BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. - SRP/DL/AO:255/2012]

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

In respect of

M/s. Hanumesh Realtors Private Limited

In the matter of

M/s. S. Kumars.Com Ltd. (presently known as S Kumars Online Ltd.)

(PAN – AABCH5774L)

FACTS OF THE CASE

1. The Securities and Exchange Board of India (hereinafter referred to as **'SEBI'**) has initiated adjudication proceedings against M/s. Hanumesh Realtors Private Ltd. (hereinafter referred to as **'the Noticee/HRPL'**) and the undersigned has been appointed as the Adjudicating Officer under section 15I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **'SEBI Act'**) to inquire into and adjudge the violation of the provisions of regulation 11(1) read with regulation 14(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **"SAST Regulations"**) alleged to have been committed by the Noticee.

2. SEBI's observations in respect of the aforesaid alleged violations are as under:

    i. It was observed from the quarterly disclosure of shareholding pattern of S Kumars.com Ltd. (presently known as S Kumars Online Limited)[hereinafter

referred to as **'the Company'**] for the quarter ended December 31, 2009 filed with the Bombay Stock Exchange Ltd.(hereinafter referred to as **'BSE'**) under the listing agreement, that the Noticee belong to the promoter group of the Company and hold 94,47,814 shares (36.62% of the share capital/voting rights) of the Company. Further, from the announcement filed by the Company with BSE, it was observed that the Company had made preferential allotment of 28,25,000 shares to the Noticee on March 03, 2010.

ii. Pursuant to the said allotment of preferential shares, the shareholding of the promoter group in the Company increased from 1,28,01,010 shares to 1,56,26,010 shares. Individual shareholding of the Noticee increased from 94,47,814 shares to 1,22,72,814 shares, which amounts to increase in shareholding/voting rights of the Noticee in the Company from 36.62 % to 42.87 % i.e. an increase of 6.25 %.

iii. It has been alleged that pursuant to said increase in shareholding/voting rights the Noticee was under obligation to comply with the requirements specified under regulation 11(1) read with regulation 14 (1) of the SAST Regulations, which it has failed to do.

3. In view of the above, it was alleged that the Noticee has contravened/violated the provisions of regulation 11 (1) read with regulation 14 (1) of the SAST Regulations. The said alleged violation(s), if established, makes the Noticee liable for monetary penalty under section 15H (ii) of the Securities and exchange Board of India Act 1992 (hereinafter referred to as **"SEBI Act"**).

SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice No. EAD-1/SRP/DA/OW/114/2010 dated November 22, 2010 (hereinafter referred to as "**the SCN**") was issued to the Noticee under rule 4(1) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Rules**') to show cause as to why an inquiry be not held against it and penalty be not imposed under section 15 H(ii) of the SEBI Act for the alleged violations of the aforesaid provisions of law.

5. The Noticee responded to the SCN vide its letter dated December 08, 2010 and made submissions in respect of the violations referred therein. In its reply the Noticee also desired a personal hearing in the matter. In consideration of the same and for the purpose of inquiry under rule 4 of the Rules an opportunity of hearing was granted to the Noticee on January 13, 2011 vide notice No. EAD-1/SRP/DA/30397/2010 dated December 20, 2010. Ms. Shailashri Bhaskar, the authorized representative of the Noticee appeared for the hearing alongwith Mr. Ramvilas J Yadav and Mr. Deepak Biyani. Submissions made by them were recorded.

6. The written and oral submissions made by the Noticee in respect of the allegations referred to in the SCN are briefly mentioned below:

   - *Regulation 11(1) of the SAST Regulations permits the acquirers to acquirer upto 5% in any financial year ending March 31. In the instant case, the percentage increase in the promoter group share holding is 4.97% only, which is well within the creeping limit of 5 % as provided in regulation 11(1)and hence regulation 11 will not be triggered pursuant to the said preferential allotment of shares.*
   - *Although, individual holding of the Noticee exceeds 5%, the overall promoters' holding has not exceeded 5% and therefore it is firmly believed that the provisions of Regulation 11(1) have not been violated.*
   - *The interpretation of this Regulation in the market is in the same manner as our (the Noticee's) interpretation and there are many companies, which have made preferential allotments in this manner.*

   In support of its contentions the Noticee has given reference of informal guidance made by SEBI in the matter of M/s. Suryajyoti Spinning Mills Ltd. and also an order earlier passed by the Adjudicating Officer of SEBI in the matter of M/s. Jamnalal Sons Pvt. Ltd. As claimed by the Noticee, in the said Order pertaining to M/s. Jamnalal Sons Pvt. Ltd. a view has been taken that creeping acquisition of the group as a whole is only to be considered and that the acquisition of the individual entity in the group need not be looked into. In support of its contention that the market interprets the regulation in the same way as they have interpreted, the Noticee has cited example of preferential allotment of Bajaj Hindustan Limited made on January 05, 2010.

7. It would be appropriate to mention here that in the instant matter the references made by SEBI and the corresponding allegations referred to in the SCN are in respect of

acquisition of shares of M/s. S Kumars Online Limited, which are listed on BSE. However, during the course of the aforesaid adjudication proceedings, it was noticed that no company in the name of S Kumars Online Limited was listed/traded on BSE. Therefore, the matter was referred to SEBI to confirm whether the name of the Company has subsequently been changed. Final confirmation/clarification was received from SEBI on December 09, 2011, wherein it was informed, *inter alia*, that the name of the Company was changed to S Kumars Online Ltd. in July 2001. However, till date the scrip is traded on BSE as S. Kumars.Com Ltd. On getting the said clarification from SEBI the undersigned informed the Noticee vide letter No. EAD-1/SRP/DL/OW/37553/2011dated December 12, 2011 that in the matter of the instant proceedings against it, wherever, the reference has been made towards trading/listing etc. on BSE, the scrip name may be read as S Kumars.Com Ltd. (now known as S Kumars Online Ltd.), and in view of the same if it had anything to say or if it has any additional submissions to make in respect of the adjudication proceedings conducted so far, then the same may be filed/made before the undersigned within 7-days. The Noticee responded to the same and confirmed its no-objection vide its letter dated December 22, 2011.

CONSIDERATION OF ISSUES AND FINDINGS

8. I have carefully examined the allegations levelled against the Noticee, the documents available on record and the written and oral submissions made by the Noticee. The issues that arise for consideration in the present case are:

    (i) Whether the acquisition of more than 5% shares/voting rights by the Noticee attracts the provisions of regulation 11 (1) of the SAST Regulations?

    (ii) If ‘yes’ to issue No. (i) above, then whether the Noticee has complied with the requirements specified under regulation 11(1) read with regulation 14 (1) of the SAST Regulations?

    (iii) If ‘no’ to issue No. (ii) above, in that case what would be the monetary penalty that can be imposed for the said violations, taking into consideration the factors mentioned in section 15 J of the SEBI Act?

9. Before moving forward it would be pertinent to refer to the provisions of the SAST Regulations alleged to have been violated/ contravened by the Noticee. The same are reproduced hereunder:

Consolidation of holdings

11 (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, [15 per cent or more but less than [fifty five per cent (55%)] of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than [5% of the voting rights],[with post acquisition shareholding or voting rights not exceeding fifty five per cent.,] [in any financial year ending on 31st March] unless such acquirer makes a public announcement to acquire shares 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:

[Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than 4 working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government 2[or the State Government as the case may be,] for the acquisition of shares or voting rights exceeding the percentage of shareholding referred to in regulation 10 or regulation 11 or the transfer of control over a target Public Sector Undertaking].

10. Now, coming to the allegations, I have observed that there is no dispute over the fact that as at end of December 31, 2009 quarter, the Noticee was holding 94, 47, 814 shares (i.e. 36.62 % of the share capital/voting rights) of the Company. Further, there is no dispute over the preferential allotment of 28, 25,000 shares to the Noticee on March 03, 2010 and thereby increase in its (the Noticee's) shareholding in the Company from 94,47,814 to 1,22,72,814 shares i.e. increase in its shareholding/voting rights in the Company from 36.62 % to 42.87 % (i.e. increase of 6.25 %).

11. The Noticee has made contentions to the effect that it is part of the promoter group of the Company and the promoters together held 1,28,01,010 shares of the Company, which pursuant to the preferential allotment, increased to 1,56,26, 010 shares and thereby the promoters' holding in the Company increased from 49.62 % to 54.59 % i.e. an increase of 4.97 % only, which is well within the creeping limit of 5 % and hence, the requirements/provisions of regulation 11 (1) was not triggered.

12. I do not agree with the above said contentions of the Noticee. I have noted that *"Acquirer"* under Regulation 2 (1) (b) of the SAST Regulations means*, "any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, **either by himself** or with any person acting in concert".* It is clear from the said definition that when a person acquires shares of a company and crosses the prescribed threshold limits, he shall be individually and/or collectively liable to be governed by the provisions of the SAST Regulations. Further, I would once again like to refer to the provisions of regulation 11(1) of the SAST Regulations, which are as under - *No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, [15 per cent or more but less than [fifty five per cent (55%)] of the shares or voting rights in a company, **shall acquire, either by himself** or through or with persons acting in concert with him, **additional shares or voting rights entitling him to exercise more than [5% of the voting rights**],[with post acquisition shareholding or voting rights not exceeding fifty five per cent.,] [in any financial year ending on 31st March] unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.* I have noted (more particularly from the highlighted portion) that under regulation 11(1) of the SAST there is no relief to a shareholder, who in his individual capacity, has acquired shares and had crossed the creeping limit of 5 %.

13. I have noted that the Noticee was holding 36.62 % of the shares/voting rights of the Company (which is more than 15 % but less than 55 %) and acquired further shares and thereby its shareholding in the Company increased from 36.62 % to 42.87 %, which is more than 5 %. In view of the same, I am of firm opinion that in the instant case the provisions of regulation 11(1) read with regulation 14 (1) were triggered and the Noticee was under obligation to comply with those.

14. Now, coming to the interpretive letter of SEBI dated April 02, 2009 in the matter of Surya Jyoti Spinning Mills Ltd., under the SEBI (Informal Guidance) Scheme, 2003, that has

been referred to by the Noticee in its reply, I have observed that the interpretation pertains to a case, which is different from the instant case concerning the Noticee. The said interpretation deals with a case, where the group's shareholding had not crossed the creeping acquisition limit of 5% and it has no mention of the situation where the individual shareholding of an entity has crossed the prescribed threshold. Besides, it is needless to mention that any such expression or letters are not binding in the present proceedings.

15. I have also perused the adjudication order passed by the adjudicating officer appointed by SEBI on August 28, 2008, in the matter of Jamnalal Sons Pvt. Ltd. and referred to by the Noticee in its submissions made before me. In this regard, I would like to reiterate that the orders passed earlier by other adjudicating officers may not have binding effect on me, more particularly, when such orders have been passed earlier in a different matter and on a different factual footing. Therefore, I have not considered the same for arriving at any conclusion in the facts and circumstances of the instant case before me.

16. Further, about the market practice or the matter regarding preferential allotment of Bajaj Hindustan Limited referred to by the Noticee, it is stated that the same is not within the ambit of the present proceedings. It is mentioned that the instant proceedings are limited to the observations of SEBI and the corresponding allegations made against the Noticee only and not against other entities involved in similar or same type of violations.

17. Therefore, taking into all the facts and circumstances of the case, as I have stated earlier, I arrive at a firm conclusion that the Noticee was holding 36.62 % of the shares/voting rights of the Company (which is more than 15 % but less than 55 %) and acquired further shares and thereby its shareholding/voting rights in the Company increased from 36.62 % to 42.87 %, which is more than 5 % and therefore, it was under obligation to comply with the provisions of regulations 11(1) read with 14 (1) of the SAST Regulations, which it has failed to do and is therefore, liable for imposition of penalty under the provisions of section 15H(ii) of the SEBI Act, which reads as under:

15H Penalty for non – disclosure of acquisition of shares and takeovers.- If any person, who is required under this Act or any rules or regulations made thereunder, fails to-

(ii) make a public announcement to acquire shares at a minimum price; or

he shall be liable to a penalty of twenty five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

18. While determining the quantum of monetary penalty under section 15H (ii) of the SEBI Act, it is important to consider the factors stipulated under section 15J of the 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 result of the default;

(c) the repetitive nature of the default."

19. In order to quantify the disproportionate gain or unfair advantage enjoyed by the Noticee and/or amount of loss caused to the investors, it is observed that regulation 11 (1) of the SAST Regulation was triggered on March 03, 2010 and in terms of the provisions of the SAST Regulations the Noticee was required to make an open offer to the shareholders of the Company to acquire a minimum of 20% of share capital of the Company (i.e., for 57, 25, 000 shares). If the offer price would have been higher than the then prevailing market price then in that case the investors would have definitely suffered a loss to the extent that they were deprived of the opportunity to exit or sell shares at such higher rates.

20. The trading data (source: BSE) suggests that the shares of the Company were 'frequently traded'. Therefore, the offer price would be determined in accordance with the parameters specified under regulation 20(4) of the SAST Regulations. I find that the Noticee had paid ₹ 10/- per share and during the relevant period i.e. in the last 26 weeks, the average price of the scrip was around ₹ 7/- per share. As has been observed, the price of acquisition was above the prevailing market price, therefore, it cannot be concluded that the Noticee had made unfair gains out of the transaction. However, I cannot ignore the fact from the point of view of the investors, that had the public offer been made the offer price should have been ₹ 10/-per share in terms of regulation 20 (4) (b) of the SAST Regulations. I have further noted that the requirement of the public announcement was triggered on March 03, 2010 and in terms of regulation 14 (1) of the

SAST regulations, the required public announcement was to be made within four working days. In the succeeding 3 months period also the shares of the Company were traded at an average price of around ₹ 7/- per share (highest closing price ₹ 8.34 on April 16, 2010 and lowest closing price ₹ 6.32 on April 01, 2010) . This implies that had the required public offer been made by the Noticee, the investors could have offered and sold their shares at a price which, on an average, would have been ₹ 3/- more than the then prevailing market price. Therefore, by not making of the public offer the Noticee has caused notional loss to the investors, which is to the extent of ₹ 1, 71, 75, 000/- [i.e. ₹ 57, 25,000 x 3 (i. e. difference in price)].

21. Apart from the above loss caused to the investors, I have observed on perusal of the various provisions of the SAST Regulations that the open offer process includes appointment of a SEBI registered merchant banker as manager to the offer, determination of offer size and price, opening of an escrow account, making public announcement in newspapers, filing of offer document with SEBI, dispatch of offer document to the eligible share holders, etc. By not having complied with the mandatory requirements of the SAST Regulations, the Noticee has definitely avoided the expenditure which otherwise would have been incurred towards cost of engaging the services of a merchant banker, making public announcement in newspapers, filing of offer document with SEBI, dispatch of offer document to the eligible share holders, etc. Estimated costs in this regard would be around ₹ 5.00 lakh and to this extent, it can be said that the Noticee has earned disproportionate gain or unfair advantage.

22. I have further observed that the violation committed by the Noticee is not repetitive in nature. Also, that on acquiring shares at a price of ₹ 10/- when the average market price of the shares was around ₹ 7 /- ,i.e. acquiring shares at a price higher than the prevailing market price, indicate that no apparent unfair gains have been made by the Noticee. However, I cannot ignore the fact that by not making the public offer the Noticee has caused notional loss to the investors as has been discussed above. Therefore, going by all the facts and circumstances of the case, I am of the opinion that a penalty to the extent of the notional loss suffered by the investors (i.e. ₹ 1.72 crore) plus three times the undue advantage accrued to the Noticee by avoiding the public offer (i.e. ₹ 15 lakh), as has been referred above, shall be commensurate with the violations committed by the Noticee.

ORDER

23. In exercise of the powers conferred upon me under Section 15 I of the SEBI Act and rule 5 of the Rules, I impose a penalty of ₹ 1.87 crore (Rupees One Crore and eighty seven lakh only) on the Noticee in terms of the provisions of Section 15H (ii) of the SEBI Act for the violation/contravention of the provisions of regulation 11 (1) read with regulation 14(1) of the SAST Regulations. I am of the view that the said penalty is commensurate with the violations committed by the Noticee.

24. The Noticee shall pay the said amount of penalty by way of a 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 the Division Chief, CFD-DCR 1, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

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

Date : January 31, 2012 **Satya Ranjan Prasad**
Place : Mumbai **Adjudicating Officer**