchange/s within five days of receipt of

the information received under regulation 13(4) and 13(5) of SEBI (PIT). HSE, vide letter dated April 09, 2007 has confirmed that no disclosure was made by the Noticee in this respect. BSE, vide its letter dated March 01, 2007 to SEBI has stated that the Noticee informed BSE on October 30, 2006.

b. In June, 2006, Dr. K Koteswara Rao acquired 11,12,000 shares (7.40% of the paid up capital of TBL) from his son Mr. K Srinivas through off market transaction. Dr. K Koteswara Rao had informed the Noticee about the aforesaid acquisition of 11,12,000 shares on July 5, 2006. The Noticee was required to inform the stock exchange/s under regulation 13(6) of SEBI (PIT) within 5 days of receipt of the information and under regulation 7(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **"SAST"**) within seven days of receipt of the information. HSE, vide letter dated April 09, 2007 has confirmed that no disclosure was made by the Noticee in this respect. BSE vide e-mail dated April 19, 2007 to SEBI has stated that the Noticee informed BSE on November 6, 2006 i.e. almost 4 months after the said information was received from Dr. K Koteswara Rao.

3. Since the Noticee has failed to make necessary disclosures in accordance with regulations 13(6) of SEBI (PIT) and 7(3) of SAST, it was alleged that the Noticee had violated the provisions of the said regulations and therefore, liable for monetary penalty under section 15A(b) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**').

APPOINTMENT OF ADJUDICATING OFFICER

4. Mr. Piyoosh Gupta was appointed as Adjudicating Officer, vide order dated August 3, 2007 under section 15 I of the SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15A(b) of the SEBI Act the alleged violation of regulation 13(6) of SEBI (PIT) and regulation 7(3) of SAST.

5. Consequent upon the transfer of Mr. Piyoosh Gupta, the undersigned was appointed as the Adjudicating Officer vide order dated November 19, 2007.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

6. Show Cause Notice (hereinafter referred to as "**SCN**") dated January 4, 2008 was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be initiated against it and penalty be not imposed under section 15A(b) of SEBI Act for their failure to comply with the provisions of regulations 13(6) of SEBI (PIT) and regulation 7(3) of SAST.

7. Dr. K Koteswara Rao, Managing Director, TBL, replied on behalf of the Noticee vide letter dated February 9, 2008. The submissions of the Noticee, *inter alia*, are as under:

   - It had already been submitted in our correspondence to the Bombay Stock Exchange Limited and Securities and Exchange Board of India that Dr. K Koteswara Rao had sold 1,00,000 Equity Shares of the Company on 19th December 2005 and had informed the same to the company on 20th December 2005 as per regulation 13(4) and 13(5) of SEBI (PIT).

   - It was also submitted by us that the same had been informed as per regulation 13(6) to the BSE vide our letter dated December 21, 2005 Hence, the information furnished by the BSE vide their letter No DOSS/INV/HP/2006-07/SEBI dated March 1, 2007 is not correct.

   - With regard to the acquisition of 11,12,000 Equity Shares by Dr. K Koteswara Rao from his son Mr. K Srinivas, we had already submitted to BSE and SEBI that we had informed the BSE vide our letter dated July 5, 2006. Hence, it is incorrect to state that the company had informed the BSE on November 6, 2006.

   - Further, it is also incorrect to say that the other relevant details like the number of shares or voting rights previously held, change in shareholding or voting rights, etc., have not been informed since the same has been furnished in the prescribed format which may kindly be noticed from the copy enclosed.

   - It is submitted that it has not been the first occasion when the stock exchange/s had reported that the returns filed were not received despite the fact that the same have been filed. We presume, therefore, that it is due to the operational hazards.

- It may kindly be noted that in our case there has been no such unpublished price sensitive information which has been held or which has been announced subsequent to the said trading of the shares. This fact can be verified from the site of BSE that there has been no announcement from the company till September 6, 2007. Further, it can also be observed that the price of the share has been fluctuating between Rs.140/- and Rs.118/- per share during May-December 2006 which indicates that there has been no volatility in the trading due to the change in the shareholding as a result of transfer of 11,12,000 shares from Mr. K Srinivas to Dr Koteswara Rao.

- It is submitted that the transfer has taken place within the family to facilitate certain family issues since the relationship between Dr K Koteswara Rao and Mr. K Srinivas is that of a father and son. Further, it may kindly be observed that no single share out of the 11,12,000 shares has been sold till date.

- Not even a single share from those shares have been disposed off or traded in the market till today. Therefore, the subject of a gain or a loss either to those two individuals or to the shareholders at large never arose which forms the crux of the insider trading.

8. In the interest of natural justice and in terms of rule 4(3) of the Rules, the Noticee was granted an opportunity of personal hearing on April 29, 2008 vide notice dated April 15, 2008. Mr. S S Marthi appeared on behalf of the Noticee and submitted, inter alia, as under:

    - There were several occasions in the past when BSE alleged that it had not received the communication or the disclosures made by the Noticee from time to time in compliance of various regulatory requirements including listing agreement. There appears to be some problem at the end of BSE regarding receipt of communication from the companies, including ours.

    - With regard to sale of 1,00,000 shares by Dr K Koteswara Rao, it is submitted that the Noticee had made necessary disclosures vide letter dated December 21, 2005 to BSE. However, the same was sent by ordinary post and therefore, no proof of dispatch or delivery is available. Similar disclosures to HSE was made and a copy of proof of acknowledgement given by HSE dated December 21, 2005 is enclosed. It is requested to take on record the fact that

we have informed BSE vide letter dated December 21, 2005, although we are not in a position to produce any proof of dispatch and delivery.

- With regard to purchase of 11,12,000 shares by Dr. K Koteswara Rao, copy of letter dated July 5, 2006 to BSE along with proof of dispatch and delivery and the copy of letter dated July 5, 2006 addressed to HSE bearing acknowledgement of HSE dated July 5, 2006 have been submitted.

9. The Noticee made further submissions vide letter dated May 07, 2008, summary of which is as under:

- We would like to submit that the BSE unfortunately and for reasons not known to us has always been very cold to the company despite the company complying with the listing requirements and also trying to put in the best efforts to turn around the company and enhance the value for all the stakeholders.

- We can only presume that the adverse attitude towards our company is because of the action taken by the company in the year 2003- 04 by going to SAT against the order of BSE for suspension of trading of our company's scrip. We humbly submit that the action taken by the company in going to SAT was only to protect the interests of all the stakeholders of the company but not to lock horns with BSE.

CONSIDERATION OF ISSUES AND FINDINGS

10. I have carefully perused the written and oral submissions of the Noticee and the documents available on record. The issues that arise for consideration in the present case are :

(i) Whether the Noticee informed the stock exchange/s (HSE and BSE in the instant case) within 5 days of receipt of information with regard to the sale of 1,00,000 shares on December 19, 2005 by Dr. K Koteswara Rao as required under regulation 13(6) of SEBI (PIT)?

(ii) Whether the Noticee informed the stock exchange/s (HSE and BSE in the instant case) within 5 days of receipt of information with regard to purchase of

11,12,000 shares on June 28, 2006 by Dr. K Koteswara Rao as required under regulation 13(6) of SEBI (PIT) and regulation 7(3) of SAST ?

(iii) Does the non-compliance, if any, on the part of the Noticee attract monetary penalty under section 15A(b) of SEBI Act?

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

11. Before moving forward, it will be appropriate to refer to the relevant provisions of SEBI (PIT) and SAST, which reads as under:

13(6) Every Listed company, within five days of receipt, shall disclose to all stock exchanges on which the company is listed, the information received under sub-regulations (1), (2), (3) and (4) in the respective formats specified in Schedule III.

7 (3) Every company, whose shares are acquired in a manner referred to in sub-regulations (1) and (1A), shall disclose to all the stock exchanges on which the shares of the said company are listed the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under sub-regulations (1) and (1A).

12. There is no dispute on the fact that Dr. K Koteswara Rao, Promoter-cum-Chairman and Managing Director of TBL, sold 1,00,000 shares on December 19, 2005. There is also no dispute with regard to the fact that he had disclosed the same on December 20, 2005 to the Noticee in terms of regulations 13(4) and 13 (5) of SEBI (PIT).

13. Thus, having received the disclosures made by Dr. K Koteswara Rao, there is an obligation on the part of the Noticee to disclose to all the stock exchange/s where the shares of the company are listed as required under regulation 13(6) of SEBI (PIT).

14. From the submissions made by the Noticee and material available on record, it is observed that the Noticee has furnished the information to HSE on December 21, 2005. HSE has acknowledged the receipt of the same on the same day at 14:30 hours.

15. However, there is no documentary evidence to show that the same procedure was followed in regard to BSE too. The information was reportedly sent by ordinary post and therefore, there is no proof of delivery or dispatch. The Noticee has confirmed and admitted the same.

16. In this regard, it will be appropriate to refer to the observations of The Hon'ble High Court at Calcutta in Writ Petition 331/2001 in the matter of Arun Kumar Bajoria v/s SEBI – Order dated March 27, 2001. The Hon'ble Court while examining the issue of compliance with regard to regulation 7 (the provision deals with disclosure by an acquirer to the target company) of SAST, made the following observations:-

"…… Therefore, it is obligatory on the part of the person so acquiring to inform the company. In what mode or manner such information should be given has not been prescribed. It has not also been mentioned that the subject information or disclosure must be given in writing. Such disclosure, therefore, may be made orally or through telephone or in writing transmitted in some known manner. The information or disclosure must, however, reach the company. In law, anyone sending a written information through the agency of someone else, appoints such agency as his agent. If a letter is posted, unless the law specifies, the Postal Authority acts as an agent of the sender. As appears to me, by law, in respect of two instances the post office is considered as the agent of the receiver of the letter. The first is in relation to acceptance of an offer and the second is in respect of a letter sent by registered post. In all other circumstances, the post office acts as a mere agent of the sender of the letter. The Certificate of Posting may be an evidence of engaging the Postal Authority as an agent of the sender to deliver the subject letter, but not the proof of receipt of the letter by the addressee. In the event, it is contended by the addressee that the letter has not been received by him, it must be established and if necessary through the agent that the letter has been received by the addressee. Merely because the letter was sent by post, it cannot be contended that the sender has discharged his obligations under Regulation 7 of the said Regulations as the said regulation cast the duty and obligation upon the acquirer to ensure receipt of the disclosure or information by the company concerned and argument contrary thereto is not acceptable. It is not permissible for the sender to contend that he has no control over the mode of transmission inasmuch as he has free choice of selecting the mode of transmission and for that purpose to engage a suitable agent."

17. The objective of casting an obligation on the part of the company to disclose to the stock exchanges under the provisions of regulation 13 (6) of SEBI (PIT) is to

make the information available to the investors to enable them to take an informed decision.

18. If the provisions of regulation 13(6) of SEBI (PIT) are tested with the touchstone of the observations of the Hon'ble High Court referred to above, it would follow that it is the responsibility of the sender to establish and if necessary, through the agent, that the letter has been received by the addressee. Thus, the burden of proving the receipt of the communication sent is upon the Noticee. I find that the Noticee has admitted that he had sent the communication dated December 21, 2005 to BSE by ordinary post and further, that it did not have any proof of dispatch or delivery. The dispatch of the letter by ordinary post does not even evidence the dispatch of the letter, leave alone the proof of receipt of the same by the addressee. Further, BSE vide its letter dated March 01, 2007 addressed to SEBI has stated that the disclosure for sale of 1,00,000 shares were filed with the exchange vide letter dated October 30, 2006. Thus, merely because the Noticee has sent the letter dated December 21, 2005 by post, it cannot be accepted that the Noticee has discharged its obligation under regulation 13(6) of SEBI (PIT). I, therefore, hold that the Noticee had failed to make timely disclosure to BSE, the information received by it from Dr K Koteswara Rao regarding the sale of 1,00,000 shares by him and consequently, violated the provisions of regulation 13(6) of SEBI (PIT).

19. With regard to acquisition of 11,12,000 shares by Dr K Koteswara Rao from Mr. K Srinivas on June 28, 2006, which aggregates to 7.40% of the paid up capital of TBL, there is also no dispute that Dr. K Koteswara Rao had disclosed the same on July 05, 2006 to the Noticee in terms of regulations 13(4) and 13 (5) of SEBI (PIT) and regulation 7 of SAST.

20. From the submissions made by the Noticee and the material available on record, it is observed that the Noticee has furnished the information to HSE vide letter dated July 05, 2006. The Noticee has submitted proof of having disclosed to HSE. On perusal of the same, I find that HSE has acknowledged receipt of the same on July 05, 2006.

21. With regard to the disclosure to BSE, the Noticee has contended that it had informed BSE vide letter dated July 05, 2006. In support of this contention, the Noticee has submitted a copy of correspondence (through e-mail dated April 25, 2008) exchanged between the Noticee and the courier company, viz., DTDC. I

have perused the same. As stated in the e-mail, I find that the Noticee has reportedly made the disclosure vide letter dated July 05, 2006 through Consignment Note No.H29473478 dated July 05, 2006. In response to the query of the Noticee to DTDC to let it have the proof of delivery (POD) of the said consignment, DTDC has replied (through e-mail dated April 28, 2008), "*we have only soft data available confirming that the c/n is delivered on 06.07.06 and received by Mr. Akbar with company seal.*"

22. The object of the SEBI (PIT) and SAST mandating disclosure of acquisitions beyond certain quantity is to give equal treatment and opportunity to all shareholders and protect their interests. To translate this objective into reality, measures have been taken by SEBI to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required. As observed by me in para 18 above, the burden of proving the receipt of the communication sent is upon the Noticee. I find that BSE vide e-mail dated April 19, 2007 to SEBI has stated that the Noticee informed BSE on November 06, 2006, i.e. almost 4 months after the said information was received from Dr. K Koteswara Rao. On the other hand, the Noticee has contended that it had made the disclosure on July 06, 2007. The Noticee was given sufficient opportunities to submit documentary evidence in support of its claim of having complied with the disclosure requirement. However, the correspondence exchanged between the Noticee and DTDC, referred to above, does not conclusively prove the receipt by BSE of the disclosure reportedly made by the Noticee. I, therefore, do not find the said correspondence as a satisfactory evidence of having made the disclosure in accordance with regulation 13(6) of SEBI (PIT) and regulation 7(3) of SAST.

23. In view of the above, I am not inclined to accept the contention of the Noticee that it had complied with the provisions of regulation 13 (6) of SEBI (PIT) and 7(3) of SAST. On the other hand, I am of the view that the Noticee has failed to comply with the said provisions of the regulations and therefore, the allegation against the Noticee stands established.

24. The next issue for consideration is as to whether the failure on the part of the Noticee to comply with the provisions of SEBI (PIT) and SAST attracts monetary penalty under section 15A(b) of SEBI Act.

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

26. As the violation of the statutory obligations under regulations 13(6) of SEBI (PIT) and 7(3) of SAST has been established, I hold that the Noticee is liable for monetary penalty.

27. In the light of the above, the next issue for consideration is as to what would be the monetary penalty that can be imposed on the Noticee for the violation/s referred to above.

28. The provisions of section 15 A (b) of SEBI Act is reproduced here 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 there under,-*

(a) ……

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor 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;

(c) ……

29. While determining the quantum of penalty under section 15A (b), it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

"15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default."

30. From the material available on record, the Noticee does not appear to have made any disproportionate gain or unfair advantage by its aforesaid failure.

31. With the sale of 1,00,000 shares by Dr K Koteswara Rao, his individual shareholding as well as the overall promoter-group shareholding in TBL has come down by 0.67%. The said sale by Dr K Koteswara Rao was of some importance from the point of view of outside shareholders / other investors as that would have prompted them to sell or buy shares. Similarly, the acquisition of 11,12,000 shares representing 7.40% by Dr. K Koteswara Rao from his son through an off market transaction assumes significance inasmuch as the same was not known to the public as the same was transacted through off market. Since the transaction had taken place off market, it is all the more important for the Noticee to have disclosed the same in a timely manner to BSE, so that it could have brought it to the knowledge of the public in time. It would, however, be difficult to come to a firm conclusion as to how the general shareholders would have reacted on knowing the aforesaid transactions. By virtue of the failure on the part of the Noticee to make the necessary disclosure on time, the fact remains that the outside shareholders were deprived of the important information at the relevant point of time.

32. I have noted the submissions of the Noticee that the attitude of BSE towards the Noticee has always been very cold despite the Noticee being compliant with the listing requirements. I have also noted the instances pointed out by the Noticee and the reasons attributed by the Noticee for the adverse attitude of BSE. If the Noticee is apprehensive of the (adverse) attitude of BSE, I am of the view that the Noticee ought to have been cautious and more careful in discharging its regulatory obligations. However, the admission of the Noticee that it had sent the communication dated December 21, 2005 by ordinary post while many other established modes of communication are available exhibits the casual attitude of the Noticee.

33. The Noticee failed to comply with the provisions of regulation 13(6) of SEBI (PIT) with regard to sale of 1,00,000 shares on December 19, 2005 and acquisition of

11, 12,000 shares on June 28, 2006 by Dr. K Koteswara Rao. This indicates the repetitive nature of the default committed by the Noticee.

ORDER

34. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of Rs.1,00,000/- (Rupees One Lakh only) on the Noticee which will be commensurate with the violation committed by it.

35. The Noticee shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Ms. Barnali Mukherjee, Deputy General Manager, Investigation Department - Division – ID8, Securities and Exchange Board of India, SEBI Bhavan, Plot No.C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai–400 051.

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

Date: **June 23, 2008** **V.S.SUNDARESAN**
Place: **Mumbai** **ADJUDICATING OFFICER**