BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM : PRASHANT SARAN, WHOLE TIME MEMBER

ORDER

In compliance with the directions of the Hon'ble Securities Appellate Tribunal made vide Order dated March 4, 2014 in Appeal No. 19 of 2014 (Arun Goenka vs. Securities and Exchange Board of India) read with Order dated April 15, 2014 in Miscellaneous Application No. 47 of 2014 in Appeal No. 19 of 2014

In respect of the representation dated March 15, 2014 filed by Mr. Arun Goenka

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Date of Hearing : April 10, 2014

Appearance of Parties :

For the applicant :

1. Mr. Aurn Goenka, appearing for himself
2. Mr. Vinod Dadlani, Chartered Accountant
3. Ms. Bhavna Bhartia

For the Securities and Exchange Board of India :

1. Ms. Anitha Anoop, Deputy Legal Adviser
2. Ms. Divya Veda, Deputy General Manager
3. Mr. T.Vinay Rajneesh, Assistant Legal Adviser
4. Mr. Abhishek Khandelwal, Assistant General Manager

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1. The Hon'ble Securities Appellate Tribunal ("the Hon'ble SAT") vide its order dated March 4, 2014 (in Appeal No. 19 of 2014 - *Mr. Arun Goenka vs. Securities and Exchange Board of India*) had directed SEBI to consider the representation of Mr. Arun Goenka (hereinafter referred to as "the applicant"), if filed within a period of two weeks from the date of the order, and pass appropriate order on merits and in accordance with law within a period of six weeks. The order of the Hon'ble SAT is reproduced below for reference :

"After the matter was argued for some time, appellant in person states that he would not press the present appeal as well as Miscellaneous Application No. 33 of 2014 and that he would file fresh representation before Securities and Exchange Board of India ("SEBI" for short) exhaustively dealing all contentions including the issues relating to events that took place subsequent to January 23, 2014 within a period of two weeks from today. If such representation is made SEBI would consider the same and pass appropriate order on merits and in accordance with law within a period of 6 weeks from today." [Emphasis supplied]

2. Pursuant to the directions of the Hon'ble SAT, the applicant, vide letter dated March 15, 2014, filed his representation. The time period for considering the representation and passing of an appropriate order by SEBI was extended by another six weeks by the Hon'ble SAT vide its Order dated April 15, 2014 made in Miscellaneous Application No. 47 of 2014 in Appeal No. 19 of 2014.

3. Before dealing with the issues and questions raised by the applicant in his representation, it is necessary to note the facts and background of the case :

(i) **Shree Rama Multi-Tech Limited** (hereinafter referred to as **"the Target Company"** or "**Company**" or **"SRMTL"**) is a company incorporated under the Companies Act, 1956. The registered office of the Target Company is situated at 603, Shikhar Shreemali Society, Near Vadilal House, Mithakhali, Navrangpura, Ahmedabad – 380 009. The shares of the Target Company are listed on the Bombay Stock Exchange Limited ("**BSE**") and the National Stock Exchange of India Limited ("**NSE**").

(ii) **Nirma Industries Limited** and **Nirma Chemical Works Limited** made a public announcement on July 25, 2005, pursuant to regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**the Takeover Regulations**"), of their open offer, in terms of regulation 21(1) of the Takeover Regulations, to all the shareholders of the Target Company (*except the Pledgee Acquirers and the Pledger Sellers*), to acquire upto 1,17,82,490 fully paid up equity shares of SRMTL of face value of □5/- each, representing 20% of the issued, subscribed and paid-up voting capital as of July 22, 2005, at a price of □18.60/- per equity share ("**the offer price**") in terms of regulation 20 of the Takeover Regulations.

(iii) Nirma Industries Limited was subsequently converted into a private limited company and the name changed to **Nirma Industries Private Limited** ("**NIPL**"). Nirma Chemical Works Limited was also converted into a private limited company and the name was changed to **Nirma Chemical Works Private Limited** ("**NCWPL**"). For sake of convenience, NIPL and NCWPL shall together be referred as "**the Acquirers**".

(iv) This open offer made by the Acquirers was a triggered offer. The facts in this regard are that -

(a) Three closely held, unlisted companies, belonging to the promoter group of the Target Company viz. East-West Polyart Limited, Shree Rama Polysynth Private Limited, and Ideal Petro Products Limited (hereinafter referred to as "**the Issuer Companies**") had issued Secured Redeemable Optionally Fully Convertible Premium Notes (hereinafter referred to as "**the Premium Notes**") to NIPL in terms of a subscription agreement dated March 22, 2002. As per the public announcement, the Premium Notes were held by both NIPL and NCWPL.

(b) In order to secure the Premium Notes issued to NIPL, promoter group (of the Target Company) entities/persons, namely, Sanket Estates and Finance Pvt. Ltd., Shree Developers Pvt. Ltd., Sejal Vikrambhai Patel, Mrudulaben Indubhai Patel, Asitbhai Natubhai Patel, Sejalben Asitbhai Patel, Vikrambhai Rambhai Patel, Monaben Prakashbhai Patel, Prakashbhai Rambhai Patel, Leenaben Vikrambhai Patel, Vrundaben Maheshbhai Patel, Maheshbhai Shashikantbhai Patel, Indubhai Umedbhai Patel, Natubhai Umedbhai Patel, Vaishaliben Saurinbhai Patel, Chandrakant Chhanabhai Patel, Bhartiben Chandrakant Patel, Sushilaben Natubhai Patel, Sonalben Ankilbhai Patel, Ankilbhai Chandubhai Patel & Sonalben Ankilbhai Patel, Anuja Prakashbhai Patel, Shinali Prakashbhai Patel, Vimpsan Investment Pvt. Ltd., Smitaben Sharadbhai Patel, Sohan Saurinbhai Patel, Sharadbhai Chhotabhai Patel and Ayaan Asitbhai Patel (hereinafter referred to as "**Pledger Sellers**"), had pledged a total of 1,42,88,700 shares ("**the Pledged Shares**") of the Target Company in favour of NIPL, in terms of the Deeds of Pledge dated March 22, 2002.

(c) The important terms of the subscription agreements entered into by the Issuer Companies with NIPL were :

1. The said Premium Notes are transferable.
2. The said premium notes issued at 1 lakh each, are redeemable by the respective issuer company upon expiry of 60 months from the date of allotment, at a nominal value of 1.35 lakh per premium note.
3. The respective Issuer Company has the option to "call" the Premium Notes at the end of 4th year i.e. March 24, 2006 from the date of allotment. The Subscribers/holders also have the option to "put" the Premium Notes at the end of 4th year i.e. March 24, 2006 from the date of allotment.
4. The holders of aforesaid shares of the Target Company have consented and agreed to pledge all their rights in the Shares as security for due redemption and full discharge of the Premium Notes.
5. The Pledged Shares shall remain as security with NIPL until the happening of one or more events of default and upon the happening of which, the security constituted shall become enforceable. Further, upon the happening of any such event, NIPL may in its / their discretion sell, transfer, assign, part with the same by giving notice of 30 days in writing without being responsible for any losses which may be occasioned thereby.
6. In case of default mentioned under the clause for "events of default" in the respective subscription agreements, NIPL can invoke the pledge in their respective demat account without referring the matter to the Pledgers.
7. The pledge of the above mentioned shares being in dematerialized form was executed in accordance with the Bye-laws of the National Securities Depository Limited and was recorded in the records of the respective Depository Participants of the Pledgers and of the Pledgees in May and June, 2002.

(d) In accordance with the terms of the respective subscription agreements, the Acquirers, vide their respective notices dated 10th June, 2005, notified each of the Issuer Companies of the occurrence of certain events of default and called upon them to redeem the outstanding Premium Notes within 30 days from the date of the notice, failing which they would be constrained to exercise their rights in respect of the Pledged Shares.

(e) As the Issuer Companies had failed to redeem the outstanding Premium Notes, NIPL intimated the Issuer Companies on July 22, 2005 that the pledge of the shares of the Target Company pledged with it by the promoter entities, was invoked in accordance with the terms of the subscription agreements and deeds of pledge. NIPL had also informed the respective Issuer Companies that it has considered the price of □18.50/- per share as the price at which the equity shares of SRMTL were transferred.

(f) Consequent to the invocation of pledge, 1,42,88,700 shares were transferred to demat account of NIPL on July 22, 2005. The same represented 24.25% of the paid-up and voting capital of the Target Company. This manner of increasing shares and voting rights by NIPL had triggered regulation 10 of the Takeover Regulations, which obligated them to make a public announcement for acquiring shares.

(g) The Acquirers, therefore, made a public announcement on July 26, 2005 in terms of regulation 10 of the Takeover Regulations.

(v) In the draft letter of offer filed with SEBI on August 8, 2005, it was also mentioned that the shareholding of the Acquirers entitle them to certain rights which would be within the definition of control under regulation 2(1)(c) of Takeover Regulations. However, the Acquirers would not be in management control of the Target Company and did not intend to acquire management control of the Target Company.

(vi) SEBI, vide its letter dated April 26, 2006, issued its comments on the draft letter of offer and advised the Acquirers/their Merchant Banker to incorporate *inter alia* the following in the letter of offer :

(a) To insert regulation 12 along with regulation 10 in the letter of offer.
(b) To dispatch letter of offer within 10 days from the date of SEBI's letter and to open the offer within 5 days thereafter.
(c) To include additional voting rights arising due to conversion of 95 lacs warrants while calculating the specified percentages for the purpose of open offer.
(d) To revise the escrow account in light of the enhanced offer size.

(vii) Subsequently, the Acquirers, vide letter dated September 22, 2006, requested SEBI for permission to withdraw their open offer in light of their discovering fraudulent embezzlement of funds in the Target Company. However, this request was rejected by SEBI and vide letter dated April 30, 2007, SEBI advised the Acquirers to proceed with the open offer. SEBI also advised the Acquirers to include the interest payment for any delay made in the completion of the offer. They were also advised that SEBI may initiate action against the Acquirers for the delay.

(viii) The Acquirers challenged this decision of SEBI in an appeal filed before the Hon'ble SAT. The Hon'ble SAT vide order dated June 05, 2008 dismissed the appeal filed by the Acquirers and directed them to complete the open offer process.

(ix) The Acquirers, thereafter, filed an appeal before the Hon'ble Supreme Court against the Order of the Hon'ble SAT. The Hon'ble Supreme Court, vide its order dated May 09, 2013, also dismissed the appeal and upheld the decision of SEBI and Hon'ble SAT whereby the Acquirers were not granted permission to withdraw their Offer. The Hon'ble Supreme Court *inter alia* observed that the Acquirers cannot be permitted to withdraw the Offer under the Takeover Regulations because permitting the withdrawal of open offer would deprive the ordinary shareholders of their valuable right to have an exit option under the Takeover Regulations. The Hon'ble Supreme Court held that as the acquisition was with the intent to acquire control in the affairs of the Target Company and not mere invocation of pledge, the Acquirers cannot be permitted to withdraw the Offer.

(x) Pursuant to the order of the Hon'ble Supreme Court, the Acquirers, vide letter dated August 06, 2013, filed a revised draft letter of offer with SEBI. The revised letter of offer included, *inter alia*, the following changes :

1. The revision in the offer size from 1,17,82,490 shares to 1,26,93,601 shares consequent to increase in share capital of the Target Company since the public announcement.
2. Inclusion of regulation 12 and a change in the object of the offer to include that the offer will result in change in control of the Target Company.
3. There has been a delay in making payment of the said Offer Price of □ 18.60/- per Share and hence the Acquirers are paying interest at a simple interest rate of

10% per annum for the period of the delay viz. from 14th June, 2006 till 24th September, 2013 being the assumed last date of payment of consideration, in cash (the interest amount is subject to change depending upon the actual date of payment). This interest will be paid on the Offer Price of 18.60/- per Share and is payable only to the Original Shareholders, i.e., those persons who were shareholders of the Target Company as on the triggering date (i.e. 22nd July, 2005), and continue to be Shareholders of the Target Company till the date of tendering their Shares in the Offer and whose Shares are accepted under the Offer.

4. The Acquirers held 29,91,419 shares of the Target Company prior to the public announcement and sold all these shares after the public announcement.

(xi) On consideration of the same, SEBI, vide its letter dated January 02, 2014, issued its comments on the revised draft letter of offer and advised the Merchant Banker to incorporate *inter alia* the following in the letter of offer :

(a) To disclose the details of shares sold by the Acquirers.

(b) To modify the letter of offer with regard to interest earned on escrow deposit and to accept the original shares first, in case of proportionate allotment.

(c) To transfer any excess interest in the escrow account to SEBI Investor Protection and Education Fund ("**the SEBI IPEF**").

(d) To redress the complaints regarding the open offer and accordingly reply to the complainants with a copy to SEBI.

(xii) In compliance with the comments of SEBI, the Merchant Banker made the changes, as advised, in the letter of offer. Thereafter, the offer opened on January 16, 2014 and closed on February 04, 2014.

(xiii) As per the post-offer report and submissions made vide letter dated May 05, 2014, the Acquirers paid applicable interest aggregating to 2,43,60,742.98/- calculated at 14.31/- per share for 17,02,358 shares which were found eligible for payment of the applicable interest. It was also submitted that total interest earned on the escrow account was 2,58,85,863.40/-. As undertaken, the excess interest of 15,25,122.42/- on the escrow account was transferred to the SEBI IPEF.

(xiv) **Complaints from Mr. Arun Goenka** : With respect to the open offer made by the Acquirers, SEBI had received complaints from the applicant, vide e-mails dated May 16, 2013, July 29, 2013, August 21, 2013, August 27, September 19, 2013, November 8, 2013, November 25, 2013, December 24, 2013, December 28, 2014, January 13, 2014, January 14, 2014 and January 19, 2013. The applicant had raised the following issues :

(a) Interest on the delayed payment of consideration should be paid to all the shareholders as the case is post the amendment of Takeover Regulations [*regulation 44(i)*] w.e.f. September 09, 2002 and no distinction between the shareholders (original or new) is made in regulation 44(i) of Takeover Regulations. The payment to only original shareholders will be an enrichment and reward for the defaulters at the cost of shareholders. Not enforcing payment to all shareholders whose shares are accepted is a violation of the regulations and must be enforced.

(b) As regulation 44(i) fixes only a floor rate and not a ceiling, the rate of interest should be compounded quarterly and must be atleast 15%. Bank Fixed Deposit rates are also compounded. The interest cost should act as a deterrent to the defaulting acquirers, but the methodology of paying interest only to continuing shareholders inadvertently incentivises such defaulters.

(c) The open offer size should be revised to 1,26,93,601 shares consequent to increase in share capital of the Target Company.

(d) The present open offer is in continuation of the original public announcement and any variation in the terms of the offer that is detrimental to the minority shareholders cannot be accepted.

(e) The Acquirer is a wilful defaulter and as per the original public announcement, it is liable for interest and penalty under regulation 22 (12) and (13) of the Takeover Regulations.

(f) Payment of interest to all shareholders under regulation 44(i) or 22(12) have not been scrutinised by the Hon'ble Supreme Court. In the absence of any adverse ruling, the regulations must be respected.

(g) The provisions of regulation 44(i) did not exist when the open offer in the Clariant case was triggered and thus not applicable. Therefore, the same could not have been the subject matter of examination by the Hon'ble Supreme Court. Further, as submitted by Merchant Banker, regulation 44(i) is not applicable in this case and therefore the Clariant order will not apply to this case.

(h) The Merchant Banker has also submitted that as the offer never commenced, regulation 22(12) is also not applicable in this case. The date of closure as mentioned in the regulation is the scheduled date of closure and not the actual date on which the offer has closed.

(xv) As advised by SEBI, the Merchant Banker had furnished replies to the applicant. The same were done vide letters dated September 6, 2013 and January 9, 2014, *inter alia* stating that:

(a) Regulation 44(i) applies only to those Acquirers who have either failed to make an offer or delayed in making an offer. The Acquirers here indeed made an open offer and were in a bona fide regulatory dispute with SEBI on various aspects of the offer. In the instant case, the Acquirers having triggered the Takeover Regulations upon invocation of the pledge on July 22, 2005, promptly made a Public Announcement in terms of the regulations on July 26, 2005 and thereafter filed the draft letter of offer on August 08, 2005 with SEBI. As such the Public Announcement and therefore the Offer itself was initiated within the time prescribed under the Takeover Regulations. Further, the draft letter of offer as filed with SEBI also contained a risk factor stating that the offer process may be delayed beyond the schedule of activities on account of any litigation leading to a stay in the offer.

(b) As provided in paragraph 2.1.10 of the draft letter of offer dated August 01, 2013, the Acquirers had sought to withdraw the Offer and had accordingly approached the applicable tribunals / court for the same. As the Offer was sub-judice, the Acquirers could not proceed till the final order had been passed. Upon receipt of the Supreme Court order dated May 9, 2013, the Acquirers diligently re-commenced the process leading to the filing of the updated draft letter of offer with SEBI.

(c) As far as the rationale for payment of interest only to Original Shareholders is concerned, the Acquirers have followed the principle set out in the Hon'ble Supreme Court's order passed in Clariant International Limited ("Clariant") and another v. Securities and Exchange Board of India [(2004) 8 SCC 524]. The Acquirers submit that SEBI has been consistently following the principle set out in the Clariant judgment in numerous cases, some of which are Khaitan Electricals Limited, FAL Industries Limited and Saurashtra Cement Limited.

(d) The principle of law accepted by the Supreme Court of India in its order passed in Clariant does not differentiate between offers which were made prior to amendment of

the Takeover Regulations which introduced Regulation 44(i) and offers which were made after the said amendment. In the said judgment, the Hon'ble Supreme Court has held that in the event of any delay in payment of consideration to shareholders who tender their shares in an open offer, only those persons who were shareholders of the target company on the date on which the open offer was triggered and who continue to be shareholders on the closure day of public offer should be entitled to interest. The provisions of regulation 44(i) are irrelevant when it comes to deciding which shareholders should be entitled to payment of interest in the context of this case.

(e) The judgment of the Supreme Court is based on the rationale that interest should be paid to only those shareholders who held shares on trigger date and were in a position to tender their shares in the offer and receive payment for the same. A person who was not holding shares and as a result not in a position to tender shares in the offer should not be entitled for any compensation for the delay in making payment of consideration under the offer. There is no reason to deviate from this rationale in the present case. Payment of interest to other shareholders would result in unjust enrichment.

(f) Both SEBI and the Hon'ble SAT have applied the rationale in the judgment of Clariant in the orders passed in connection with the public offers of Khaitan Electricals Limited and FAL Industries Limited wherein it has been directed that interest be paid only to those shareholders who were holding shares of the target company on the date on which the open offer was triggered.

(g) There is no basis or reason to deviate from a settled principle laid down by the Supreme Court of India and which has been consistently followed by SEBI.

(h) In so far as the offer size is concerned, the Acquirers have revised the same as mentioned in the revised letter of offer submitted to SEBI.

(i) The provision of regulation 22(12) only applies where an acquirer defaults in making payment to shareholders within fifteen days from the date on which the offer closes. In the present case, the offer never commenced on account of the judicial proceedings and therefore regulation 22(12) is not applicable in this case.

(xvi) SEBI, vide its letter dated January 23, 2014 provided a copy of the letter dated January 9, 2014 and letter of offer dated January 13, 2014 to the applicant. The applicant was advised to be guided by such letters and that the payment of interest to shareholders is in line with the law laid down by the Hon'ble Supreme Court in the matter of Clariant International Limited.

(xvii) Thereafter, the applicant filed an appeal (in Appeal No. 19 of 2014) challenging the SEBI letters dated April 26, 2006, January 2, 2014 and January 23, 2014. This appeal was disposed off vide Order dated March 4, 2014 by the Hon'ble SAT as mentioned in paragraph 1 of this Order. The applicant filed his representation dated March 15, 2014 before SEBI, wherein he made submissions and put forth various questions/issues for the consideration of SEBI, which are as follows:

(i) Examine and establish the correct trigger date.
(ii) Examine and establish the correct offer price
(iii) Examine and establish the correct date from which interest is to be paid
(iv) Examine and establish the correct rate of interest to be paid
(v) Examine and establish the correct and specific regulation under which interest is payable.
(vi) Examine and establish the persons to whom the interest is to be paid.
(vii) Disgorge the full amount of interest denied to the investors.
(viii) Disgorge the full amount of profit earned by the acquirers on sale of shares during the offer period keeping the public in dark.
(ix) Distribute the amount disgorged to the investors
(x) Institute proceedings against the Acquirers and representatives for giving false statements and evidence on record.
(xi) Examine and establish that all the terms and conditions given to the acquirers have been fully complied with especially the SEBI letter dated April 26, 2006.
(xii) Examine and establish as to who was in control of the target company during the period March 23, 2002 to March 24, 2006 (date of creation of pledge and invocation thereof).

The applicant also sought the following 'reliefs' in his representation:

(i) The trigger date should be reckoned as March 22, 2002 being the date on which the sum of 4 8.94 crore was paid to erstwhile promoters of SRMTL for 1,42,88,700 equity shares.

(ii) The offer price should be revised to 34.21 per share paid being the rate arrived at by dividing 48.94/1.42 crore, 48.94 crore being the amount paid for 1,42,88,700 shares. Further, this was the ruling market price around that time.

(iii) Interest should be paid from the date calculated with reference to trigger date of March 22, 2002.

(iv) Rate of interest should be 15% minimum or higher and should be higher than the current rate for commercial borrowing prevailing during the relevant period.

(v) In case the trigger date is accepted as July 22, 2005, the date on which pledge was invoked, then the rate should be 46.24 per share and interest should be payable from October 20, 2005 i.e. after 15 days from October 2005 being the original date of closing of offer as given in public announcement dated July 25, 2005.

(vi) Declaration that the Regulation 22(12) of the Takeovers Regulations is applicable in this case and accordingly to levy penalty etc. as per the provisions of this regulations.

(vii) As stipulated in the Takeover Regulations, 1997, the Acquirers be directed to make payment of interest to all the shareholders who participated in the offer and whose shares were accepted.

(viii) Directing the Acquirers to submit a detailed list to all the participating shareholders with their complete transaction history and the actual interest paid.

(ix) Disgorgement of the entire unjust income to ensure that no defaulter is benefitted from his default. Further, distribution of such disgorged amount amongst the shareholders. This unjust income may be in any form eg :

- Profit earned by unethical sale during the offer period (in the past SEBI had taken severe action against people who were selling the shares on one hand while on the other hand recommending people to buy them).
- Interest earned on the Bank Fixed deposit kept in the escrow account since initial open offer dated July 26, 2005.
- Interest denied to the investors on the ground of their not being "Original/continuous Shareholders".

(x) SEBI should also appreciate that besides deciding the core issues as above, the other collateral issues which are the backbone of a healthy capital market and justice delivery system needs to be addressed such as :

(a) Impart a sense of responsibility in the professionals who are attending on behalf of the acquirers so that they are discouraged from camouflaging the issue and putting wrong facts on record with a malafide intention of misguiding an authority /Hon'ble Tribunal etc. in order to dupe the general investing public.

(b) Perjury proceedings against the Acquirers for giving false information on record, to the Tribunal.

4. The applicant was afforded an opportunity of personal hearing on April 10, 2014 when he along with Mr. Vinod Dadlani and Ms. Bhavna Bhartia appeared before me and made oral submissions. Such submissions were a reiteration of the applicant's submissions and issues raised in his representation dated March 15, 2014.

5. I have considered the representation dated March 15, 2014 filed by the applicant and the documents enclosed therein, the submissions made by the applicant during the personal hearing and other material available on record. From the various issues which have been raised by the applicant, I proceed to consider the following primary issues (*these issues themselves cover a majority of the submissions made by the applicant*) first and then take up the ancillary issues raised by him :

(a) Who (*i.e., whether the original shareholders or all shareholders, irrespective of whether they held shares of a company on the trigger date and continue to hold and tender the same in the offer*) are eligible for interest payment ;

(b) Date of triggering the Takeover Regulations by the Acquirers, whether it is March 22, 2002 (date of pledge) or July 22, 2005 (the date of intimation of invocation of pledge and transfer of shares to the Acquirers) ;

(c) The offer price ; and

(d) What should be the rate of interest ?

The above issues are dealt with in the following paragraphs.

A. Who (*i.e., whether the original shareholders or all shareholders, irrespective of whether they held shares of a company on the trigger date and continue to hold and tender the same in the offer*) are eligible for interest payment?

(a) The applicant has stated that there should not be any distinction between original shareholders and other shareholders and that if there has been any delay in making a public announcement, consequently the payment of consideration to the shareholders, and then the interest, for the delayed payment, should be paid to all shareholders who have tendered their shares in the offer.

(b) In this case, the Acquirers have made the public announcement and in terms of the post-offer report and letter dated May 05, 2014, paid applicable interest aggregating to □2,43,60,742.98/- calculated at □14.31/- per share for 17,02,358 shares which were found eligible for payment of the applicable interest. It was also submitted that total interest earned on the escrow account was □2,58,85,863.40/-. As undertaken, the excess interest of □15,25,122.42/- on the escrow account was transferred to the SEBI IPEF.

(c) In terms of the revised letter of offer filed by the Acquirers, this interest (i.e., □14.31/-) will be paid on the Offer Price of □18.60 per share and is payable only to the Original Shareholders, i.e., those persons who were shareholders of the Target Company as on the triggering date (i.e. 22nd July, 2005), and continue to be Shareholders of the Target Company till the date of tendering their Shares in the Offer and whose Shares are accepted under the Offer.

(d) Interest has therefore been paid to only the original shareholders. The applicant's contention is that the Order of the Hon'ble Supreme Court in the Clariant case was not applicable in view of the insertion of regulation 44(i) in the Takeover Regulations in the year 2002 and that the trigger date in the Clariant case was prior to this amendment and hence not applicable.

(e) In this regard, I refer to the provisions of regulation 44(i) of the Takeover Regulations, which reads as follows -

"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:—

……

…….

(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."

The first issue to be considered is whether the above provision is applicable in the instant case. The Acquirers had made a public announcement of their open offer on July 25, 2005, which was made within 4 days of the trigger date. This is in compliance with the provision of regulation 14 of the Takeover Regulations. Subsequent to the issue of comments by SEBI on the letter of offer, the Acquirers, due to certain reasons, wished to withdraw their open offer. Regulation 27 provides for withdrawal of the open offer for reasons/circumstances as mentioned therein. As SEBI had rejected the request for withdrawal made by the Acquirers, it challenged the same before the Hon'ble SAT and then before the Hon'ble Supreme Court, which were statutory appeals filed against the respective decisions of SEBI and SAT. Pursuant to the decision of the Hon'ble Supreme Court, the Acquirers made a corrigendum to their public announcement with respect to their resumption of their open offer process. Therefore, issuing directions to the Acquirers invoking the powers under regulation 44(i) was not warranted in this case, as pursuant to the Hon'ble Supreme Court's order, the Acquirers have re-commenced their open offer and completed the process.

(f) **The Clariant's case** – The Hon'ble Supreme Court of India in its judgment dated August 25, 2004 in *Clariant International Limited and another vs. SEBI* [*Appeal (Civil) No. 3183/2003*], made the following observations with respect to the interest on account of delay in making the public announcement and payment of consideration to shareholders :

"A shareholder having regard to the direction issued by the Tribunal must be one who was a shareholder on the triggering date. Purpose and object of creating a legal fiction is well-known. Once a fiction is created upon imagining a certain state of affairs, the imagination cannot be permitted to be boggled when it comes to the inevitable corollaries thereof. [See Dipak Chandra Ruhidas vs. Chandan Kumar Sarkar [(2003) 7 SCC

66]], ITW Signode India Ltd. Vs. CCE, [(2004) 3 SCC 48], and Ashok Leyland Ltd. Vs. State of Tamil Nadu, (2004) 3 SCC 1].

Directions by the Board are required to be issued for the purpose of protecting the interest of the investors which would imply that such protection be extended to the persons who are entitled thereto and not any other shareholder who would get the same by windfall. The shareholders contemplated under clause (i) of Regulation 44 must be those shareholders whose shares have been accepted upon public announcement of offer and who have suffered loss owing to blockage of amount by not being able to sell the shares held by them. The object of the said provision is to protect the interest of such shareholders who had suffered a loss for delay in making the public announcement and, thus, may have to be compensated. The very fact that the bench-mark as regard the rate of interest has been fixed is also a pointer to the fact that the interest is to be paid to such investors who had suffered some loss.

While compensating a person, the court should see that he is not unjustly enriched. Interest is directed to be paid on the default of the acquirer occasioning loss suffered by an investor of his money. The question of paying interest by way of compensation to persons who had not suffered any loss, thus, would not arise.

Interest was, therefore, payable only to such persons who were shareholders of target company as on the triggering date.

……

We uphold that part of the decision of the Tribunal whereby it was held that those persons who were the shareholders till 24.2.1998 and continued to be shareholders on the closure day of public offer alone would be entitled to interest.

……." [Emphasis supplied]

The contention of the applicant that *the provisions of regulation 44(i) could not have been the subject matter of examination by the Hon'ble Supreme Court in the Clariant's case,* is incorrect as the Hon'ble Supreme Court has elaborately dealt with the provisions of regulation 44(i) of the Takeover Regulations and had made its observations cited above, upon considering the same. However, I am of the clear view that regulation 44(i) is not applicable to the instant

case, as there is neither a delay nor a failure here. In the instant case, the Acquirers had made a public announcement of their open offer on July 25, 2005 and subsequently filed an application for withdrawal of the same. However, the application was not allowed by SEBI, which stand was also affirmed by the Hon'ble SAT and the Hon'ble Supreme Court. Pursuant to the decision of the Hon'ble Supreme Court, the Acquirers completed their open offer during February 2014, which was commenced vide the public announcement dated July 25, 2005.

The cue taken from the Clariant's judgment is that only those shareholders who held shares as on the trigger date and who continued to hold and tender those shares in the open offer would be eligible for the interest payment. Therefore, even in the kind of offer, peculiar to the case before me, I am bound by the above rationale of Hon'ble Supreme Court. In view of the above, I have no hesitation in holding that the Acquirers are bound to pay interest to the original shareholders in respect of the payment of consideration due to them, in the light of the above principle laid down by the Hon'ble Supreme Court in the Clariant's case.

(g) Further, as rightly indicated to the Acquirers/their Merchant Banker by SEBI, the new shares (*those acquired after the trigger date*) of the original shareholders would also not be eligible for receiving interest if tendered and accepted in the open offer.

(h) In the light of the position settled by the Hon'ble Supreme Court of India with respect to this subject on who is eligible for interest payment, the submissions of the applicant that "*all shares rank pari-passu*" and "*no share would get advantage or preference over other share*", is misplaced. Similarly, the submission that a person who purchased a share just before the record date would be entitled for a bonus share or dividend on such share cannot be applied to this case as the right to receive interest on delayed public offer arises by virtue of the fact of holding on to the shares as on the trigger date. This "exit opportunity" does not continue with the share in the hands of a new owner to make him also eligible for interest.

(i) The applicant has also stated that if interest is denied on the ground of not being a 'continuous shareholder', then why should a new shareholder be eligible to even

participate in the open offer. This argument is not valid despite its apparent attractiveness. Giving an opportunity to exit to all the shareholders when the target company is being taken over is a different right from the right of the shareholder who could not exit when the open offer became due and was not made (by an acquirer) and continued to be a shareholder, to be compensated for loss of interest. Very clearly, the Hon'ble Supreme Court, in their judgment in the case of Clariant, was not in favour of rewarding the shareholders who came in later and were not a part of those eligible to tender shares in the original offer.

(j) I also note that the applicant has raised queries as to (i) why would a holder lose his right to interest if his name was substituted because of succession (ii) why would a shareholder lose entitlement on interest if the demat accounts were re-organised on account of marriage or family settlements, and (iii) why would a corporate shareholder lose interest on account of a merger or change in name? So far as this order is concerned, these concerns are not supported by any instance. However, it would be open for SEBI to examine, if such matters do arise.

(k) I have also considered the contentions of the applicant that more an acquirer delays in making an open offer, the more it incentivizes him as the original shareholders would gradually diminish due to passage of time, which would reduce the interest outflow from the acquirer on account of such delayed offer and payment of consideration. This argument presumes that the acquirer has subverted the legal system and has been able to delay the making of an offer. In this connection, it would be relevant to note the following observations made by the Hon'ble Supreme Court in the Order dated May 06, 2014 in the matter of *Subrato Roy vs. Union of India and others* [Writ Petition (Criminal) No. 57 of 2014] :

> "…….
>
> 147. The number of similar litigants, as the parties in this group of cases, is on the increase. They derive their strength from abuse of the legal process.
> …….
>
> 149. This abuse of the judicial process, needs to be remedied ……

150. The Indian judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims.

151. What is sought to be redressed is a habituation, to press illegitimate claims. This practice and pattern is so rampant, that in most cases, disputes which ought to have been settled in no time at all, before the first Court of incidence, are prolonged endlessly, for years and years, and from Court to Court, upto the highest Court.
……."

It is therefore clear that the litigant may be punished by the Hon'ble Courts, if deliberate and wilful delaying tactics are applied, but cannot form the basis of punishing all litigants on account of time taken to secure a decision from courts/judicial fora.

Further, it needs to be appreciated that allowing interest to be paid to all shareholders to deter such conduct may not be a justifiable and a reasonable proposition, irrespective of whether they held shares on the trigger date and continued to hold the same till they tendered in the delayed offer, for the reasons stated above. The Hon'ble Supreme Court has also observed, in the Clariant order, that a person should not be unjustly enriched.

B. Actual date when the Acquirers triggered the Takeover Regulations :

(a) As per the public announcement dated July 25, 2006 read with the corrigendum dated January 16, 2014 to the public announcement, regulation 10 was triggered by the Acquirers on July 22, 2005 when they had invoked the pledge on 1,42,88,700 shares (*representing 24.25% of the capital during the relevant period*) of the Company, which had been pledged with it by the promoter entities/persons of the Company, and the transfer of such shares to the demat account of NIPL.

(b) The applicant has submitted that the date of trigger of the Takeover Regulations by the Acquirers should be March 22, 2002, the date when the shares were pledged by the promoter entities with NIPL. According to the applicant, the Acquirers by subscribing to a colourful devise termed as Premium Notes issued by the promoter-related companies (Issuer Companies) and obtaining pledge of 1,42,88,700 shares of SRMTL for securing such instruments, has in fact acquired such shares on March 22, 2002.

(c) In this regard, I have referred to the public announcement dated July 25, 2005, wherein *inter alia* it has been stated that consequent to the invocation of the pledge on account of default committed by the Issuer Companies, 1,42,88,700 shares kept as pledge were transferred to the demat account of NIPL on July 22, 2005. The said statement indicates that shares were transferred to the account of the Acquirers only on July 22, 2005 and in view of the same, the Acquirers would have beneficial ownership rights over those shares on and from July 22, 2005. Even as per the representation filed by the applicant, the pledge of shares in favour of NIPL was recorded in the depository system. It is noted that prior to the invocation of the pledge, the Acquirers held 5% shares/voting rights in the Company. As per the Indian Contracts Act, 1872, a mere pledge of shares/good would not transfer the ownership of those goods to the pledgee. Therefore, in the absence of other evidence or material on record, it cannot be said that the Acquirers acquired such shares on March 22, 2002 and thereby triggered the regulations on that date itself.

(d) In view of the above, I do not see any merit in the contention of the applicant that the trigger date should be March 22, 2002. Accordingly, the submission of the applicant for calculating interest from March 22, 2002, also becomes inapplicable.

(e) The applicant has also contended that in terms of regulation 22(12) of the Takeover Regulations, the interest should have been paid from October 20, 2005 (15 days from October 04, 2005, which is the original scheduled date of closure of the offer in terms of the public announcement dated 25.07.2006) and that the acquirers were paying interest only from June 14, 2006.

(f) In the letter of offer, paragraph 5.3.1 mentions that pursuant to the public announcement, SEBI had issued its observations on April 26, 2006 and according to the revised schedule of activities, the date of payment of the offer price would have been June 13, 2006. Paragraph 5.3.2 further states that due to the events described in paragraphs 2.1.10 and 2.1.11, there has been a delay in making payment and hence the Acquirers are paying simple interest at 10% p.a. for the period of delay from June 14, 2006 till February 19, 2014 being the assumed last date for payment of consideration.

(g) In this regard, I refer to the provisions of regulation 22(12) of the Takeover Regulations, which reads as follows :

"The acquirer shall, within a period of fifteen days from the date of the closure of the offer, complete all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer and for the purpose open a special account as provided under regulation 29:

Provided that where the acquirer is unable to make the payment to the shareholders who have accepted the offer before the said period of fifteen days due to non-receipt of requisite statutory approvals, the Board may, if satisfied that non-receipt of requisite statutory approvals was not due to any wilful default or neglect of the acquirer or failure of the acquirer to diligently pursue the applications for such approvals, grant extension of time for the purpose, subject to the acquirer agreeing to pay interest to the shareholders for delay beyond fifteen days, as may be specified by the Board from time to time." [Emphasis supplied]

The above provision refers to the clause "date of closure of the offer". This does not indicate any assumed date of closure but the actual date of closure. From such actual date of closure, an acquirer is allowed a period of 15 days to complete all the formalities required in respect of his public offer including payment of consideration to those shareholders whose shares have been accepted in the offer. Accordingly, the dates of the offer related activities underwent changes pursuant to the issuance of comments from SEBI. The above said regulation also mentions about the "payment of consideration to the shareholders who have accepted the offer". The acceptance of offer by a shareholder can be ascertained only when he tenders his shares in the open offer. The same could be done only when the offer opens. This again is a factor which would emphasize that the "closure date" would mean the actual closure of the open offer, when eligible shares are accepted and others rejected.

(h) It also needs to be appreciated that in the facts and circumstances of the case, the open offer made by the Acquirers is unique, as it cannot be said that the Acquirers had failed or delayed in the making of the open offer. They had made the public announcement in time, in terms of the regulations, but did not proceed as they had subsequently filed an application for withdrawal of the open offer under regulation 27 of the Takeover Regulations. This request was rejected by SEBI and against this action, the Acquirers had

filed statutory appeals before Hon'ble SAT and on failing to get any favourable verdict, went on to file further appeal before the Hon'ble Supreme Court.

(i) The applicant has also alleged that regulation 22(13) of the Takeover Regulations were applicable to this case and therefore penalty needs to be levied as per the provisions of the said regulation. Regulation 22(13) states that -

"(13) Where the acquirer fails to obtain the requisite statutory approvals in time on account of wilful default or neglect or inaction or non-action on his part, the amount lying in the escrow account shall be liable to be forfeited and dealt with in the manner provided in clause (e) of sub-regulation (12) of regulation 28, apart from the acquirer being liable for penalty as provided in the regulations."

On a reading of the above provision, it cannot be said that statutory approvals were not obtained on time. As stated in the offer document, there were no statutory approvals required to be taken by the Acquirers. Therefore, this provision does not appear to be applicable and consequently no penalty needs to be levied. However, it needs to be noted that the Acquirers had undertaken to transfer the interest earned in the escrow deposit to SEBI IPEF, if any, remaining after payment of interest to the eligible investors. This, in turn, ensured that the Acquirers are not unjustly benefitted.

The applicant has also submitted that the delay in obtaining approval of SEBI on the draft letter of offer should be treated as a "statutory approval" in terms of regulation 22(12). It needs to be understood that SEBI does not approve or disapprove an offer document. SEBI only gives its observations on the contents of the offer document to ensure that adequate disclosures are made in order to enable investors to take a reasoned decision in respect of the offer.

(j) At this juncture, it needs to be reiterated that the facts and circumstances relating to the open offer that was commenced and concluded by the Acquirers was uncommon and for the reasons stated above, neither regulation 22(12) nor 44(i) would therefore be applicable. In such kind of cases, SEBI has to invoke the general provisions of sections 11(1) and 11B of the SEBI Act read with the provisions of the Takeover Regulations, and interest has to

be granted in accordance with the position settled by the Hon'ble Supreme Court in the Clariant's case, with interest rate to be allowed on the basis of the guidance available under regulation 44(i) of the Takeover Regulations.

C. What should be the offer price ?

(a) The Acquirers have offered a price of ₹18.60/- as the offer price with respect to the shares accepted in their open offer. According to the public announcement/letter of offer, the said offer price has been determined in terms of regulation 20(4) of the Takeover Regulations, considering the prices as determined under the following criteria mentioned in regulation 20(4) :

1. Negotiated price under an agreement for purchase of shares – **not applicable**

2. Highest price paid by the Acquirers for acquisition of shares including by way of allotment in a public or rights or preferential issue during the period of 26 weeks prior to the date of allotment of the PA (being the price at which pledged shares got transferred as intimated to the Issuer Companies for computation of part settlement of debt – **₹18.50/-.**

3. The average of the weekly high and low of the closing prices quoted on the BSE being the Stock Exchange where the shares were most frequently traded during the 26 week period preceding the date of the PA – **₹16.32/-**

4. The average of daily high and low prices quoted on the BSE being the stock exchange where the shares were most frequently traded during the 2 weeks preceding the date of the PA – **₹18.59/-.**

(b) According to the applicant, this offer price should be revised to ₹34.21/- as ₹48.94 crores were paid by the Acquirer to subscribe to the Premium Notes and that 1,42,88,700 equity shares of the Company were pledged with NIPL as security. As the pledged shares were acquired by NIPL, the price of a share is ₹34.21/- (= ₹48,94,00,000 ÷1,42,88,700 shares). This sum was paid by the Acquirers to the Issuer Companies on March 22, 2002. The applicant has also submitted that the market price of the scrip during that period was around ₹34.25/-.

(c) As it has been observed above that there is no reason to consider March 22, 2002 as the trigger date, the manner of calculation of price as suggested by the applicant is not maintainable.

D. What should be the rate of interest applicable ?

(a) The applicant has stated that the rate of interest should be minimum 15% or higher and that it should be higher than the current rate for commercial borrowings prevailing during relevant period.

(b) In the Clariant's case, the Hon'ble Supreme Court has observed that the rate of interest should be a reasonable one as the same became payable for the delay in making the payment, subject of course to the statutory provision contained in the Regulations. The Hon'ble Court has further observed that by reason of Regulation 44, as substituted in 2002, the discretionary jurisdiction of the Board is curtailed.

(c) Regulation 44(i) of the Takeover Regulations provides guidance as to what should be the rate of interest that could be allowed in case of a delayed offer. In terms of the said provision, the interest is at the "rate not less than the applicable rate of interest payable by banks on fixed deposits".

(d) In the present case, the Acquirers have paid interest at the rate of 10%, which is not less than the applicable interest rates offered by banks.

(e) Though regulation 44(i) is not applicable to this case, for the reasons stated above in this decision, it needs to be noted that the same offers guidance with respect to the rate of interest that need to be paid to the eligible shareholders.

6. The applicant has also alleged that when the Issuer Companies issued the Premium Notes and when such debt was secured by the pledge of SRMTL shares of the promoter entities and persons, such pledge was not adequate for the value of exposure of the Acquirers in subscribing to the Premium Notes. The applicant has also alleged that the level of value was not uniform though the pledge was of SRMTL shares and that the security for the Premium Notes issued by East West Polyart (one of the issuer companies) was less than 50%. In this regard, I note that these are commercial decisions of the respective entities and therefore, questioning their wisdom in respect of such acts may not be appropriate in the absence of any material to the contrary.

7. The applicant has also sought examination of the compliance with the terms and conditions mentioned in the SEBI letter dated April 26, 2006. In this regard, I note that the letter dated April 26, 2006 was issued by SEBI as its observations on the draft letter of offer filed by the Acquirers in 2005. Subsequently, the Acquirers requested for withdrawal of offer which was rejected by SEBI vide its letter dated April 30, 2007. The rejection was subsequently challenged in SAT and Supreme Court by the Acquirers. In compliance with the order of Supreme Court, the Acquirers filed the revised letter of offer on August 01, 2013, which was examined by SEBI and it issued the observation letter on January 2, 2014. As a consequence, the observations issued vide letter dated January 2, 2014 override the observations made in the letter dated April 26, 2006. It is also noted that the Acquirers have complied with the SEBI observations issued vide letter dated January 2, 2014.

8. The applicant has alleged that the Acquirers have not been truthful in their submissions made before authorities/Hon'ble SAT, as they submitted that they were not the shareholders of the Company. According to the applicant, the Acquirers were the promoters/persons acting in concert with promoters. In this regard, I note that the Acquirers had submitted that they were shown as persons acting in concert with the promoters of the Target Company without their knowledge. Pursuant to the objections raised by the Acquirers vide their letter dated July 20, 2005, the Target Company, vide its letter dated August 05, 2005, had intimated that it stopped referring to the Acquirers as the PACs of its promoters. Though, the applicant has stated that one Nirma Credit & Capital Limited was a shareholder of the Company since inception, it is observed from the shareholding pattern disclosed on the stock exchange that the entity was shown under the public shareholder category. The obligation to make open offer arose only due to the invocation of pledge for which public announcement was duly made by the Acquirers.

9. Another concern raised by the applicant was that how could the Acquirers sell shares of the Company when they already made a public announcement to acquire 20% shares of the Company. As per records, the Acquirers had sold an aggregate of 29,91,419 shares (5.07%) post their public announcement. The merchant banker had stated that such sale was not prohibited under the Takeover Regulations and did not also require any disclosure under such regulations or the Insider Trading Regulations. It was also stated that the disclosure of the pre and post offer shareholding, in the draft letter of offer, was correct and that such data could

not be updated in view of the litigation with respect to the Acquirers' withdrawal request. I note that details of acquisition of shares and sale of shares by NIPL and NCWPL were disclosed in the letter of offer and that such sale happened during the period – November 2004 and April 2006 i.e. the Acquirers sold shares before and after the public announcement. As per the provisions of the Takeover Regulations, there was no prohibition on the sale of shares by the Acquirers. As a consequence of the above, disgorging the profits earned by the Acquirers on account of the sale of shares of SRMTL would not arise.

10. The applicant has also alleged that the Acquirers have borrowed funds for their investments and that they were acting as unregistered NBFCs. With respect to this allegation, the applicant may, if so desired, make his representation before the concerned regulatory authority, as it is beyond SEBI's purview. The applicant has also alleged that NIPL and NCWPL do businesses that are not defined in their main object clause and the names of these companies do not have any connection with their current line of business. For this allegation, the applicant should approach the concerned regulator.

11. With the above observations, I, in compliance with the directions of the Hon'ble Securities Appellate Tribunal made vide its order dated March 4, 2014 (in Appeal No. 19 of 2014 - *Mr. Arun Goenka vs. Securities and Exchange Board of India*) read with Order dated April 15, 2014 in Miscellaneous Application No. 47 of 2014 in Appeal No. 19 of 2014, hereby dispose off the representation dated March 15, 2014 filed by Mr. Arun Goenka.

PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Date : May 26th, 2014
Place: Mumbai