BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. VSS/AO- 27/2009]

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

In respect of

Alok Jain

(PAN. AAFPJ1052L)

FACTS OF THE CASE IN BRIEF

1. An open offer was made by Kashyap Kanaiyalal Mehta and others (hereinafter collectively to as "**Acquirers**") to the shareholders of M/s Matra Realty Limited {formerly known as Yashraj Securities Limited (hereinafter referred to as **"MRL/YSL/Company"**)} through a public announcement dated September 20, 2006 in compliance with the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers Regulations) 1997 (hereinafter referred to as **"SAST"**) for acquisition of 2,04,543 equity shares representing 20% of issued, subscribed, paid up and voting capital of YSL. The offer price was Rs.94.50 for each fully paid up equity share. As mentioned in the Letter of Offer dated March 12, 2007 the offer opened on November 8, 2006 and closed on November 27, 2006.

2. Upon examination of the offer document pertaining to the aforesaid open offer, it was alleged that, Mr. Alok Jain (hereinafter referred to as **"Noticee"**) had failed to comply with regulation 6(3) of SAST for the year 1997 and regulation 8(2) of SAST for the financial years 1998 to 2002 and 2004-05 and consequently, liable for monetary penalty under section 15A (b) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act"**).

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned has been appointed as Adjudicating Officer under section 15 I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Rules'**) vide order dated November 19, 2007 to inquire into and adjudge under section 15A(b) the alleged violation/s.

SHOW CAUSE NOTICE, HEARING AND REPLY

4. Show Cause Notice No. EAD-5/VSS/JR/139196/2008 dated September 25, 2008 (hereinafter referred to as **"SCN"**) was issued to the Noticee under rule 4(1) of the Rules to show cause as to why an inquiry should not be held against the Noticee and penalty be not imposed on the Noticee under section 15A (b) of SEBI Act for the alleged violations specified in the said SCN.

5. The Noticee did not reply to the said SCN. In the interest of natural justice and in order to conduct an inquiry as per rule 4 (3) of the Rules, the Noticee was granted an opportunity of personal hearing on February 10, 2009 at SEBI Head Office, Mumbai, vide notice dated January 29, 2009. Mr. Ramesh Mishra, Authorized Representative (hereinafter referred to as "**AR**") appeared. During the hearing, the

AR contended that provisions of regulations 6(3) and 8(2) of SAST were not attracted by the Noticee. In support of this contention, written submissions along with supporting documents were submitted by the AR. A summary of the said written submissions is as under:

None of the Director(s) of the company can exercise any right relating to any control over management of the company for the following reasons:

- *(a) The shareholding pattern confirm that none of them were having any controlling stake;*
- *(b) The composition of the Board also not controlled by them as they are not interrelated to each other; and*
- *(c) Any of the disclosed shareholding pattern amply informed the existing shareholders about the same position; and*
- *(d) That was one of the reasons of change of management during the period of 2006 – 2007.*

CONSIDERATION OF ISSUES AND FINDINGS

6. The issues that arise for consideration in the present case are :

i. Whether the Noticee had violated regulation 6(3) of SAST for the year 1997 and 8(2) of SAST for the financial years 1998 to 2002 and 2004-05?

ii. Does the non-compliance, if any, on the part of the Noticee attract monetary penalty under section 15 A (b) of SEBI Act?

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

7. Before moving forward, it is pertinent to refer to the provisions of regulations 6(3) and 8(2) of SAST, which reads as under:-

> ***6. Transitional Provision***
> *(3) A promoter or any person having control over a company shall within two months of notification of these regulations disclose the number and percentage of shares or voting rights held by him and by person (s) acting in concert with him in that company, to the company.*
>
> ***8. Continual Disclosure***
> *(2) A promoter or every person having control over a company shall, within 21 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, disclose the number and percentage of shares or voting rights held by him and by persons acting in concert with him, in that company to the company.*

8. The Noticee had not disputed the fact that he had not complied with the disclosure requirements under regulations 6(3) of SAST for the year 1997 and 8(2) of SAST for the financial years 1998-2002 and 2004-05. However, his contention was that the provisions of regulations 6(3) and 8(2) of SAST were not applicable to him and hence, the question of compliance with the same does not arise. I have perused the material relied upon and put forth by him before me in support of his contention. Therefore, the first issue to be examined is whether the Noticee is covered under regulations 6(3) and 8(2) of SAST.

9. I find that regulation 6(3) of SAST stipulates a one time disclosure by (a) promoter or (b) any person having control over a company, to disclose the number and percentage of shares or voting rights held by him and by persons acting in concert with him to the company within two months of notification of SAST.

10. I find that regulation 8(2) of SAST deals with yearly disclosure by (a) promoter or (b) every person having control over a company to disclose the number and percentage of shares/voting rights held by him and by persons acting in concert with him to the company under two situations, i.e., (i) within 21 days from the financial year ending March 31 and (ii) the record date for dividend declaration.

11. Upon perusal of the material available on record including the Letter of Offer dated March 12, 2007, copy of the disclosures made by YSL to Bombay Stock Exchange (hereinafter referred to as "**BSE**") under the listing agreement submitted during the hearing, the details of shareholding pattern downloaded from the website submitted by the Noticee, etc., I have noted the following:

a. The shareholding of the directors and persons acting in concert with them as disclosed in the Letter of Offer dated March 12, 2007 is as under:

As on February 20, 1997 – Disclosure filed on April 21, 2004

Sl No	Name	No. of Shares	Percentage
1.	Alok Jain & PACs	47,700	6.996
2.	Nimish Unadkhat & PACs	21,200	3.129
3.	Emmanuel Anthraper	10	0.001
	Total	**68,910**	**10.126**

As on March 31, 2004 – reported u/r 8(3) for 2004

Sl No	Name	No. of Shares	Percentage
1.	Alok Jain & PACs	71,550	6.996
2.	Nimish Unadkhat & PACs	34,875	3.41
3.	Bharat Lakhani & PACs	34,200	3.343
	Total	**1,40,575**	**13.749**

b. YSL has made a statement regarding disclosures made under regulations 6 (4) and 8(3) of SAST in para 4.5.1 of page 19 of the Letter of Offer dated March 12, 2007 that “The management of the Company vests in the Board of Directors comprising professionals and persons having a wide range of managerial experience and business acumen particularly in securities business.” The Company has, however, disclosed the shareholding of the Directors of the Company and their relatives in their filings u/r 8(3) stating that they may be considered as persons acting in concert.

c. Vide letter dated October 29, 2001, YSL had disclosed its shareholding pattern to BSE under the listing agreement as on March 31, 2001, June 30, 2001 and September 29, 2001. In the said disclosures, the shareholding of the “Directors & Relatives” was shown under the category “Promoters” holding 70,750 equity shares comprising of 10.38% of the total shareholding in all the three quarters.

d. Vide the same letter, YSL had disclosed the balance shareholding of 89.62% having held by (i) other bodies corporate (7 entities) – 89,150 shares (13.08%) and (ii) Indian public (178 entities) – 5,21,910 shares (76.55%).

e. As per the shareholding pattern published on the website of BSE for the year ended on March 31, 2003 and March 31, 2004, the shareholding of the “Directors and Relatives” – 1,40,825 shares (13.75%) has been disclosed under the category “Non Promoter’s Holding” with a disclaimer that “There is no individual promoter. The management of the Company vests in the Board of Directors comprising professionals and persons having a wide range of managerial experience and business acumen particularly in securities business.”

f. Further, as per the aforesaid shareholding pattern, the remaining shareholding of 86.25% was disclosed having held by (i) private corporate bodies – 1,93,075 shares (18.88%) and (ii) Indian public – 6,89,015 shares (67.37%).

g. The disclosure made for the years ended March 31, 2003 and 2004 was with a disclaimer regarding the 'Promoter' of YSL, whereas a similar disclaimer was not made while making the disclosure by YSL vide its letter dated October 29, 2001. Thus, there is a discrepancy in the disclosure made with regard to the shareholding pattern of YSL. This also brings out the fact that YSL had not followed any uniform pattern while disclosing the shareholding pattern, more particularly, the shareholding of the "Directors and their Relatives", under the listing agreement.

h. There is nothing on record to show that the private corporate bodies and the Indian public were acting in concert, either amongst their respective categories or inter category. This leads to the inference that the Directors of YSL (both individually and collectively) were the shareholders holding the largest stake as compared with any other shareholder in the category of Private Corporate Bodies and/or Indian Public.

i. The control of YSL vested with the Board of Directors which consisted of 3 directors, viz., (a) Alok Jain, i.e. the Noticee, (b) Nimish Kantilal Unadkhat and (c) Emmanual Anthraper as on February 20, 1997. The constitution of the Board underwent a change by substitution of Bharat Lakhani in place of Emmanual Anthraper during the year 2004. Thus, the Board of YSL at those points of time consisted of only 3 directors including the Noticee.

j. Thus, the Director/s of YSL, individually as well as collectively, was/were by virtue of his/their shareholding as well as his/their

position as ‘Director/s’ could have alone exercised control over the affairs of YSL.

12. Since YSL has made a specific disclosure in the form of a disclaimer to BSE that there was no individual promoter in YSL, the directors and their relatives (who have been disclosed as persons acting in concert with the respective directors, in the Letter of Offer dated March 12, 2007), they may not be treated as ‘promoters’ of YSL.

13. However, the issue still remains as to whether these directors, the Noticee being one of them, can be said to have exercised ‘control’ over YSL and thus, be covered under ‘person having control over a company’ referred to u/r 6(3) and 8(2) of SAST. In order to examine this issue, it will be pertinent to refer to regulation 2(1)(c) of SAST, which defines the term “control” as under:

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

14. The definition of “control” is an inclusive definition, meaning that the instances enumerated in it are not exhaustive and there can be other ways to exercise control over a company. According to the said definition, among others, any person who falls under one of the following categories will be deemed to be in control over the company,

(a) anyone with the right to appoint majority of the directors
(b) anyone who controls the management
(c) anyone who controls or makes policy decisions

(d) such a power can be exercised by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other matter.

15. According to Black's Law Dictionary, 8th Edition, "control" means, "*the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee*".

16. According to the aforesaid, any person who controls the management of a company either individually or collectively with other persons or controls or influences the policy decisions by virtue of his position, can be said to be in 'control' over the affairs of the company. In the present case, the Noticee was a part of the Board of Directors which controlled the affairs of YSL since May 15, 1995.

17. A director is one of the controllers of the company's affairs. The Board of Directors is the brain and the company is the body. The company can and does act only through the Board. When the brain, i.e., the Board, functions, the company, i.e. the body, is said to function. Thus, the functioning of the company is totally controlled and directed by the Board.

18. In this connection, it would be appropriate to refer to the observations made by the Hon'ble Supreme Court in Reserve Bank of India V Peerless General Finance & Investment Co. Ltd., (AIR 1987 SC 1023) that "*Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are*

important. That interpretation is best which makes the textual interpretation match the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place".

19. It is not in dispute that (a) YSL was a Board managed company, (b) the Board consisted of only 3 directors at the relevant point of time which included the Noticee, (c) the Noticee along with his PACs held 6.996% as of February 20, 1997, (d) the 3 directors along with their respective PACs collectively held 10.126% and 13.749% as of February 20, 1997 and March 31, 2004, respectively, (e) the 'Directors and their Relatives' held 10.38%, private corporate bodies held 13.08% and Indian public 76.55% as on March 31, 2001, June 30, 2001 and September 29, 2001 (f) the 'Directors and their Relatives' held 13.75%, private corporate bodies held 18.88% and Indian public 67.37% as on March 31, 2003 and March 31, 2004 (g) the entities in the category of Corporate Bodies and Indian Public were not acting in concert within the same category or inter-category (h) the Directors and their respective relatives (PACs) were the largest shareholders by virtue of their position as well as shareholding.

20. In view of the foregoing, I am of the view that the Noticee along with the other 2 directors, individually as well as collectively, was/were in 'control' over YSL at the relevant point of time and would be covered under regulation 2(1) (c) of SAST. Consequently, the Noticee as well

as the other Directors, would fall within the ambit of '***person having control over a company'*** as stated in regulations 6(3) and 8(2) of SAST. ***Thus, the Noticee as well as the other Directors ought to have made the requisite disclosure of the number and percentage of shares/voting rights held by him/them and by persons acting in concert with him/them to the company under the said regulations.*** All of them had failed to do so. None of them had disputed this fact.

21. Therefore, the allegation of violation of regulation 6(3) for the year 1997 and regulation 8(2) for the financial years 1998-2002 and 2004-05 against the Noticee stands established.

22. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that "*once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established, then the penalty is to follow"*.

23. The Hon'ble SAT, in Appeal No.66 of 2003 order dated April 15, 2005 - *Milan Mahendra Securities Pvt. Ltd. Vs SEBI*, has also observed that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market. We cannot therefore subscribe to the view that the violation was technical in nature"*.

24. I find that the Noticee was the Compliance Officer of YSL at the relevant point of time. I am of the view that being a Compliance Officer, he ought to have taken care to ensure compliance with the statutory requirements relating to disclosures. The Noticee is

supposed to be diligent and act according to the statutory requirements. He has failed to do so.

25. In view of the above, I find that it is a fit case to impose monetary penalty under section 15A(b) of SEBI Act. The provisions of 15 A (b) reads as under:

From January 25, 1995 to October 28, 2002

Penalty for failure to furnish information, return, etc. **–**

15A. *If any person, who is required under this Act or any rules or regulations made there under, -*

a)……

b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;

From October 29, 2002 to till date

Penalty for failure to furnish information, return, etc.

15A. If any person, who is required under this Act or any rules or regulations made thereunder,-

(a) ….

(b) To file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return furnish the same within the time specified therefore in the regulations, he shall be liable to [a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less];

26. While determining the quantum of penalty under section 15A (b), it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

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

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

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

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

(c) the repetitive nature of the default."

27. From the material available on record, it is not possible to ascertain the disproportionate gain or unfair advantage to the Noticee which may have accrued due to the aforesaid failure.

28. Though it may not be possible to ascertain the monetary loss to the investors on account of default by the Noticee, the details of the shareholding of the persons in control over the company and timely disclosure thereof, were of some importance from the point of view of outside shareholders/other investors as that would have prompted them to buy or sell shares of the company. It would, however, be difficult to come to a firm conclusion as to how the general shareholders would have reacted on knowing the aforesaid shareholding of the directors/persons in control over YSL. The Noticee could not pre-judge the reaction of the investors. By virtue of the failure on the part of the Noticee to make the necessary disclosures on time, the fact remains that the outside shareholders were deprived of the important information at the relevant point of time.

29. The Noticee failed to comply with the provisions of regulations 6(3) of SAST for the year 1997 and 8(2) of SAST for the financial years ended 1998-2002 and 2004-05. This indicates the repetitive nature of default committed by the Noticee.

30. It is also appropriate to refer to the 'SEBI Regularization Scheme, 2002' which was introduced by SEBI with a view to enable the defaulters to regularize the non-compliance, if any, with regulations 6 and 8 of SAST. This scheme was framed keeping in view the fact that disclosures were not made by several companies and market participants either on account of oversight or lack of knowledge or apprehension with regard to the applicability or otherwise of the regulations. The scheme which was initially framed for duration of 3 to 4 months was extended from time to time and eventually expired in June 2003. The Noticee could have approached SEBI when the scheme was in force and got clarified with regard to the applicability of the provisions of the regulations and regularized the non-compliance by participating and paying a sum of Rs.10,000/- per non-compliance under the said scheme. But I find that the Noticee had failed to take advantage of this scheme.

ORDER

31. After taking into consideration all the facts and circumstances of the case, I impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) under section 15A(b) of SEBI Act on the Noticee which will be commensurate with the violation/s committed by him.

32. The Noticee shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of

India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Ms. Soma Majumdar, Deputy General Manager, CFD-DCR, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

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

Date: **March 06, 2009** **V.S.SUNDARESAN**

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