SECURITIES AND EXCHANGE BOARD OF INDIA
ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

In respect of: -

Sl. No.	NOTICEE(S)	PAN
1	Umesh Kumar Modi	AAPPM6795H
2	Kumkum Modi	AAAPM4518P
3	Jayesh Modi	BBHPM1522Q
4	Longwell Investments Pvt. Ltd.	AAACL3163G
5	A to Z Holding Pvt. Ltd.	AAECA0001A
6	Moderate Leasing & Capital Services Ltd.	AAACM6945K
7	SBEC Systems (India) Ltd.	AAACS8692P

In the matter of SBEC Sugar Ltd.

1. SBEC Sugar Ltd. (hereinafter referred to as "Target Company / SBEC / the company") is a company having its registered office at 'Malakpur, Loyan, Baraut Distt. Baghpat, 250611, Uttar Pradesh' and its securities are listed on the Bombay Stock Exchange (BSE). As per the shareholding pattern of the Target Company filed with Bombay Stock Exchange (BSE), for the quarters ending June, 2014 and September, 2014, the Promoter Group of the Target Company included Umesh Kumar Modi, Kumkum Modi, Jayesh Modi, Longwell Investments Pvt. Ltd., A to Z Holding Pvt. Ltd., Moderate Leasing & Capital Services Ltd. and SBEC Systems (India) Ltd. (hereinafter collectively referred to as the 'Promoter Group' or 'the promoters' or 'the Noticees').

2. It was observed by the Securities and Exchange Board of India (SEBI) from the abovementioned quarterly shareholding pattern filed with BSE that the shareholding/voting rights of the Promoter Group had increased from 54.46% (2,59,51,083 shares) as on June 30, 2014 to 63.86% (3,04,32,117 shares) as on September 30, 2014. Thus, the Noticees had together acquired 9.4% voting rights in SBEC during the quarter ending on September 30, 2014.

3. Regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (Takeover Regulations, 2011) provides *inter alia* the following:

*"**Substantial acquisition of shares or voting rights.***

"3. (1) … … …

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

… … …"

4. As the Promoter Group was already holding 54.46% shares and voting rights (i.e. more than 25%) in the Target Company as on June 30, 2014 and the promoters further acquired 9.4% of the shares and voting rights in the Target Company, thereby increasing their shareholding and voting rights to 63.86% as on September 30, 2014 (i.e. increase of more than 5% within the financial year 2014-15), SEBI vide letter dated May 15, 2015 sought clarifications from the Target Company on compliance with the said provisions of Takeover Regulations, 2011. In response, the Target Company vide letter dated June 18, 2015 submitted *inter alia* the following:

(a) The Target Company was in continuous losses and the net worth of the company was completely eroded. The company was compelled to file reference with the Board of Industrial and Financial Reconstruction (BIFR) and by an order dated February 04, 2014 the company was declared 'Sick' by the BIFR and the reference had been registered as case no. 58/2013. Further, IDBI was appointed as its Operating Agency for the preparation of Rehabilitation Scheme for revamping the position of the company to normal.

(b) Two borrowers, ABC Holding Pvt. Ltd. and Kumabhi Investments Pvt. Ltd. had borrowed funds from the promoters, namely A to Z Holding Pvt. Ltd. and Moderate Leasing & Capital Services Ltd. respectively, and when they failed to return the same, promoters acquired their shares which led to an increase in their shareholding in the

company. The increase in shareholding was not on account of purchase of shares but due to adjustment against loans outstanding.

5. Since regulation 10(1)(d)(i) of the Takeover Regulations, 2011 provides a general exemption to any acquisition pursuant to a scheme made under Section 18 of the SICA, 1985 or any statutory modification or enactment thereto, from the obligation of making an open offer *inter alia* under regulation 3, SEBI sought further clarification from the Target Company in this regard. The Target Company vide letter dated September 08, 2015 submitted *inter alia* that the company on the directions of the BIFR under Section 17(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA, 1985) prepared a scheme of rehabilitation under Section 18 of the SICA, 1985 in discussion with IDBI (its Operating Agency). It further submitted that the adjustment of loans given by promoters in lieu of shares of the company was within the scheme framed under Section 18 of the SICA, 1985 and the said transaction was exempted under regulation 10(1)(d)(i) of the Takeover Regulations, 2011.

6. SEBI sought a copy of the abovementioned scheme of rehabilitation prepared under Section 18 of the SICA, 1985, from the Target Company. However, the company failed for provide the same. Thereafter, SEBI requested IDBI (the Operating Agency) to confirm whether the abovementioned increase in the shareholding of the promoters of the Target Company was a part of the scheme filed under BIFR order. In reply, IDBI vide email dated March 17, 2016 submitted *inter alia* that till date the BIFR had not sanctioned any Draft Rehabilitation Scheme of the Target Company under BIFR case no. 58/2013.

7. Since the abovementioned acquisition of shares by the promoters from the two borrowers i.e. ABC Holding Pvt. Ltd. and Kumabhi Investments Pvt. Ltd. had resulted in increase of the Promoter Group's shareholding from 54.46% as on June 30, 2014 to 63.86% as on September 30, 2014, thereby breaching the 5% limit specified under regulation 3(2) of the Takeover Regulations, 2011 during the financial year 2014-15 and since the said acquisition was not exempted from the obligation of making an open offer under regulation 10(1)(d)(i), the promoters, being persons acting in concert, were required to make a public announcement of an open offer to acquire shares of the Target Company in accordance with the provisions of the Takeover Regulations, 2011. However, no such public announcement was made by the Promoter Group.

8. In view of the above, a notice dated March 27, 2017 (SCN) was issued to the Noticees calling upon them to show cause as to why suitable directions under Sections 11 and 11B of the SEBI Act, 1992 and regulation 32 and 35 of the Takeover Regulations, 2011 should not be issued against them for the alleged violations referred to above.

9. The Noticees have filed a common reply to the SCN vide letter dated May 19, 2017. Subsequently, they were granted an opportunity of hearing on September 12, 2017 during which the Noticees made submissions through their authorized representatives. The Noticees also filed further written submissions vide letter dated September 18, 2017. Vide letters dated August 29, 2018, SEBI had given another opportunity to the Noticees to make additional submissions, if any. However, no response was received from them in this regard.

10. The Noticees vide the abovementioned letters and during the personal hearing have submitted *inter alia* the following:

    i. SBEC Sugar Ltd. was incorporated in 1991 to establish a sugar manufacturing plant in Uttar Pradesh. Over a period of time, the business of the company suffered huge operating losses due to various factors and net worth of the company got completely eroded by March 31, 2013. The company was compelled to file a reference with the Board of Industrial and Financial Reconstruction ("BIFR") on July 26, 2013. BFIR registered the case (Case No. 58/2013) and after enquiring into the matter, declared SBEC as a sick company on February 4, 2014. Industrial Development Bank of India (IDBI) was appointed as Operating Agency under section 17(3) of the SICA, 1985 and the company was directed to prepare a Draft Rehabilitation Scheme for the revival of the company.

    ii. The concerned transaction happened during the period when very recently the company was declared sick by BIFR and the Draft Rehabilitation Scheme was under preparation by the company in discussion with lawyers and experts.

    iii. In the discussions held with experts, advisors, banks and financial institutions etc. towards rehabilitation, it was deliberated that Promoters / Noticees would be required to put funds in the company as a part of rehabilitation programme. In furtherance of those discussions, the promoters made efforts to realise funds. In

furtherance of the same, the promoters / Noticees made efforts to realize funds. For this, two promoters, namely, Moderate Leasing & Capital Services Ltd. and A to Z Holding Pvt. Ltd. (together referred to as 'lending promoters'), approached ABC Holdings Pvt. Ltd. and Kumabhi Investments Pvt. Ltd. (together referred to as 'borrowers') demanding the repayment of loans advanced to them by issuing demand notices. However, the borrowers expressed their inability to repay the loan as they were undergoing tight financial situation and repeatedly pursued the lending promoters for adjustment of loan amounts.

iv. Despite repeated follow-up when the lending promoters failed to realize the loan amounts. Then, after discussions with experts, it was agreed in the best interest of the company to accept the shares of the company from the borrowers. It was pondered by the lending promoters that the shares as receivable from borrowers could be encumbered to raise funds for use in the rehabilitation program of the company. Therefore, it was proposed that the receipt of shares from borrowers against adjustment of loans would be made part of the Rehabilitation Scheme which was under discussion at that time.

v. It was only because of the receipt of shares by the lending promoters (Moderate Leasing & Capital Services Ltd. and A to Z Holdings Pvt. Ltd.) during August 25, 2014 to September 16, 2014 from the borrowers that the shareholding of the entire promoter group increased from 54.46% to 63.86%.

vi. Apart from the lending promoters, other promoters / Noticees, namely Umesh Kumar Modi, Kumkum Modi, Jayesh Modi, Longwell Investments Pvt. Ltd. and SBEC Systems Ltd., did not receive a single share nor acted as persons acting in concert with lending promoters towards the abovementioned adjustment of loan against company's sharers.

vii. In addition to the aforesaid acquisition mentioned in the SCN, one of the lending promoters, Moderate Leasing & Capital Services Ltd. had also acquired 1.31% shares of SBEC during March 18, 2015 to March 23, 2015, which increased the shareholding of the Promoter Group to 65.17%.

viii. The Rehabilitation Scheme was under discussion and preparation and was not finalized, nor was it portrayed that it was finalized. The statement made by the company vide letter dated September 8, 2015 that the transaction was covered under the scheme being prepared by the company was genuinely made under the bonafide belief that the scheme would be approved by BIFR. However, vide notification dated 25.11.2015, the SICA, 1985 was repealed with effect from 01.12.2016. In term of Section 4(b) of the Repeal Act, all pending proceedings under the SICA, 1985 stand abated.

ix. The Promoter Group / Noticees did not intend to consolidate their holdings in SBEC by virtue of the aforesaid adjustment of loans leading to increase in their shareholding. The said increase did not result in any change in control since they were already having de-facto control of the company by holding 54.46% shares.

x. Owing to the precarious situation of the Sugar Industry in Uttar Pradesh, the company went into a vicious circle of sickness. It is the promoters / Noticees who have been continuously extending much needed financial backing to the company during tough times, due to which the company has managed to operate continuously and pay Rs.522.12 Crores towards cane dues of the farmers. The company currently is in dire need of funds. If any monetary liability of open offer is imposed on the promoters, who are extending the necessary financial support to the company, it will drain and deplete their limited resources (whatsoever available) which is much needed for survival of the company. The direction of open offer would also not be in the interest of the securities market as the same would result in company losing whatsoever opportunity it has to resurrect its position.

xi. No direction to make an open offer should be passed as the acquisition was made by persons in control of the company in order to raise money for the benefit of the company and not with any ulterior motive. Even if SEBI finds that the said transaction has violated regulation 3(2) of the Takeover Regulations, 2011, then also, the facts and circumstances warrant that in the larger interest of the investors, the direction for open offer should not be issued, keeping in view the judgment of the

Hon'ble SAT in the matter of *Nirvana Holdings Pvt. Ltd. vs. SEBI (Appeal no. 31, of 2011, decided on 08.09.2011).*

xii. The Sugar Industry in Uttar Pradesh has started showing signs of recuperation. Further, the developments taken place during financial year 2016-17 have created an expectation of reforms related to sugar industry which would improve the operational performance of the company and uplift its profits and financial performance. The company's projected financial performance depicts that the company carries potential to maximize shareholder's wealth. The company is on path of expansion and is in the process of merging a subsidiary company with itself. The business of the company is undergoing an overhaul and it would be in the larger interest of the investors to stay with the company.

xiii. The company is pursuing growth plans for which funds are of utmost importance and in such scenario the monetary liability of making an open offer will drain and deplete the limited resources available with promoters.

xiv. The Noticees are willing to divest the shares acquired in excess of the limits prescribed under regulation 3(2) of the Takeover Regulations, 2011.

11. I have examined and considered the facts of the case, the charges against the Noticees in the SCN and the submissions made by the Noticees. I note that the shareholding of the Promoter Group in the Target Company had increased from 54.46% as on June 30, 2014 to 63.86% as on September 30, 2014, which is a change of more than 5% within one financial year (i.e. 2014-15). The Noticees have not disputed the same. In fact, they have disclosed purchase of additional 1.31 % shares by Moderate Leasing & Capital Services Ltd. during March 2015, which increased the Promoter Group shareholding to 65.17%. The Noticees have also not disputed the fact that the acquisition of shares was not exempt under regulation 10(1)(d)(i) of the Takeover Regulations, 2011 from obligation to make an open offer, as the Draft Rehabilitation Scheme of the Target Company was yet to be sanctioned by the BIFR. However, the Noticees have contended for relief from obligation to make open offer on primarily two grounds:

(a) That the said acquisitions of shares were made only by two promoter Noticees out of the seven promoter Noticees. The remaining five promoter Noticees did not receive a single share nor were they acting in concert with the two acquiring promoter Noticees.

(b) That since the shares in question were acquired by the two promoter Noticees from two borrowers against adjustment of loans in order to arrange funds for the company and since the company was sick and was in dire need of funds for its revival, the obligation of open offer would jeopardize the future prospects of the company. Thus, the obligation of open offer should not be imposed on the Noticees.

12. It is noted that the threshold of 5% creeping acquisition within one financial year prescribed under regulation 3(2) of the Takeover Regulations, 2011 applies to only such situations where the acquirers along with persons acting in concert already hold more than 25% shares or voting rights in the Target Company. I note that the shareholding of the Promoter Group in the Target Company before and after acquisition of the said shares as referred to in the SCN was as follows:

Sl. No.	**Name of the Promoter Entity**	**Shareholding as on June 30, 2014 (in %)**	**Shareholding as on September 30, 2014 (in %)**
1.	Umesh Kumar Modi	3.30	3.30
2.	Kumkum Modi	0.06	0.06
3.	Jayesh Modi	0.12	0.12
4.	Longwell Investments Pvt. Ltd.	5.71	5.71
5.	**A to Z Holding Pvt. Ltd.**	**6.56**	**7.10**
6.	**Moderate Leasing & Capital Services Ltd.**	**8.85**	**17.72**
7.	SBEC Systems (India) Ltd.	29.86	29.86
	TOTAL	**54.46**	**63.86**

13. From the above Table, I note that while the total shareholding of the Promoter Group was more than 25% before the said acquisitions of shares and the same had increased by more than 5% in one financial year, the actual acquisitions of shares in question were made by only two promoter entities (i.e. A to Z Holding Pvt. Ltd. and Moderate Leasing & Capital Services

Limited), who were together holding less than 25% shares in the Target Company before or after the said acquisitions. In order to determine whether the Noticees have violated the provision of regulation 3(2) of the Takeover Regulations, 2011 by acquiring shares in excess of the prescribed limit without making an announcement for open offer, it is pertinent to see whether the promoter group entities, who have not acquired any share during the relevant period, can be termed as 'persons acting in concert' with the acquiring promoter entities. In this regard, it is relevant to refer to regulation 2(1)(q) of the Takeover Regulations, 2011, which defines 'persons acting in concert'. The same reads as follows:

"2. (1) In these regulations, unless the context otherwise requires, the terms defined herein shall bear the meaning assigned to them below, and their cognate expressions and variations shall be construed accordingly,-

… … …

(q) "persons acting in concert" means, -

(1) persons who, for a common objective or purpose of acquisition of shares or voting rights in or exercising control over the target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,-

… … …

(iv) promoters and members of the promoter group;

… … …"

14. As per the definition provided under regulation 2(1)(q)(1) of the present Takeover Regulations, 2011, two or more persons are treated as 'persons acting in concert', if they, for a common objective or purpose of acquisition of shares or voting rights in or exercising control over the target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company. However, apart from the said persons, the deeming provision under regulation 2(1)(q)(2) also brings within the ambit of definition of 'person acting in concert' certain categories of person depending on the relationship they

share. This is because such categories of persons generally share such a degree of common interest and loyalty with one another in a company that they are presumed to be acting in unison, unless proved otherwise. 'Promoters and members of the promoter group' is one such category of persons deemed to be acting in concert, as per regulation 2(1)(q)(2)(iv) of the Takeover Regulations, 2011. Thus, all the persons belonging to promoter group are *prima facie* regarded as 'persons acting in concert' in respect of any acquisition of shares or voting rights in the target company by any of the promoter entities, unless the contrary is established.

15. It is noted that in the instant case, all the seven Noticee promoters have been disclosed as promoter group entities of SEBC during the relevant period. Thus, even though the said acquisition of shares in question were made by only two promoter Noticees, by virtue of the deeming provision under regulation 2(1)(q)(2)(iv) of the Takeover Regulations, 2011, all the seven promoter Noticees have to be treated as persons acting in concert for the said acquisitions. While the said presumption is open to rebuttal, there is nothing on record to establish the contrary position. The Noticees have not put forth any evidence to show that they were acting independent of each other, except taking a plea that not all Noticees had acquired shares. In fact, the submissions of the Noticees indicate that there was an indirect co-operation between all the Noticees in respect of acquisition of shares by two promoter Noticees with the common objective of arranging funds for the financial revival of the Target Company. The Noticees in their reply dated May 19, 2017 have admitted that the adjustment of loans by the lending promoters against receipt of shares was proposed to be made part of the rehabilitation scheme which was under discussion. I note that the said proposal could not have been made without the consent of all the promoters of the company. Thus, the Noticees can be said to have acted in concert in respect of the said acquisition. Once it is established that they were acting in concert, their collective shareholding before and after the said acquisitions has to be taken into account while deciding any breach of the provisions of regulation 3(2) of the Takeover Regulations, 2011. In this case, since the collective shareholding of the Noticees had increased from 54.46% as on June 30, 2014 to 63.86% as on September 30, 2014, which is a change of more than 5% within one financial year (i.e. 2014-15), they had an obligation to make an open offer for shares of the Target Company in accordance with the provisions of the Takeover Regulations, 2011.

16. Having concluded as above, the next important issue to be decided is whether the Noticees' plea to give them relief from the obligation to make an open offer by considering the facts and circumstances of the case and the financial position of the Target Company deserves any merit. The Noticees have rested their case on the ground that the shares in question were acquired by the two promoter Noticees from two borrowers against adjustment of loans. However, I note that the provisions of the Takeover Regulations, 2011 do not provide for an exemption to any acquisition of shares from obligation of an open offer merely on the ground that the shares were received by the acquirer in lieu of settlement of loans given by him. Thus, the said contention of the Noticees does not have any merit. The Noticees have further contended that the obligation of open offer would result in financial liability on the Noticees who are trying to arrange funds for the company which has been declared sick and desperately needs funds for its revival. According to the Noticees, the same would jeopardize the future prospects of the company. I note that the obligation to make an open offer would surely cast a substantial monetary liability on the promoter Noticees. However, under the Takeover Regulations, 2011 what is paramount is the interest of the investors and their protection and not that of the promoters. The shareholders' interest cannot be sacrificed at the altar of the company's interest or that of its promoters. In this regard, it is pertinent to refer to the judgment of Hon'ble SAT in the matter of *Nirvana Holdings Private Limited vs. SEBI* (Appeal no. 31/2011) dated September 08, 2011, where it has been held as under:

> *"The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation."*

17. The above judgment of the Hon'ble SAT highlights the primary object of the Takeover Code which is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. It has further clarified that any deviation from the said normal rule of providing an exit opportunity to shareholders can be permitted only if issuance of such direction is not in the interest of the securities market or for the protection of interest of investors. It is noted from the submissions made by the Noticees vide letter dated September 18, 2017 that the shares were purchased by the acquirers in off market deals at prices ranging from Rs. 5.13 to Rs.10 during the period August 25, 2014 to March 23, 2015. It is also noted that the shares of the company are infrequently traded and that too in small quantities and the price of the scrip on BSE as on September 14, 2018 is Rs.7.99. Thus, if an exit opportunity is provided to the existing shareholders, they may tender their shares and exit from the company. Further, a number of shareholders who were holding shares in the Target Company on the date when the Noticees incurred the liability to make an open offer and are eligible for interest payment as per law upon tendering of shares pursuant to the open offer, may also benefit from such payment of interest over and above the consideration amount for the period of delay in making the open offer. In such circumstances, it is apparent that if an open offer is directed to be made by the Noticees in accordance with the provisions of the Takeover Regulations, 2011, the same would be beneficial for the investors. I have considered the various submissions made by the Noticees in support of their plea for not directing an open offer. However, I find that they have failed to make out a case that the issuance of a direction for open offer in this case is not in the interest of the securities market or for the protection of interest of investors.

Directions

18. I, therefore, in exercise of powers conferred upon me under Sections 11 & 11B read with Section 19 of the SEBI Act, 1992 and regulation 32 of the Takeover Regulations, 2011, hereby issue the following directions to the Noticees, viz. viz. Umesh Kumar Modi, Kumkum Modi, Jayesh Modi, Longwell Investments Pvt. Ltd., A to Z Holding Pvt. Ltd., Moderate Leasing & Capital Services Ltd. and SBEC Systems (India) Ltd,:

a) The Noticees shall, jointly or severally, make a public announcement to acquire shares of the Target Company in accordance with the provisions of the Takeover Regulations, 2011, within a period of 45 days from the date of this order;

b) The Noticees shall, along with the offer price, pay interest at the rate of 10% per annum from the date when they incurred the liability to make the public announcement till the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any.

19. This order shall come into force with immediate effect.

Place: Mumbai
Date: September 17, 2018

G. MAHALINGAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA