QJA/AA/IVD/ID8/24669/2022-23

SECURITIES AND EXCHNAGE BOARD OF INDIA

ORDER

UNDER SECTION 11(1), 11(4), 11(4A), 11B(1) AND 11B(2) OF THE SECURTIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH SECTION 15H(ii) OF THE SECURTIES AND EXCHANGE BOARD OF INDIA ACT, 1992 AND REGULATION 44 AND 45 OF THE SECURTIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997 READ WITH REGULATIONS 32 AND 35 OF THE SECCURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011.

IN THE RESPECT OF-

SR. NO.	NAME OF THE ENTITY	PAN/ Company No.
1.	**Ferryden International Limited**	**639771**
2.	**Shri Ashok Bhandari**	**ABVPB1331K**

(hereinafter individually referred to as Noticee Nos. 1 and 2 and collectively referred to as Noticees)

IN THE MATTER OF ELECTROTHERM INDIA LIMITED-

BACKGROUND:

1. Securities and Exchange Board of India (**"SEBI"**) had conducted an investigation in the scrip of Electrotherm (India) Limited (**"EIL/ Target Company"**), a company incorporated on October 29, 1986 as public limited company; the shares of which are listed on Bombay Stock Exchange (BSE- listing dated October 31, 1994) and National Stock Exchange (NSE-listing date July 28, 2007), to ascertain whether there was any violation of the provisions of the SEBI Act, 1992 (**"SEBI Act"**) and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (**"SAST Regulations, 1997"**) during the period April 01, 2005 to March 31, 2007 (**"Investigation Period"**).

2. Upon investigation, it was observed that EIL, a public limited company, classified as Non-government Company, is registered at Registrar of Companies,

Ahmedabad. The registered office of EIL is situated at A-1, Skylark Apartment, Satellite Road, Satellite, Ahmedabad, Gujarat, 380015. The shareholding pattern of EIL during the period April 01, 2005 – March 31, 2007 was as under:

(Source: BSE Website)

Particular	Quarter ended Jun 2005		Quarter ended Sep 2005		Quarter ended Dec 2005		Quarter ended Mar 2006	
	No. Of shares	%	No. Of shares	%	No. Of shares	%	No. Of shares	%
Promoter Holding	29,84,675	62.62	31,09,675	65.24	30,84,675	64.72	27,34,675	57.34
Cumulative Holding of Castleshine and Leadhaven	-	0	-	0	-	0	-	0
Non Promoter Holding excluding the cumulative holding of Castleshine and Leadhaven	17,81,200	37.38	16,56,700	34.76	16,81,700	35.28	20,31,700	42.66
Total share capital	47,66,375	100	47,66,375	100	47,66,375	100	47,66,375	100
Particular	**Quarter ended Jun 2006**		**Quarter ended Sep 2006**		**Quarter ended Dec 2006**		**Quarter ended Mar 2007**	
	No. Of shares	**%**	**No. Of shares**	**%**	**No. Of shares**	**%**	**No. Of shares**	**%**
Promoter Holding	27,26,075	57.19	27,26,075	57.19	27,26,075	57.19	27,26,075	29.84
Cumulative Holding of the Castleshine and Leadhaven	-	0	-	0	-	0	20,00,000	21.90
Non Promoter Holding excluding the cumulative holding of Castleshine and Leadhaven	20,40,300	42.81	20,40,300	42.81	20,40,300	42.81	44,08,633	48.26
Total share capital	47,66,375	100	47,66,375	100	47,66,375	100	91,34,708	100

3. It was further observed that two Singapore based companies i.e. Castleshine Pte Ltd ("Castleshine") and Leadhaven Pte Ltd ("Leadhaven") cumulatively held 18% shares in EIL. The said companies were allotted 10,00,000 warrants each on September 09, 2005 which were subsequently converted into 10,00,000 equity shares each on February 27, 2007. As per the shareholding pattern available on BSE, Castleshine and Leadhaven were shown as public shareholders by the target company. Change in the shareholding pattern of Castleshine and Leadhaven during the investigation period as per the shareholding pattern available on BSE website is as under:

S. No	Particulars	December 31, 2006	March 31, 2007	Remarks
1.	Promoters	57.19%	29.84%	-
2.	Castleshine	0.00%	**10.95%**	Castleshine has disclosed Leadhaven as PAC in delayed disclosures made with BSE under Regulation 7(1) of the
3.	Leadhaven	0.00%	**10.95%**	

				SAST Regulations, 1997 on April 15, 2019.
4.	Other-Public	42.81%	48.26%	-
	Total	100%	100%	

4. On March 12, 2007, Ferryden International Limited, a company incorporated in British Virgin Islands (hereinafter referred to as "Ferryden / Noticee No. 1"), 100% owned by Shri Ashok Bhandari (hereinafter referred to as "Noticee No. 2"), acquired 100% of both Castleshine and Leadhaven. Such acquisition resulted in Castleshine and Leadhaven becoming persons acting in concert (PACs) amongst each other by virtue of common holding of Noticee No. 1, which in turn was 100% held by Noticee No. 2. Pursuant to the said acquisition, Noticee No. 1 along with Noticee No. 2 had acquired more than 15% of the equity share capital of EIL which required a public announcement by way of an open offer to acquire the shares of EIL in accordance with the provisions of Regulations 10 of the SAST Regulations, 1997. However, the Noticees, by failing to make a public announcement for acquiring the shares of EIL were observed to have violated the provisions of Regulation 10 of the SAST Regulations, 1997.

SHOW CAUSE NOTICE, REPLY AND HEARING:

5. Considering the aforesaid, a Show Cause Notice dated December 13, 2021 ("SCN") was issued to the Noticees to show cause as to why appropriate directions including penalty under Section 11(4), 11B(1) read with Section 11(1) of the SEBI Act and Regulation 44 of the SAST Regulations, 1997 and those under Section 11(4A) and 11B(2) read with Section 15H(ii) of the SEBI Act and Regulation 45 of the SAST Regulations, 1997 read with Rule 4 of the SEBI (Procedure for holding Inquiry and Imposing Penalties) Rules, 1995 should not be issued against them for the alleged violation of Regulation 10 of the SAST Regulations, 1997. The following annexures were provided to the Noticees along with the said SCN:

(i) Copy of Board Resolution for allotment of equity shares,

(ii) Copy of the responses received from Castleshine and Leadhaven dated March 11, 2021,

(iii) Disclosures made to BSE on April 15, 2019

6. The said SCN was duly delivered to Noticee No. 2 which has been acknowledged by him (on behalf of himself and Noticee No. 1) vide his letter dated December 25, 2021 (received on December 27, 2021). Thereafter, it is noted from the records available before me that on March 09, 2022, the Noticees had filed a settlement application in terms of the SEBI (Settlement Proceedings) Regulations, 2018 ("Settlement Regulations") to settle the present enforcement proceedings initiated against them vide the aforementioned SCN dated December 13, 2021. However, the said application was returned to the Noticees owing to the non-compliance with the open offer requirements under the SAST Regulations, 1997. As no reply was received from the Noticees to the SCN dated December 13, 2021 even after the settlement application filed by the Noticees was returned by SEBI, vide reminder letter dated July 05, 2022, the Noticees were advised to file their replies, if any, to the SCN within 7 days of receipt of the said letter. However, it is noted that the Noticees re-submitted the settlement application along with a representation on July 12, 2022 with respect to the obligation to make an open offer under the SAST Regulations, 1997.

7. Even though the settlement application filed by the Noticees was under consideration, in terms of Regulation 8(1) of the Settlement Regulations and in compliance with the principles of natural justice, an opportunity of personal hearing was granted to the Noticees before me on November 18, 2022.

8. In the meantime, the settlement application was examined by SEBI and vide email dated November 01, 2022, the Noticee No. 2 was informed that an obligation to make an open offer had been triggered and the same being in the interest of investors, making a public announcement for open offer by the acquirer is a pre-requisite pursuant to which the Noticees would be eligible for settling the matter under the Settlement Regulations. In view thereof, vide the said email, the settlement application was once again returned by SEBI to the Noticees on account of non-compliance with the open offer requirements.

9. With respect to the scheduled personal hearing on November 18, 2022, Noticee No.2, while responding to the intimation granting the Noticees an opportunity of personal hearing, made a request to adjourn the hearing scheduled on November

18, 2022 to any suitable date in the last week of December 2022. In the light of the fact that considerable time had lapsed since the issuance of the SCN, the request for adjournment of personal hearing was partly acceded to and an opportunity of personal hearing was granted to the Noticees on December 16, 2022. However, vide email dated December 13, 2022, the Noticee, while seeking another adjournment to the hearing scheduled on December 16, 2022, sought for an opportunity of inspection of documents in the matter. In order to comply with the principles of natural justice, the said request for inspection of documents was acceded to and an opportunity to inspect the documents was granted to the Noticee on December 26, 2022. The hearing scheduled on December 16, 2022 was accordingly adjourned. On the scheduled date for inspection i.e. December 26, 2022, the Authorized Representative of the Noticee inspected the documents as mentioned in the record of the proceedings.

10. Thereafter, an opportunity of hearing was granted to the Noticees on January 16, 2023. After completion of the inspection of documents and before the scheduled date of hearing, vide letter dated January 12, 2023, the Noticees filed their joint / common reply in the matter. On the scheduled date of hearing, the Authorized Representative viz. Mr. Somasekhar Sundaresan and Mr. Robin Shah, Advocates appeared before me on behalf of the Noticees and made oral submissions. Further, on request, time till January 27, 2023 was granted to the Noticees to file additional submissions in the matter. Vide letter dated January 26, 2023, the Noticees have submitted their detailed reply in the matter.

11. The submissions made by the Noticees vide their letters dated January 12, 2023 and January 26, 2023 are summarized as under:

(i) EIL had decided to offer, issue and allot 30,00,000 warrants on preferential basis at price of Rs. 156/- to six non-promoter entities for a period of eighteen months. The said warrants were issued for benefit of the shareholders since the target company desired infusion of fresh capital for "*capital expenditure*" and "*long term working capital requirement*". On February 27, 2007, against the aforesaid warrants, 22,50,000 equity shares at a price of Rs. 156/- were allotted by EIL to the following entities:

Sr. No.	Name of the Allottees	No. of equity shares of EIL
1.	Lavish Packagers Ltd	2,50,000
2.	Leadhaven PTE Ltd	10,00,000
3.	Castleshine PTE Ltd	10,00,000
Total		**22,50,000**

(ii) After the said conversion, the shareholding of Leadhaven and Castleshine was 12.88% each of the share capital of EIL. Thereafter, in March 2007, EIL issued further shares to other entities and the shareholding of Leadhaven and Castleshine decreased to 10.95% each. In the subsequent years, EIL issued further shares to various entities and the said shareholding of Leadhaven and Castleshine was further diluted to 7.85% of the total shareholding.

(iii) Thus, it is submitted by the Noticees that the issuance of warrants was with a view to furthering the business and capital requirement of EIL and the warrants so allotted on preferential basis were issued in full compliance with the erstwhile SEBI (Disclosure and Investor Protection) Guidelines, 2000 applicable at the relevant time. Further the issuance of the said warrants was approved by the public shareholders of EIL and therefore, the entire process was in public domain and was disclosed on BSE from time to time.

(iv) There has been no change in the composition of Board of Directors of EIL after the impugned acquisition in question. The purpose of an open offer is to provide public shareholders an exit opportunity when there is a substantial change in control of a listed company. Under the scheme of Takeover Regulations, the requirement of a public offer where there was a change in control could have been waived by shareholders by passing a special resolution. Therefore, the principle that there is no inflexible rule that an open offer is an absolute must.

(v) The Noticees submit that the proceedings are vitiated by inordinate delay and laches of almost fifteen years since the fact that could have led to discovery of the alleged violation was in public domain since 2007. The said delay is prejudicial to the Noticees as Ferryden was incorporated outside the country and governed by overseas laws. Noticee No. 2 is also an NRI and does not have sufficient records in India pertaining to such an old transaction. The

underlying data / documents in respect of the impugned transaction are not readily and handily available and hence, impossible for the Noticees to holistically defend themselves before SEBI. In support of the said submission, the Noticees have placed reliance on the orders passed by the Hon'ble Supreme Court in *Adjudicating Officer, SEBI Vs. Bhavesh Pabari (2019) 5 SCC 90* and *Securities and Exchange Board of India Vs. Sunil Krishna Khaitan (2002), SCC Online 862* and orders passed by the Hon'ble SAT in the cases, *Rajiv Bhanot & Ors Vs. SEBI (2021) SCC Online SAT 2815*, *Rakesh Kathotia & Ors Vs. SEBI (Appeal No. 07 of 2016, Order dated May 27, 2019)*, *Ashok Shivlal Rupani Vs. SEBI (Appeal No. 417 of 2018, Order dated August 22, 2019)* and *Anilkumar Nandkumar Harchandani Vs. SEBI (Appeal No. 75 of 2019, Order dated December 05, 2019)*.

(vi) The Noticees have stated that during the inspection granted, redacted portion of the investigation report was given to them without justification or articulating any reasons for the same. Further, correspondence with third parties have not been made available. The same is contrary to the principles enshrined in *T. Takano Vs. SEBI (2022) 8 SCC 162*.

(vii) Further, the Noticees have submitted that there are various powers available to SEBI under the Takeover Regulations in relation to violation of provisions thereof. In the absence of specification of the exact direction to be issued, the Noticees are denied opportunity to present effective submissions on correct measure. The same vitiates the SCN.

(viii) The Noticees submit that no remedial directions under Section 11 and 11B of the SEBI Act including a direction to make an open offer are called for let alone a monetary penalty given the inordinate delay which leads to fundamental change in circumstances. In support of the said submission, the Noticees have placed reliance on the order passed by the Hon'ble Supreme Court in *Securities and Exchange Board of India Vs. Sunil Krishna Khaitan (2002), SCC Online 862.*

(ix) The law governing takeovers of the listed companies has undergone a sea change with SAST Regulations, 2011 that allows an acquirer to acquire upto

25% of the paid up capital of a target company without making an open offer. The impugned acquisition, if undertaken today, would not have resulted in an open offer being triggered.

(x) From public domain, the Noticees state that a majority of the shareholders as on date of the alleged trigger of an open offer are no longer the shareholders in the Target Company rendering any direction to make an open offer infructuous and apposite. Such a direction would be punitive rather than remedial.

(xi) The impugned acquisition did not result in any change of control as the promoters of the Target Company continued to hold 29.84% of the voting rights in the Target Company.

(xii) Further, the Noticees have stated that there are numerous orders of SAT and SEBI that have taken a view that breach of the charging provisions of the Takeover Regulations does not automatically mean an open offer direction should follow. Reliance is placed on *Vakrangee Holding Ltd Vs. SEBI (Appeal No. 353 of 2018, SAT Order dated June 08, 2021), Rajiv Bhanot & Ors Vs. SEBI (2021) SCC Online SAT 2815, Therm Flow Engineers Pvt. Ltd Vs. SEBI (Appeal No. 349 of 2018, SAT Order dated May 01, 2019), SEBI Order dated July 28, 2004 in Jay Yushin Ltd, SEBI Order dated December 15, 2011 against Anil Gandhi & Ors in the matter of Zigma Software Ltd, SEBI order dated January 08, 2013 against Rotomac Global Private Limited in the matter of Flawless Diamonds Limited, SEBI order dated July 18, 2018 against Saraf Holdings Limited in the matter of Comfort Incap and SEBI Order dated February 02, 2017 in the matter of Refex Industries.*

(xiii) It is submitted by the Noticees that even monetary penalty is not warranted in the facts and circumstances of the case. The Noticee has placed reliance on the SAT order dated May 15, 2019 in *Piramal Enterprises Vs. SEBI (Appeal No. 416 of 2016)* and SAT Order dated August 02, 2019 in *PG Electroplast & Ors Vs. SEBI (Appeal No. 281 of 2017)*. Further, reliance is also placed by the Noticees in the order passed by the Hon'ble Supreme Court in the case of *Adjudicating Officer, SEBI Vs. Bhavesh Pabari*.

(xiv) Vide letter dated January 26, 2023, the Noticees have provided certain documents in support of their submissions & also compilation of case laws relied upon.

CONSIDERATION OF ISSUES AND FINDINGS:

12. I have carefully perused the SCN issued, the replies filed by the Noticees and the other material available on record. The only issue which arises in the present case is whether, upon acquisition of shares of EIL, the Noticees were under an obligation of make a public announcement of open offer for acquiring the shares of the target company in terms of Regulation 10 of the SAST Regulations, 1997. Before moving forward, it is felt apposite to refer to the relevant provisions of law which are reproduced as under:

SAST Regulations, 1997

Acquisition of fifteen or more of the shares or voting rights of any company.

10. *No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen percent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.*

Timing of the public announcement of offer.

14. (1) *The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:*

……..

Directions by the Board.

44. *Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including:—*

(a) directing appointment of a merchant banker for the purpose of causing disinvestment of shares acquired in breach of regulation 10, 11 or 12 either through public auction or market mechanism, in its entirety or in small lots or through offer for sale;

(b) directing transfer of any proceeds or securities to the Investors Protection Fund of a recognised stock exchange;

(c) directing the target company or depository to cancel the shares where an acquisition of shares pursuant to an allotment is in breach of regulation 10, 11 or 12;

(d) directing the target company or the depository not to give effect to transfer or further freeze the transfer of any such shares and not to permit the acquirer or any nominee or any proxy of the acquirer to exercise any voting or other rights attached to such shares acquired in violation of regulation 10, 11 or 12;
(e) debarring any person concerned from accessing the capital market or dealing in securities for such period as may be determined by the Board;
(f) directing the person concerned to make public offer to the shareholders of the target company to acquire such number of shares at such offer price as determined by the Board;
(g) directing disinvestment of such shares as are in excess of the percentage of the shareholding or voting rights specified for disclosure requirement under regulation 6, 7 or 8;
(h) directing the person concerned not to dispose of assets of the target company contrary to the undertaking given in the letter of offer;
(i) directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount along with interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits.

SAST Regulations, 2011
Repeal and Savings*.*
35.*(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stands repealed from the date on which these regulations come into force.*
(2) Notwithstanding such repeal,—
(a) anything done or any action taken or purported to have been done or taken including comments on any letter of offer, exemption granted by the Board, fees collected, any adjudication, enquiry or investigation commenced or show-cause notice issued under the repealed regulations, prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations;
(b) the previous operation of the repealed regulations or anything duly done or suffered thereunder, any right, privilege, obligation or liability acquired, accrued or incurred under the repealed regulations, any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed regulations, or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, shall remain unaffected as if the repealed regulations has never been repealed;
(c)any open offer for which a public announcement has been made under the repealed regulations shall be required to be continued and completed under the repealed regulations.
(3) After the repeal of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, any reference thereto

in any other regulations made, guidelines or circulars issued thereunder by the Board shall be deemed to be a reference to the corresponding provisions of these regulations.

13. I note that two Singapore based companies i.e. Castleshine and Leadhaven cumulatively held 18% shares in EIL. The said companies were allotted 10,00,000 warrants each on September 09, 2005 which were subsequently converted into 10,00,000 equity shares each on February 27, 2007. Upon the said conversion, as per the shareholding pattern available on BSE, Castleshine and Leadhaven as public shareholders held 10.95% each of the share capital in EIL.

14. I further note that on March 12, 2007, Noticee No. 1 acquired 100% of both Castleshine and Leadhaven. Such acquisition resulted in Castleshine and Leadhaven becoming PACs by virtue of common holding of Noticee No. 1, which in turn was 100% held by Noticee No. 2. Also, it is noted that while making disclosures under Regulation 7(1) of the SAST Regulations, 1997 at BSE on April 15, 2019, Castleshine had disclosed Leadhaven as a PAC. Pursuant to the said acquisition, I note that Noticee No. 1 along with Noticee No. 2 acquired 21.90% in EIL i.e. more than 15% of the equity share capital of EIL which required a public announcement by way of an open offer to acquire the shares of EIL in accordance with the provisions of Regulation 10 of the SAST Regulations, 1997. However, the Noticees, by failing to make a public announcement for acquiring the shares of EIL were alleged to have violated the provisions of Regulation 10 of the SAST Regulations, 1997.

15. The Noticees, while admitting that no public announcement was made by them to acquire shares of EIL as they were not aware of the provisions of Indian laws to be complied with, have submitted that upon the said acquisition of shares, they did not exercise any control on the target company as the promoters of the Target Company continued to hold 29.84% of the voting rights in the Target Company. I note that in terms of Regulation 10 of the SAST Regulations, 1997, no 'acquirer', himself or with 'persons acting in concert' with him, can acquire 15% or \ more shares or voting rights in a target company unless such acquirer makes a public announcement to acquire shares of such company in accordance with Regulation 14. Thus, Regulation 10 of the SAST Regulations, 1997 clearly states that

acquisition of more than 15% or more shares in a target company requires the acquirer/s to make a public announcement to acquire the shares. Thus, making a public announcement of open offer is a pre-requisite to acquire shares beyond 15%. In view of a clear and unambiguous provision, the submission of the Noticees that there was no change in control of the target company and that the promoters continued to hold 29.84% of the voting rights in the target company does not hold any merit. The Noticees have also submitted that the shareholding of Leadhaven and Castleshine, after the acquisition of the said companies by Noticees, has decreased substantially. I do not find merit in the said submission as the statutory obligation to make a public announcement of open offer under Regulation 10 of the SAST Regulations, 1997 gets triggered, the moment the acquirers acquire 15% or more shares in the Target Company. The fact that the shareholding decreased later in time does not absolve the Noticees from making the public announcement at the relevant time when the acquisition triggered the breaching limit.

16. Further, it is the case of the Noticees that there has been an inordinate delay and laches of almost fifteen years which has vitiated the present proceedings. In support of the said contention, the Noticees have placed reliance on orders passed by the Hon'ble Supreme Court in *Adjudicating Officer, SEBI Vs. Bhavesh Pabari (2019) 5 SCC 90* and *Securities and Exchange Board of India Vs. Sunil Krishna Khaitan (2002) SCC Online 862* and orders passed by the Hon'ble SAT in the cases, *Rajiv Bhanot & Ors Vs. SEBI (2021) SCC Online SAT 2815*, *Rakesh Kathotia & Ors Vs. SEBI (Appeal No. 07 of 2016, Order dated May 27, 2019)*, *Ashok Shivlal Rupani Vs. SEBI (Appeal No. 417 of 2018, Order dated August 22, 2019)* and *Anilkumar Nandkumar Harchandani Vs. SEBI (Appeal No. 75 of 2019, Order dated December 05, 2019).*

17. Here, it is pertinent to note that SEBI had received several complaints with respect to the instant case dated January 8, 2019, February 11, 2019, February 22, 2019, May 27, 2019 and July 24, 2019 based on which preliminary investigation was conducted by SEBI. Thereafter, a detailed investigation was undertaken to ascertain if there have been violations of the provisions of the SAST Regulations in the scrip of EIL. Pursuant to the investigation, it was observed that Noticee Nos. 1 and 2 had acquired the shares of the Target Company beyond the threshold limit of

15% thereby triggering the open offer requirement under the SAST Regulations, 1997 without making any public announcement to acquire such shares. Upon completion of the investigation, it was proposed that directions under Section 11(1), 11(4) and 11B(1) of the SEBI Act and Regulation 44 of the SAST Regulations, 1997 along with imposition of penalty under Section 11(4A) and 11B(2) read with Section 15H(ii) of the SEBI Act may be initiated against the Noticees. Pursuant to approval from the competent authority, SCN was issued on December 13, 2021 to the Noticees in the instant proceedings. I note that the Hon'ble Supreme Court in the case of *Adjudicating Officer, SEBI Vs. Bhavesh Pabari* while dealing with issue of delay in issuance of the SCN by the Adjudicating Officer had observed that *"…. There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default / statute, prejudice caused, whether the third - party rights had been created etc……"* In the facts and circumstances of the present proceedings, the said case stands differentiated as there has been no delay in issuance of the SCN after completion of the investigation. Also, as held by the Hon'ble Supreme Court, the reasonable time is dependent upon many factors including the nature of default and the prejudice caused. As the shareholders of EIL were deprived of an opportunity to exit the target company by offering their shares in the open offer, there was a prejudice caused to them and therefore, the facts and circumstances in which the present proceedings have been initiated are differently placed and therefore, cannot be equated with the facts in *Bhavesh Pabari* (Supra) case.

18. Further, in the case of *Rajiv Bhanot & Ors Vs. SEBI and Rakesh Kathotia & Ors Vs. SEBI* cited by the Noticees, I note that the Hon'ble SAT has made the observations based on the facts of the cases therein. In the said cases, I note that there was material to show that the fact of change in the shareholding and acquisition by the acquirers was in public domain much before the issuance of the SCN and yet there was a delay in initiating action. The Hon'ble SAT, after taking into consideration all these facts, has made the observations relied upon by the Noticees with respect to the delay which is not the case in the instant case in hand and therefore, the reliance on the said cases is misplaced. Though the Noticees have submitted that the information with respect to the said acquisition of shares of EIL was in public

domain, the same is incorrect as the warrants were issued to Leadhaven and Castleshine by EIL which had an approval of the public shareholders and therefore, I note that the information which can be said to be in public domain was with respect to issuance of warrants and not with regard to the acquisition of shares of EIL by the Noticees. Here, it is pertinent to see the unambiguous wordings of Regulation 10 of the SAST Regulations, 1997 which casts an obligation on the acquirer/s to make a public announcement the moment the acquisition would reaches 15% or more shares of the target company. Furthermore, issuance of warrants does not amount to compulsory conversion of the said warrants into equity shares by the allottees. The said right of conversion may also be waived by the allottees upon completion of the relevant period. In the instant case, Leadhaven and Castleshine exercised their right to convert the warrants into equity shares and upon conversion their shareholding increased to 10.95% each in EIL. However, the Noticees triggered the open offer requirement under the SAST Regulations, 1997 on acquiring the said two companies on March 12, 2007, which cannot be said to be in the public domain. In view of the same, the said submission of the Noticees is found to be incorrect and misplaced.

19. Similarly, in the case of *Ashok Shivlal Rupani Vs. SEBI*, the Hon'ble SAT, while making observation with respect to the delay, has observed that the alleged disclosures under the PIT Regulations were not made but similar disclosures were made by the appellant under the SAST Regulations and therefore, information was available on the Stock Exchange. When a disclosure was made by the company under the SAST Regulations, the investors became aware of the change in the shareholding and therefore, the Hon'ble SAT was of the view that the violation of Regulation 13 of the PIT Regulations was technical in nature. I note that the instant case in hand is that of failure to make a public announcement to acquire shares and not that of disclosure violations which are placed on a different pedestal. In view of the same, the observations of the Hon'ble SAT in the said case with respect to delay are based on the facts and circumstances in that case which cannot be applied in the present case as the facts are differentially placed.

20. The Noticee has also placed reliance on the order passed by the Hon'ble SAT in the case of *Anilkumar Nandkumar Harchandani Vs. SEBI* wherein the Hon'ble SAT

had allowed the appeal by observing that there was an inordinate delay in initiation of the proceedings. In the said case, the Hon'ble SAT has placed reliance on its observations in the case of *Ashok Shivlal Rupani & Anr* (Supra) which has been differentiated in the preceding paragraph. It is once again noted that the Hon'ble SAT while holding that there was an inordinate delay also observed that in the case of *Anilkumar Nandkumar Harchandani*, the investigation report itself showed non-availability of the documentary evidence because of which the investigating authority did not recommend taking drastic action to direct making of public announcement. Also, the said appeal was filed by the appellants for imposition of monetary penalty by the Adjudicating Authority for the violation of Regulation 11(1) of the SAST Regulations, 1997. Thus, the said order passed by the Hon'ble SAT stands differentiated.

21. Further, the Hon'ble Supreme Court in the case of *Securities and Exchange Board of India Vs. Sunil Krishna Khaitan* has made observations and findings on interpretation of the provisions of SAST Regulations, 1997 relating to individual trigger and collective trigger by acquirers whereas in the instant case, the violation of Regulation 10 of the SAST Regulations, 1997 has been clearly established without requiring any interpretation of law. Therefore, factually, the case of *Sunil Krishna Khaitan* cannot be relied upon in the present case as the facts of the present case are different as brought out in the previous paragraphs.

22. The Noticees have also submitted that only redacted portion of the Investigation Report was provided to them and that the statements recorded of third parties were not provided to them. In support of their contention, reliance is placed in the case of *T. Takano Vs. SEBI (2022) 8 SCC 162*. I note that relevant portions of the investigation report have been given to the Noticees as the redacted portions had third party information which was not relevant to the allegations made in the SCN against the Noticees and would have affected third party rights. Further, the other documents which are stated to have not been given to the Noticees are not relied upon by me while dealing with the instant case. Therefore, the submissions made by the Noticees in this regard are without any basis.

23. The Noticees have even submitted that in the absence of specification of the exact direction to be issued, the Noticees are denied opportunity to present effective submissions on correct measure. I note from the SCN issued to the Noticees that at para 3 of the said SCN, the Noticees have been specifically show caused as to why directions under Regulation 44 of the SAST Regulations, 1997 and monetary penalty under Section 15H(ii) should not be issued against the Noticees for the alleged violations of the provisions of law. Therefore, I find no merit in the said submissions of the Noticees.

24. The Noticees have stated that it is seen from public domain that a majority of the shareholders as on date of the alleged trigger of an open offer are no longer the shareholders in the Target Company rendering any direction to make an open offer infructuous and apposite. Such a direction would be punitive rather than remedial. Here, the following observations of the Hon'ble Supreme Court in the case of *Sunil Krishna Khaitan (Supra)* specifically with respect to the discretion of the Board to issue directions under Regulation 44 of the SAST Regulations, 1997 are relevant:

"70. Use of the word 'may' and not 'shall' in Regulation 44 is significant. It is not mandatory that in case of every violation and breach of Regulations 10, 11 and 12, direction under Regulation 44 shall be issued. The interpretation gets fortified in view of the words and object of the Regulation 44 which empowers the Board to issue directions as it deems fit. Section 11(1), while broadly defining the functions of the Board, states that it is the duty of the Board to protect interest of investors in securities and to promote the development of, and regulate the securities market by such measures as it thinks fit…….The Board, therefore, when it decides to exercise its power under Regulation 44 and issues directions under the said Regulation has to keep the two facets in mind, namely, (i) interest of the securities market; and (ii) protection of interest of the investors. The exercise of discretion of the Board, in fact, would not be restricted to the two facets mentioned above as the power and functions of the Board are far broader as they include promotion, development and regulation of securities market as a whole and regulating substantial acquisition of shares and takeover of companies.

72. In the context of Regulations 44 and 45, it implies that the Board has the power to make a choice between different courses of action or inaction. This choice is not unfettered but is always held subject to implied limitations inherent in every statute, limitations set by the common law and the constitutional mandate of rule of law. The underlying rationale of giving discretion is to ensure that the Board exercises the discretion in consonance with legitimate values of public law, which include need to maintain legal certainty and consistency which are at the

heart of the principle of rule of law. These have to be balanced with other equally legitimate public law value, which is the object and purpose of the enactment. The need for the said flexibility is given and is necessary to meet unusual and practical situations and to do justice in a particular case. The remedial order passed by the Board as the regulator must also meet the said parameters in addition to meeting the requirements of the enactment.

…….

79……. We are not stating that this direction can never be issued, but the exercise of discretion to issue the said directions has to be predicated and based upon good grounds and reasons. The directions of this nature are not automatic and are to be issued only when they are warranted and justified….."

25. I note that the Hon'ble Supreme Court has clearly stated that direction to make an open offer under Regulation 44 of the SAST Regulations, 1997 can be issued keeping in mind two facets namely, (i) interest of the securities market; and (ii) protection of interest of the investors. The Hon'ble Supreme Court also stated that, there can be other factors too which can be considered while issuing such directions. Also, it has been observed that the exercise of discretion to issue the said directions has to be predicated and based upon good grounds and reasons. I note that an open offer is an offer made by the acquirer to the shareholders of the target company inviting them to tender their shares in the target company at a particular price. The primary purpose of an open offer is to provide an exit option to the shareholders of the target company on account of substantial acquisition of shares occurring in the target company. I find that where the acquirers had altogether failed to make a public announcement or made such announcement with a delay, SEBI had directed such acquirers in the past to make the public announcements which is the statutory requirement and also pay interest for the delayed period based on the facts and circumstances of the case.

26. In the instant case, I note that the Noticees have admitted their failure to make a public announcement for acquiring shares of the Target Company at the relevant period. Though the Noticees have claimed ignorance, I note that it is a settled principle that *'ignorantia juris non excusat'* or *'ignorantia legis neminem excusat'* or '*ignorance of law is no excuse'* and therefore, the Noticees cannot take shelter under the same. Also, the submission of the Noticees that if the acquisition would have taken place now, the same would not have triggered the open offer requirement owing to the change in the SAST Regulations cannot be accepted

considering the trite law that the law existing at the time of the violation would be attracted irrespective of the law governing the facts at a later stage. Considering the same, the violation of the provisions of Regulation 10 of the SAST Regulations cannot be ignored on the ground of change of laws. Therefore, the charges in the SCN against the Noticees, as also admitted, are established. In this context, I note that the Hon'ble SAT, vie order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited Vs. SEBI (Appeal No. 31 of 2011)* has observed that,

> *"It must be remembered that whenever an acquirer violates Regulation 10, 11 or 12 of the takeover code by not making a public announcement, he should be directed to comply with the provision by making a public offer. The words "unless such acquirer makes a public announcement" appearing in Regulations 10 and 11(1) make these provisions mandatory and a public announcement has to be made. Similar words appear in Regulation 12 as well. These provisions make the acquisition conditional upon a public announcement being made. The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation."*

27. As mentioned in the preceding paragraph, I note that the object and purpose of the SAST Regulations, 1997 as well as SAST Regulations, 2011 is to provide equality of treatment of all stakeholders, to provide an exit opportunity to the shareholders in case of substantial acquisition of shares or takeover and to ensure that persons in control of the target company do not consolidate their shareholdings in the target company in a clandestine manner and to the detriment of other shareholders. I note that regulation 44 of the SAST Regulations, 1997 and Regulation 32 of the SAST Regulations, 2011 provide for consequences of the breach of the provisions thereof. The guiding principles for the directions as provided in these regulations are the interests of the investors and securities

market, which are the statutory guiding principles as inbuilt in the SEBI Act,1992, the SAST Regulations, 1997 and the SAST Regulations, 2011. I, therefore, am of the view that the above mentioned principles laid down by Hon'ble SAT shall apply in the present case also.

28. It is pertinent to mention here that as on March 09, 2007, there were 3618 shareholders who could have availed of the opportunity to exit from the Target Company if a public announcement to acquire shares would have been made by the Noticee in compliance with Regulation 10 of the SAST Regulations. From the available record, the number of shareholders of EIL as on March 09, 2007 who continue to hold shares as on the date of issuance of the SCN were 400 in number. Considering that 400 odd shareholders are holding shares of EIL on the date of issuance of the SCN who may get an opportunity to exit and avail of the said benefit, I find that in the facts of the present case, a direction to make an open offer will definitely be in the interests of the shareholders of EIL. Also, such a direction may not be fruitful if the price is disadvantageous to the shareholders. With regard to the same, I find that the closing price of the scrip of EIL on the trigger date was Rs. 422.45/- which is more than the closing price of the scrip as on date. Therefore, I am inclined towards concluding that a direction to make an open offer would be beneficial to the shareholders of EIL who were deprived of the opportunity to exit at the trigger date.

29. Coming to the issue of interest, I note that payment of interest is the compensation paid to the shareholders of the target companies due to their losing an exit opportunity at the right time as a result of the failure on the part of the acquirers to make the public announcement within the stipulated time period prescribed under the SAST Regulations and such interest payment by the acquirer cannot be considered as a penalty that has been paid by the acquirers. Therefore, I find that ends of justice would be met if a direction to make an open offer that too with interest would be issued in the case in hand. Here, I find it apposite to refer to the decision of Hon'ble Supreme Court in the case of *Clariant International Ltd & Anr. Vs. SEBI INSC: (2004) INSC 492* in which the Hon'ble Apex Court held that only those shareholders which were holding shares on the trigger date (i.e. March 12, 2007 in

the present proceedings) and continue to hold the shares of the Company till date of tendering of shares in open offer are entitled for interest for the delayed period.

30. Furthermore, considering the said violation of the provisions of SAST Regulations, 1997 and the prejudice caused to the investors due to the said failure / delay, a monetary penalty under Section 15H (ii) is also warranted. Section 15H(ii) of the SEBI Act, 1992 reads as under:

> ***15H. Penalty for non-disclosure of acquisition of shares and take-overs.-***
> *If any person, who is required under this Act or any rules or regulations made thereunder, fails to—*
> *(i)……*
> ***(ii)*** *make a public announcement to acquire shares at a minimum price,*
> *(iii)……..*
> *he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.*

31. It is relevant to mention here that for the imposition of penalty under the provisions of the SEBI Act, guidance is provided by Section 15J of the SEBI Act. The said provision reads as follows:

> ***15J. Factors to be taken into account while adjudging quantum of penalty.***
> *While adjudging quantum of penalty under 15-I or section 11 or section 11B, the Board or 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.*
> *Explanation. —For the removal of doubts, it is clarified that the power to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.*

32. I find that the violations of the provisions of SEBI Act and the SAST Regulations have been established against the Noticees in the light of the reasons discussed in detail in the preceding paragraphs. Also, as already discussed, the loss that has been caused to the investors in the present case is the denial of an exit opportunity in the event of substantial acquisition in the target company. I find that there is no

repetitive nature of default. However, it is also noteworthy that the non-compliance with open offer requirements is a continuing violation. I, therefore, find that the above factors have to be considered for the purpose of arriving at the amount of penalty to be levied in the present case.

ORDER.

33. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 11(1), 11(4), 11(4A), 11B(1) and 11B(2) read with Section 19 of the SEBI Act and Regulation 44 of SAST Regulations, 1997 read with Regulation 32 of the SAST Regulations, 2011, hereby issue the following directions:

33.1 Noticee Nos. 1 and 2 i.e. Ferryden International Limited and Shri Ashok Bhandari are directed to:

(i) take the requisite steps within a period of 15 days from the date of this order to complete the open offer to acquire shares of the target company in accordance with the provisions of the SAST Regulations, 1997 read with the provisions of SAST Regulations, 2011;

(ii) pay, along with the consideration amount, interest at the rate of 10% per annum from March 12, 2007 to the date of payment of consideration, to the shareholders whose shares are accepted in the open offer.

33.2 Except for the purpose of ensuring compliance with the direction at paragraph 33.1 above, Noticee nos. 1 and 2 are restrained from accessing the securities market and prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, in any manner, whatsoever, till the time they ensure compliance with the directions issued at paragraph 33.1.

33.3 The Noticees are hereby imposed with a penalty of Rs. 10,00,000 (Rupees Ten Lakh Only) to be paid, jointly and severally, under Section 15H(ii) and are directed to pay the said penalty within a period of forty five (45) days from the date of receipt of this order.

33.4 The Noticees shall remit / pay the said amounts of penalty through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -

>Orders of EDs/CGMs -> PAY NOW. In case of any difficulties in online payment of penalties, the Noticee may contact the support at portalhelp@sebi.gov.in.

34. This order shall come into force with immediate effect. The order shall be served upon the Noticees for ensuring compliance with the above directions. A copy of this order shall also be sent to the Monetary Authority of Singapore for information and necessary action, if any.

35. Further, a copy of this Order shall be forwarded to the recognized Stock Exchanges, Depositories and Registrar and Transfer Agents and Ministry of Corporate Affairs / concerned Registrar of Companies for their information and necessary action.

Date: March 16, 2023
Place: Mumbai

Dr. ANITHA ANOOP
CHIEF GENERAL MANAGER
SECURITIES AND EXCHANGE BOARD OF INDIA