**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPLICATION NO. 124 OF 2013**

**IN**

**COMPANY SCHEME PETITION NO. 234 OF 2011**

**CONNECTED WITH**

**COMPANY SUMMONS FOR DIRECTIONS NO. 125 OF 2011**

Securities & Exchange Board of India )
SEBI Bhavan, Plot No. C4-A, "G" Block, )
Bandra Kurla Complex, Bandra (East), )
Mumbai-400 051 )...Applicant

In the matter of:

IKISAN LIMITED, )
a Company incorporated under the provisions of the )
Companies Act,1956 and having its registered office at )
A/612, Dalamal Towers, 211, Nariman Point, )
Mumbai-400 021 )...Petitioner

**ALONG WITH**

**COMPANY APPLICATION NO. 125 OF 2013**

**IN**

**COMPANY SCHEME PETITION NO. 235 OF 2011**

**CONNECTED WITH**

**COMPANY SUMMONS FOR DIRECTIONS NO. 126 OF 2011**

Securities & Exchange Board of India )
SEBI Bhavan, Plot No. C4-A, "G" Block, )
Bandra Kurla Complex, Bandra (East), )
Mumbai-400 051 )...Applicant

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In the matter of:

KAKINADA FERTILIZERS LIMITED, )
a Company incorporated under the provisions of the )
Companies Act,1956 and having its registered office at )
A/612, Dalamal Towers, 211, Nariman Point, )
Mumbai-400 021 )...Petitioner

Mr. Darius Khambata, Senior Advocate, along with Mr. Pratik Sakseria, Mr. Jayesh Ashar, Mr. Mihir Mody and Mr. Rushin Kapadia, instructed by M/s. K. Ashar & Co., for the Applicant.

Mr. Janak Dwarkadas, Senior Advocate, along with Mr. Shyam Mehta, Senior Advocate, Mr. Ankit Lohia, Mr. Aditya Thakkar, Mr. Anoj Menon, Ms. Dhanyashree Shah and Ms. Henna Daulat, instructed by M/s. Desai & Diwanji, for the Petitioners.

Mr. J.P. Sen, Senior Advocate, for the Official Liquidator.
Mr. C.J. Joy for the Regional Director.

**CORAM: S.J. KATHAWALLA, J.**
**Judgment reserved on: 8th May, 2015**
**Judgment pronounced on : 10th September, 2015**

**JUDGMENT:**

**1.** The above Company Applications are filed on 21st February, 2013, by the Applicant – Securities and Exchange Board of India ("SEBI"), inter alia, for the following relief:

> " *(a) That this Hon'ble Court be pleased to recall/review and/or set aside the order dated 17th June 2011 (sanctioning the Scheme of Arrangement and Amalgamation) and order dated 22nd July 2011 (sanctioning amendments to the scheme)"*

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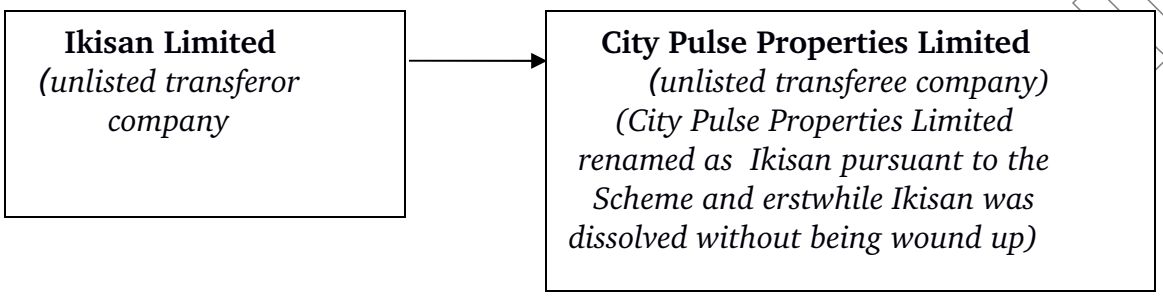
**2.** On 27th August, 2010, this Court sanctioned a Scheme whereunder Ikisan Limited (Unlisted Transferor Company) was merged into City Pulse Properties Limited (Unlisted Transferee Company). The Scheme was made effective on and from 8th September, 2010. Pursuant to the Scheme, City Pulse Properties Limited was renamed as Ikisan Limited.

**3.** However, the orders sought to be recalled/reviewed by SEBI are the orders passed by this Court in Company Scheme Petition Nos. 234 of 2011 and 235 of 2011, by which this Court was pleased to sanction a composite scheme between Kakinada Fertilizers Limited [ (KFL) Transferee Company – Original Petitioner ], erstwhile Nagarjuna Fertilizers and Chemicals Limited [ (erstwhile NFCL) Transferor Company No. 1 – Demerged Company], Ikisan Limited [ (Ikisan) Transferor Company No.2); and Nagarjuna Oil Refinery Limited [ (NORL) Transferee Company No. 2/Resulting Company], under which composite scheme, the oil business of the erstwhile NFCL was demerged into NORL and the erstwhile NFCL together with its residual business and Ikisan were merged into the Petitioner. After the merger, KFL was renamed as NFCL. A schematic diagram of the Ikisan Merger 2010 and a schematic diagram of the composite scheme 2011 are reproduced hereunder:

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## SCHEMATIC DIAGRAM OF THE IKISAN MERGER (2010)

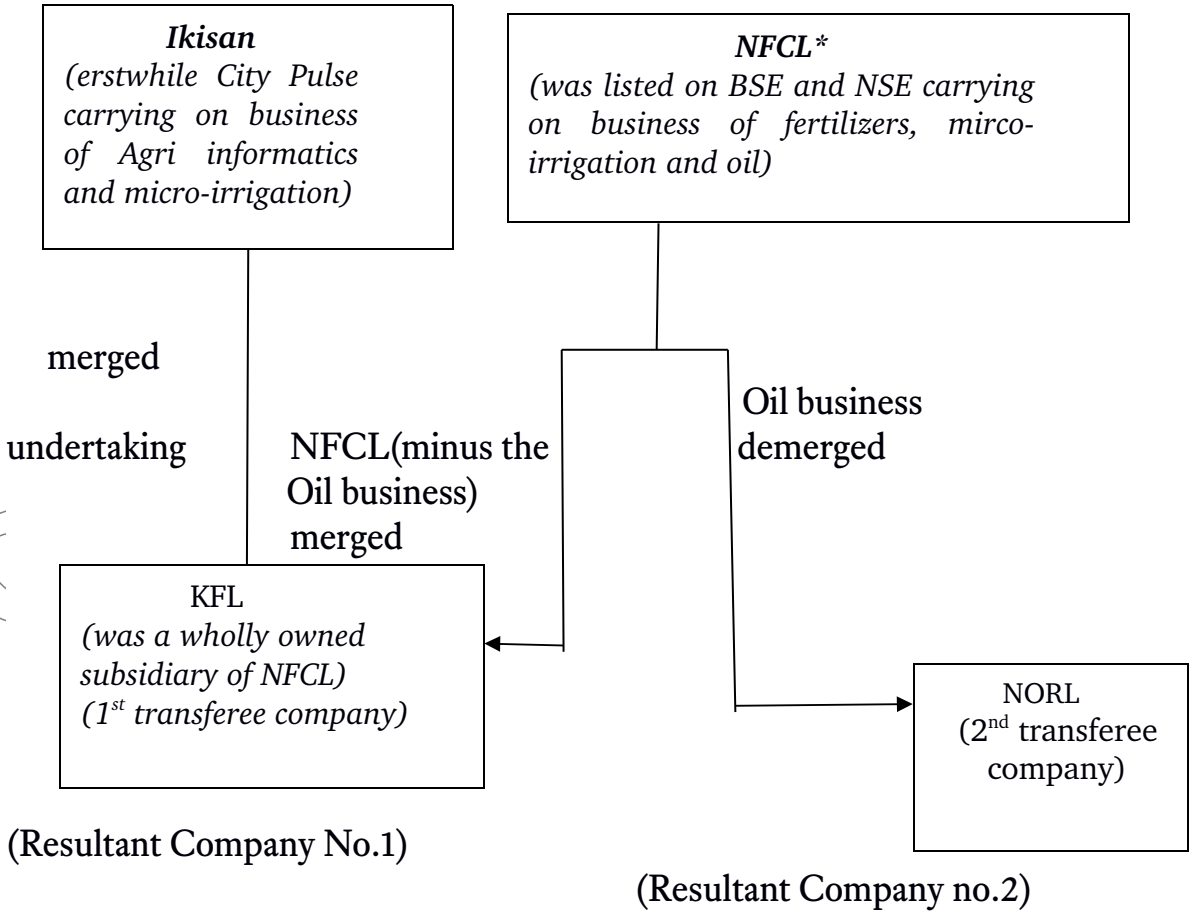
**Merger**




**This Scheme was approved by the Bombay High Court on 27 August 2010 and made effective on 08 September 2010.**

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## SCHEMATIC DIAGRAM OF THE COMPOSITE SCHEME 2011




*NFCL oil business merged and NFCL dissolved without winding up pursuant to the Composite Scheme.

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**4.** The composite scheme has been made effective and shares have been allotted to the respective shareholders. Subsequent to the composite scheme, dividends have been declared and paid. The shares of the demerged entity viz. NORL have been listed on 23rd March, 2012, and are being traded on the Bombay Stock Exchange ("BSE") and National Stock Exchange ("NSE"). Even as regards the Resultant Company No. 1 (Original KFL and now renamed NFCL), BSE and NSE granted in principle approval for listing on 8th December, 2011 and 13th January, 2012, respectively.

**5.** According to SEBI, subsequent to the sanction of the composite scheme, SEBI received an application dated 13th December, 2011, from the BSE for exempting NFCL (i.e. KFL whose name was changed to NFCL) from the applicability of Rule 19 (2) (b) of the Securities Contract Regulation Act ("SCRA") . During the course of considering the aforesaid application, SEBI for the first time had an opportunity to peruse some of the details of the financials of Ikisan Limited for the years 2009-2010 and 2010-2011, which inter alia revealed that the gross fixed assets of Ikisan had increased from nil in financial year 2009, to Rs. 54.61 crores and Rs. 75.70 crores in financial years 2010 and 2011 respectively. From the schedule of fixed assets of Ikisan Ltd., it was

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observed that there were two items – 'Trademarks' and 'Customer Contracts Valuation' which were valued at Rs. 36.4 crores and Rs. 18.2 crores respectively in 2009-2010 and that the total fixed assets of the Company for 2009-2010 were Rs. 54.61 crores. The said two items i.e. '"Trademarks" and "Customer Contracts Valuation" appeared in the balance sheet of Ikisan Ltd. in the year 2010, consequent to its merger with a Company, City Pulse Properties Limited. Considering the aforesaid financials of City Pulse Properties Ltd. and Ikisan Ltd. for the years 2007-2008 and 2008-2009, SEBI claims to have realised that the amounts stated for the two items – trademarks and customer contracts valuation - in the financials of Ikisan Limited in 2009-2010 did not seem to be justified and prima facie it appeared that the Promoters of KFL stood to benefit significantly from the scheme of arrangement. SEBI therefore thought it fit that further examination ought to be conducted before granting permission for the listing of shares. Accordingly SEBI appointed M/s. Bansi S. Mehta & Co., as an independent Valuer to examine the matter, seek relevant documents from the Company and independently value the assets of Ikisan Ltd. Bansi S. Mehta & Co. have thereafter submitted their Valuation Report dated 27th September, 2012. The Report submitted by Bansi S. Mehta & Co. shows:

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**(i)** that the accounting methods adopted for incorporating the assets and liabilities of Ikisan Limited are not consistent with the mandatory Accounting Standards ("AS") and the accounts prepared consequently are not in accordance with law;

**(ii)** that though accounting standard 14 requires that excess consideration over the net assets should be debited to Goodwill, which in normal cases is required to be amortized over a period of 5 years, in the case of Ikisan Ltd., such excess value over the net assets has not been ascribed to 'Goodwill' but to 'Trademarks' and 'Customer Contract Valuation';

**(iii)** that though accounting standard 26 requires the existence of control of an enterprise over customers or market share which will ensure continued trade with the enterprise, as per the Valuation Report, the governing criteria, namely existence of control, does not seem to have been critically examined while valuing the customer contract relationships;

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**(iv)** the turnover of Ikisan Ltd. was only Rs. 1.55 crores for the year ended March 31, 2009. However, the value ascribed to Trademarks is Rs. 36.4 crores, a multiple of 23.52 times the turnover of IKisan Ltd.;

**(v)** the current valuation of Trademarks is based on discounted earnings of royalty taken at the rate of 10% applied to projected turnover. If the same is taken at the rate of 2.5%, the discounted value of royalty would come down by 3/4th approximately;

**(vi)** the manner in which the assets and liabilities of Ikisan Ltd. have been cast post its merger with City Pulse Properties Ltd., is patently inconsistent with the requirements under AS 10 and AS 14;

**(vii)** SEBI should also consider the possibility of recasting the accounts of Kakinada Fertilizers to comply with the mandatory Accounting Standards before considering the request of the Company for listing of its equity shares.

**6.** It is further submitted by SEBI that:

**(a)** the last traded price of NFCL (before the Company got delisted due to the Scheme of Arrangement) was Rs. 27.45 . Multiplying the same

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by the total number of equity shares (428181821), the total market capitalization was Rs. 1175.36 crores.

**(b)** the closing price of NORL on the day of listing, i.e. on March 28, 2012 was Rs. 6.95. Multiplying the same by the total number of equity shares (428181821), the total market capitalization was Rs.297.58 crores.

**(c )** Deducting the market capitalization of NFCL from NORL, the approximate market capitalization of KFL was Rs. 877.77 crores. Excluding the shares allotted to the Promoters of Ikisan Ltd. (127064742 shares), the total number of equity shares of KFL was 471000261. Price per share of KFL calculated by dividing the market capitalization of KFL by the total shareholding of KFL (excluding the shares allotted to the Promoters of Ikisan Ltd.) was Rs. 18.64.

**(d)** Considering the price per share of KFL, as calculated above, the value of shares allotted to the Promoters of Ikisan Ltd. was Rs. 236.8 crores.

**7.** Without prejudice to the above, SEBI has submitted that even if it is assumed that the Valuation Report submitted by Grant Thornton (Chartered Accountants) relied upon by the Company is true and fair, the

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Promoters of Ikisan Ltd. have been allotted approximately 3 times more equity shares than the worth of the assets brought in by them through Ikisan Ltd. in KFL. According to SEBI, by the said scheme, the shareholding of the Promoters in NFCL or KFL (which subsequent to the merger was renamed back as NFCL) has increased from 38.25 per cent to 51.37 per cent. This is an approximate increase of 13 per cent in the stake of the Promoters in NFCL. According to SEBI, the value of a 13 per cent shareholding according to the market price, prevailing on the Bombay Stock Exchange, of NFCL during the relevant period was to the tune of approx. 175 crores.

**8.** SEBI has in paragraph 23 of the Application alleged that the Petitioners have suppressed from this Court, inter alia, the following facts to achieve their objective of increasing their shareholding:

**(a)** KFL which is a 100% subsidiary of NFCL was incorporated on 7th June 2006 with an issued, paid up and subscribed share capital of 50,000 equity shares of Rs. 10/- each, aggregating to a share capital of Rs. 5 lakhs.

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**(b)** The provisional balance sheet of KFL reveals that the said Company had no business income whatsoever inasmuch as there was no business conducted by KFL, and in fact it did not have any fixed assets nor any investments either. The accounts further reveal that as against the share capital of Rs. 5 lakhs, being the only funds available with the Company, the preliminary and pre-operational expenses of the company were to the tune of Rs. 2,27,776/- and Rs. 1,15,890/- respectively, which in turn means that these expenses themselves eroded the Company's share capital.

**(c )** NFCL which was a Public Listed Company having an Authorised share capital of Rs. 8,000,000,000.00 and paid up share capital of Rs. 4,281,818,210.00 and having reserves and surpluses to the tune of Rs. 5,244,000,000 as on September, was sought to be transferred and merged into KFL (a wholly owned subsidiary of NFCL) under the garb of synergy, etc.

**(d)** Under the said scheme of arrangement and amalgamation, the shareholders of NFCL were allotted 11 equity shares of Rs. 1/- each fully paid up in KFL for every 10 equity shares of Rs. 10/- each held by the equity shareholders of NFCL. This, in effect, means that in so far as the

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shareholders of NFCL (a Listed Company) were concerned, for the aggregate face value of Rs. 100/- in the Listed company, they were to be issued shares which would be of an aggregate face value of Rs.11/- in the transferee company (KFL).

**(e)** The aforesaid clearly shows that the investors/shareholders of the flagship company NFCL, which was incorporated way back in 1976 and listed with Bombay Stock Exchange since decades, whose equity shares of the face value of Rs. 10/- each were listed on the Bombay Stock Exchange as on the date of the scheme at a price of approximate Rs. 31/-, were severely prejudiced by reason of the said scheme. Such a scheme can thus by no stretch of imagination be called either fair or reasonable and is also against public policy.

**(f )** Ikisan Ltd. was incorporated originally on 11th April 2007 under Registration No. 169889 as City Pulse Properties Pvt. Ltd. The said City Pulse Properties Pvt. Ltd. was later renamed as City Pulse Properties Ltd. The said City Pulse Properties Pvt. Ltd. was incorporated with an aggregate paid up and subscribed share capital of 10,000 equity shares of Rs. 10/- each.

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**(g)** Similarly, by a Certificate of Incorporation dated 21st March 2000, a distinct and separate Company by the name of 'Ikisan Limited' was incorporated.

**(h)** By an Order dated 27th August, 2010, passed by this Court in Company Petition No. 392 of 2010 connected with Company Summons for Directions No. 464 of 2010, the said Ikisan Ltd. was merged into City Pulse Properties Limited. Upon such merger, the name of the said City Pulse Properties Limited was changed back to Ikisan Ltd. (the name of the Transferor Company).

**(i)** The said Ikisan Ltd. originally had an issued, paid up and subscribed share capital of 10,000 equity shares of Rs. 10/- each as on 31st March 2009. The same was thereafter increased to 50,000 shares of Rs. 10/- each aggregating to a sum of Rs. 5,00,000/- towards share capital as on 31st March 2010. Between 31st March 2010 and the date on which the composite scheme of arrangement and amalgamation was filed before this Court, the issued, subscribed and paid up share capital of Ikisan Ltd. was increased from Rs. 5 lakhs to Rs. 29.55 crores by adopting various tactics such as conversion of unsecured loans of its promoters, group companies etc. and other share application monies

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received from its promoters and/or group companies so as to ensure that under the composite Scheme of Arrangement and Amalgamation, the shareholders of Ikisan Ltd., the second transferor company, who are none other than the core promoters of Nagarjuna Group (NCL) would get huge quantities of shares in exchange for the transfer, and thereby increase their shareholding in NFCL.

**(j)** Under the said scheme of arrangement and amalgamation, for every 10 equity shares of Rs. 10/- each fully paid up, held by the shareholders of Ikisan Ltd. (which had no income whatsoever), they were to be issued 43 equity shares of Rs.1/- each fully paid up in the transferee KFL.

**9.** SEBI has also stated in paragraph 17 of the Application that during the pendency of the exemption application filed by the Bombay Stock Exchange (i.e. after 13th December 2011) SEBI had received a complaint pertaining to the Composite Scheme of Arrangement and Amalgamation (Exhibit-G pg. 213 of Review Application No. 125 of 2013). It is pertinent to note that in the said complaint addressed to the Chairman, SEBI, it is stated/alleged by the Complainant as follows:

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*"Sub: Composite Scheme of Arrangement and Amalgamation (Nagarjuna Fertilizers and Chemicals Ltd. NFCL)*

*In respect the above, I herewith submit my views and the representation filed before the authorities of Bombay Stock Exchange and also the Competition of India on the matters specified (of the Composite Scheme of Arrangement and Amalgamation -- Nagarjuna Fertilizers) highlighting the loss being caused to the investors of the Company and the resultant problems faced by the investing public. The copies of the relevant letters together with the enclosures are sent herewith for your kind perusal and scrutiny. Now a stage has reached that he investing community is no longer in a position to keep reliance upon the public statements made by the Company's administration and the equity shareholders are put to loss heavily for the benefit of the management of the companies.*

*In the statement of Scheme of Merger and Amalgamation enclosed to the letters addressed to Stock Exchange and Commissioner, Competition of India, with the proposed implementation of the scheme being detrimental and will result in a total loss of Rs. 862.66 crores to the equity shareholders of NFCL. Since the company is reported to have earned net profits for the next three quarters after March 2010, amounting to Rs. 88.87 crores (33.37 + 28.36 + 27.14) the erosion in net worth of the equity shareholders is Rs. 950.53 crores (862.66 + 88.87). To this amount, the profit to be earned for the last quarter of the current year -- March 2011 also will have to be added. (An extract of the Company's quarterly results is enclosed for your kind reference). In view of the above mentioned facts submitted*

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*in the letters furnished to the Bombay Stock Exchange, it is very much evident that the consideration offered is detrimental for the interest of the equity shareholders.*

*I shall be very much obliged if an appropriate remedial action could be taken from your side, by your intervention in this regard safeguarding the interest of the small public investors."*

**10.** According to SEBI, it is in these circumstances that SEBI filed the above Company Application seeking review of the Orders dated 17th June 2011 (sanctioning the Scheme of Arrangement and Amalgamation) and Order dated 22nd July 2011 (sanctioning amendments to the scheme), passed by this Court in Company Scheme Petition No. 235 of 2011.

**11.** It is pertinent to note that the above Company Application was preceded by an earlier Company Application (L) No. 45 of 2013 filed on 24th January 2013 seeking review of the Orders dated 17th June, 2011, and 22nd July, 2011, in which no allegations of fraud were made. The said Company Application was withdrawn with liberty, without notice to the other side, by a praecipe dated 20th February, 2013. The praecipe does not provide any reasons for withdrawal. During the course of submissions before this Court, SEBI has orally sought to contend that

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the first Company Application came to be withdrawn for "technical reasons".

**12.** It is also pertinent to note at this stage itself that though it is clear from paragraph 16 of the Affidavit- in- Support of the Application for review, that SEBI was aware of the Valuation Report submitted by Grant Thornton relied upon by the Petitioner in support of the composite scheme of 2011, SEBI has in the Petition not impugned the GT Report dated 6th January 2011 or the fairness opinion expressed by Keynote Corporate Services Ltd. It is only in its Affidavit- in- Rejoinder dated 22nd July, 2013, that SEBI for the first time challenged the said Reports and also criticized/challenged the Discounted Cash Flow (DCF) method of valuation adopted by Grant Thornton whilst deciding the swap ratio, by alleging that the DCF method uses a mere *ipse dixit* to arrive at future cash flows for the equity holders, discounted by the firm's cost of equity. In the course of hearing, SEBI has also contended that the management has not disclosed the projections supplied to Grant Thornton on the basis of which the valuation was arrived at.

**13.** It is therefore submitted by SEBI that the Orders passed by this Court dated 17th June, 2011 and 22nd July, 2011 be recalled. During oral

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submissions, the following two solutions are suggested by SEBI which also form part of their written submissions:

SOLUTION – 1

A. Business of Ikisan Ltd. (100% subsidiary of Nagarjuna Corporation Ltd. one of the Promoters of the original NFCL) to be demerged from the new NFCL (Kakinada Fertilizers Ltd.).

B. 12,70,64,742 number of shares of Re. 1/- each in the new NFCL which were allotted to Nagarjuna Corporation Ltd. (as Shareholder of Ikisan Ltd.), be cancelled.

C. The balance number of shares i.e. 18,01,64,988 held by the Promoters in new NFCL, which have been attributed to the residual NFCL business (merged into the new NFCL) will remain.

D. The result of the above will be that the effect of the fraud on this Hon'ble Court and on the body of investors of the old NFCL and the new NFCL (other than the Promoters) will be nullified.

E. Since Ikisan Ltd. was merged into the new NFCL (Kakinada Fertilizers Ltd.) at completely inflated values, the demerger of its business will have no adverse impact on the non-promoter investors of the new NFCL. On the other hand, the disproportionately high number of shares allotted to the Promoters (Nagarjuna Corporation Ltd.) for the Ikisan Ltd. business shall stand cancelled.

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F. Sanctioned scheme to be modified by directions under Section 392 of the Companies Act,1956.

SOLUTION-2

A. Valuation of Ikisan Ltd. as on March 31, 2010 and March 31, 2011 to be done by an independent Chartered Accountant appointed by the Court ("C.A.").

B. Share Exchange ratio of shares to be allotted to the Promoters in lieu of the Ikisan Ltd. business to be reworked by such C.A., and the number of shares to be allotted to shareholders of Ikisan Ltd. (i.e. to Nagarjuna Corporation Ltd.) computed again.

C. Difference in number of shares between the 12,70,64,742 number of shares of Re. 1/- each in new NFCL (Kakinada Fertilizers Ltd.) allotted to the Promoter Group (Nagarjuna Corporation Ltd.) as per the sanctioned scheme and the correct number of shares that should have been allotted (computed as above) to be cancelled.

D. Sanctioned scheme to be modified as above by issue of directions under Section 392 of the Companies Act, 1956."

**14.** The Learned Senior Advocate appearing for the original Petitioner has made the following submissions:

**14.1** SEBI does not have locus to intervene in a Scheme Petition under Sections 391-394 of the Companies Act, 1956. The judgement in the case of *Sahara India Real Estate Corporation Ltd. and others vs. SEBI*[1] does not

1 (2013) 1 SCC 1

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confer any such locus upon SEBI. On the contrary, the binding judgments of this Court in *Securities & Exchange Board of India vs. Sterlite Industries (India) Limited*[2] *(DB) ("Sterlite"), AVM Capital Services Private Limited*[3] and *Jindal Iron and Steel Co. Ltd. vs. Assistant Commissioner of Income Tax 5(2), Mumbai* [4] hold that SEBI does not have locus to intervene in a scheme matter under Sections 391-394 of the Companies Act, 1956. In fact SEBI's own case as recorded in the judgement in *MCX Stock Exchange Ltd. vs. SEBI*[5]*,* was that SEBI does not have locus in a scheme under Sections 391-394 of the Companies Act, 1956;

**14.2** The present Review Petition is barred by limitation;

**14.3** The present Review Petition is not maintainable since liberty could not have been granted in the absence of any formal defect;

**14.4** The Review Petition suffers from gross delay and laches and hence, even in case of discovery of an alleged constructive fraud at a belated stage, the same may not be sufficient to set aside the judgment;

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2 [2003 (113) Com Cas 273)
3 Unreported decision of this Court dated 12th July, 2012 in Company Scheme Petition No. 670 of 2011
4 Unreported decision of this Court dated 2nd September, 2004 in Company Application No. 123 of 2004
5 (2012) Vol. 114 (2) Bombay Law Reporter 1002

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**14.5** The Assets of Ikisan Ltd. were fairly valued in pursuance of clauses 4.1 and 6.1 of the 2010 Scheme of Merger and the law for the time being in force;

**14.6** The Financial data and projections furnished by the Management was reviewed for reasonableness and consistency by the Independent Experts in the course of the valuation. The allegation of SEBI that Grant Thornton has accepted the projections provided by the management at face value is unfounded and contrary to the GT Report as well as GT's letter dated 22nd July 2013;

**14.7** The valuation exercise was conducted in accordance with well known principles of valuation. Tested against the touchstone of the law laid down by the Supreme Court in the case of ***G.L.Sultania & Anr. Vs SEBI***[6], the Valuation reports are not liable to be set aside or ignored;

**14.8** There has been no suppression of material facts as alleged by SEBI. All necessary disclosures in relation to the 2010 Scheme were made to the concerned authorities / court. All necessary disclosures in relation to the 2011 Composite Scheme were made to the shareholders, Stock Exchanges, Official Liquidator, Regional Director and the concerned authorities / court;

6 (2007) 5 Supreme Court Cases 133

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**14.9** The issues relating to valuation and the alleged unfair advantage / gain made by the Promoters, cannot be gone into by this Court at the instance of SEBI, particularly when the shareholders have after due consideration approved the valuation and the swap ratio;

**14.10** There has been no violation of the Accounting Standards. On the contrary, the valuation and the accounting entries under the 2010 Scheme are in accordance with the applicable Accounting Standards. Without prejudice and in any event, the alleged violation of Accounting Standards in the 2010 Scheme does not affect the swap ratio under the 2011 Composite Scheme. Even Bansi Mehta in its report has not commented upon the swap ratio under the 2011 Composite Scheme. Again without prejudice and assuming whilst denying that there is a violation, the Accounting Standards are merely a norm and a departure therefrom is not completely impermissible as held by this Court in *Hindalco Industries Ltd.*[7] and *Reliance Communication Ltd. vs. Reliance Infratel Limited*[8].

7 (2009) 93 CLA 58 (Bom)

8 2009 Vol. III (8) Bom. LR 3340

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**14.11** The Regional Director and the Official Liquidator, after having perused all relevant papers, have filed their reports with the Andhra Pradesh High Court and the Bombay High Court, stating that the Composite Scheme is not prejudicial to the interest of the shareholders.

**14.12** The withdrawn Review Petition, the present Review Petition and the Affidavit-in-Rejoinder filed by SEBI shows that the case of SEBI has from time to time undergone a substantial change;

**14.13** The concerned stock exchanges, which have been delegated the powers / authority of granting approvals / no objections to schemes under Sections 391-394 of the Companies Act, 1956, have granted their approval to the Composite Scheme. The approvals granted by the concerned stock exchanges being delegates of SEBI, are binding on SEBI and SEBI cannot absolve itself by alleging fraud;

**14.14** The solutions sought to be suggested by SEBI cannot be implemented *inter alia* on account of the same being beyond the scope of Section 392, and in any event amounting to a new commercial bargain to which the shareholders and other stakeholders have not consented.

**15.** The Learned Senior Advocate appearing for SEBI has taken me through the pleadings of SEBI wherein the submissions made by the Petitioner are denied and disputed. The Learned Senior Advocate

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appearing for the Official Liquidator and the Learned Advocate appearing for the Regional Director have submitted that they do not support the contention of SEBI that a fraud has been perpetrated by the Petitioner on this Court through misrepresentation and/or suppression of relevant facts/documents.

**16.** I have considered the pleadings filed by the parties, the oral and written submissions made by them and the case law relied upon by them in support of their submissions.

**17.** The first submission which needs to be dealt with is the submission advanced on behalf of the Petitioner that SEBI does not have locus to intervene in a scheme petition under Sections 391 and 394 of the Companies Act, 1956 ("the Act"). In support of this submission, the Petitioner has relied on the decision of the Division Bench of this court in *Sterlite.* In this case, SEBI as well as the Central Government had challenged the Order of the Learned Single Judge on the ground that the Court had no power to sanction the scheme under Section 391 of the Act and that the Company was required to follow the procedure prescribed by Section 77A of the Act. The scheme was also challenged on the ground that it was unconscionable and unfair to the shareholders and violated the provisions of various laws including the Companies Act. The Division Bench held that SEBI had no right to notice or the right to appear in

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proceedings under Sections 391 and 394 of the Act and therefore held that the Appeal filed by SEBI was not maintainable in law. However, the Division Bench held that the Appeal filed by the Central Government was maintainable as an Appeal under Section 391 (7) of the Act. The relevant observations of the Appeal Court are reproduced hereunder:

> *"First, we will take up the issue of maintainability of the appeal by the SEBI. The Companies Act does not provide for any notice being issued to the SEBI prior to any order being passed under Section 391 or Section 394 of the Companies Act. Even the Securities & Exchange Board of India Act, 1992 does not contemplate any notice to the SEBI or any right of appearance by SEBI in proceedings before this Court in its company jurisdiction including proceedings under Section 391. Section 394A provides for notice to the Central Government and further provides that the court shall take into consideration the representation, if any made to it by the Central Government before passing any order under law of these sections. On plain reading of the provisions of the Companies Act we are unable to appreciate how SEBI would get right of statutory appeal under Section 391 (7) of the Companies Act. Mr. Dada, however, submitted that by virtue of the provisions contained in Section 55A of the Companies Act, SEBI has been empowered to administer the provisions of the sections specified in Section 55A including Sections 77 and 77A. Under Section 621 of the Companies Act SEBI is the appropriate authority to take steps for prosecution of any*

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*offences in regard to matters in respect of which it is the authority for administration. SEBI was, therefore, a necessary party to the proceedings and ought to have been heard before any order was passed. Mr. Dada also submitted that under Section 11A and 11B of SEBI Act. SEBI is the guardian to protect the interest of investors and it is the statutory duty of SEBI to take up any cause where investors interest has been adversely affected and when the SEBI has come to court with specific grievance that the scheme has affected the interest of the investors/ shareholders the court has discretion to grant leave to SEBI to file the appeal.*

*9. We are afraid we cannot accede to the submission of Mr. Dada. Under Section 55A. SEBI has been empowered to administer the provisions of sections specified in Section 55A in so far as they relate to issue of securities, transfer of securities and non-payment of dividend. Merely because the SEBI has been empowered to administer the provisions of Section 77 and 77A, it does not give SEBI any locus in a petition under Section 391 or Section 394. The right to notice under Section 391 proceedings remains with the Central Government under Section 394A The SEBI has not right of notice nor does it have any right to appear in the proceedings under Section 391 and 394A of the Act.*

*11. In so far as the appeal filed by the Central Government is concerned, we feel that the case of the Central Government stands on a different footing. Section 394A was inserted in the Companies Act with the object to enable the*

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*Central Government to study the proposal and raise such objections as it thinks fit in the light of the facts and information available with it and also place the court in possession of certain facts which might not have been disclosed by those who appear before it so that the interest of the investing public at large may be fully taken into account by the court before passing its order. A more liberal approach is required to be adopted in the background of objective of the legislature in enacting Section 394A. The Central Government has the statutory duty and interest to see that the interest of the investing public should be protected and that laws are not violated. Section 394 A enjoins the Court to take into consideration the representation, if any, made to it by the Central Government before passing any orders under Section 291 or 394. If the decision of the company court, according to the Central Government is contrary to the law or it is of the opinion that sanctioning of the scheme of arrangement would adversely affect the interest of the investing public at large the Central Government can be said to be aggrieved person to safe guard the interest of the investing public and can maintain an appeal under Section 391 (7).”*

**18.** A Special Leave Petition was filed by SEBI challenging the above order of the Division Bench of this Court, holding that SEBI had no right to notice or to appear in proceedings under Sections 391 and 394A of the Act. SEBI urged before the Hon'ble Supreme Court that though certain

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submissions made by SEBI were recorded by the Division Bench of this Court, the Division Bench failed to deal with the said submissions and came to the conclusion that SEBI had no right to notice or the right to appear in proceedings under Sections 391 and 394A of the Act. The Hon'ble Supreme Court refused to interfere with the order and judgment of the Division Bench of this Court. However, the Hon'ble Supreme Court observed thus:

> "....i*t will be open to the SEBI to raise these submissions in an appropriate case before the appropriate forum and it will be open to the forum to consider these questions in the light of the legal provisions which are sought to be relied upon on behalf of the SEBI. We make it clear that we have not gone into the merits of the issue involved in these Appeals".*

In my view, while it was left open to SEBI to assert its locus in proceedings under Section 391 to 394 "in an appropriate case before an appropriate forum", the Hon'ble Supreme Court did not reverse the view taken by the Division Bench of this Court in *Sterlite*. On the contrary, the Hon'ble Supreme Court made it explicit that they have "not gone into the merits of the issue…" As such, in my view, the Judgment of the Division Bench in *Sterlite* continues to be binding on this Court. It is pertinent to note that the decision of the Hon'ble Supreme Court is dated 22nd February, 2006. Thereafter in the last nine years, SEBI has, prior to the

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present Review Application, not raised the submissions with regard to which liberty was granted by the Hon'ble Supreme Court to SEBI to so raise. Instead, immediately after the *Sterlite* Judgment, SEBI, vide its Circular dated 8th May, 2003 bearing No. SEBI/SMD/Policy/List/Cir-17/2003, introduced Clause 24 (f) in the Listing Agreement thereby authorizing the relevant Stock Exchanges with whom the shares of the Company are listed i.e. the BSE and NSE in the present case, to grant approval, by issuing no objection certificates to schemes under Sections 391-394 of the Companies Act,1956. In fact, as recorded in paragraph 34 (xvii) of the judgment of the Division Bench of this Court in *MCX Stock Exchange Ltd. (supra) dated* 14th March, 2012, SEBI made a submission that a scheme under Section 391 binds the creditors and shareholders and cannot bind SEBI **which does not in any event have locus in a Section 391 Petition**. By Circular dated 4th February, 2013 bearing No. CIR/CFD/DIL/5/2013 SEBI issued revised requirements for the Stock Exchanges and listed Companies under the said revised terms. Under the said revised terms, listed Companies desirous of undertaking a Scheme of Arrangement under Chapter V of the Companies Act, 1956 are required to file the Draft Scheme with the Stock Exchanges in terms of Clause 24 (f) of the Listing Agreement. Along with the same, the Listed Companies are also required to submit various documents. These

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documents are mentioned in para 2 of Part A of Annexure 1 to the Circular issued to the Stock Exchanges. Such Listed Companies are also required to place before its Audit Committee the Valuation Report obtained from an Independent Chartered Accountant. It is provided that the Audit Committee shall thereafter furnish a report recommending the Draft Scheme, taking into consideration the said valuation report. By the said circular, the Stock Exchanges also have to fulfil certain obligations including forwarding their Objection/No Objection letter along with the draft scheme to SEBI. It is further provided in the Circular that SEBI shall upon receipt of the objection/no objection letter from the Stock Exchanges provide its comments on the draft scheme to the Stock Exchanges. It is also provided in the circular that approval of the shareholders to the Scheme shall also be obtained through postal ballot and e-voting.

**19.** Again admittedly SEBI had prior to the approval and sanction of the composite scheme by this Court received a complaint dated 5th April, 2011 on 18th April, 2011 from a shareholder alleging that the proposed implementation of the Scheme would be detrimental to and would result in a total loss of Rs. 862.66 crores to the equity shareholders of NFCL. The Chairman, SEBI was requested to intervene and take

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appropriate remedial action to safeguard the interest of small public investors. However, SEBI despite its claim to have wide powers to intervene and act in the interest of the investors/shareholders of a Company, did not bother to take any action on the complaint and forwarded the same to the BSE to look into it. SEBI has in its plethora of pleadings nowhere mentioned as to whether it thereafter followed up with the BSE or at least sought the say of the BSE on the said complaint. In fact, it appears that not having any explanation for its callous conduct, SEBI has preferred to make an incorrect statement in para 17 of the above Application for review viz. that the Complaint was received by SEBI only after SEBI had already started investigations in the matter i.e. after 13th December, 2011, though SEBI had received the same much prior to this Court granting sanction to the Composite Scheme of 2011.

**20.** To overcome the above difficulties, SEBI has relied on paragraphs 66, 67, 78, 141, 296 and 303 of the decision of the Hon'ble Supreme Court in the case of *Sahara* (supra) wherein the Hon'ble Supreme Court has inter alia observed that SEBI has very wide powers to take any actions/steps necessary for investor protection and for the development and regulation of the securities market and that SEBI's powers are not fettered by any other law including the Companies Act. SEBI has

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submitted that since the Division Bench in *Sterlite* (supra) did not consider the powers conferred under the SEBI Act, particularly Sections 11, 11A and 11B and was concerned only with the provisions of Section 55A of the Act, *Sterlite* is no longer good law after the decision in *Sahara India* (supra). SEBI has submitted that even if the Division Bench judgment were to be still treated as good law, it is restricted to a scenario de hors the SEBI Act, 1992. *Sterlite* involved a case where SEBI sought to file an appeal in a pending proceeding, and it did not concern a case of SEBI (as regulator and guardian of investors) bringing acts of fraud and suppression by a party to the attention of a Court.

**21.** In my view, the observations of the Hon'ble Supreme Court in the case of *Sahara India* (supra) are general in nature. While the Supreme Court has observed that SEBI has very wide powers to take any action/step necessary for investor protection and for the development and regulation of the Securities Market, the observations in the *Sahara* Judgment cannot be construed to have overruled the categorical finding of the Division Bench of this Court in the *Sterlite* case that SEBI cannot, as a matter of right, be heard in all scheme petitions coming up before the Court under Section 391 of the Act. Therefore the decision of the Hon'ble Division Bench in the *Sterlite* case, in my view, holds the field on

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this aspect and it cannot be said that the said finding has been set aside by the Hon'ble Supreme Court.

**22.** SEBI has also submitted that by virtue of the provisions contained in Section 392 of the Companies Act, SEBI has locus to file the present review petition inasmuch as the Court has *suo motu* powers by virtue of Section 392 of the Companies Act to pass appropriate orders for the proper working of a Scheme. I am not in agreement with the submission advanced on behalf of SEBI. Section 392 of the Companies Act expressly provides that a modification to a Scheme can only be made for the proper working of a scheme and that such modifications cannot alter the basic fabric of the Scheme. The said position has been expressly clarified by the Hon'ble Supreme Court in the case of *S.P. Gupta* vs. *K.P. Jain*[9] which judgment has been followed/confirmed by the Hon'ble Supreme Court in the case of *Reliance Natural Resources Ltd. vs. Reliance Industries Ltd.*[10]. In fact in the case of *Reliance*, the Hon'ble Supreme Court has emphasized that even before a court could embark upon a mission of suggesting modifications, it has to first determine what modifications are necessary in order to make the compromise or

9 [ 1979 (3) SCC 54]

10 [2010 (156 Comp. Cas 455]

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arrangement workable. The Hon'ble Supreme Court has further held that "before any such determination the Court has to first arrive at a conclusion that the Scheme has become unworkable in its entirety or in a portion thereof". In my view, the two alternative "solutions" suggested by SEBI amount to imposing a new commercial bargain on the shareholders and other stakeholders which has not been consented to by them and do not fall within the scope of S.392 of the Companies Act.

**23.** It is further contended by SEBI that by virtue of Rule 6 of the Companies (Court) Rules, 1959, the provisions of the Code of Civil Procedure, 1908 apply to proceedings under the Companies Act, 1956. It is therefore submitted that pursuant to the provisions of Sections 114 and 151 of the Code of Civil Procedure, 1908 and order 47 of the CPC, this Court has the power to review/recall its orders. As correctly submitted on behalf of the original Petitioner, assuming that the provisions of the Code of Civil Procedure, 1908 with regard to the filing of Review Petitions do apply, it is only a 'person aggrieved' by an order who can file a review petition. SEBI cannot claim to be a person aggrieved. If SEBI has no locus to appear in a Scheme Petition, SEBI can hardly be a "person aggrieved" who would be entitled to file a Petition seeking a review/recall of the order sanctioning the scheme. Again as set

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out hereinabove, SEBI having failed to look into the complaint of the Shareholder, which was received prior to this Court having sanctioned the composite scheme by its Order dated 17th June, 2011, can hardly be heard to claim that it is an aggrieved party.

**24.** The original Petitioner is also correct in submitting that the review petition filed by SEBI is barred by the law of limitation. SEBI had admittedly received a Complaint dated 5th April, 2011 from a shareholder of NFCL on 18th April, 2011 which complaint was forwarded by SEBI to BSE to look into the same. It appears that SEBI thereafter did not take any follow up action on the complaint and allowed this Court to approve the Scheme by its order dated 17th June, 2011. SEBI allegedly sought a report from Bansi Mehta only after SEBI received an application dated 13th December, 2011 from the BSE for exempting NFCL from the applicability of Rule 19 (2) (b) of the SCRA, as more particularly set out in paragraph (j) above. SEBI received the report from Bansi Mehta dated 25th September, 2012 but filed the review petition only on 21st February, 2013 which is well beyond the statutory period of 30 days.

**25.** Despite all these factors being against SEBI, however, only since SEBI has contended that there is a fraud perpetrated on this Court by

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NFCL and others and in my view attention of the Court can be drawn by any person/entity to an alleged fraud perpetrated on the Court, I have decided to examine whether SEBI is in possession of any material to establish that the orders dated 17th June, 2011 and 22nd July, 2011 have been obtained by suppression of facts thereby perpetrating a fraud on this Court and whether the orders therefore deserve to be recalled or set aside.

**26.** In order to decide whether the parties have as alleged by SEBI not disclosed the relevant facts but have suppressed the same from their shareholders or from the BSE/NSE or from the Regional Director or the Official Liquidator or this Court, thereby committing a fraud as alleged, the relevant material disclosures made prior to obtaining the orders in respect of the 2010 Scheme and the 2011 composite scheme need to be considered.

A. <u>DISCLOSURES MADE PERTAINING TO THE 2010 SCHEME.</u>

**27.** As stated hereinabove, under the 2010 Scheme, the erstwhile Ikisan Limited (unlisted transferor company) was merged into City Pulse Properties Limited (unlisted transferee company).

**27.1** On 23rd February, 2010 and 24th February, 2010, the Board of Directors of City Pulse and the Board of Directors of erstwhile Ikisan

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respectively passed a resolution approving the 2010 Scheme.

**27.2** On 25th June,2010, City Pulse filed Company Summons for Direction No. 465 of 2010 before this Court. In compliance with Rules 67 to 87 of the Companies (Court) Rules, 1959, and in compliance with the specific requirements prescribed in a checklist of the Company Registrar of this Court, along with the said Company Summons for Direction, the following documents were submitted:

**(i)** Memorandum of Association and Articles of Association of City Pulse and erstwhile Ikisan;

**(ii)** Audited accounts as on 31 March 2009 of City Pulse and erstwhile Ikisan;

**(iii)** Unaudited accounts as on 31 March 2010 of City Pulse;

**(iv)** Unaudited (provisional) accounts as on 31 March 2010 of erstwhile Ikisan;

**(v)** 2010 Scheme of Amalgamation;

**(vi)** Board resolution dated 23 February 2010; and

**(vii)** Consent letters of the equity shareholders (according their approval to the 2010 Scheme).

**27.3** The 2010 Scheme had, inter alia, the following provisions:

The provisional unaudited accounts of Ikisan clearly reflected that whereas in 2009 the value of the trademarks and customer contracts of erstwhile Ikisan (pre 2010 Scheme) were shown as Nil, in the provisional

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unaudited accounts of Ikisan for the year ended 31st March, 2010, trademarks and customer contracts were shown at their fair value of Rs. 36.4 crores and Rs. 18.2 crores respectively.

**27.4** On 25th June, 2010, the erstwhile Ikisan also filed Company Summons for Direction No. 464 of 2010 before this Court. Along with the said Company Summons for Direction, the erstwhile Ikisan submitted the following documents:

(i) 2010 Scheme of Amalgamation;
(ii) Board Resolution dated 24 February, 2010;
(iii) Consent letters of equity shareholders (according their approval to the 2010 Scheme);
(iv) List of unsecured creditors; and
(v) Consent letter of the unsecured creditor (according its approval to the 2010 Scheme).

**27.5** The erstwhile Ikisan had filed Company Summons for Direction No. 464 of 2010 in compliance with Rules 67 to 87 of the Companies (Court) Rules, 1959 and in compliance with the specific requirements (prescribed in a checklist) of the Company Registrar of this Court. As per practice Note 26 of this Court, documents such as audited and unaudited accounts of the concerned companies are required to be filed only along

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with the Company Summons for Direction of the Transferee Company (i.e. City Pulse in the instant case).

**27.6** On 2nd July, 2010, this Court passed orders in Company Summons for Direction No. 464 of 2010 and Company Summons for Direction No. 465 of 2010 dispensing with holding meetings of equity shareholders, secured creditors and unsecured creditors.

**27.7** On 2nd July, 2010, City Pulse filed Company Scheme Petition No. 393 of 2010 before this Court. Along with the said Scheme Petition, the following documents were submitted:

**(i)** Memorandum of Association and Articles of Association of City Pulse and erstwhile Ikisan;
**(ii)** Audited accounts as on 31 March 2009 of City Pulse and erstwhile Ikisan;
**(iii)** Unaudited accounts as on 31 March 2010 of City Pulse;
**(iv)** Unaudited (provisional) accounts as on 31 March 2010 of erstwhile Ikisan;
**(v)** 2010 Scheme;
**(vi)** Board resolution dated 23 February 2010;
**(vii)** Order dated 02 July 2010.

The provisional unaudited accounts for the year ended March 31, 2010 of erstwhile Ikisan therefore clearly reflects that in 2009 the value of the trademarks and customer contracts of erstwhile Ikisan (pre the 2010

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Scheme) were Nil, whereas in the provisional unaudited accounts of Ikisan for the year ended 31 March 2010, trademarks and customer contracts were shown at their fair value at Rs. 36.4 crores and Rs.18.2 crores, respectively.

**27.8** On 2nd July, 2010, the erstwhile Ikisan also filed Company Scheme Petition No. 392 of 2010 before this Court. Along with the said Company Scheme Petition, the following documents were submitted:

**(i)** 2010 Scheme;

**(ii)** Board Resolution dated 24 February 2010; and

**(iii)** Order dated 02 July 2010.

**27.9** On 9th July, 2010, this Court in Company Scheme Petition No. 393 of 2010 (filed by Citypulse) passed an order admitting the Petition and fixing 13th August, 2010 as the date for final hearing of the petition, and *inter alia* directing that notice for hearing of Company Scheme Petition No. 393 of 2010 be:

**(i)** served on the Regional Director, Western Region, Ministry of Corporate Affairs Mumbai, Maharashtra pursuant to Section 394A of the Companies Act, 1956;

**(ii)** served on the concerned Registrar of Companies;

**(iii)** served by R.P.A.D. upon all its Unsecured Creditors; and

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**(iv)** published in the Free Press Journal in English and the Maharashtra Times in Marathi, both circulated in Mumbai.

**27.10.** On 9th July, 2010, this Court in Company Scheme petition No. 392/2010 (filed by the erstwhile Ikisan) also passed an order admitting the petition and fixing 13 August 2010 as the date for final hearing of the petition and *inter alia* directing that notice for hearing of Company Scheme Petition No. 392 of 2010 be:

**(i)** served on the Regional Director, Western Region, Ministry of Corporate Affairs Mumbai, Maharashtra pursuant to Section 394A of the Companies Act, 1956;

**(ii)** served on the concerned Registrar of Companies;

**(iii)** served on the Official Liquidator, High Court, Bombay pursuant to section 394 (1) of the Companies Act,1956; and

**(iv)** published in the Free Press Journal in English and the Maharashtra Times in Marathi, both circulated in Mumbai.

**27.11** In Compliance with the Order dated 9th July, 2010, City Pulse and erstwhile Ikisan submitted a copy of Company Scheme Petition Nos. 392 and 393 of 2010 along with all annexures thereto to the Regional Director, Western Region, the Registrar of Companies, the Official

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Liquidator and to the Ministry of Law and Justice. The documents furnished included, inter alia, the following:

**(i)** a copy of e-form – 61 (i.e. copy of petition filed with Registrar of Companies), Valuation Report, certified audited accounts along with directors' and auditors' report of the erstwhile Ikisan for the last five years, certified audited statement of accounts along with the directors' and auditors' report of City Pulse for the last 2 years, list of shareholders along with shareholding of Ikisan and City Pulse, list of directors of Ikisan and City Pulse, Company Summons for Direction Nos. 464 and 465 of 2010 and affidavits of service of Ikisan and City Pulse to the Regional Director;

**(ii)** a copy of Company Scheme Petition Nos. 392 and 393 of 2010 along with all annexures thereto to the Registrar of Companies;

**(iii)** a copy of Company Scheme Petition Nos. 392 and 393 of 2010 along with all annexures thereto to the Official Liquidator;

**(iv)** a copy of the audited financial accounts for the period 01 April 2004 to 31 March 2009 of erstwhile Ikisan were also forwarded to the Official Liquidator; and

**(v)** a copy of Company Scheme Petition Nos. 392 and 393 of 2010 to the Ministry of Law and Justice;

Further, public notices were issued giving notice of the final hearing of the Petition.

**27.12** On 27th August, 2010, this Court sanctioned the 2010 Scheme. The 2010 Scheme was sanctioned after taking into account the

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clearance/no objection given by the Regional Director and the Official Liquidator. The clearance/no-objection given by the Regional Director and the Official Liquidator is recorded in the order dated 27 August 2010 of this Court sanctioning the 2010 Scheme which states as follows:

> "*5. Save and except as stated in para 6(a) & 6(b) it appears that the scheme is not prejudicial to the interest of the shareholders and public.*
>
> *7. The Official Liquidator has filed a report in Company Scheme Petition No. 392 of 2010 stating therein that the affairs of the Transferor Company has been conducted in a proper manner and that the Transferor Company may be ordered to be dissolved.*"

**27.13** On 8th September, 2010, the Scheme was made effective. City Pulse and erstwhile Ikisan filed e-form 21 with the Registrar of Companies.

**28.** From the aforestated facts it is established that City Pulse and/or erstwhile Ikisan has not suppressed any document containing any relevant fact from its shareholders, the Registrar of Companies, the Regional Director i.e. the Ministry of Law and Justice, the Official Liquidator, and this Court. It is pertinent to note that the unaudited accounts for the year ended March 31, 2010 of erstwhile Ikisan were

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placed before all concerned including this Court which, inter alia, clearly reflects that whereas in 2009 the value of the trademarks and customer contracts of erstwhile Ikisan (pre 2010 Scheme) were shown as Nil, in the provisional unaudited accounts of Ikisan for the year ended 31st March, 2010, trademarks and customer contracts were shown at their fair value at Rs. 36.4 crores and Rs. 18.2 crores respectively. It is further pertinent to note that as erstwhile Ikisan and City Pulse were unlisted Companies, approval of the Stock Exchanges were not required to be sought. This Court has also noted that though SEBI has strongly criticized the Grant Thornton Report dated 24th June, 2010 (the first GT Report) on the alleged ground that it has violated the accounting standards , which report was called for by SEBI from the original Petitioner and a copy whereof was forwarded to SEBI prior to SEBI filing the Review Application, SEBI has in the Review Application chosen not to seek recall/review of the order sanctioning the 2010 Scheme.

## B. DISCLOSURES MADE UNDER THE 2011 COMPOSITE SCHEME.

**29**. As stated hereinabove, the 2011 Composite Scheme of Arrangement was between the erstwhile Nagarjuna Fertilizers & Chemicals Ltd. ("erstwhile NFCL"), Nagarjuna Oil Refineries Limited ("NORL"), Kakinada Fertilizers Limited ("KFL") and Ikisan Limited

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("Ikisan") .

**B-1. <u>Disclosures in the 2011 Composite Scheme filed by erstwhile NFCL before the Andhra Pradesh High Court.</u>**

**29.1** On 6th January, 2011, the Company informed the Bombay Stock Exchange ("**BSE**") and National Stock Exchange ("**NSE**") that a meeting of the Board of Directors of the Company will be held on 10th January 2011, to consider and approve the 2011 Composite Scheme.

**29.2** On 10th January, 2011, the Board of Directors passed a resolution approving the 2011 Composite Scheme after considering the valuation Report of Grant Thornton dated 06 January 2011 (Second GT Report) and the fairness opinion of Keynote in respect of the share exchange ratio dated 07 January 2011. Board of directors of erstwhile NFCL informed BSE and NSE of such board's approval.

**29.3** On 27th January, 2011, erstwhile NFCL applied to BSE and NSE under Clause 24(f) of the Listing Agreement for approval to the 2011 Composite Scheme. As per BSE and NSE requirements, *inter alia* the following details/documents (as specified in the checklist available on the BSE and NSE websites at the relevant time) were provided along with the clause 24(f) application:

**(i)** Board Resolution dated 10 January 2011;

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**(ii)** Draft 2011 Composite Scheme approved by the Board;

**(iii)** Rationale of the 2011 Composite Scheme;

**(iv)** Brief details of Ikisan, erstwhile NFCL, KFL and NORL (*in the format prescribed by BSE and NSE*);

**(v)** Grant Thornton's Valuation Report setting out the share exchange ratio dated 06 January 2011;

**(vi)** Keynote's fairness opinion setting out the share exchange ratio dated 07 January 2011;

**(vii)** Auditor's Certificate under Clause 24(i) of the Listing Agreement certifying the accounting treatment;

**(viii)** Shareholding pattern of KFL and NORL pre and post the 2011 Composite Scheme as required under clause 35 of the Listing Agreement;

(**ix)** Shareholding pattern of erstwhile NFCL and Ikisan pre the 2011 Composite Scheme as required under clause 35 of the Listing Agreement;

**(x)** Capital evolution details of Ikisan, erstwhile NFCL, KFL and NORL;

**(xi)** 3 years financials (i.e. year ended 2010, 2009 and 2008) of Ikisan, erstwhile NFCL, KFL and NORL;

**(xii)** Details of directors of Ikisan, erstwhile NFCL, KFL and NORL pre and post the 2011 Composite Scheme;

**(xiii)** Details of cross-holding between companies;

**(xiv)** Provisional pre and post 2011 Composite Scheme Networth certificate for Ikisan, erstwhile NFCL, KFL and NORL.

**29.4** On 15th/22nd February, 2011, NSE and BSE granted approval

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under Clause 24 (f) to the 2011 Composite Scheme.

**29.5** On 24th February, 2011, erstwhile NFCL filed Company Application No. 178 of 2011 before the Andhra Pradesh High Court enclosing therewith the following documents :

**(i)** Memorandum of Association and Articles of Association of KFL, Ikisan, erstwhile NFCL and NORL;

**(ii)** 2011 Composite Scheme duly approved by the Board, NSE and BSE;

**(iii)** Board resolution dated 10 January 2011;

**(iv)** Audited accounts as on 31 March 2010 of KFL, Ikisan and erstwhile NFCL;

**(v)** Clause 24(f) approval of BSE and NSE;

**(vi)** List of secured creditors of erstwhile NFCL.

**29.6** On 4th March, 2011, the Hon'ble Andhra Pradesh High Court passed an order in Company Application No. 178 of 2011 *inter alia* directing:

**(i)** That a meeting of the equity shareholders of erstwhile NFCL be convened and held on 15 April 2011;

**(ii)** At least 21 days before the day of the court convened meeting, an advertisement convening the same and stating that copies of the said arrangement and explanatory statement under Section 393 of the Companies Act, 1956 can be obtained at the registered office of the company or at the

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office of its advocate, shall be issued in English in "Hindu" and in Telugu in "Eenadu";

**(iii)** At least 21 days before the day of the court convened meeting a notice convening the meeting together with an explanatory statement under Section 393 of the Companies Act, 1956 shall be sent by prepaid letter post under certificate of posting to each member and an affidavit of service of notices shall be filed as per Rule 74 of the Company (Court) Rules, 1959;

**(iv)** Advocate for the Company to file, within 30 days, the form of advertisement, the notice along with the explanatory statement and that the same shall be settled by the Registrar of the Andhra Pradesh High Court;

**(v)** Chairman of the court convened meeting shall issue advertisement and send out the notices;

**(vi)** Quorum for the meeting shall be 25 members present in the meeting, either in person or through proxies;

**(vii)** Value of each member shall be in accordance with the books of erstwhile NFCL and where the entries are disputed the Chairman shall determine the value for the purpose of the meeting;

**(viii)** The Chairman's report to be filed on or before 20 April 2011 as per Rule 78 of the Company (Court) Rules, 1959;

**(ix)** Dispensation from holding meeting of the secured creditors of the company;

**(x)** Dispensation from holding meeting of the unsecured creditors.

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**29.7** In compliance with the order dated 04 March 2011:

**(i)** Notice (of the Court convened meeting of the members of the erstwhile NFCL) along with explanatory statement under Section 393 of the Companies Act, 1956 was issued to all shareholders which disclosed/ provided the following:

**(a)** background of erstwhile NFCL, KFL, NORL and Ikisan;

**(b)** the reasons which necessitated the 2011 Composite Scheme and the benefits of the arrangement as proposed in the 2011 Composite Scheme;

**(c)** the effect of the 2011 Composite Scheme *vis-à-vis* the financial position and the rights and interests of the creditors and the shareholders;

**(d)** salient features of the 2011 Composite Scheme;

**(e)** the pre-2011 Composite Scheme shareholding pattern of the erstwhile NFCL;

**(f)** the pre-2011 Composite Scheme shareholding pattern of Ikisan;

**(g)** the pre and post- 2011 Composite Scheme shareholding pattern of NORL;

**(h)** the pre and post- 2011 Composite Scheme shareholding pattern of KFL;

**(i)** directors interest;

**(j)** the shareholding of the directors of the erstwhile NFCL in the Erstwhile NFCL, NORL, Ikisan and KFL, either singly or jointly or as a nominee;

**(k)** approval under Clause 24(f) of the Listing Agreement obtained from BSE and NSE;

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**(l)** the swap ratio and that it is based on the GT Report and that Keynote has provided its fairness opinion; and

**(m)** the following documents were made available for inspection upto 14 April 2011:

***(i)*** Order dated 04 March 2011 of the Andhra Pradesh High Court;

***(ii)*** 2011 Composite Scheme;

***(iii)*** Memorandum of Association and Articles of Association of erstwhile NFCL, KFL, Ikisan (which included a copy of the entire 2010 Scheme) and NORL;

***(iv)*** audited financial statements of erstwhile NFCL and KFL as on 31 March 2010, 2009 and 2008;

***(v)*** audited financial statements of Ikisan as on 31 March 2010 and 2009;

***(vi)*** unaudited financial statements of the erstwhile NFCL, KFL, Ikisan and NORL as on 31 December 2010;

***(vii)*** No-objection certificates of NSE and BSE under clause 24(f) of the Listing Agreement;

***(viii)*** capital structure of the erstwhile NFCL, KFL, Ikisan and NORL pre and post the 2011 Composite Scheme;

***(ix)*** Valuation Report of M/s Grant Thornton setting out the share exchange ratio; and

***(x)*** Fairness Opinion of Keynote setting out the share exchange ratio.

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All necessary disclosures/ information as required under Section 393 of the Companies Act, 1956 and Clause 24(h) of the listing agreement were provided in the notice to the shareholders.

**(ii)** Public notice issued by the Chairman of the court convened meeting in Hindu (English) and Eenadu (regional language) informing that the court convened meeting will be held on 15 April 2011 and stating that copies of the 2011 Composite Scheme and the explanatory statement will be made available .

**(iii)** The copies of the public notices were forwarded to BSE and NSE on 28 March 2011.

**(iv)** Court convened meeting chaired by Mr. B. Satya Sivaji, an Advocate appointed by the Andhra Pradesh High Court, was held on 15th April 2011, when members of erstwhile NFCL considered and approved the 2011 Composite Scheme with 99.83% in number and 89.45% in value. Quorum was 583 (338 in person and 245 by proxy), i.e. more than the quorum of 25 prescribed by the Court.

**(v)** Erstwhile NFCL informed BSE and NSE that the 2011 Composite Scheme was approved by requisite majority of the members at the Court convened meeting.

**(vi)** Chairman prepared his Report (*Ex P12 @ pg. 479 of Company Petition No. 72 of 2011*) and filed the same with the Andhra Pradesh High Court.

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**29.8** On 19th April, 2011, erstwhile NFCL filed Company Petition No. 72 of 2011 before the Andhra Pradesh High Court enclosing therewith the following documents :

**(i)** 2011 Composite Scheme duly approved by the Board, NSE and BSE;

**(ii)** Memorandum of Association and Articles of Association of KFL, Ikisan , erstwhile NFCL and NORL;

**(iii)** Annual Report for 2009-2010 of KFL, Ikisan and erstwhile NFCL;

**(iv)** Unaudited balance sheet of NORL as on 31 December 2010;

**(v)** Board resolution dated 10 January 2011;

**(vi)** Order dated 04 March 2011;

**(vii)** Chairman's Report (without annexures);

**(viii)** List of secured creditors;

**(ix)** Clause 24(f) approval of BSE and NSE.

**29.9** In compliance with the order dated 26th April, 2011:

**(i)** E-Form 61 was filed with the Registrar of Companies, Andhra Pradesh enclosing the notice of hearing, a copy of the Petition and the Valuation Report.

**(ii)** Copy of the Petition along with material papers and notice of hearing was filed with the Regional Director, Southern Region, Chennai.

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**(iii)** Copy of the petition along with relevant information (as required by the Official Liquidator including Valuation Report) was filed with the Official Liquidator, High Court of Andhra Pradesh.

**(iv)** Erstwhile NFCL issued public notice in Hindu and Eenadu giving notice of the final hearing of the Petition and stating that a copy of Company Petition No. 72 of 2011 can be obtained and that any person desirous of opposing the sanction of the 2011 Composite Scheme should send to the Counsel of the company, a notice of his intention to oppose not later than 2 days before the date fixed for hearing of the petition.

**29.10** On 26th June, 2011, the Andhra Pradesh High Court sanctioned the 2011 Composite Scheme (after taking into account the clearance/no-objection given by the Regional Director and the Official Liquidator). The clearance/no-objection given by the Regional Director and Official Liquidator is recorded in the order dated 26 June 2011 of the Andhra Pradesh High Court sanctioning the 2011 Composite Scheme which states as follows:

> "*The Official Liquidator placed on record his report on Company Petition No. 72 of 2011. It is stated in the report that the affairs of NFCL appears to have not been conducted in a manner prejudicial to the interests of the members or to the public interest.*
>
> …

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*The only objection taken by the Registrar of companies is that NOC has not been obtained from the secured creditors…In view of the letter the objection of the Registrar of Companies has been complied with by the petitioners.*

*From the material on record, the scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to the public policy.*

*Having considered the report of the Registrar of Companies and Official Liquidator and there being no opposition from any quarter for the proposed scheme and as all the statutory compliances have been fulfilled, I do not see any impediment in granting sanction to the composite scheme of arrangement and amalgamation as proposed by the petitioners."*

**B-2. <u>Disclosures in 2011 Scheme filed by Kakinada Fertilizers Ltd. (KFL) and Ikisan Limited before this Court.</u>**

**30.1** On 10th January, 2011, the Board of Directors of KFL and the Board of Directors of IKISAN passed Resolutions approving the 2011 Composite Scheme.

**30.2** On 17th February, 2011, KFL filed Company Summons for Direction No. 126 of 2011 before this Court enclosing therewith the following documents :

**(i)** Memorandum of Association and Articles of Association of KFL, erstwhile NFCL, Ikisan and NORL (the order dated 27th August,

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2010 approving the 2010 Scheme was appended to the Memorandum and Articles of Association of Ikisan).

**(ii)** Audited accounts as on 31 March 2010 of KFL, erstwhile NFCL and Ikisan;

**(iii)** Unaudited accounts as on 31 September 2010 of erstwhile NFCL;

**(iv)** Unaudited accounts as on 31 December 2010 of KFL, Ikisan and NORL;

**(v)** 2011 Composite Scheme;

(**vi)** Board resolution dated 10 January 2011;

**(vii)** List of equity shareholders;

**(viii)** Consent letters of the equity shareholders (according their approval to the 2011 Composite Scheme).

**30.3** On 17th February, 2011 Ikisan filed Company Summons for Direction No. 125 of 2011 before the Bombay High Court enclosing therewith the following documents :

**(i)** 2011 Composite Scheme;

(**ii)** Board Resolution dated 10 January 2011;

**(iii)** List of equity shareholders;

**(iv)** Consent letters of equity shareholders (according their approval to the 2011 Composite Scheme);

**(v)** List of secured creditors;

**(vi)** List of unsecured creditors.

**30.4** On 25th February, 2011, this Court passed orders in Company Summons for Direction No. 126 of 2011 filed by KFL and Company

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Summons for Direction No. 125 of 2011 filed by Ikisan dispensing with holding meetings of equity shareholders, secured and unsecured creditors of KFL and Ikisan respectively.

**30.5** On 7th March, 2011, KFL filed Company Scheme Petition No. 235 of 2011 before this Court enclosing therewith the following documents :

**(i)** Memorandum of Association and Articles of Association of KFL, erstwhile NFCL, Ikisan and NORL;

**(ii)** Audited accounts as on 31 March 2010 of KFL, erstwhile NFCL and Ikisan;

**(iii)** Unaudited accounts as on 31 December 2010 of KFL, Ikisan and NORL;

**(iv)** 2011 Composite Scheme;

**(v)** Board resolution dated 10 January 2011;

**(vi)** Order dated 25 February 2011;

**(vii)** Form of Minutes.

**30.6** On 7th March, 2011, Ikisan filed Company Scheme Petition No. 234 of 2011 before the Bombay High Court enclosing therewith the following documents :

**(i)** 2011 Composite Scheme

**(ii)** Board Resolution dated 10 January 2011;

**(iii)** Order dated 25 February 2011.

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**30.7** On 15th April, 2011, this Court passed an order in Company Scheme Petition No. 235 of 2011 admitting the Petition and fixing 10th June, 2011 for final hearing of the Petition and inter alia directing that notice of hearing of Company Scheme Petition NO. 235 of 2011 be:

**(i)** served on the Regional Director, Western Region, Ministry of Corporate Affairs Mumbai, Maharashtra pursuant to Section 394A of the Companies Act, 1956;

**(ii)** served on the concerned Registrar of Companies; and

**(iii)** published in the Free Press Journal in English and Maharashtra Times in Marathi, both circulated in Mumbai.

**30.8** Again, on the same day i.e. 15th April, 2011, this Court also passed an order in Company Scheme Petition No. 234 of 2011 admitting the Petition and fixing 10th June 2011 for final hearing of the Petition and inter alia directing that notice of hearing of the Company Scheme Petition No. 234 of 2011 be :

**(i)** served on the Regional Director, Western Region, Ministry of Corporate Affairs Mumbai, Maharashtra pursuant to Section 394A of the Companies Act, 1956;

**(ii)** served on the concerned Registrar of Companies;

**(iii)** served on the Official Liquidator, High Court, Bombay pursuant to Section 394 (1) of the Companies Act,1956;

**(iv)** published in the Free Press Journal in English and Maharashtra Times in Marathi, both circulated in Mumbai; and

**(v)** served by R.P.A.D. upon all its secured and unsecured creditors.

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**30.9** In Compliance with the order dated 15th April, 2011, KFL and Ikisan:

**(i)** Submitted a copy of Company Scheme Petition Nos. 234 and 235 of 2011 along with all annexures thereto to the Regional Director. A copy of e-form – 61 (i.e copy of petition filed with Registrar of Companies), Valuation Report, certified audited accounts along with directors' and auditors' report of KFL for the last four years, certified audited statement of accounts along with the directors' and auditors' report of Ikisan for the last three years, list of shareholders along with shareholding of Ikisan and KFL, list of directors of Ikisan and KFL and Company Summons for Direction Nos. 125 and 126 of 2011 were also *inter alia* submitted to the Regional Director;

**(ii)** Submitted a copy of Company Scheme Petition Nos. 234 and 235 of 2011 along with all annexures thereto to the Registrar of Companies;

**(iii)** Submitted a copy of Company Scheme Petition Nos. 234 and 235 of 2011 along with all annexures thereto to the Official Liquidator;

A copy of the audited financial accounts for the period 11 April 2007 to 31 March 20010 of Ikisan were also forwarded to the OL;

**(iv)** Submitted a copy of Company Scheme Petition Nos. 234 and 235 of 2011 to the Ministry of Law and Justice;

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**(v)** KFL and Ikisan issued a public notice in Free Press Journal (English) and Maharashtra Times (regional language), respectively, giving notice of the final hearing of the Petition and stating that a copy of Company Scheme Petition No. 235 of 2011 can be obtained from the Petitioner's Advocates and that any person desirous of opposing the sanction of the 2011 Composite Scheme should send a notice of his intention to oppose not later than 2 days before the date fixed for hearing of the petition;

**(vi)** Ikisan issued notices on 07 May 2011 to Secured and Unsecured Creditors giving notice of the final hearing of the Petition and stating that a copy of Company Scheme Petition No. 234 of 2011 can be obtained from the petitioner's advocates and that any person desirous of opposing the sanction of the 2011 Composite Scheme should send a notice of his intention to oppose not later than 2 days before the date fixed for hearing of the petition.

**30.10** On 17th June, 2011, this Court sanctioned the 2011 Composite Scheme (after taking into account the clearance/no objection given by the Regional Director and the Official Liquidator. The clearance/no objection given by the Regional Director and the Official Liquidator is recorded in the order dated 17th June,2011 of this Court sanctioning the 2011 Composite Scheme which reads thus:

"*4. The Regional Director has filed an affidavit stating therein that save and except as stated in paragraphs 6(a), 6(b)*

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*and 6(c) of the said Affidavit, it appears that the Scheme is not prejudicial to the interest of shareholders.*

*8. The Official Liquidator has filed his report in Company Scheme Petition No.234 of 2011 stating therein that the affairs of the Second Transferor Company have been conducted in a proper manner and that the Transferor Company may be ordered to be dissolved.*"

**30.11** On 22nd July, 2011, Erstwhile NFCL informed BSE and NSE that the 2011 Composite Scheme was approved by the Bombay High Court on 17 June 2011 and the Andhra Pradesh High Court on 27 June 2011. Copies of the certified orders were also forwarded.

**30.12** On 27th July, 2011, BSE and NSE were informed that the Board of Directors of erstwhile NFCL at its meeting held on 27 July 2011, have fixed 01 September 2011 as the Record Date for the purpose of determining the shareholders eligible to receive shares in NORL and KFL, subject to confirmation from the stock exchanges.

**30.13** On 28th July, 2011, erstwhile NFCL forwarded applications to BSE and NSE for fixing 1st September 2011 as the 'Record Date for determining the shareholders eligible to receive shares of NORL and KFL.

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**30.14** On 30th July, 2011, the 2011 Composite Scheme was made effective. Erstwhile NFCL filed e-form 21 with the ROC.

**30.15** On 30th July, 2011, BSE and NSE were informed that the 2011 Composite Scheme was made effective from 30 July 2011.

**31.** It is therefore submitted on behalf of the Petitioner that the aforestated facts belies the allegation of suppression made by SEBI.

**32.** SEBI has submitted that at the time of seeking approval for the 2011 Composite Scheme of arrangement and merger of NFCL, KFL and Ikisan, the following material facts were suppressed:

**(i)** There is no reference made to the 2010 Scheme;

**(ii)** There is no reference made to the merger of Ikisan and City Pulse;

**(iii)** No disclosure is made regarding the methodology adopted to value the intangible assets (trademarks and customer contracts) which are included in the fixed assets;

**(iv)** The information pertaining to the manner in which the intangible assets were valued at Rs. 54.61 crores was not disclosed;

**(v)** The Grant Thornton Valuation Reports (GT Reports) were suppressed from this Court;

**(vi)** Even if the checklist did not require the petitioner to submit the valuation report, it does not exonerate the Petitioner from its duty of candour and good faith. Disclosure of valuation report to the Stock Exchanges cannot relieve the Petitioner of the burden of disclosing all material facts to this Court.

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**(vii)** The response of NFCL to the query raised by the Official Liquidator was misleading and incorrect.

**32.1** However, it is an admitted position that the second GT Report of 2011 was, *inter alia*, submitted to BSE, NSE, the Official Liquidator, Regional Director, etc. and placed for inspection by the shareholders prior to the shareholders approving the scheme.

**32.2** The Petitioner, as required by BSE/NSE, had submitted the GT Valuation Report dated 6th January, 2011, along with its applications dated 27th January, 2011, for obtaining an in-principle approval as required under Clause 24 (f) of the Listing Agreement. The Petitioners are correct in their submission that if there was an intent to suppress the valuation report as alleged, the Respondent would have never submitted the valuation report to the Stock Exchanges.

**32.3** As set out hereinabove, clause 24 (f) of the Listing Agreement was introduced only after the judgment in *SEBI* vs. *Sterlite Industries India Ltd.* (supra) was passed by the Division Bench of this Court holding that SEBI had no right of notice in a scheme matter and that, however, the Central Government would be entitled to notice under Section 394A, the reason being that the Central Government acting through the Regional Director, Department of Company Affairs, submits a report on the

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scheme of arrangement to the Company Court. Hence, it appears that it was in this background that Clause 24(f) was introduced.

**32.4** A perusal of the 8th May, 2003 Circular whereby the Listing Agreement was amended would show that the objective behind insertion of Clause 24(f) was to enable the Stock Exchanges to be able to peruse the schemes so as to be able to check the schemes for violation of securities laws. As submitted by the Petitioner, in the course of granting the Clause 24(f) approval, the Stock Exchanges had: (a) in compliance with Clause 24(i), accepted the certificate of the Statutory Auditors of the erstwhile NFCL, recording that the accounting treatment mentioned in the 2011 Composite Scheme is in compliance with the generally accepted accounting principles and applicable accounting standards notified under Section 211(3C) of the Companies Act, 1956 and that there is no deviation from the same; and (b) examined the valuation report of Grant Thornton including the swap ratio mentioned therein and the fairness opinion of Keynote Corporate Services Ltd. ("Keynote") obtained in compliance of Clause 24(h) of Listing Agreement. The approval granted by the Stock Exchanges after seeing the relevant documents including the valuation report and fairness opinion by the Stock Exchanges also shows that the question of suppression of valuation report or any relevant facts does not arise. SEBI has submitted that the

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grant of approval under Clause 24 (f) of Listing Agreement pertains to listing and does not pertain to the jurisdiction of this Court under Sections 391 -- 394 of the Companies Act, 1956. This submission is disingenuous. The complaint received from a shareholder of NFCL prior to the sanction of the scheme alleged that the proposed implementation of the Scheme would be detrimental and would result in a total loss of Rs. 862.66 crores to the equity shareholders of NFCL. The Chairman, SEBI was requested to intervene and take appropriate remedial action to safeguard the interest of the small public investors. The complaint pertained to the Scheme and the alleged loss likely to be caused to small investors upon the scheme being sanctioned. If the Stock Exchanges were only concerned with the grant of approval for listing under Clause 24 (f) of the Listing Agreement and not with the scheme propounded under the provisions of Sections 391-394 of the Act, as alleged by SEBI, SEBI ought to have investigated the complaint at its own end instead of forwarding the same to the Stock Exchanges and thereafter completely forgetting about the same and allowing NFCL and KFL to obtain sanction of the Courts to the proposed Scheme of Arrangement and Amalgamation. The stand now taken by SEBI is an opportunistic one motivated only by its failure to give timely, indeed any, attention to the Complaint filed by a shareholder.

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**33.** The allegation made by SEBI to the effect that the 2011 Composite Scheme did not make any reference to the 2010 Scheme is not to be found in the pleadings before this Court. In any event, it is SEBI's own case in paragraph 28(iii) of the written submissions that a disclosure regarding the merger of Ikisan and City Pulse was made. The 2011 Scheme Petition not only mentions the fact that the name of City Pulse Properties was changed to Ikisan Limited, but also provides the Memorandum of Association and Articles of Association of Ikisan Limited which contains the order of this Court dated 27th August 2010 approving the 2010 scheme. Again the allegation made by SEBI to the effect that the notes to accounts of Ikisan (post merger) do not make any disclosure with regard to the methodology adopted to value the intangibles is not to be found in the pleadings before this Court. In any event, the audited accounts of Ikisan, which have been submitted with Company Scheme Petition No. 285 of 2011, clearly reflects that in 2009 the value of trademarks and customer contracts (pre 2010 scheme) were nil and that the trademarks and customer contracts in the audited accounts for the year ended 31st March 2010 are recorded at Rs. 36.4 crores and Rs. 18.2 crores at their respective fair values. The allegation of SEBI during the course of oral submissions before this Court was that the 2011 GT Report (Second GT Report) was suppressed from this Court. In its written submissions, SEBI

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has now sought to allege that the 2010 GT Report has been suppressed from this Court. In any event it is well settled that in considering schemes under the provisions of Sections 391 and 394 of the Companies Act, 1956, the Company court does not in ordinary course look into aspects of consideration and valuation. The standard procedures prescribed by this Court do not require the Valuation Report to be submitted before the Court and hence the same had not been filed. Therefore, NFCL has discharged its duty of candour and good faith by placing the second GT report of 2011 before all concerned with the aspects of valuation in accordance with the statutory and regulatory requirement. In my view, from the aforestated facts it is clear that SEBI has not made out any case of suppression or even intent to do so. The material facts which are required to be disclosed in accordance with the practice and procedures of this Court which have been followed in every Scheme Petition have been disclosed by NFCL. The GT Report had been made available to all stakeholders who were entitled to be heard before the Scheme was sanctioned by this Court. None of these stakeholders raised any grievance which this Court was then called upon to address regarding either the valuation or the swap ratio that was determined on the basis of such valuation.

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**34.** SEBI has in support of its case of suppression also sought to place reliance on the response made by NFCL to one of the queries posed by the Official Liquidator. The relevant query posed by the Official Liquidator to the Auditors of NFCL was as under:

> "*12.6 Whether revaluation of assets of the company was made at any time with a view to declare dividends or to misguide the shareholders, creditors etc.?*

According to SEBI, the answer given to the said query viz. *"No revaluation of any assets of the Company was made at any time with a view to declare dividends or to misguide the shareholders, creditors, etc.*" shows the deliberate misreading of the questions posed by the Official Liquidator and the response thereto by the Auditors appointed by the Official Liquidator. It needs to be noted that the questionnaire was not responded to by NFCL but by the Auditors appointed by the Official Liquidator. Again, the query being specific whether there has been any declaration of dividend by Ikisan on account of revaluation of the assets has been correctly answered in the negative inasmuch as since there had in fact been no revaluation of Ikisan, the question of dividend being declared on account of revaluation obviously would not arise.

**35.** It is therefore clear that there was no suppression of any relevant and/or material fact whilst obtaining orders on either the 2010 Scheme

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or the 2011 Scheme. The question therefore of any fraud committed by the Companies which have approached the Court seeking orders on the said Schemes by suppression of facts as alleged does not arise and in fact the Regional Director has, with the exception of certain objections which have been complied with, informed the Court that the Scheme is in the interest of the shareholders of the Company. The question therefore of setting aside the orders sanctioning the Scheme of Arrangement and Amalgamation or sanctioning amendments to the Scheme on the ground of alleged suppression thereby perpetrating a fraud on this Court does not arise.

**36.** SEBI has in its Review Petition not challenged the first G.T. Report but has emphatically submitted that the valuation of intangible assets (trademarks and customer contracts) in the books of Ikisan is contrary to Accounting Standards 14 and 26.

**37.** It is submitted on behalf of the Petitioner:

**(i)** that the relevant Accounting Standard applicable to the 2010 Scheme is Accounting Standard 14 (AS-14). The relevant para of AS-14 which indicates the main principle is the para in bold italic type i.e. para 36 of AS-14.The same reads thus:

"***36. In preparing the transferee company's financial***

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> ***statements, the assets and liabilities of the transferor company should be incorporated at their existing carrying amounts or, alternatively, the consideration should be allocated to individual identifiable assets and liabilities on the basis of <u>their</u> fair values at the date of amalgamation. The reserves (whether capital or revenue or arising on revaluation) of the transferor company, other than the statutory reserves, should not be included in the financial statements of the transferee company except as stated in paragraph 39***"

The fact that para 36 lays down the main principle in bold italic type is clarified by the opening part of AS 14 which reads as under:

> "***This Accounting Standard includes paragraphs set in bold italic type and plain type, which have equal authority. Paragraphs in bold italic type indicate the main principles. This Accounting Standard should be read in the context of the General Instructions contained in part A of the Annexure to the Notification.***"

Para 36 of AS-14 is required to be read in the context of the general instructions contained in para 12 of AS-14. The same is reproduced hereunder:

> "***12. Under the purchase method, the transferee company accounts for the amalgamation either by incorporating the assets and liabilities at their existing carrying***

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***amounts or by allocating the consideration to individual identifiable assets and liabilities of the transferor company on the basis of <u>their</u> fair values at the date of amalgamation. The identifiable assets and liabilities <u>may</u> <u>include assets and liabilities not recorded in the financial</u> <u>statements</u> of the transferor company.***"

**(ii)** that from a reading of the aforesaid main principles along with the general instructions it would be apparent that:

**(a)** The purchase method is what is applicable for the 2010 Scheme;

**(b)** under the purchase method the value of the assets and liabilities being taken over by the transferee company shall be accounted for either at *"existing carrying amounts"* or *"by allocating the consideration to the individual identifiable assets and liabilities at <u>their</u> fair values"*

**(c)** since in the instant case the intangible assets did not have any existing carrying values, their fair values were required to be determined and their consideration had to be allocated accordingly;

**(d)** Besides in para 4.1 read with para 6.1 of the 2010 Scheme itself, it was provided as under:

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*"4.1. With effect from the opening of business as on the Appointed Date, the entire business and whole of the undertaking of the Transferor Company including all its properties and assets (whether movable or immovable, tangible or intangible, whether recorded or not in the books of accounts) of whatsoever nature such as licenses, permits, quotas, approvals, lease, tenancy rights, permissions, incentives, know how, software, databases, user base, customer lists, trademarks, trade names, developed technologies, etc. if any, and all other rights, title, interest, contracts, consent, approvals or powers of every kind nature and descriptions whatsoever shall under the provisions of Sections 391 to 394 of the Act and pursuant to the Orders of the High Court or any other appropriate authority sanctioning this Scheme and without further act, instrument or deed, but subject to the existing charges affecting the same as on the Effective Date be transferred and/or deemed to be transferred to and vested in the Transferee Company so as to become the properties and assets of the Transferee Company.*

*6.1. The Transferee Company shall record all assets and liabilities (as mentioned in clause 4) of the Transferor Company, at their fair values. The Board of Directors of the Transferee Company will have the absolute discretion as to determination of the fair value of any asset of liability"*

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**(e)** Thus the fact that the fair value was ascribed to the intangible assets which were acquired from the Transferor Company by the Transferee Company is in compliance with AS-14 and not in violation of any Accounting Standard.

**(iii)** that the Report dated 25th September 2012 of Bansi S. Mehta & Co. (Exhibit-F, page 184) places reliance on both AS-10 and AS-14 and states, inter alia as under:-

> *"3.3…As stated earlier, it is the consideration that is to be apportioned based on the estimate of the experts of fair values of such assets and liabilities and not fair values of assets and liabilities per se.…"*
>
> "*5.1 The manner in which the assets and liabilities of IKO have been incorporated in the accounts of IKN is patently inconsistent with the requirements under AS-10 and AS-14, whereby what is to be allocated is only the consideration and does not extent to incorporating assets at "fair value". The relevant clause under the Scheme, no doubt, purportedly empowers the Board of Directors to incorporate "fair values". However, neither it is customary for the Court to permit non-compliance with mandatory Accounting Standards nor can it be a fair interpretation of the relevant clause so as to be empowering the Board to relieve itself of any responsibility to ensure compliance with mandatory Accounting Standards. Presumably, similar treatment would have been followed even*

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*by K in recording the assets and liabilities of IKN which would be in the same manner non-compliant with the Accounting Standards."*

**(iv)** that the interpretation given by M/s. Bansi Mehta to AS-14, is unreasonable and would lead to erroneous results. NFCL has specifically dealt with the said aspects in its Affidavit in Reply dated 25th April 2013 in paragraphs 9(p) (v) (page 267) which is reproduced hereunder:

"*(v) If the principles as suggested by BSM are applied, it will give erroneous results because in that scenario, effectively in case of amalgamation, the consideration is always net consideration after taking into account the liabilities that will be transferred pursuant to amalgamation. Further, assuming that it is only the consideration that has to be allocated to the assets and not the fair values of respective assets, then there would be no situation in which goodwill/capital reserve arise pursuant to merger. Further, if the allocation of fair value of the assets and liabilities is restricted to the consideration, then the resultant values of the assets and liabilities would neither be at fair value / acquisition cost or book value as per the financial statements of the transferor companies."*

Significantly, the same has not been dealt with in the Affidavit in Rejoinder filed by SEBI. Though an attempt to deal with the same is made by M/s. Bansi Mehta & Co. in their letter dated 2nd September

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2013 (Page 1874), however, it is significant to note that save and except for reiterating the stand already taken by Bansi Mehta & Co. in its previous report dated 25th September 2012, there is no attempt to deal with the contentions raised by the Petitioner in their affidavit dated 25th April 2013. What the letter of Bansi Mehta & Co. dated 2nd September 2013 seeks to do is to once again rely upon AS-10 in support of its interpretation of AS-14 to suggest that the '**fair value of the consideration'** not being over Rs.86,910/-, the assets in the books of the transferee company post merger could only have been recognized to that extent.

**(v)** that M/s. Bansi Mehta have in their letter dated 2nd September 2013 (page 1874) once again relied upon AS-10, AS-14 and AS - 26. The said letter after quoting paragraphs 12, 17, 36 and 39 of AS-14 states, *inter alia*, that:

> *"11. Thus, in the light of the foregoing paragraphs of AS-14, and as discussed above, given that the fair value of the consideration was not over Rs.86,910, assets could have been recognized in the books of City pulse post merger only to the extent of this amount."*
>
> *"25. This means that following AS 10 and AS 14 the recognition of assets and liabilities of merging entity IKN should have been recorded at the consideration paid for such*

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> *acquisition, viz. the value of shares issued upon merger. However, the assets and liabilities seem to be recorded at their fair values without considering the treatment required under AS 14, which would have restricted the recording of the assets and liabilities to the fair value of the consideration paid."*

M/s. Bansi Mehta & Co. have additionally relied upon paragraph 35 of AS-10 to support the above conclusion.

**(vi)** that the above contention of Bansi Mehta & Co. has been dealt with by the Petitioners in paragraph 7 , pages 1900 to 1910 of the affidavit dated 19th September 2013, in which it has been *inter alia* submitted as under:

**(a)** Reliance upon AS-10 is out of place;

**(b)** AS-10 deals with accounting for fixed assets and does not deal with accounting of fixed assets in the course of amalgamation;

**(c)** In fact, paragraph 5 of AS-10 provides, *inter alia*, as under:

> *"5. This standard does not deal with the treatment of government grants and subsidies, and assets under leasing rights. It makes only a brief reference to the capitalization of borrowing costs and to assets acquired in an amalgamation or merger. These subjects require more extensive consideration than can be given within this Standard.";*

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***(d)*** It is AS-14 which deals with accounting for amalgamation and provides for the manner in which assets and liabilities are required to be recorded pursuant to an amalgamation;

(e) The two accounting standards, viz. AS-10 and AS-14 deal with 2 different subject matters and one accounting standard cannot be applied to interpret another accounting standard;

(f) This would also be clear from paragraphs 2, 17 and 37 of AS-14. Paragraph 2 of AS-14 reads as under:

> *"This standard does not deal with cases of acquisitions which arise when there is a purchase by one company (referred to as the acquiring company) of the whole or part of the shares, or the whole or part of the assets, of another company (referred to as the acquired company) in consideration for payment in cash or by issue of shares or other securities in the acquiring company or partly in one form and partly in the other. The distinguishing feature of an acquisition is that the acquired company is not dissolved and its separate entity continues to exist."*

**(g)** Paragraph 17 of AS-14 deals with the subject of reserves on amalgamation and reads as under:

> "*17. If the amalgamation is an 'amalgamation in the nature of purchase', the identity of the reserves, other than the*

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*statutory reserves dealt with in paragraph 18, is not preserved. The amount of the consideration is deducted from the value of the net assets of the transferor company acquired by the transferee company. If the result of the computation is negative, the difference is debited to goodwill arising on amalgamation and dealt with in the manner stated in paragraphs 19-20. If the result of the computation is positive, the difference is credited to Capital Reserve."*

*(h)* Paragraph 37 of AS 14 provides *inter alia* as under:

*"37. Any excess of the amount of the consideration over the value of the net assets of the transferor company acquired by the transferee company should be recognized in the transferee company's financial statements as goodwill arising on amalgamation. If the amount of the consideration is lower than the value of the net assets acquired, the difference should be treated as Capital Reserve."*

**(i)** The interpretation adopted by M/s Bansi Mehta & Co. would render paragraphs 17 and 37 of AS-14 irrelevant and redundant (see page 1901);

**(j)** In view of the fact that the consideration paid by the transferee company to the shareholders of the transferor company was Rs.86,910, whereas the net value of the assets acquired by the transferee company pursuant to the amalgamation was in excess of the consideration of

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Rs.86,910, post the amalgamation, the books of the transferee company reflected an amount of Rs. 4.57 crores (Balance Sheet of Transferee Company at Exhibit - 4 – Volume I, page 399 read with paragraph 4 of the Notes to Accounts at page 407) as reserves being the difference between the net value of assets and the consideration in terms of paragraph 17 of AS-14.

**38.** In response SEBI has submitted that Accounting Standards 14 clearly stands violated by the treatment given to the valuation of Ikisan's assets upon its merger with City Pulse. Relying on paragraphs 36 and 47 of AS-14, SEBI has submitted that it is clear that:

**(i)** the assets/liabilities of the transferor must be incorporated either at their book value ("existing carrying amounts") or alternatively the consideration paid should be allocated to individual identifiable assets and liabilities on the basis of their fair values. In view of the fact that the consideration is to be allocated, the values to be allocated are subject to a maximum ceiling, namely, the consideration;

**(ii)** Clause 37 does not in any manner disturb the above. If the consideration exceeds the value of the asset of the transferor acquired by the transferee that difference must be shown as goodwill arising on amalgamation i.e. on the assets side of the

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transferee company's balance sheet – this does not arise in the present case;

**(iii)** if however the amount of consideration is lower than the value of the net assets acquired the difference has to be treated as Capital Reserve. Capital Reserve is a reserve shown on the liabilities side of the balance sheet. In other words if consideration is lower than book value only the book value can be shown as the value of assets on the assets side and the difference is shown on the liabilities side – hence the value of assets shown in the balance sheet of the transferee still cannot exceed the total amount of consideration i.e. in the present case could not have exceeded Rs. 86,910/-.

**39.** It is submitted on behalf of the Petitioner that the above contentions raised by SEBI are wholly misconceived and in fact contrary to each other. It is submitted that as can be seen from clause 1 hereinabove, SEBI has sought to contend that the consideration is to be allocated to individual assets and liabilities on the basis of "their fair values" subject to a maximum ceiling of the consideration. Such an interpretation placed by SEBI in paragraph 26(i) is contrary to SEBI's own submissions in clause (iii), wherein it has been contended that the consideration under the scheme is to be compared with the "book value" and if the consideration is lower than the book value, the difference is to be treated as capital reserve on the liability side of the balance sheet. It is

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submitted that if the interpretation placed by SEBI is to be accepted, it would result in a situation where for the purpose of allocation of consideration one would have to compare the consideration with the book value of the assets and upon such comparison if and only if the consideration is higher than the book value of the assets and liabilities, the same would be allocated to individual assets and liabilities on the basis of their fair values. Such an interpretation is contrary to the provisions of clauses 36 and 37 of AS-14 and cannot be accepted. It is further submitted that the mere non-compliance of the Accounting Standards (though not true in the present case) cannot be a ground for objection to or recall or review of a court sanctioned scheme especially when due process of law has been complied with. The important premise is that accounting takes place after the completion of the transaction; accounting only records the transaction and does not change the character or the value; and alleged non-compliance in respect of accounting cannot and will not change the transaction or the treatment of the transaction. The ultimate test that is required to be seen is whether the transaction has been fair to all concerned, and that test has been satisfied. This position in law has been accepted by this Court in the case of *Hindalco Industries Limited* (supra) at paras 15 and 16 and *Reliance Communications Ltd. (supra)* at paras 32 to 37 at pages 3363 to 3365.

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**40.** I am in agreement with the submissions advanced on behalf of the Petitioner. Apart from the fact that it does not appear that the 2010 Report of Grant Thornton violates the accounting standards as alleged, in any event, as correctly submitted by the Petitioner, the mere non-compliance of the Accounting Standards (though not true in the present case) cannot be a ground for recall or review of a court sanctioned scheme especially when due process of law has been complied with. As the Petitioner has rightly contended, accounting takes place after the completion of the transaction; accounting only records the transaction and does not change the character or the value; and alleged non-compliance in respect of accounting cannot and will not change the transaction or the treatment of the transaction. The ultimate test that is required to be seen is whether the transaction has been fair to all concerned, and that test has been satisfied. Again though it is too late for SEBI to contend (in the year 2013) that the 2010 Report of Grant Thornton violates accounting standards, it is also pertinent to note that SEBI has in the Review Petitions chosen not to seek any reliefs qua the GT Report of 2010 or seek recall/review of the order sanctioning the 2010 Scheme. In view thereof, the question of setting aside or recalling the order dated 17th June, 2011, sanctioning the Scheme of Arrangement

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and Amalgamation and order dated 22nd July, 2011 sanctioning amendments to the Scheme on the basis of an alleged defect in accounting in the GT Report of 2010 does not arise.

**41.** This Court has hereinabove already recorded its finding that SEBI has failed to establish any fraud played by NFCL/KFL by way of suppression of facts and is therefore not entitled to the reliefs as prayed for in the above Applications. However, SEBI has in support of its case also alleged that NFCL/KFL has perpetrated a fraud on the shareholders of NFCL in view of several other grounds which are set out and dealt with hereunder:

**42. (i) At the time of the sanction of the 2011 composite Scheme the balance sheet of Ikisan contained certain fictitious assets which were grossly overvalued.**

**42.1** According to SEBI, at the time of the sanction of the 2011 composite scheme the balance sheet of Ikisan contained certain fictitious assets which were grossly overvalued. The Original Ikisan Ltd. was incorporated on 21st March, 2000 and City Pulse was incorporated on 11th April, 2007. In spite of both the original Ikisan Ltd. and City Pulse being in very poor financial health and having negligible assets / operations, the accounts of the post-merger Ikisan strangely reflect a

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significant increase in fixed assets. The balance sheet of Ikisan for the year ended 31 March 2010 shows fixed assets valued at Rs. 54.61 crores, which include "trademarks" valued at Rs. 36.40 crores and "customer contracts valuation" valued at Rs. 18.20 crores. The profit and loss statement of Ikisan for the same period shows sales of Rs. 17.34 lakhs, income from services of Rs. 2.98 crores, other income of Rs. 8.10 lakhs and a profit before tax of Rs. 1.71 crores.

**42.2** In response the Petitioner has pointed out that SEBI has for the first time sought to allege in the oral submissions made in rejoinder that the Trade Marks and Customers Contracts were "fictitious assets". However, the case pleaded in the Review Petition (Para 11 (b) page 10 of the Petition) is that gross fixed assets had increased from nil in financial year 2009 to Rs. 54.61 cr. and Rs. 75.79 cr. in financial years 2010 and 2011 respectively. Further in paragraph 16 of the Review Petition at page 13, SEBI has sought to allege that the promoters got shares worth more than 3 times the assets brought in by the promoters. Therefore, in the Review Petition SEBI has admitted the existence of the assets but has only sought to allege an increase in the valuation thereof.

**42.3** It is further submitted on behalf of the Petitioner that SEBI's case that the intangible assets of Ikisan were valued with the ulterior motive of

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artificially placing a highly inflated/exaggerated value on intangible assets of Ikisan (viz. Rs. 54 crores) and within a short time thereafter utilizing the said highly inflated assets in the 2011 Composite Scheme is misconceived. It is submitted on behalf of the Petitioner that firstly this case has never been pleaded by SEBI. Secondly, the fact that any asset(s) or intangible asset(s) may not have been valued for 10 years, i.e. pre the 2010 Scheme (*since the accounting principles which apply to a going concern do not provide for recording valuations for self-generated intangible assets*) does not *ipso facto* mean that the assets are not worth nothing. It also does not mean that because the same may not have been fair valued and therefore reflected in the Balance Sheet as nil, would *ipso facto* mean that valuation is ex facie inflated/exaggerated merely because what was shown as "nil" in the balance sheet is fair valued at Rs. 54 crores. SEBI is now attempting to improve its case by alleging that the Trade Marks and Customer Contracts were "fictitious assets". For SEBI, to now call these assets 'fictitious' only to buttress its case of fraud would amount to SEBI attempting to plead a new case that too in the form of Written Submissions, without any such case having been pleaded on oath and without any particulars of the alleged fraud and without an opportunity being given to NFCL to respond to the same.

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**42.4** I am in agreement with the Petitioner that the trademarks and customer contracts cannot be termed as "fictitious assets" as alleged by SEBI. It is true that Ikisan was incorporated in 2000 but it is not as if Ikisan did not do any business between 2000 and 2010. The fact that it has done business is apparent from the records and from the fact that it generated revenue. The fact that a business, in its nascent stage, may have made a loss in a particular year or years does not necessarily mean that the business is incapable of making profits in the future. Equally, the fact that the business is conducted without any tangible fixed assets but with the help of intangibles also does not mean that the business is incapable of making profits and that the business and it's intangibles have no value. Besides, from the Second GT Report, it is clear that Ikisan was engaged in 2 businesses, viz. agri-informatics and micro-irrigation. It is an admitted position that since 2000 Ikisan had applied for registration of 21 trademarks, all of which ultimately came to be assigned to NFCL, i.e. the resultant entity, pursuant to the 2011 Composite Scheme. It cannot be suggested that the trademarks under which the business was carried on for a period of 10 years would acquire no reputation or goodwill at all or that a cash loss incurred by a company can only mean that the trademarks owned and in use by the company acquired no value/reputation/goodwill. Under the 2010 Scheme, the assets and liabilities of the Transferor

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Company being Ikisan Limited (pre-merger) were to be fair valued (Clause 4.1 and 6.1 @ Pages 163 and 166 of the Company Scheme Petition No. 393 of 2010). The GT Valuation Report dated 24th June, 2010 (*which provided for fair valuation of the intangibles, viz. Trademarks and Customer Contracts*) clearly states that the valuation analysis of 2010 is based on various sources of information which are listed in paragraph 4.3 of the report. The same is reproduced hereunder:

> "***4.3 Sources of information***
>
> *The valuation analysis is based on a review of historical and projected financial information relating to Ikisan as provided by the Management of Ikisan. The sources of information include:*
>
> *Business Plan of Ikisan dated 16 December 2009 as provided by the Management of Ikisan;*
>
> *Audited Historical Financial Statements of Ikisan from FY06 to FY09 as provided by the Management of Ikisan;*
>
> *Provisional financial Statement of Ikisan for FY10, provided by the Management of Ikisan;"*
>
> *Financial projections of Ikisan for five years provided by the Management of Ikisan;*
>
> *Paper published in world congress on information and communication technologies for development 2009, Beijing (WCID 2009);*
>
> *Discussions with the Management of Ikisan;*
>
> *NSE and BSE websites*

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*In addition to the above, we have also obtained such other information and explanations which were considered relevant for the purpose of our analysis."*

**42.5** SEBI has inter alia contended that GT accepted the information/projections provided by the Management "at face value". However, GT in response to the said contention of SEBI has by its letter dated 2nd July, 2013, (*Exhibit A Page 1862 at pgs. 1863 and 1864 of the Affidavit in Sur-Rejoinder*), expressly denied the contentions raised by SEBI and has *inter alia* stated as follows:

*"For any valuation exercise, future projections are provided by the management of the company who are responsible for a making business plan for steering the future performance of their company. The vision and targets are set by the management of the company and the performance of the company is guided by this business plan drawn by the management. Since the financial forecasts or projections are future oriented, one can take due care by checking for reasonableness of the strategy/ future plan on the company, which has already been done as part of the valuation exercise. However, as clarified in the Valuation Report, the management would continue to be responsible for the forecasts and the valuer would not be in a position (or expected to) step into their shoes or share the responsibility.*

*In keeping with the above and in addition to what is stated in the Rejoinder, the the Caveats (Para 4 of the Valuation Report*

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*referred in the rejoinder) specifically mention that the data received by Grant Thornton has been reviewed for consistency and reasonableness. It also mentions that nothing has come to our attention to indicate that the information provided has material mis-statement or would not afford reasonable grounds upon which to base the report. These additional clarifications, inter alia, provide the basis on which the Valuation Report has been prepared, which the Rejoinder seems to have overlooked.*

*As mentioned in the Valuation Report, iKisan Limited has two businesses; Agri Portal business which has been an existing business and Micro Irrigation business which is a start-up business in its nascent stage. We would like to submit that a reasonability check was performed for data received for both the businesses by reviewing supporting data/ information produced by the company as well as information available in the public domain. For Agri Portal Business we had –*

***1.*** *Acquired information about the turn key projects already handled by the Portal on behalf of government agencies as well as agri professionals, research fraternity and trade channels.*

***2.*** *Reviewed existing orders on hand with Agri Portal at the time of carrying out valuation exercise.*

***3.*** *Had discussions with the management to understand future plans and contracts being discussed with potential customers.*

***4.*** *Obtained information about the popularity of the Portal and the number of hits received by the Portal on a daily basis showing potential user interest in the portal.*

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***5.*** *Considered competitors in the business and obtained information about the company's edge over the competitors.*

*For the Micro Irrigation Business we –*

***1.*** *Reviewed documents for setting up of the production facility.*

***2.*** *Studied and analysed performance of other players in the micro irrigation business, considered analyst reports highlighting growth potential for the business.*

***3.*** *Reviewed orders received and letter of intent from potential customers to acquire products of iKisan Ltd.*

***4.*** *Studied data on the business opportunity prepared by NMMI, Market Intelligence department of Government of India as well as analyst reports capturing Micro Irrigation business.*

***5.*** *Cross checked data given by external agencies with the projections provided by the company to test for reasonability.*

*Based on the above, the contention that information provided by management was accepted at face value by Grant Thornton is incorrect."*

**43.** Therefore, in my view, the allegation that the intangible assets of Ikisan were "fictitious" which means non-existent, is without any justification or basis. Equally unjustified is the allegation with regard to overvaluation and its effect which is discussed hereunder, whilst dealing

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with SEBI's submission that the valuation done by Grant Thornton in its Report dated 24th June, 2010 is unrealistic, perverse and incredibly high.

**44. (ii) The valuation done by Grant Thornton in its report dated 24th June, 2010 is unrealistic, perverse and incredibly high.**

**44.1** SEBI has submitted that the valuation done by Grant Thornton in its report dated 24th June, 2010 is unrealistic, perverse and incredibly high due to the following reasons:

**(a)** Based on discussions with Ikisan's management Grant Thornton has taken the useful life of Ikisan's trademarks to be indefinite.

**(b)** Grant Thornton states that : "*a trademark generates future economic benefits for its owner in two ways; it may increase sales volumes and it may enable its owner to charge premium prices in comparison to similar unbranded products and services. Control over these potential future benefits is customarily achieved by legal registration of the trademark. We have considered the trademark of Ikisan as the most important internally generated intangible asset which has established its brand image in agri portal market leading to higher recognition followed by higher revenue*." "Trademarks" are valued at Rs. 36.40 crores as on 1st March, 2010. This according to Grant Thornton would be reflected in substantially corresponding sales income. However, the

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total income of the original Ikisan Ltd. for the year ended 31st March 2009 was all of Rs. 1.62 crores and for the year ended 31st March, 2010 was Rs. 3.23 crore. This is a multiple of about 23 times income in 2009 and 12 times the 2010 income.

**(c)** There was a huge difference between the forecasted revenue base used by Grant Thornton for the purposes of the valuation and the actual revenue generated by Ikisan. The forecasted revenue base for the year 2011 used by Grant Thornton for the valuation exercise is Rs. 12.6 crores. Grant Thornton has noted that these financial projections were provided to it by the management. The actual revenue of Ikisan for the year 2011 was only Rs. 6.76 crores, which is significantly lower than the projections used by Grant Thornton.

**(d)** Grant Thornton has used arbitrary growth rates to project the revenue for the years beyond 2012 and has not provided any rationale for arriving at the growth rates.

**44.2** In response, NFCL has submitted that SEBI has not submitted earlier that the GT Report dated 24th June 2010 is unrealistic, perverse and incredibly high. It is therefore another attempt to make a new case in the written submissions. The GT Report of 2010 has not been put into issue in the Review Petition. Only compliance of accounting standards

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was questioned. The challenge to the GT Report of 2010 has been made for the first time in the form of Written Submissions. In the Review Petition, SEBI has not dealt with GT's Valuation Report dated 24 June 2010. SEBI has only questioned the manner in which the assets and liabilities of Ikisan have been cast post its merger with City Pulse as being patently inconsistent with the requirements under AS-10 and AS-14 by relying on M/s. Bansi Mehta & Co.'s Report dated 25 September 2012, whilst filing the Review Petition.

**44.3** NFCL has submitted that the contention raised by SEBI to the effect that the valuation is unrealistic, perverse and incredibly high and the reasons given in support thereof are incorrect. I am in agreement with the submissions made by NFCL in this behalf.

**44.4** The contention raised by SEBI to the effect that the valuation is "unrealistic, perverse and incredibly high" on account of the fact that GT has taken the useful life of Ikisan's trademarks to be indefinite cannot be accepted since the same appears to suggest that an intangible asset/trademark would not have any growth or revenue generation potential. It is not even SEBI's case, either in the pleadings or in the submissions made before this Court, that the trademarks of Ikisan could be used only for a limited number of years and not thereafter. In fact,

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even under the Trade Marks Act, 1999 a trademark can be renewed in perpetuity as long as the renewal fees are paid and procedural requirements have been complied with.

**44.5** The contention raised by SEBI to the effect that the valuation is "unrealistic, perverse and incredibly high" on account of the fact that trademarks have been valued at Rs. 36.04 crores as on 31 March 2010 (i.e. at a multiple of 23 times the income earned by Ikisan in 2009 and 12 times the income earned by Ikisan in 2010) also cannot be taken cognizance of. Whilst it is true that GT has stated that the valuation of trademarks would be substantially dependent on revenues, what SEBI has overlooked is the fact that GT has at the same time taken into account the income generating capacity of the business of Ikisan, viz. sales income, based on the future earning potential upto the year 2015 and a terminal value based on revenue and by applying a discounting factor arrived at the valuation of trademarks at Rs.36.40 crores. In other words, if SEBI's submission were to be accepted it would mean that valuation of trademarks must correspond only to past income and cannot have any relation to the future earning potential of the trademarks regardless of the reputation, goodwill and business it already may have generated in the market. Secondly, a value of the trademark based on a multiple of only past income also cannot afford a good guide nor is it a

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correct method of valuation particularly in the case of a start-up or a nascent business. For instance, in the case of a start-up or nascent business which may have earned only Rs. 100 in the first year and which is likely to earn Rs. 1000 in the second Rs. 3000 in the third and Rs. 5000 in the fifth year; according to SEBI, such increase in income is impossible to achieve because on a year on year basis the income has gone up 10 times in the second year 30 times in the third year and 50 times in the fifth year. In fact even between the years 2009 and 2010, on account of a rise in income from Rs. 1.62 crores to Rs. 3.23 crores (doubling or 100% growth in income) on a year on year basis, the multiple itself has come down from 23 times income in 2009 to 12 times 2010 income.

**44.6** The contention raised by SEBI that the valuation is unrealistic, perverse and incredibly high on account of the fact that whereas the revenues of Ikisan for the year 2011 were projected at Rs. 12.6 crores, the actual revenue was only Rs. 6.76 crores, is nothing but an attempt on the part of SEBI to challenge the valuation which is inherently based on future projections by applying what is essentially a hindsight view. Valuation being an exercise required to be conducted at a particular point of time is to be carried out on the basis of the projections made of the revenues in future as on the date of valuation, which has to be based on

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the valuer's own fair judgment. The exercise of valuation must be viewed as on the date of valuation - looking forward and cannot be reviewed in hindsight. Such an approach would not be fair.

**44.7** The contention raised by SEBI to the effect that the valuation is "unrealistic, perverse and incredibly high" on account of the fact that GT had used arbitrary growth rates to project the revenue for the year beyond 2012 and has not provided any rationale for arriving at the growth rates also cannot be accepted in view of what is stated hereinabove as well as the fact that the GT Report and the letter of GT dated 22nd July 2013 make it clear that GT had reviewed the data provided by the Management for reasonableness and consistency and that GT did not accept the projections at face value.

**44.8** In fact, in a very instructive passage from "*Damodaran on Valuation*" by Aswath Damodaran, Second Edition, it has been stated as under:

> "***Classifying Discounted Cash Flow Models***
>
> *There are three distinct ways in which we can categorize DCF models. In the first, we differentiate between valuing a business as a going concern as opposed to a collection of assets. In the second, we draw a distinction between valuing the equity in a business and valuing the business itself. In the third, we lay out two different and equivalent ways of doing*

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*CF valuation in addition to the expected cash flow approach- a value based on excess returns and the adjusted present value (APV).*

***Going Concern versus Asset Valuation*** *The value of an asset in the DCF framework is the present value of the expected cash flows on that asset. Extending this proposition to valuing a business, it can be argued that the value of the business is the sum of the values of the individual assets owned by the business. While this may be technically correct, there is a key difference between valuing a collection of assets and a business. A business or a company is an ongoing entity with assets that it already owns and assets it expects to invest in in the future. This can be best seen when we look at the financial balance sheet (as opposed to an accounting balance sheet) for an ongoing company in Figure 1.1. Note that investments that have already been made are categorized as assets in place, but investments that we expect the business to make in the future are growth assets.*

*A financial balance sheet provides a good framework to draw out the differences between valuing a business as a going concern and valuing it as a collection of assets. In a going concern valuation, we have to make our best judgements not only on existing investments but also on expected future investments and their profitability. While this may seem to be foolhardy, a large proportion of the marked value of growth companies comes from their growth assets. In an asset-based valuation, we focus primarily on the assets in place and estimate the value of each asset separately. Adding the asset*

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*values together yields the value of the business. For companies with the lucrative growth opportunities, asset-based valuations will yield lower values than going concern valuations.*

*One special case of asset-based valuation if liquidation valuation, where we value assets based on the presumption that they have to be sold now. In theory, this should be equal to the value obtained from DCF valuations of individual assets, but the urgency associated with liquidating assets quickly may result in a discount on the value. How large the discount will be will depend on the number of potential buyers for the assets, the assets characteristics, and the state of the economy.*"

**44.9** Though SEBI has for the first time challenged the Second GT Report dated 6th January, 2011 only in its rejoinder dated 5th July, 2013, SEBI has in the said rejoinder not challenged the first GT Report. In fact the First GT Report does not in any manner affect the swap ratio of the Composite Scheme. Admittedly, SEBI has relied upon the Report of M/s Bansi Mehta & Co. which questioned the Accounting Treatment of intangibles in the books of Ikisan as per the 2010 Scheme but at no stage has SEBI questioned the GT Report dated 24 June 2010 anywhere in the pleadings. The Petitioner is therefore correct in its submission that having realised that merely stating that the valuation of the intangibles

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was on the basis of the projections provided by Ikisan's management will not be sufficient to establish its case of alleged fraud and its new allegation of 'fictitious assets', SEBI has tried to improve its case by now questioning and challenging Grant Thornton's 2010 valuation report which case is not pleaded by SEBI. In any event, for the reasons set out hereinabove, SEBI's contention that the GT Report of 2010 is unrealistic, perverse and incredibly high cannot be accepted.

**45. (iii) Petitioner has refused to disclose information relating to the projections, historical, factual and other data provided by its management to Grant Thornton.**

**45.1.** SEBI has alleged that the Petitioner has refused to disclose information relating to the projections, historical, factual and other data provided by its management to Grant Thornton. The Petitioner is correct in its response that in scheme matters, no company is required to disclose information relating to projections, historical, factual and other data provided to a valuer for the purposes of valuation. In fact, as per well established practices and procedures, companies are not even required to submit the valuation report(s) to the court at the time of seeking the sanction of the Court for a Scheme under Sections 391 or 394. Therefore, NFCL cannot be faulted for not having submitted the valuation report or

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the projections, historical, factual and other data provided to a valuer for the purposes of valuation before this Court along with the Company Summons for Direction and Company Scheme Petition. The projections given by the management are always regarded as confidential in nature being 'price sensitive', which, as a matter of practice, has never been made part of the record of the Court unless the Court desires to examine them. In any event, admittedly, the Second Valuation Report of GT was forwarded to the BSE as well as NSE prior to the sanction of the Scheme and inspection of the valuation report was also offered to the shareholders of NFCL.

**46. (iv) Additional share capital of Rs. 29.50 crores was infused in Ikisan between 31st March 2010 and 31st December 2010 by the promoters so that the promoter would get additional shares of NFCL upon the subsequent merger of Ikisan with NFCL and KFL.**

**46.1** SEBI has submitted that between 31 March 2010 and 31 December 2010 the promoters of the Nagarjuna group infused approximately Rs. 29.50 crores of additional share capital into Ikisan. Ikisan appears to have utilized part of this fresh capital to purchase fixed assets in the form of land and buildings. SEBI has submitted that this additional capital was infused into Ikisan so that the promoters would get additional shares of NFCL upon the subsequent merger of Ikisan with NFCL and KFL. As

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pointed out by the Petitioner, the promoters of Ikisan had infused a sum of Rs. 30 crores into Ikisan for setting up a micro-irrigation plant. To fund the project cost, Ikisan had also taken a loan of Rs. 20 crores. It therefore cannot be held that a sum of Rs. 30 crores was infused into Ikisan by its promoters with the objective of getting shares of the value of Rs. 240 crores as alleged by SEBI. The swap ratio arrived at in the 2011 Composite Scheme is on the basis of the projected cash flows in accordance with the DCF Method. SEBI has overlooked the fact that Ikisan was engaged in two businesses viz. the agri portal business and the micro irrigation business. The Valuation Report of GT takes into account the projected cash flows for the two businesses. Merely because a promoter has invested Rs. 30 crores by way of additional capital, does not ipso facto mean that the valuation of the enterprise in which the investment is made would be nothing more than Rs.30 crores. The Petitioner has also correctly pointed out that while contending that the promoters have secured shares worth Rs.240 crores, SEBI has also overlooked a fundamental fact viz. that the market price of NFCL has in fact gone up post the approval of the Board of Directors on January 2011 from Rs. 30.36 to Rs. 33.53 on 4th August 2011 i.e. when the scheme was made effective. It is for this reason that SEBI is in a position to ascribe a value of Rs. 240 crores to the shares allotted to the promoters. This is

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obviously a hindsight view to take. If the contention of SEBI that the 2011 Composite Scheme is a fraud on the shareholders is to be accepted, the value of the shares of NFCL would have come down and the argument of SEBI with respect to the purported gain made by the promoters would not have survived.

**47. (v) Swap ratio in the 2011 Composite Scheme --unjustified.**

**47.1** SEBI has next contended that in spite of the extremely poor financial condition of Ikisan compared to that of NFCL, by using the DCF method, Grant Thornton valued the business of Ikisan at Rs. 245 crores and the business of NFCL at Rs. 911 crores and arrived at the following exchange ratios even though KFL was a shell company with no operations:

**(i)** 11 equity shares of KFL of face value of Rs. 1 per share fully paid up for every 10 equity shares of NFCL of Rs. 10 each fully paid up;

**(ii)** 1 preference share of Rs. 90 each fully paid up of KFL for every 1 preference share of Rs. 100 each fully paid up, held by the preference shareholders of NFCL; and

**(iii)** 43 equity shares of KFL of face value Rs. 1 each for 10 equity shares of Ikisan of Rs. 10 each fully paid up.[*Company Application 125 of 2014 - Affidavit in Reply - Vol. I – page 293*].

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**47.2** SEBI has therefore sought to contend that NFCL, which had a huge asset base has been given a lower valuation and Ikisan, which did not have sufficient assets has been given a higher valuation.

**47.3** NFCL has contended that the contention of SEBI to the effect that the past performance of Ikisan did not justify the swap ratio in the 2011 Scheme is devoid of any merit, inasmuch as GT has in the 2011 Report as well as in the letter dated 22nd July 2013 justified the reasons for adopting the DCF method of valuation. In the letter dated 22nd July 2013, GT has stated as under:

> *"With respect to the use of valuation method please note that for determination of share swap ratio in case of merger of two or more entities, a relative valuation exercise is carried out where a consistent and suitable approach is applied to value all the entities in the merger. Accordingly, consistent approach was applied to value residual business of NFCL as well as Micro Irrigation and Agri-Portal Business of iKisan Limited. Further, we had considered three approaches for valuation of these businesses; viz.*
>
> *Asset Based Approach (Net Assets Value Method)*
>
> *Market Approach (Market Price and Market Multiple Method) and*
>
> *Cash Flow Based Approach (Discounted Cash Flow Method (DCF Method)*
>
> *As explained in the Valuation Report, under the Net Asset*

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*Value method, the net assets of a company as per its financial statements are considered. This method ignores the future return the assets can produce and is calculated using historical accounting data that may not reflect the worth of the business. Hence, this method was not considered for valuation of all the entities. Further, this method is typically used as the minimum break-up value for any business and largely used where the going concern premise is affected. In the current exercise, such was not the case and hence this method was not considered.*

*The Valuation Report further explains that the Market Approach was also not possible due to lack of stock market price data as well as availability of data on closely comparable listed companies.*

*Hence, we had used the DCF method for valuation of these entities on a relative basis given the fact that the entities under consideration are operational and the management of the companies being valued had prepared detailed business plans/ projections for the same.*

*The DCF method is a very scientific and widely accepted method of valuation for operating companies on a going concern basis as it concentrates on cash generation potential of a business. The foundation of Discounted Cash Flow is the present value rule, where the value of any asset / business is the present value of expected future cash flows that the business generates. The risk related to the business is adjusted in the discount rate used to derive net present value of future cash flows. The future cash flows are projected based on the*

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*detailed business plan of the company considering the current business opportunities and future potential as envisaged as at the valuation date. Hence we do not agree to the statement that the Discounted Cash Flow method uses a mere ipse Dixit to arrive at future free cash flows for the equity holders, discounted by the firm's cost of equity.*

*In case of a share exchange ratio in a scheme to be sanctioned by the court there are no methods prescribed under the statutes. In view of several judgements over the years, it is clear that the method to be followed for the valuation have been left to the expertise and wisdom of the valuers. Several decisions of the court where this aspect has been reiterated and some other aspects of valuation are set out in* ***Schedule 1*** *hereto.*

*…*

*This reasoning is also evident from various empirical data from transactions where such businesses have been acquired at a significant premium to the historical financial performance. In some cases, in fact, companies having zero revenues and negative margins have been acquired or are being traded on stock exchanges at a significant valuation. A few of such cases have been highlighted below-*

| | | | |
|---|---|---|---|
| 1. | *Piramal Life Sciences Limited (PLSL)* | *Very low historical revenues- INR 2.8 Cr & INR 5.2 Cr in FY12 and FY13. Significant losses historically - negative* | *Despite low revenues and huge losses the company's shares are being traded at a valuation (market cap) in the range of INR 77* |

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| | | | |
|---|---|---|---|
| | | *INR 7.2 Cr and 6.3 Cr in FY12 and FY13* | *Cr to 65 Cr* |
| 2. | *Instagram* | *No revenue generation* | *Facebook bought Instagram for USD 1 Billion.* |
| 3. | *Pinterest* | *No revenue generation* | *The company sold USD 200 million in stock to new and current investors for less than 10% of the company, effectively valuing it at USD 2.5 billion.* |
| 4. | *Flipkart* | *In FY 10 the revenue was INR 11.6Cr, In FY11 revenue was about INR 50 Crore.* | *As per industry estimates, in 2012, Flipkart raised about INR 825 Crore at current forex value (US# 150 million) which implies a total value of about INR 4,675 crore (US$ 850 million) from its existing investors Accel Partners and Tiger Global Management in the fourth round of funding.* |

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| | | | |
|---|---|---|---|
| 5. | *Regeneron Pharmaceuticals (REGN)* | *For 9 out of 10 years in the past, REGN has been consistently making losses. The operating cash flow and free cash flow were negative most of the time.* | *Despite huge losses the company's market price is higher than industry average i.e. Price/Book Value of REGN was 24.6x as on 6 September 2012 whereas industry average was 6.1x.* |

*In the context of valuation of iKisan Limited, as mentioned earlier, as on the date of valuation the Company had two businesses; the Agri Portal business as well as Micro Irrigation business. While the Agri portal business was an existing business and being a niche initiative by the company, was at the growth stage, the Micro Irrigation business was in its nascent stage. Considering this nature of business, the historical financials of the company did not reflect the future potential of the business. Hence, valuing iKisan Limited based on the past performance of the company would not have been appropriate and would not reflect the true worth of the company. DCF method being the only valuation method which takes into account the future cash flows of the company was thus used for the valuation exercise. Further, the value conclusion of DCF method of Rs 245 Crores is not "imaginary" and is based on expected future cash flows, the reasonability of which was assessed after taking into account various factors as highlighted in point 1 above and the risk of achieving those cash flows being factored in the discount rate.*

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*It is hereby submitted that the share exchange ratio was derived as a result of consistent application of valuation methods for NFCL as well as business of iKisan Limited after taking into consideration the underlying potential of each of the companies. We would like to further mention that share exchange ratio stated by us was an outcome of application of consistent and appropriate method of valuation by thorough review of available data, both external as well as internal, analysis and application of reasonability test on the projected financial data."*

**47.4** NFCL has given a plausible explanation that what SEBI has failed to take into account is the fact that on 31st March 2010 NFCL was a Company operating in a Government controlled regulated Industry and further was undergoing a Corporate Debt Restructuring with a liability to pay recompense interest and that the loan funds of NFCL as on 31 March 2010 were Rs. 977.35 crores and the Agri- Informatics and Micro-Irrigation business was a free growing business. GT had, as can be seen in their report, taken all these factors into consideration while arriving at the swap ratio. Further SEBI has also failed to appreciate that the figures provided in paragraph 31 (A) of SEBI's submissions are of NFCL (pre-merger), inclusive of the oil division business which was demerged pursuant to the 2011 Composite Scheme. SEBI has at no point in time contended that NFCL has been undervalued. The entire basis of SEBI's

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contention with regard to swap ratio has been that Ikisan has been overvalued. Again, SEBI has sought to compare NFCL with Ikisan on the basis of their respective assets. However, what SEBI has failed to appreciate is the fact that the valuation of the two entities was based on the DCF method of the merged entity and not on the basis of either the fixed assets or the past performance of the 2 entities, viz. Ikisan and NFCL. The contention of SEBI that KFL was a shell company with no operations fails to take into account the fact that the swap ratio under the 2011 scheme was not based on the operations of KFL but was based on the projected cash flow of the merged Ikisan and the residual businesses of the erstwhile NFCL. Since, GT's Valuation Report and Keynote's Fairness Opinion were available for inspection (as required under Section 393 of the Companies Act, 1956) by the shareholders, who alone are concerned with the exchange or the swap ratio, the shareholders are deemed to have considered all relevant aspects of valuation. It is well settled that while exercising jurisdiction under Sections 391 to 394, the Court ought to treat with respect the commercial wisdom of the shareholders and creditors of a Company as held by the Hon'ble Supreme Court in its decision in *Miheer Mafatlal vs. Mafatlal Industries Ltd*.[11]. The very fact that not a single shareholder has, post the sanction of the 2011

11 AIR 1997 SC 506

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Composite Scheme, made any grievance whatsoever of the kind or nature which forms the basis of the Review Petition by SEBI, itself does not support the case of SEBI that the Review petition is filed or is maintainable in the interest of "investors". The Regional Director, having perused all relevant papers, had filed an Affidavit stating that the Composite Scheme was not prejudicial to the interest of the shareholders except for the objections raised in paragraphs 6(a) to 6(c) of the said Affidavit. These objections were duly addressed in the Order dated 17th June, 2011.

**47.5.** In view of the above SEBI has failed to make out any case of fraud in GT arriving at the above exchange ratio.

**48. (vi) Considerations relevant for valuation of assets by DCF method are ignored by Grant Thornton.**

**48.1** SEBI has submitted that the value of the Company's assets are relevant for the purpose of determining value based on the DCF method given that depreciation and amortizations are relevant considerations. It is submitted that in a case such as that of Ikisan where the value of assets include "customer contracts" and "trademarks" which have a direct correlation with the revenue earning capacity of a company, the asset

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value of the Company is bound to be relevant in determining the future projected earnings of a Company. The Petitioner wrongly refused to disclose these financial projections that had been provided by the management to GT on the basis that they were confidential in nature being price sensitive, but contended that Grant Thornton had independently verified the reasonableness and consistency of the data supplied by the management. This contention is misleading and an attempt to suppress vital information from this Court. It is submitted that there is nothing confidential about such financial projections. It is also submitted that it is incorrect to state that GT had independently verified the reasonableness and consistency of the data supplied – what Grant Thornton has done is to review - the data for consistency and reasonableness but it expressly states that it has not independently investigated or otherwise verified the data provided. There is a clear difference between review of data and its verification. SEBI has further submitted that the assertion made in the arguments that the share exchange ratio in respect of the 2011 composite scheme was not worked out on the basis of the net asset value of Ikisan and that the value of Trademarks and Customer Contracts of Ikisan as reflected in its balance sheet would have no impact on the determination of the exchange ratio for the promoters' shareholding in Ikisan, is not correct and an analysis

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of the GT Report I and Grant Thornton's letters and responses itself establishes that the financial projections utilized for a DCF analysis are necessarily affected by the extent of the underlying assets of a company. Moreover, the Petitioners accept that Keynote Corporate Services Limited in its "Fairness Opinion on the Valuation" took into account amongst other things the benefit of the intangible assets of Ikisan viz. trademarks and customer contracts collectively valued at Rs. 54 crores, which would also vest with NFCL.

**48.2** The above submissions of SEBI are denied and disputed by the Petitioner.

**48.3** As submitted by the Petitioner, in the case of DCF Method of Valuation, the value is derived based on cash flow projected to be generated by the company in future years. It does not consider non-cash items of income or expense such as depreciation/amortization except to derive tax expense whenever such non-cash expenses are tax deductible. In the valuation of the Agri Portal Business of Ikisan using DCF, the amortization of intangible assets has been considered and accordingly the tax expense has been estimated. However, since the amortization is lower, the tax saving on account of deduction of amortization is low which leads to a lower value for the company. In case a higher depreciation /

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amortization were considered, the tax expense would have reduced which would have resulted in increasing cash flows leading to a higher value for the company.

**48.4** The contention of SEBI inter alia to the effect that GT Report II does not indicate the factors which have been taken into account by GT does not appear to be correct. GT Report II at pages 289 to 291 of Ex.1, Vol-I sets out the factors which have been considered by GT in arriving at the valuation of Ikisan.

**48.5** Neither has the Keynote fairness opinion expressed any opinion on the value of Ikisan's trademarks and customer contracts nor has NFCL relied upon the Keynote fairness opinion for the purpose of substantiating the valuation of trademarks and customer contracts under the 2010 Scheme. The contention raised by SEBI that Keynote has considered the value of trademarks and customer contracts at Rs.54 crores for the purpose of providing it's fairness opinion is erroneous in as much as the fairness opinion of Keynote is based on the valuation arrived at by GT as per the DCF method for the 2011 Composite Scheme. The fairness opinion of Keynote is not based upon the net asset valuation of Ikisan or the erstwhile NFCL.

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**48.6** Even the argument that in the case of Ikisan, the Trade Marks and Customer Contracts are relevant in order to ascertain the value of the business of Ikisan, as submitted by the Petitioner, does not advance the case of SEBI because firstly these are intangible assets. Secondly, these assets being in the nature of brands/goodwill can only be valued on the basis of future projections of income which these brands/goodwill will generate in the future. Therefore of necessity these assets cannot be valued on the same basis or employing the same method of valuation as apply to tangible assets. Thirdly, it is a well settled position of law with regard to valuations, that valuation is not an exact science and can never be done with arithmetic precision. The attempt on the part of SEBI to challenge the valuation which is by its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the basis of whatever information is available on the date of the valuation and a projection of future revenue that the valuer may fairly make on the basis of such information. Even Bansi S. Mehta, the valuer appointed by SEBI, has itself confirmed this to be the correct basis ( para 4.1 page 193 of the Review Petition).

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**48.7** The Hon'ble Supreme Court in the matter of *G.L. Sultania* (supra) while holding that the valuation in that case ought not to be set aside, *inter alia*, observed that views may differ and that there was no gainsaying that even experts may differ in their conclusions or even reasoning and that the Court must not interfere unless there are compelling reasons to upset the finding of the expert valuer. In the said case, the Hon'ble Supreme Court also observed as follows:

> *"32. These decisions clearly lay down the principle that valuation of shares is not only a question of fact, but also raised technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares. If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter. Where a method of valuation is prescribed the valuation must be made by adopting scrupulously the method prescribed, taking into account all relevant factors which may be enumerated as relevant for arriving at the valuation."*

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The test laid down above by the Hon'ble Supreme Court as to when a court may interefere with the findings of a valuer is not satisfied in the present case in as much as it is not SEBI's case that a recognized method of valuation was not adopted, or that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or that the valuer adopted a demonstrably wrong approach, or that there was a fundamental error going to the root of the matter. In any event, SEBI has failed to make out any such manifest error in the approach adopted by the valuer in the present case.

**48.8** As regards the submission of SEBI that financial projections are not confidential, it is well settled that financial projections being 'price sensitive" are by their nature confidential and a party ought not to be compelled to disclose the same. In any event neither SEBI nor any shareholder ever demanded the financial projections prior to the filing of the Review Petition.

**48.9** With regard to the submission that the material furnished by the Management was reviewed and not verified by GT and that the Report does not indicate that these factors were taken into account by GT, as correctly submitted by the Petitioner, SEBI's contention is largely semantic. Whereas SEBI has sought to rely upon the distinction between

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review and verify, the question which needs to be addressed is whether GT has blindly accepted the data provided by the management as sought to be contended by SEBI. SEBI has overlooked what GT has confirmed in its subsequent letter dated 22nd July, 2013 at page 1862 of the Affidavit in Sur-Rejoinder in which GT has categorically stated as under:

> *"However, a general study, analyses and checks for reasonableness of the future projections provided for valuation as is customary for issuing a valuation report had been carried out. For any valuation exercise, future projections are provided by the management of the company who are responsible for making a business plan for steering the future performance of their company. … Since the financial forecasts or projections are future oriented one can take due care by checking for reasonableness, of the strategy/future plan of the company which has already been done as part of the valuation exercise…that the data received by Grant Thornton has been reviewed for consistency and reasonableness. It also mentions that nothing has come to our attention to indicate that the information provided has material misstatement or would not afford reasonable grounds upon which to base the report….Based on the above, the contention that information provided by management was accepted at face value by Grant Thornton is incorrect."* (emphasis supplied)

Realizing that the test of *Sultania* has not been satisfied, SEBI has in its oral submissions in Rejoinder sought to allege that that the GT Reports of

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2010 and 2011 are fundamentally erroneous, demonstrate a completely wrong approach and are vitiated by a fundamental error going to the root of the matter. This is clearly an afterthought.

**49. (vii) The reasoning of the Petitioner in support of the gigantic leaps in valuation is unjustified.**

**49.1**. SEBI has submitted that the justification given by the Petitioner for these gigantic leaps in valuations is that one's mindset has to be radically modernized to eschew the traditional approach of a "bricks and mortar" value in favour of a modern "the sky is the limit" approach to valuation. Such a contention is only to be stated to be rejected. It is submitted that even modern valuation techniques are grounded in solid principles and do not permit fantastic projections to be made the basis of valuations. Referring to the example of Facebook given by the Petitioner, it is submitted that since the GT Report I had valued Ikisan's intangible assets (Trademarks and Customer Contracts) at Rs. 54.16 crores as on 31 March 2010, the sky-rocketing valuation of Ikisan, 9 months later, on 6 January 2011 by the same valuer (GT Report II) at Rs. 245 crores must logically be attributable not to a dramatic rise in the valuation of the same intangibles but to the 'bricks and mortar' micro-irrigation business for which Ikisan had established a manufacturing facility in Gujarat in

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December 2010 which commenced its commercial production only from 1 February 2011 i.e. for 60 days or so in the financial year 2010-2011 and for which Ikisan had incurred capital expenditure of Rs. 21.17 crores and had sales of Rs. 0.05 crores [Ikisan Financial statement for year ended 31 March 2011, Note 6, Vol. IV Page 1278 and 1286-1288]. By any stretch of imagination such a business could not have been responsible for a leap in valuation of over Rs. 200 crores. It is also submitted that the number of hits on the original Ikisan website does not alter these hard figures since these hits apparently never translated into high sales or revenue.

**49.2** It is submitted on behalf of NFCL that it has never been the argument of NFCL either in oral or written submissions that *"one's mindset has to be radically modernized to eschew the traditional approach of a "bricks and mortar" value in favour of a modern "the sky is the limit" approach to valuation"*. The only example which SEBI has attempted to deal with is of Facebook in answer to which SEBI has adopted a dismissive approach by alleging that *"Ikisan is no Facebook"* which argument, however overlooks the fact that by making such an argument SEBI itself is accepting Facebook as an instance of a non bricks or mortar business enjoying a high valuation. SEBI has not even attempted to deal with the other examples of high valuation of companies such as Oculus, Zomato, Whatsapp, Justdial, etc on the basis only of their business model

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and projected revenues. For example, Oculus fetched a very high valuation of 300 million dollars even though it had not yet commenced its business operations. These are only a few examples out of several available in the public domain and not a fictitious statement made on behalf of the Petitioners. If the contention of SEBI is to be accepted, it would mean that a start-up web-portal will not have any value whatsoever and any value ascribed to such a business in the books of the company will be termed by SEBI as a "fictitious asset" and the value of the company will be equivalent to the value of its assets. SEBI has *inter alia* in paragraph 45(iii) sought to contend that the micro irrigation business of Ikisan is valued at Rs. 200 Crores. This submission is premised on the basis that the intangible assets of Ikisan were valued at Rs. 54 Crores and therefore the residuary value is attributable to the micro irrigation business. This contention of SEBI cannot be accepted inasmuch as the 2010 GT Report did not value the business of Ikisan but valued two of its intangible assets. The valuation under the 2011 Composite Scheme is the enterprise valuation of the merged Ikisan and not a valuation based on individual assets of Ikisan or KFL. The Petitioner's contentions in this behalf appear to be justified. The comparison between the 2010 GT Report which valued two of the intangible assets of Ikisan and the 2011

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Report which had as its purpose the valuation of Ikisan's business by the DCF method is inappropriate.

**50.** In view of the above, it is clear that the 2010 Scheme was sanctioned by this Court by its order dated 27th August, 2010 whereunder the erstwhile Ikisan Ltd. (unlisted Transferor Company) was merged into City Pulse Properties Limited (Unlisted Transferee Company). As set out hereinabove, it is established that City Pulse Properties Ltd. and/or Ikisan have not suppressed any document containing any relevant fact from its shareholders, the Registrar of Companies, the Regional Director i.e. the Ministry of Law and Justice, the Official Liquidator, and this Court. The said 2010 Scheme was sanctioned by this Court after taking into account the clearance/no objection given by the Regional Director and the Official Liquidator. On 8th September, 2010, the Scheme was made effective. Before the order was passed by this Court on 17th June, 2011 sanctioning the scheme of arrangement and amalgamation (2011 Composite Scheme), SEBI had received a complaint from a shareholder of NFCL alleging that the consideration offered under the Scheme to the shareholders of NFCL is detrimental to the interest of the equity shareholders of NFCL and will result in a total loss of Rs. 862.66 crores to the equity shareholders of NFCL. SEBI did not take any steps upon receipt of the said complaint

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but forwarded the same to the BSE and has also not explained as to what steps were taken by SEBI to pursue the complaint thereafter with the BSE. The 2011 Composite Scheme was sanctioned by an order dated 17th June, 2011. The said sanction was granted after considering the approval granted by the BSE/NSE and the Regional Director and also after taking into consideration the fact that the Composite Scheme was passed by 99.83 per cent of the shareholders in number and 89.45 per cent in value at the court convened meeting of the erstwhile NFCL i.e. much more than the statutory majority required under the Companies Act, 1956. The shareholder who had sent his complaint to SEBI qua the Composite Scheme not only did not attend the shareholders' meeting when the Composite Scheme was passed but has also not appeared before this Court when the said Scheme was sanctioned. As already held hereinabove, in my view, no fraud has been perpetrated by the promoters of NFCL/KFL on the shareholders, Regional Director, BSE/NSE, the Official Liquidator or this Court and all the disclosures as required under the law were made. The explanation given by NFCL/KFL as well as Grant Thornton in response to the allegations made by SEBI are plausible. More so, it is settled law with regard to valuations, that valuation is not an exact Science and can never be done with arithmetic precision. No allegations of mala fides on the part of the Valuers have

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been made. In fact, in its first Company Application (L) No. 45 of 2013 filed by SEBI on 24th January 2013 seeking review of the Orders dated 17th June, 2011, and 22nd July, 2011, no allegations of fraud were made at all. The said Company Application was withdrawn with liberty, without notice to the other side by a praecipe dated 20th February, 2013 which praecipe does not provide any reasons for withdrawal. The Composite Scheme of 2011 as stated hereinabove has already been made effective and shares have been allotted to the respective shareholders. Subsequent to the Composite Scheme, dividends have been declared and paid. The shares of the demerged entity viz. NORL have been listed on 23rd March, 2012, and are being traded on the Bombay Stock Exchange ("BSE") and National Stock Exchange ("NSE"). In fact, as regards the Resultant Company No. 1 (Originally KFL and now renamed NFCL), BSE and NSE granted in principle approval for listing on 8th December, 2011 and 13th January, 2012, respectively.

**51.** In the circumstances, the question of granting any reliefs as prayed for or otherwise to SEBI does not arise and the above Applications are dismissed with costs.

**(S.J. KATHAWALLA, J.)**

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**CERTIFICATE**

" Certified to be true and correct copy of the original signed Judgment"

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