

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PKB/AO- 126 /2009]

IN RESPECT OF :

- 1. INDIA NEWBRIDGE INVESTMENTS LIMITED**
- 2. INDIA NEWBRIDGE COINVESTMENTS LIMITED**
- 3. INDIA NEWBRIDGE PARTNERS FDI LIMITED**
- 4. MAXWELL(MAURITIUS)PTE LIMITED**

IN THE MATTER OF:

MATRIX LABORATORIES LIMITED

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

BRIEF FACTS OF THE CASE:

1. Matrix Laboratories Limited (hereinafter referred as "Target Company") has its registered office at 1-1-151/1, Sairam Towers, 4th Floor, Alexander Road, Secunderabad , and its shares are listed in Bombay Stock Exchange Limited (hereinafter referred to as "BSE"). The total paid-up equity voting capital of Target Company as on December 31, 2004 was 1,49,68,321 shares.
2. India Newbridge Investments Limited, India Newbridge Coinvestments Limited, India Newbridge Partners FDI Limited and Maxwell Mauritius Pte Limited (hereinafter collectively referred to as "noticees") acquired 22,50,000 (15.16%) equity shares of Target Company vide separate agreements through a preferential allotment. The allotment was in terms of agreement dated

April 15, 2004. Subsequently, the noticees came out with a Public Announcement in terms of Regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1997 {hereinafter referred to as "SAST"} on April 18, 2004. As regard the applicability of Regulation 12, it was stated in the letter of offer that the provisions of Regulation 12 were not applicable to the said offer. I also note from the letter of offer that the shareholding of the noticees [acquirer/PACs] pursuant to the open offer {assuming full acceptance of 20% shares/voting rights by the noticees} would have been 40.46% , which would have been greater than the total shareholding of the promoters of the Target Company. The said open offer opened in July , 2004 and closed in September , 2004.

3. Thereafter , vide an agreement dated August 28, 2006 M. P. Laboratories (Mauritius) Limited and Mylan Laboratories Limited acquired 51.5% shares from the promoters of Target Company and made the Public Announcement on August 26, 2006. It is in this letter of offer that it was observed from the shareholding pattern, that as on the date of the Public Announcement i.e August 26, 2006 the names of the noticees were shown under the promoter group category. Thereafter, it was also observed from the shareholding pattern for the quarter ended December 31, 2004 filed by the Target Company, that the names of the noticees figured under the promoter group category who were having controlling/Strategic Holdings.

4. In this context it shall be noted that, earlier, when the noticees acquired stake in the Target Company and made the open offer as referred to at para no. 2 above, the said open offer was made in terms of Regulation 10 and not in terms of Regulation 12. This creates an impression that the noticees had no intention to acquire control over the Target Company. However, as it was observed in the letter of offer and from the shareholding pattern for the quarter ended December 31, 2004 filed by the Target Company, that the names of the noticees figured under the promoter group category who were having controlling/strategic holdings , therefore it was alleged that the noticees acquired control over the Target Company on December 31, 2004

and did not made the triggered open offer in terms of Regulation 12 read with Regulation 14(3) of SAST thereby violating the said provisions of SAST.

APPOINTMENT OF ADJUDICATING OFFICER

5. Accordingly, Shri. Amit Pradhan was appointed as Adjudicating Officer under Section 15 I of SEBI Act, 1992, read with Rule 3 of SEBI (Procedure For Holding Inquiry And Imposing Penalties By Adjudicating Officer) Rules, 1995 (hereinafter referred as 'Adjudication Rules') vide SEBI order dated April 13, 2007 to inquire into and adjudge under section 15H (ii) of SEBI Act, 1992, the aforesaid alleged violation. Pursuant to the transfer of Shri. Amit Pradhan, Shri. D. S. Reddy was appointed as Adjudicating Officer vide order of the Whole Time Member, dated June 12, 2007 and the proceedings thereof were conveyed vide communication dated July 19, 2007. Pursuant to the transfer of Shri. D. S. Reddy, the undersigned was appointed as Adjudicating Officer vide order of the Whole Time Member, dated December 10, 2008.

SHOW CAUSE, REPLY AND HEARING:

6. A Show Cause Notice (SCN) dated May 29, 2007 was issued to the noticees under Rule 4(1) of Adjudication Rules, wherein it was stated that the noticees violated provisions of Regulation 12 read with Regulation 14(3) of SAST.

7. The noticees submitted their written submissions, which were forwarded by their authorized representative through letters dated December 4, 2007 and December 6, 2007 respectively. The noticees inter-alia submitted as follows :
 - (a) The noticees were advised by the Target Company to file the Declarations under Regulation 8(2). It is evident from the Target Submissions, now available with the noticees, that the Bombay Stock Exchange ("BSE") had advised the Target Company to show the holdings of the noticees under the "foreign promoter" category purely for computation of "free float" under the listing agreement. Such classification under the listing agreement can never be mis-read to have substantial implications under

the Takeover Regulations.

- (b) In any case, whether or not a person is in control over a listed company is a question of fact, which has to be answered on the basis of whether or not the person in question has control over the company in question. The operative part of the definition of the term “control” set out in Regulation 2(1) (c) is extracted below :-

“control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly , including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

- (c) Therefore, in order to acquire control over a listed company one would have to have ability to control the management or policy decisions of such company. Such control can be inferred from the right to appoint a majority of the directors. Such control could also arise out of statutory rights as a shareholder, or the provisions of any management rights agreement or shareholders agreements or voting agreements.
- (d) Merely because the declarations quoted Regulation 8(2) of the Takeover Regulations, none of the noticees can be said to have acquired control over the Target Company. The entire factual and circumstantial environment governed by the legal and contractual position involving the Target Company and the noticees remained unchanged since April 15, 2004 , when the agreement between the Target Company and the noticees had been signed. Therefore, the citing of Regulation 8(2) in the declarations cannot be said to have conferred control in the hands of any of the noticees , over the Target Company.

8. In the interest of natural justice, a notice of inquiry dated January 2, 2009 was issued to the authorised representative of the noticees fixing the date for hearing on January 15, 2009. The authorised representative appeared before me and sought adjournment of the said hearing till January 20, 2009. Therefore, vide letter dated January 15, 2009, the date for hearing was fixed

for January 20, 2009.

9. The authorised representative appeared before me on January 20, 2009 and made additional submissions. The noticees were not able to provide any documentary evidence with respect to BSE letter vide which the noticees were advised by the Target Company to file declaration in terms of Regulation 8(2) of SAST, which in turn was advised by BSE to depict the noticees as foreign promoters. The noticees also submitted as follows :

“We have seen the letter dated March 8, 2005 issued by Matrix Ltd. The letter states to the BSE that the shareholding of the foreign bodies corporate has been included in the promoters holding. This is the letter that has enclosed the revised shareholding pattern, which appears to have been pattern formulated by the company after the noticees holding was reclassified by them as not forming part of the free float of shares of the company. It is also true that the filing quoted Regulation 8(2) of the Takeover Regulations”.

“We have explained the circumstances leading to the re-classification by the company in our written response to the Show Cause Notice. We wish to emphasize that there has been no change in any circumstance or occurrence of any new event that would confer control over the Noticees. To determine whether control was acquired, one would have to determine whether there was any change or if any new event took place that would give them control, and whether despite such acquisition of control, no open offer was made”.

“Even if one were to assume that the noticees were already in control over the company by reason of their rights under their investment agreements, they had made an open offer immediately upon execution of those agreements. Therefore, even if one were to say that those rights brought them into control, the open offer which would be a consequence of such control was already made. We therefore submit and highlight that nothing new took place after that open offer, for control to be conferred or for any higher degree of control to have been acquired. No new directorships were given, no new shares were acquired, no fresh amendments to the agreements were made”.

It was also submitted :

“There has arisen no fresh trigger of any of the charging provisions of Regulations 10, 11, or 12 of the Takeover Regulations after the open offer was made by the noticees in 2004. No fresh acquisitions were made to mandate any open offer. What has occurred is a quoting of Regulation 8(2) instead of Regulation 8(1). To determine whether there has been a breach of an obligation to make an open offer, one would have to first determine whether the open offer was triggered to begin with. In the absence of an open offer being triggered, we respectfully submit that these proceedings may be dropped.”

Subsequent to the hearing, further submissions were made vide two letters both dated January 30, 2009.

CONSIDERATION OF ISSUES AND FINDINGS THEREOF :

10. I have carefully considered the SCN, submissions put forth by the noticees and all the other materials on record. I note that the noticees had collectively acquired 22,50,000 (15.16%) equity shares of Target Company vide separate agreements through a preferential allotment. The allotment was in terms of agreement dated April 15, 2004. Subsequently, the noticees came out with a Public Announcement in terms of Regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1997 on April 18, 2004. As regard the applicability of Regulation 12, it was stated in the letter of offer that the provisions of Regulation 12 were not applicable to the said offer. I further note that vide disclosure in terms of Regulation 8(2) of SAST dated December 31, 2004, the noticees have disclosed themselves under the category of promoters/persons in control. I further note that the target company also vide its letter addressed to the Stock Exchange, Mumbai dated March 8, 2005 has disclosed the noticees as having control over it and forming part of the promoter group.

11. I note that the allegation against noticees is that because of the disclosure dated December 31, 2004 made under Regulation 8(2) of SAST, the noticees have acquired control over the Target Company. Therefore, it was alleged that the noticees had triggered and thereby violated Regulation 12 read with Regulation 14(3) of SAST as on December 31, 2004.

12. In the replies of the noticees dated December 06, 2007 and December 04, 2007, it has been mentioned that Bombay Stock Exchange had advised the Target Company to show the holding of the Noticees under the "Foreign Promoter" category purely for computation of "free float", and in turn the Noticees were advised by the Target Company to file declaration in terms of Regulation 8(2) of SAST. In light of this submission made by the noticees, at the time of personal hearing, the representative of the noticees was advised to submit the documentary evidence in support of the particular submissions, in reply to which the authorized representative submitted that they had not been able to locate the written communication pertaining to the same. In light of above, I find that the disclosures in terms of Regulation 8(2) of SAST Regulation, were made by the noticees voluntarily.

13. It has been alleged that acquisition of control by the noticee happened on December 31, 2004 i.e subsequent to the completion of the open offer and not as a result of acquisition of shares through public offer. I am of the opinion that if this is the case, then there should have been some change in the position of the noticees at any time after the public offer. I find that there is no change in the status of the noticees (acquirer) except that the noticees have disclosed themselves as promoters/persons in control. Other than this there is no change on record either in the noticees position subsequent to the open offer or in Target Company's position which could establish that the noticees acquired control of the Target Company subsequent to the public offer i.e as on December 31, 2004 as has been alleged.

14. I am of the opinion that declarations are only an expression of the state of affairs. In the instant case, however a mere disclosure in terms of Regulation 8(2) of SAST in my opinion cannot effect acquisition of control onto the noticees until and unless it is coupled with some definitive and factual changes which would entail such a disclosure leading to acquisition of control as on December 31, 2004. Control in my opinion, is possession of

power to direct or cause the direction of affairs or management of any company, which cannot merely rest or be liable to rest on the basis of a disclosures only. Therefore, a mere disclosure cannot conclusively provide ample credence to the ultimate question of acquisition of control by noticees as on December 31, 2004.

15. On considering the aforementioned facts on record, I am of the opinion that the declaration made by the noticees under regulation 8(2) of SAST on December 31, 2004 does not indicate that the noticees have acquired control of the Target Company on that particular date i.e December 31, 2004 as there is nothing on record that corroborates the said disclosure i.e the disclosure is not supported by other facts like increase in the number of directors appointed by the noticees or change in management in favour of the noticees , change in shareholdings, or any amendment or rescinding of shareholders agreement or any other material change, which could have actually given effect to acquisition of control leading to such a disclosure being made. In the present matter there is no such fact on record. Further, there is no new shareholder agreement accompanying any new managerial or controlling rights. I also find that there is no further material to suggest that by making of such disclosures, the noticees have been put in a position to exercise managerial right or position to influence the policy decisions. In effect, the status quo was maintained from the date of agreement vide which the noticees acquired shares in the Target Company till December 31, 2004.

16. I note that Noticees collectively acquired 22,50,000 shares (15.46%) through a preferential allotment in the Target Company. The allotment was in terms of agreement dated April 15, 2004 between the Noticees and Target Company. I further note that in this regard Noticees jointly came up with a public announcement on April 18, 2004 in terms of Regulation 10 of the SAST to acquire additional 20% of the shares of Target Company. I further observe that SEBI must have figured it out at the time when draft letter of offer was submitted to SEBI that subsequent to the completion of the public offer

noticees would have been in a position to hold around 40.46% share/voting rights of the company and in turn were in position to become the single largest shareholder in the Target Company as compared to the 32.35% shares/voting rights being held by the existing promoter group, thus implying defacto control.

17. In such a scenario what pricks me is the fact that by virtue of their shareholding the noticees were always in a position to take control of the target company from inception i.e the day they made an open offer. I observe that the noticees entered into Share Purchase Agreement on April 15, 2004 to acquire 2977394 shares/voting rights (This includes secondary purchase of 727394 shares/voting rights by the Noticees from promoter shareholders under SPA dated April 15, 2004 , post open offer) representing 20.46% shares/voting rights of the target company. Further, this Share Purchase Agreement obligated the Noticees to make open offer to further acquire additional 20% shares /voting rights of the Target Company for which the public announcement was made on April 18, 2004. I further observe from the offer letter that subsequent to the completion of the open offer noticees were in a position to hold 40.46% share/voting rights of the company, thereby becoming the single largest shareholder of the Target Company. In the light of which , it is pertinent to note that the noticees were in a position to acquire control the day they acquired shares through the open offer , a note of which SEBI would have taken. Therefore, the ideal situation would have been that SEBI should have initially itself advised the noticees to make an open offer in terms of Regulations 10 & 12 and not just in terms of Regulation 10, if SEBI was of the view that the noticees would acquire control subsequent to the open offer due to the noticees becoming largest shareholders on completion of open offer.

18. However, I also observe from the Shareholders' Agreement dated April 15, 2004 that the noticees had a restricted right to appoint a maximum of three directors on the Board of the Target Company. Further, the noticees also did

not have any right to nominate any officer or manager of the Target Company. I further note that the number of directors appointed by the noticees was unchanged even subsequent to the said public announcement and the completion of open offer. I am of the opinion that shareholders' agreement can be amended or rescinded by the parties to the agreement and in the present matter also it could not be denied. However, it is very difficult to prove the amendment or rescinding of such an agreement especially when the parties to the agreement negate such probable rescinding.

19. Taking all the facts on the record I am of the opinion that as no change in the position of the noticees could be established from the date of noticees entering agreement. Therefore, I am of the opinion that the allegation on the noticees of having acquired the control over the Target Company on December 31, 2004 does not stand established.

20. In light of aforesaid, I am of the opinion that the violation of Regulation 12 read with Regulation 14(3) of SAST as on December 31, 2004 as specified in the proceedings appointing Adjudicating Officer does not stand established and the matter is, accordingly, disposed of.

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

MUMBAI

P. K .BINDLISH

October 1, 2009

ADJUDICATING OFFICER