BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PB/AO- 33-35 /2012]

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

In respect of

Name of Noticees	**Permanent Account No.**	**Order Number**
Anwar S. Daud	ABHPD8385K	PB/AO-33/2012
Unijules Life Sciences Ltd.	AAACU8032D	PB/AO-34/2012
Zakir S. Vali	ABCPV6541L	PB/AO-35/2012

FACTS OF THE CASE IN BRIEF

1. ZIM Laboratories Ltd. (hereinafter referred to as **'ZIM/Company'**) was incorporated on February 14, 1984 as a private limited company under the provisions of the Companies Act, 1956. The company became a public limited company on January 21, 1993. The company has its registered office at Shop No. 41, Manisha Plaza, Sonapur Lane, Off. L.B.S. Marg, Kurla (West), Mumbai- 400 070. The shares of ZIM are listed on Over The Counter Exchange of India Ltd. (hereinafter referred to as **'OTCEI'**). Mr. Anwar S Daud, Unijules Life Sciences Ltd. (hereinafter referred to as **"USL"**), and Mr. Zakir S Vali (hereinafter collectively referred to as **"Noticees"**) are the

acquirers of the shares of ZIM. ZIM had made preferential allotments of shares on December 07, 2001, March 01, 2007, March 21, 2008 and May 20, 2008 to the Noticees, the details of which are as under:

December 07, 2001:- Anwar S. Daud had acquired 6,50,000 shares of ZIM constituting 21.67% of the paid up share capital of ZIM on December 07, 2001. As a result of the acquisition, shareholding of Anwar S. Daud in ZIM increased from 0.38% to 21.83% which crossed the threshold limit mentioned in regulation 10 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **'SAST Regulations, 1997'**). This acquisition was done without making a public announcement as required under regulation 10 of SAST Regulations, 1997.

Name of Acquirer	**Pre- paid up share capital of the target company**	**Pre-acquisition shareholding**		**Acquisition shareholding**		**Post- paid up share capital of the target company**	**Post-acquisition shareholding**	
		No. of shares	**Percentage**	**No. of shares**	**Percentage**		**No. of shares**	**Percentage**
Anwar S. Daud	1309410	5000	0.38	650000	21.67	3000000	655000	21.83

March 01, 2007:- The Noticees, i.e. Anwar S. Daud, USL and Zakir S. Vali acquired 14,40,590 shares of ZIM constituting 48.02% of the paid up share capital of ZIM on March 01, 2007. As a result of the acquisition, shareholding of Noticees in ZIM increased from 0.47% to 48.50% which crossed the threshold limit mentioned in regulation 10 of SAST Regulations, 1997. This acquisition was done without making a public announcement as required under regulation 10 of SAST Regulations, 1997.

Date of acquisition	Name of Acquirer	Pre- paid up share capital of the target company	Pre-acquisition shareholding		Acquisition shareholding		Post-paid up share capital of the target company	Post-acquisition shareholding	
			No. of shares	Percen-tage	No. of shares	Perce-ntage		No. of shares	Percen-tage
March 01, 2007	Mr. Anwar S. Daud	3000000	5000	0.17	500000	16.67	3000000	505000	16.84
March 01, 2007	Unijules Life Sciences Ltd.	3000000	0	0	6,90,590	23.02	3000000	6,90,590	23.02
March 01, 2007	Zakir S Vali	3000000	9060	0.30	2,50,000	8.33	3000000	2,59,060	8.64
	Total	**3000000**	**14060**	**0.47**	**14,40,590**	**48.02**	**3000000**	**1454650**	**48.50**

March 21, 2008:- Anwar S. Daud and USL acquired 20,00,000 shares of ZIM constituting 40% of the paid up share capital of ZIM on March 21, 2008. As a result of the acquisition, shareholding of Anwar S. Daud and USL increased from 39.86% to 63.91% which crossed the threshold limit mentioned in regulations 11(1) and 11(2) of SAST Regulations, 1997. This acquisition was done without making a public announcement as required under regulation 11(1) and 11(2) of SAST Regulations, 1997.

Date of acquisition	Name of Acquirer	Pre- paid up share capital of the target company	Pre-acquisition shareholding		Acquisition shareholding		Post-paid up share capital of the target company	Post-acquisition shareholding	
			No. of shares	Percen-tage	No. of shares	Percen-tage		No. of shares	Percen tage
March 21, 2008	Mr. Anwar S. Daud	3000000	505000	16.84	1,80,000	3.60	5000000	68,5000	13.7
March 21, 2008	Unijules Life Sciences Ltd.	3000000	6,90,590	23.02	18,20,000	36.40	5000000	25,10,590	50.21
	Total	**3000000**	**1195590**	**39.86**	**20,00,000**	**40**	**5000000**	**3195590**	**63.91**

May 20, 2008:- Mr. Anwar S. Daud and USL acquired 10,00,000 shares of ZIM constituting 16.66% of the paid up share capital of ZIM on May 20, 2008. As a result of the acquisition, shareholding of Anwar S. Daud and USL increased from 63.91% to 69.92% which crossed the threshold limit mentioned in regulation 11(2) of SAST Regulations, 1997. This acquisition was done without making a public announcement as required under regulation 11(2) of SAST Regulations, 1997.

Date of acquisiti -on	**Name of Acquirer**	**Pre- paid up share capital of the target company**	**Pre-acquisition shareholding**		**Acquisition shareholding**		**Post- paid up share capital of the target company**	**Post-acquisition shareholding**	
			No. of shares	**Percen -tage**	**No. of shares**	**Percen -tage**		**No. of shares**	**Percen -tage**
May 20, 2008	Mr. Anwar S. Daud	5000000	68,5000	13.7	5,00,000	8.33	6000000	11,85,000	19.75
May 20, 2008	Unijules Life Sciences Ltd.	5000000	25,10,590	50.21	5,00,000	8.33	6000000	3010590	50.17
	Total	**5000000**	**3195590**	**63.91**	**10,00,000**	**16.66**	**6000000**	**3195590**	**69.92**

2. In view of the above, adjudication proceedings were initiated against the Noticees for the alleged violation of the provisions of regulations 10 and 11 read with regulation 14(2) of SAST Regulations, 1997 for the abovementioned past acquisitions made on December 7, 2001, March 1, 2007, March 21, 2008 and May 20, 2008.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned has been appointed as Adjudicating Officer vide order dated May 13, 2011 under section 15-I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **"SEBI Act"**) read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating

Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15H (ii) of the SEBI Act.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notices nos. EAD-7/PB/CS/33654/2011, EAD-7/PB/CS/33651/2011 and EAD-7/PB/CS/33658/2011 all dated November 17, 2011 (hereinafter referred to as "**SCN**") were issued to the Noticees under rule 4 of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15H (ii) of the SEBI Act for failure to comply with the provisions of regulations 10 and 11 read with regulation 14(2) of SAST Regulations, 1997.

5. The SCNs were received by the Noticees. The Noticees vide letters dated December 1, 2011 requested for one month's time for compiling the reply to the SCNs. The Noticees further requested for twenty one days time for filing reply stating that they were collecting information from OTCEI and ZIM. The Noticees filed their replies dated February 22, 2012 to the SCNs wherein Noticees have denied all the allegations leveled against them. The extracts of the replies of Noticees, inter alia are as follows:

"At the outset I would like to bring out that the Show Cause Notice is bad in law as we had made an open offer in 2009, which SEBI had asked us to withdraw and make a delisting offer, at a new price, which we complied with in its entirety. As a result, the adjudicating proceedings initiated are illegal, as the honorable SAT has clearly stated that once the directions of SEBI are complied with, SEBI cannot go ahead and start any proceedings to penalize the acquirers. Honorable SAT has stated that either one of the following can be done:

a. Give directions regarding any change to be done in open offer like price etc. or

b. Impose penalty

"Both of the above cannot be done. My case is one in which SEBI has issued directions with regard to the open offer which we have completely complied with and then also started proceedings for imposing penalty……."

……..

"It may be pointed out that the acquirers have made complete compliance of the SEBI directions issued vide letter dated December 3, 2009. It was the public shareholders who rejected the delisting offer made as per SEBI directions. Further the acquirers had not voted in the postal ballot in which only public shareholders were required to vote. In view of the above, the complete compliance of SEBI directions dated December 3, 2009 was done by acquirers, as they withdrew the open offer, then offered a higher price of Rs. 35.22 and made a delisting offer…."

"SEBI has not given any further directions to the acquirer's even after 23 months…".

"I would like to submit that a fraud was played on ZIM Laboratories Ltd. by Shri Dhananjay R. Dayma and Shri Zafar S. Daud who were asked to resign from directorship of the company as their fraud had come to light….."

"I may submit that on the date of allotment of the above shares i.e. on 7.12.2001 Public Announcement was not applicable to preferential allotment as per the then existing Regulation 3(c) which was deleted in the SEBI Takeover Regulations w.e.f. 09.09.2002. In view of this, there was no need for making any Public Announcement before the acquisition of above shares by me……."

……..

"Consequent on the forfeiture of 16,90,590 shares by ZIM, out of paid-up capital of 30.00 lakhs, more than 50% of the paid-up capital was at stake. As the Managing Director of the company my primary concern was to prevent the company from facing disastrous consequences and, therefore, in the Board Meeting held on 10.05.2006, the Board decided to find immediately purchaser for the shares to be forfeited and forfeited the shares only after that so that ZIM does not face reduction in paid-up capital or loss of capital. Accordingly, the Promoters made efforts to find purchasers for the shares to be forfeited……..."

"It may be highlighted that before the allotment, the promoters were holding majority control in the company. Further, the promoters were having already control over the

management of the affairs having the chairman, the Management Director and another two Directors from the Promoters Group. There was, therefore no intention of bringing about change in the management control of the company……."

……..

" Your attention is also drawn to the fact that the shares in question were not listed in OTCEI from 2007 onward to 2011. It is only in 2011 that the shares have got listed in OTCEI, and OTCEI vide letter dated 03.02.2011 has given listing permission, but has not given any trading permission. As on date of initiation of adjudicating proceedings in May 2011, the shares in question were unlisted at any stock exchange. Also till date, the trading permission has not been obtained for any of these shares.

Table-G

Date of allotment	*Allottee*	*No. of shares allotted*	*Paid up capital (crores)*	*Listing Status*	*Trading status*	*Status of OTCEI*
7.12.2001	*Anwar Daud*	*1650000*	*3*	*No*	*No*	*Not functioning as trading deactivated*
	(Forfeited on 01.03.2007)					
1.3.2007	*Anwar Daud*	*250000*	*3*	*No*	*No*	*-do-*
1.3.2007	*ULSL*	*690590*	*3*	*No*	*No*	*-do-*
1.3.2007	*Zakir Vali*	*250000*	*3*	*No*	*No*	*-do-*
21.3.2008	*Anwar Daud*	*180000*	*5*	*No*	*No*	*-do-*
21.3.2008	*ULSL*	*1820000*	*5*	*No*	*No*	*-do-*
20.5.2008	*Anwar Daud*	*500000*	*6*	*No*	*No*	*-do-*
20.5.2208	*ULSL*	*500000*	*6*	*No*	*No*	*-do-*

"The SAT judgment in the case of Fascinating Leasing & Finance Pvt. Ltd. v/s SEBI decided on July 16, 2008 in appeal no. 2 & 3 of 1998 is quoted below where it was decided that unlisted shares are not in purview of SEBI (SAST) Regulations…."

……..

"The same view was also taken by SAT in its judgement in the matter of Mr. Jogeshwar Rijumal Karachiwala and others v/s SEBI in the appeal no. 189 of 2011 decide on 18.11.2011, when it said that the shares were allotted to the appellants had never been listed on any stock exchange and that the trading in the scrip of the company had been suspended since January 7, 2002 which is still continuing, therefore the default committed by the Appellants did not make any adverse effect in the market……"

6. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticees were granted an opportunity of personal hearing on March 9, 2012 vide notice dated February 28, 2012 delivered through speed post. The said hearing notice was received and acknowledged by the Noticees. Mr. Rahul Porwal of Anand Rathi Advisors Limited and Mr. Janak C. Thacker appeared as Authorised Representatives (ARs) on behalf of the Noticees for the hearing. During the course of the hearing the ARs were asked to make submissions on (a) Filing of consent application with SEBI; (b) Compliance of requirements given under the then existing regulation 3(1) (c) of SAST Regulations, 1997 (c) Approval of listing permission, submission of letter on listing approval from OTCEI. ARs reiterated the submissions made by the Noticees in their reply dated February 22, 2012 and stated that they would submit a detailed reply in this regard. Noticees filed their reply dated nil received on March 28, 2012. With regard to their filing consent application before SEBI prior to the initiation of adjudication proceedings, the Noticees stated that they were wrongly advised by the merchant bankers on the basis of which the consent application was filed. With regard to submission of report of compliance of regulation 3(1)(c) of SAST Regulations, 1997 and approval of listing permission, Noticees enclosed the copies of report submitted to OTCEI and SEBI.

CONSIDERATION OF ISSUES AND FINDINGS

7. The issue that arises for consideration in the present case are:

1. Whether the Noticees had violated regulations 10 and 11 read with regulation 14(2) of SAST Regulations, 1997?

2. Does the violation of the abovementioned regulations, if any, attract monetary penalty under section 15H(ii) of the SEBI Act?

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

8. Before moving forward, it will be appropriate to refer to the relevant provisions of the SAST Regulations, 1997 which reads as under:

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 per cent 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".*

"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.*

(2) *No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through or with persons acting in concert with him any additional shares entitling him to exercise voting rights or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations:*

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted."

"14(2). *In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the* ***public announcement referred to in sub-regulation (1) shall be made not later than four working days*** *before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be."*

Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipt.."

Acquisition of shares on December 7, 2001:

9. From the available records, it is observed that prior to the allotment of shares by ZIM on December 7, 2001, Anwar S. Daud was holding 5000 shares constituting 0.38% of the paid up share capital of ZIM. Pursuant to the allotment of 6,50,000 shares constituting 21.67% of the paid up share capital of ZIM on December 07, 2001, shareholding of Anwar S. Daud in ZIM increased from 0.38% to 21.83% which crossed the threshold limit mentioned in regulation 10 of SAST Regulations, 1997.

10. Anwar S. Daud in his reply dated February 22, 2012 has stated that pertaining to the preferential allotment of 6,50,000 shares on 7.12.2001, public announcement for making an open offer was not applicable to preferential allotments as per the then existing regulation 3(1)(c) of SAST Regulations, 1997 which was deleted from the SAST Regulations, 1997 w.e.f. 09.09.2002.

11. It is observed that regulation 3(1)(c) was omitted by the SAST (Second Amendment) Regulations, 2002, w.e.f. 9-9-2002. Prior to its omission, regulation 3 (1)(c) read as below:

*"**3. (1)** Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:*

……..

(c) *preferential allotment, made in pursuance of a resolution passed under section 81 (1A) of the Companies Act, 1956 (1 of 1956):*

Provided that,-

(i) board resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board;

(ii) full disclosures of the identity of the class of the proposed allottee(s) is made, and if any of the proposed allottee(s) is to be allotted such number of shares as would increase his holding to 5 percent or more of the post issued capital, then in such cases, the price at which the allotment is proposed, the identity of such person(s), the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company, and whether such allotment would result in control over the company are all disclosed in the notice of the general meeting called for the purpose of consideration of the preferential allotment."

12. It is observed that on the date of acquisition i.e. on December 7, 2001 regulation 3(1)(c) was in effect. The then existing regulation 3(1)(c) of SAST Regulations 1997 stated that the requirements of regulations 10,11 and 12 will not be applicable in case of preferential allotment made in pursuance of a resolution passed under section 81 (1A) of the Companies Act, 1956 provided that the conditions given in the proviso are fulfilled. The proviso to the above regulation stipulated that for preferential allotment, a company is required to send board resolution to all the stock exchanges where the shares of the company are listed. A company is further required to disclose the identity of the class of proposed allotee (s), in the notice of the general meeting, if the proposed allottee (s) is to be allotted such number of shares as would increase his holding to 5 percent or more of the post issued capital.

13. Further, regulation 3(4) of the SAST Regulations, 1997 states as follows:

"In respect of acquisitions under clauses (a), (b), (c) and (i) of sub-regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise [15] percent or more of the voting rights in a company."

14. The company ZIM is listed on OTCEI. In the present case it would be pertinent to know whether board resolution in respect of the preferential allotment on December 07, 2001 was sent to OTCEI and whether full disclosures of the identity of proposed allotee (s) was disclosed in the notice of the general meeting called for the purpose of consideration of the preferential allotment.

15. Pursuant to the hearing dated March 09, 2012 Anwar S. Daud filed additional written submissions dated nil received on March 28, 2012 along with two annexures. Annexure-1 is copy of letter dated December 8, 2001 by Anwar S. Daud to OTCEI regarding submission of board resolution and details of allotment and allottees under regulation 3(1) (c) of SAST Regulations, 1997 enclosing the copy of board resolution and Annexure-2 is copy of letter dated December 10, 2001 by Anwar S. Daud to SEBI submitting a report to SEBI under regulation 3(4) of SAST Regulations, 1997 on his acquisition of 6,50,000 shares. In order to verify the aforesaid submissions made by Anwar S. Daud information was sought from OTCEI. OTCEI vide email dated April 12, 2012 has confirmed that it had received the board resolution of ZIM as required under regulation 3(1)(c) of SAST Regulations 1997. However, regarding contention of Anwar S. Daud of filing the report under regulation 3(4) of SAST Regulations, 1997 to SEBI, SEBI database does not contain any details of his having filed such a report. In Jogeshwar Rijumal Karachiwala & Ors. vs. SEBI, Honorable Securities Appellate Tribunal (hereinafter referred to as SAT) opined that; *what was not done by the appellants was that as acquirers they had not submitted a report to SEBI within 21 days of the allotment*

which was only meant to cross check whether the exemption had been properly granted……..This apart, we are of the view that the default committed by the appellants did not, in the circumstances of this case, have any adverse effect on the market…". If the facts of the present case are tested with the aforesaid dicta of SAT, I am of the view that in respect of the said acquisition there was no adverse effect on the market as there was no trading in the scrip of ZIM. Thus, I am inclined to take a lenient view in respect of said acquisition of shares and give the benefit of doubt to Anwar S Daud.

Acquisition of shares on March 01, 2007

Date of acquisiti -on	**Name of Acquirer**	**Pre- paid up share capital of the target company**	**Pre-acquisition shareholding**		**Acquisition shareholding**		**Post- paid up share capital of the target company**	**Post-acquisition shareholding**	
			No. of shares	**Percen -tage**	**No. of shares**	**Perce -ntage**		**No. of shares**	**Percen -tage**
March 01, 2007	Mr. Anwar S. Daud	3000000	5000	0.17	500000	16.67	3000000	505000	16.84
March 01, 2007	Unijules Life Sciences Ltd.	3000000	0	0	6,90,590	23.02	3000000	6,90,590	23.02
March 01, 2007	Zakir S Vali	3000000	9060	0.30	2,50,000	8.33	3000000	2,59,060	8.64
	Total	**3000000**	**14060**	**0.47**	**14,40,590**	**48.02**	**3000000**	**1454650**	**48.50**

16. I find that prior to the allotment of shares by ZIM, on March 01, 2007, Noticees were holding 14060 shares constituting 0.47% of the paid up share capital of ZIM. Pursuant to the allotment of 14,40,590 shares constituting 48.02% of the paid up share capital of ZIM on March 01, 2007, shareholding of Noticees in ZIM increased from 0.47% to 48.50% which crossed the threshold limit mentioned in regulation 10 of SAST Regulations, 1997. I find that at this juncture the Noticees ought to have made public announcement of open offer in accordance with provisions of regulation 10 read with regulation 14(2) of SAST Regulations, 1997.

Acquisitions on March 21, 2008

Date of acquisition	Name of Acquirer	Pre- paid up share capital of the target company	Pre-acquisition shareholding		Acquisition shareholding		Post-paid up share capital of the target company	Post-acquisition shareholding	
			No. of shares	Percen-tage	No. of shares	Percen-tage		No. of shares	Percen tage
March 21, 2008	Mr. Anwar S. Daud	3000000	505000	16.84	1,80,000	3.60	5000000	68,5000	13.7
March 21, 2008	Unijules Life Sciences Ltd.	3000000	6,90,590	23.02	18,20,000	36.40	5000000	25,10,590	50.21
	Total	**3000000**	**1195590**	**39.86**	**20,00,000**	**40**	**5000000**	**3195590**	**63.91**

17. I find that prior to the allotment of shares by ZIM on March 21, 2008, Anwar S. Daud and USL were holding 11,95,590 shares constituting 39.86% of the paid up share capital of ZIM. Pursuant to the allotment of 20,00,000 shares constituting 40% of the paid up share capital of ZIM on March 21, 2008, shareholding of Anwar S. Daud and USL in ZIM increased from 39.86% to 63.91% which crossed the threshold limit mentioned in regulations 11(1) and 11(2) of SAST Regulations, 1997. I find that at this juncture Anwar S. Daud and USL ought to have made public announcement of open offer in accordance with provisions of regulation 11(1) and 11(2) read with regulation 14(2) of SAST Regulations, 1997.

Acquisitions on May 20, 2008

Date of acquisition	Name of Acquirer	Pre- paid up share capital of the target company	Pre-acquisition shareholding		Acquisition shareholding		Post- paid up share capital of the target company	Post-acquisition shareholding	
			No. of shares	Percentage	No. of shares	Percentage		No. of shares	Percentage
May 20, 2008	Mr. Anwar S. Daud	5000000	68,5000	13.7	5,00,000	8.33	6000000	11,85,000	19.75
May 20, 2008	Unijules Life Sciences Ltd.	5000000	25,10,590	50.21	5,00,000	8.33	6000000	3010590	50.17
	Total	**5000000**	**3195590**	**63.91**	**10,00,000**	**16.66**	**6000000**	**3195590**	**69.92**

18. I find that prior to the allotment of shares by ZIM on May 20, 2008, Anwar S. Daud and USL were holding 31,95,590 shares constituting 63.91% of the paid up share capital of ZIM. Pursuant to the allotment of 10,00,000 shares constituting 16.66% of the paid up share capital of ZIM on May 20, 2008, shareholding of Anwar S. Daud and USL in ZIM increased from 63.91% to 69.92% which crossed the threshold limit mentioned in regulation 11(2) of SAST Regulations, 1997. Therefore, I find that at this juncture Anwar S. Daud and USL ought to have made public announcement of open offer in accordance with provisions of regulations 11(1) and 11(2) read with regulation 14(2) of SAST Regulations, 1997.

19. As per regulation 10 of SAST Regulations, 1997, an acquirer, acquiring 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) would be entitled to exercise fifteen percent or more of the voting rights in a company, only if such acquirer makes a public announcement of open offer to acquire shares in accordance with the provisions of SAST Regulations, 1997.

20. As per regulation 11(1) of SAST Regulations, 1997, any acquirer along with persons acting in concert together holding 15 percent or more but less than 75 percent of shares or voting rights in a company would be able to acquire shares or voting rights in excess of 5 percent in any financial year ending 31st March, only if such acquirer makes a public announcement of open offer to acquire shares in accordance with the provisions of the SAST Regulations, 1997.

21. As per regulation 11(2) of SAST Regulations, 1997, any acquirer along with persons acting in concert together holding 55 percent or more but less than 75 percent of shares or voting rights in a target company would be able to acquire any additional share or voting right, only if such acquirer makes a public announcement of open offer to acquire shares or voting rights in accordance with the provisions of the SAST Regulations, 1997.

22. As per regulation 14 (2) of SAST Regulations 1997, the public announcement of the open offer is required to be made within four working days of the acquisition of voting rights by the acquirer if acquirer's shareholding and voting rights exceeds the threshold limit specified in regulation 10 or regulation 11 of the SAST Regulations, 1997.

23. As can be seen from the above paragraphs the Noticees on March 01, 2007, March 21, 2008 and May 20, 2008 crossed the threshold limit prescribed in regulation 10, 11 (1) and 11(2) of the SAST Regulations, 1997, however did not at that point of time make any public announcement as required under the said regulations. It is observed from the facts of the case that Noticees had acquired shares without making any public announcement of offer. The Noticees have not disputed any of the facts, i.e., acquisition of additional shares/voting rights and failure to make public announcement of open offer at each of the junctures pursuant to preferential allotment. However, the Noticees have claimed that the preferential allotments were done to improve the financial position by infusing funds in the company ZIM.

24. The Noticees have contended that the shares in question i.e shares allotted on preferential basis on March 01, 2007, March 21, 2008 and May 20, 2008 were not listed on OTCEI from 2007 onward till 2011 and it is only in February 2011 that the shares have got listed. In order to verify the aforesaid submission made by the Noticees information was sought from OTCEI. OTCEI vide email dated April 12, 2012 has confirmed that shares got listed in February 2011. I find that in support of their contention, the Noticees have cited two case laws, viz Mr. Jogeshwar Rijumal Karachiwala and others v/s SEBI and Fascinating Leasing & Finance Pvt. Ltd. v/s SEBI.

25. Upon perusal of case law cited by the Noticees in the matter of Mr. Jogeshwar Rijumal Karachiwala and others v/s SEBI , appeal no 189 of 2011 decide on 18.11.2011 I find that SAT had never held in that case that SAST Regulations are not applicable to the unlisted shares of a listed company but had considered the unlisted shares only as one of the mitigating factors in reducing the penalty.

26. Regarding the cited case law of Fascinating Leasing & Finance Pvt. Ltd. v/s SEBI I am of the opinion that this case is not relevant to refer here as the facts of the case are different as the matter pertains to a company which had come out with an initial public offer (IPO) and none of the shares were listed on stock exchange at the relevant point of time. In the present case certain shares of the company were listed on OTCEI and the shares allotted on preferential basis in 2007 and 2008 got listed in February 2011. Moreover the delay in listing was due to non submission of documents on the part of ZIM. In any case whether the shares allotted on preferential basis to the Noticees on March 01, 2007, March 21, 2008 and May 20, 2008 got listed only on February 2011 is not relevant as the Noticees were enjoying voting rights pursuant to the allotment of the shares and therefore the shares fall under the purview of SAST Regulations, 1997. Therefore, I do not agree with the contention of the Noticees.

27. The Noticees failed to fulfill the statutory obligation of making public announcements and with the result denied the statutory right of the shareholders of ZIM to exit through the open offer mechanism at the relevant time. In view of the above, the allegations of violation of regulations 10, 11(1) and 11(2) and 14(2) of the SAST Regulations in respect of the shares allotted to the Noticees on March 01, 2007, March 20, 2008 and May 21, 2008 stands established.

28. It is not in dispute that the Noticees did not make any public announcement in compliance with the aforesaid regulation in respect of the acquisitions referred to above. It has been held by the Hon'ble SAT in the case of Arya Holdings Limited V/s. P Sri Sai Ram, Adjudicating Officer, -- Appeals No.3-5 of 2001 – Order dated May 04, 2001 – that "……, *the acquirer is required to comply with the requirement of making a public offer in terms of regulation 10, and failure to do so would attract the provisions of section 15H(ii)".*

29. The Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC) held that once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Thus, as the violation of statutory obligations by the Noticees has been established, I hold that they are liable for monetary penalty.

30. I further find that in accordance with the provisions of regulation 14 (2) of SAST Regulations 1997, the public announcement of the open offer is required to be made within four working days of the acquisition of voting rights by the acquirer if acquirer's shareholding and voting rights exceeds the threshold limit specified in regulation 10 or regulation 11 of the SAST Regulations, 1997. However, Noticees made PA of abovementioned acquisitions on April 12, 2009 which is much after the abovementioned

acquisitions. Therefore the Noticees have violated the provisions of regulation 14(2) of SAST Regulations, 1997.

31. As the violation of the statutory obligation under regulations 10, 11(1) and 11(2) and 14(2) of SAST Regulations, 1997 has been established for the allotments made on March 01, 2007, March 21, 2008 and May 21, 2008, I hold that the Noticees are liable for monetary penalty under section 15H(ii) of SEBI Act, which reads as under:-

Penalty for non-disclosure of acquisition of shares and takeovers

15H. 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; or

(iii) ……..

(iv) ……

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.

32. While examining the quantum of monetary penalty under Section 15H(ii) of SEBI Act, I have considered the factors stipulated in Section 15J of SEBI Act, which reads as under;

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

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

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

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

(c) the repetitive nature of the default."

33. I have noted the following from the available records:

i. ZIM made public announcement dated April 21, 2009 and filed draft letter of offer with SEBI April 23, 2009.

ii. Upon perusal of the draft letter of offer SEBI noted the following:

a. The Noticees along with person acting in concert were holding 44,99,960 shares of ZIM representing 74.99 % of the paid up capital of ZIM before making the aforesaid public announcement.

b. The Noticee's intention was to delist the shares of ZIM from OTCEI in compliance with SEBI Delisting Guidelines, if the post open offer public shareholding falls to a level below the minimum, i. e. 25%.

c. The Noticees made certain acquisitions in past in violation of Regulation 10 and 11 of the SAST Regulations 1997. The acquirers made open offer with an intention to regularize the past violations.

d. The company is only listed in OTCEI, there is no trading of shares.

iii. On the basis of the abovementioned grounds SEBI directed that the acquirers to withdraw the public announcement and issue a corrigendum to that effect and provide an exit opportunity to the shareholders by making a delisting offer in terms of SEBI (Delisting of Equity Shares) Regulations, 2009. The Noticees informed that they had issued a corrigendum dated December 03, 2009 and made a delisting offer as directed by SEBI. They informed SEBI that public shareholders disapproved the special resolution for delisting.

34. On perusal of the various provisions of the SAST Regulations, it is observed 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 requirement of the SAST Regulations at the relevant point of time, the Noticees have avoided the expenditure which otherwise they would have 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. To this extent, it can be said that the Noticees have earned disproportionate gain or unfair advantage. I however find that in order to regularize the past violations Noticees had filed a draft letter of offer dated April 22, 2009 to SEBI under SAST Regulations, 1997 for acquisition of 12,00,000 equity shares representing 20% of the total voting capital of ZIM at a price of Rs. 24.76/- (the price includes interest taken from 2001 onwards) per fully paid-up equity share.

35. I find that in the case before me, as a result of all the aforesaid acquisitions, there was no change in control and management of the company ZIM. All through the acquisitions, the promoters remained the same, i.e. the Vali family and Anwar S. Daud family who were the promoters since inception of the company since appointment of Zakir Vali as chairman in 1984 and Anwar S. Daud as Managing Director in 1988. The other major promoter, USL is the company promoted by Faiz Vali, son of Zakir Vali. The acquisitions had been made by the promoter group and among the promoter group Noticees were the major shareholders.

36. Hon'ble SAT in its order dated September 14, 2010, in the matter of Ushdev Trade Limited v. SEBI, Appeal no. 106 of 2010 stated that *"……we are satisfied that even though the appellant violated the provisions of Regulation 10 of the takeover code, this violation, in the circumstances of the case, has not prejudiced*

or jeopardized the interest of the shareholders of the target company and cannot be said to be serious enough calling for an exorbitant penalty as imposed by the adjudicating officer. This is not a case where a non promoter has acquired a substantial chunk of shares in the target company changing its shareholding pattern and has gone away without making a public announcement. The acquisition by the appellant is within the promoter group which has not led to any change in the control of the target company nor has its management changed. However Regulation 10 having been violated, penalty must follow as observed by the Supreme Court in Chairman, SEBI vs. Shriram Mutual fund AIR 2006 SC 2287……..".

37. IN Arvind Kumar B. Shah & Ors. v/s SEBI decided on 19.11.2010, SAT held that *" There has been no change of management or control over the target company consequent upon the preferential allotment as notified to the shareholders. This is also not a case where a rank outsider had acquired a large chunk of shares in the company and was seeking exemption from the takeover code. Such an acquisition or change in management or control over the target company brings with it an element of uncertainty and the takeover code provides that in such an eventuality the existing shareholders be provided with an exit route by requiring the acquirer to make a public offer. In the case before us, there was no element of uncertainty and there was no change of management or control and we are satisfied that the shareholders of the target company did not get affected in any manner by the acquisition."*

38. I am also of the view that present case is also similar in so much as it is not a case where a non promoter has acquired a substantial chunk of shares in the target company changing its shareholding pattern and has gone away without making a public announcement. The acquisitions by the Noticees in March 01, 2007, March 21, 2008 and May 20, 2008 have not led to any change in the control and management of ZIM. However, Noticees had accepted that they failed to make the public announcement of offer for the acquisitions of shares of ZIM in March 01, 2007, March 21, 2008 and May 20, 2008 pursuant to the preferential allotments. The violations are repetitive in nature as the Noticees crossed the threshold limit thrice.

ORDER

39. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of ₹ 50,00,000 (Rupees Fifty Lakh only) on the Noticees which will be commensurate with the violations committed by them. The Noticees shall be jointly and severally liable to pay the said monetary penalty.

40. The Noticees shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Mr. V.S. Sundaresan, Chief General Manager, Division of Corporate Restructuring, SEBI, SEBI Bhavan, Plot No. C– 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

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

Date: **April 23, 2012** **PARAG BASU**

Place: **MUMBAI** **ADJUDICATING OFFICER**