

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

DIRECTIONS UNDER REGULATION 44 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997 AGAINST NIRVANA HOLDINGS PRIVATE LIMITED, MS. NARA BHUVANANESHWARI AND MR. NARA LOKESH IN THE MATTER OF HERITAGE FOODS (INDIA) LIMITED

1. The Securities and Exchange Board of India (hereinafter referred to as SEBI) issued a notice dated November 25, 2009 to Nirvana Holdings Private Limited (hereinafter referred to as the acquirer) requiring it to show cause as to why appropriate directions under Regulation 44 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the Takeover Regulations) should not be issued against it, as it had *prima facie* violated Regulation 11(1) of the Takeover Regulations. The facts of the case as mentioned in the show cause notice (hereinafter referred to as the notice) are as follows: The directors and promoters of the acquirer, Ms. Nara Bhuvaneshwari and Ms. Nara Lokesh, belong to the promoter group of Heritage Foods (India) Limited (hereinafter referred to as the target company). The promoter group of the target company held 45.70% of the equity capital of the target company as on September 30, 2008. The acquirer had acquired 9,161 shares of the target company on November 13, 2008 and 7,02,260 shares on November 17, 2008 from Franklin Templeton Mutual Fund, which together constituted 6.17% of the equity capital of the target company. It was observed that the acquirer is a part of the

promoter group of the target company as per explanation (I)(b)(ii) to Regulation 2(h) of the Takeover Regulations as Ms. Nara Bhuvaneshwari and Ms. Nara Lokesh belong to the promoter group of the target company and hold 50% each of the equity capital in the acquirer. The said acquisitions had increased the shareholding of the promoter group in the target company from 45.70% to 51.87% and since the same was not followed by a public announcement, was found to be in contravention of Regulation 11(1) of the Takeover Regulations. Hence, the show cause notice. A similar notice dated February 18, 2010 was also issued by SEBI to Ms. Nara Bhuvaneshwari and Ms. Nara Lokesh requiring them to show cause as to why appropriate directions under Regulation 44 of the Takeover Regulations should not be issued against them as they had indirectly acquired 6.17% of the equity capital of the target company. The acquirer filed its reply dated December 30, 2009. Ms. Nara Bhuvaneshwari and Ms. Nara Lokesh filed similar submissions, vide separate letters dated March 26, 2010. The acquirer, Ms. Nara Bhuvaneshwari and Ms. Nara Lokesh are hereinafter collectively referred to as the entities and individually by their names. An opportunity of hearing was also granted by SEBI to the entities on May 25, 2010. However, vide separate letters dated May 25, 2010, the entities informed SEBI that they were not in a position to attend the hearing and further requested SEBI to decide the matter based on their respective replies. In view of the above submissions, I proceed with the matter on the basis of the show cause notices, the replies of the entities and other material available on record.

2. The fact that the acquirer had acquired 7,11,421 shares (6.17%) of the target company in two tranches, as stated in the notice is not in dispute. The case of the acquirer is that SEBI had erroneously clubbed their shareholding with that of the promoter group of the target company. According to the acquirer, it was not holding any share in the target company prior to November 13, 2008. The acquirer further stated that simply because its

promoters/directors are also the promoters of the target company and are holding 33.38% in the target company, it had been concluded that its promoters/directors are acting in concert with other persons in the promoter group of the target company. The acquirer denied the allegation that it belongs to the promoter group of the target company. It was the contention of the acquirer that, nowhere in the notice it is alleged that, it was acting in concert with the promoter group of the target company at the time of the impugned acquisition. The acquirer submitted *“Without prejudice to the aforesaid submissions, it is submitted that if SEBI takes a very narrow technical view that since our promoters were holding 33.38% shares in the Target Company, therefore there shareholding is to be treated as our shareholding, then in that event our shareholding would be deemed to have increased from 33.38% to 39.55%. Acquisition of 6.17% is marginally higher than the permissible creeping acquisition limit of 5% in a financial year. The alleged violation in the instant case is to the extent of acquisition of 1.17% equity shares only, which is too insignificant and miniscule. Further, as a result of additional acquisition of 1.17% equity shares in the Target Company we have not acquired control over the Target, since our promoters by virtue of their shareholding of 33.38% were already in control of the Target Company.* (emphasis supplied). The acquirer further stated *“In the circumstances, it is submitted that the alleged violation is at the highest a technical, procedural and venial breach and has not caused any adverse consequence to anybody. The same was inadvertent and unintentional”*. Ms. Nara Bhuvaneshwari and Mr. Nara Lokesh have also made similar submissions.

3. According to the entities, as the acquirer does not belong to the promoter group of the target company, the impugned acquisitions cannot be clubbed with the holding of the promoters of the target company. It is stated in the notice that the promoter group of the target company holds 45.70% of the total equity capital of the target company. The same is not disputed. The impugned acquisition of 6.17% equity capital of the target company by the acquirer is an

admitted fact. What is disputed is taking together the holding of the acquirer (through the impugned acquisitions) with the holding of the promoter group of the target company. Therefore, considering the facts of the case, it is to be examined whether the acquirer belongs to the promoter group of the target company or not. If the answer is in the affirmative, then the impugned acquisitions would be in contravention of Regulation 11(1) of the Takeover Regulations, as there was no public announcement made in respect of such acquisitions. In view of the above, it is necessary to refer to the definition of the term 'promoter' as contained in the Takeover Regulations. The same is reproduced herein below:

“promoter” means –

- (a) any person who is in control of the target company;*
- (b) any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later;*

and includes any person belonging to the promoter group as mentioned in Explanation I:

Provided that a director or officer of the target company or any other person shall not be a promoter, if he is acting as such merely in his professional capacity.

Explanation I: For the purpose of this clause, “promoter group” shall include:

- (a)*
- (b) in case the promoter is an individual –*
 - (i) the spouse of that person, or any parent, brother, sister or child of that person or of his spouse;*
 - (ii) any company in which 10 per cent or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member;*

..... [Underline supplied]

4. The promoter group of the target company is holding 45.70% of the equity capital of the target company. Ms. Nara Bhuvaneshwari and Mr. Nara Lokesh are shown as promoters of the target company in the quarterly

disclosure made by the target company to the National Stock Exchange of India Limited, for the quarter ended September 30, 2008. As per the said disclosure, they are holding 33.38% in the target company. A copy of said disclosure was annexed to the notices issued to the entities. The reply of the acquirer that its promoters/directors are also the promoters of the target company and are holding around 33.38% shares in the target company is clearly an admission to the fact that its promoters belong to the promoter group of the target company. Ms. Nara Bhuvaneshwari and Mr. Nara Lokesh, have also in their respective replies to SEBI, stated that they are the promoters of the acquirer. Ms. Nara Bhuvaneshwari and Mr. Nara Lokesh are the promoters of the acquirer, each holding 50% of its share capital. This is not in dispute. If an individual promoter of a company 'A' holds 10 per cent or more of the share capital in a company 'B', then as per Explanation (I)(b)(ii) to Regulation 2(h) of the Takeover Regulations, company 'B' is considered as part of the promoter group of company 'A'. In the present case, Ms. Nara Bhuvaneshwari and Mr. Nara Lokesh, promoters of the target company (company 'A') hold 50% each of the share capital in the acquirer (company 'B'), then in terms of Explanation (I)(b)(ii) to Regulation 2(h) of the Takeover Regulations, the acquirer is to be considered as a part of the promoter group of the target company. In view of the above, I am unable to accept the submission of the entities in this regard. Therefore, in the context of the present case, any acquisition of shares of the target company by the acquirer would be treated as an acquisition by the promoter group of the target company. In view of the impugned acquisitions, the shareholding of the promoter group has increased from 45.70% to 51.87%, an increase of more than 5% (6.17%), for which, the acquirer was statutorily obliged to make a public announcement in terms of Regulation 11(1) of the Takeover Regulations, in respect of the acquisition of 1.17% (over and above 5%) share capital of the target company. As per the said Regulation, an acquirer is entitled to acquire voting rights only upto 5% in a financial year, without making a public

announcement. Therefore, the acquirer in the present case was liable to make the public announcement in respect of 1.17% (1,34,905 shares) of the equity capital of the target company. Such an announcement was admittedly not made and the acquirer has therefore, contravened Regulation 11(1) of the Takeover Regulations for which it is liable for action in terms of Regulation 44 of the Takeover Regulations.

5. The acquirer, vide letter dated May 25, 2010, *inter alia* stated “ *Without prejudice to the aforesaid, we submit that if you are not satisfied with our submissions, that at the relevant time we were not acting in concert with others as alleged and feel that we have violated the provisions of Regulation 11(1), then we submit that we are open to disinvesting the shareholding of 1.17% which is allegedly in excess of 5% permissible creeping acquisition limit available to us for the Financial year 2008-2009. The proposed disinvestment by us of the 1.17% shares would be in consonance with the provisions of Regulation 44 of Takeover Regulations.....* ” In the present case, the promoters of the target company had consolidated their shareholding in the target company without due compliance of law, which cannot be allowed in the interest of the public shareholders. If such practices are not curbed, the same would defeat the very purpose of the Takeover Regulations.

6. I also observe that in the shareholding pattern of the target company, the acquirer is still shown as part of the “public” category. It has already been held above that the acquirer belongs to the promoter group of the target company. The classification of the shareholders in a company and informing their correct holding is an important factor for ascertaining compliance with the minimum public shareholding in a public listed company and any wrong classification or misreporting of the same would not be in accordance with provisions of the Listing Agreement. It is therefore expected that the target company and the acquirer take effective steps to properly classify the acquirer under the head

“promoter” group as statutorily mandated. Considering the totality of the facts and circumstances of the case, the present proceeding initiated by SEBI against the entities, vide show cause notices dated November 25, 2009 and February 18, 2010 are disposed of, as ordered herein below.

7. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11 and 11B thereof and Regulation 44 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereby, direct the acquirer, Nirvana Holdings Private Limited to disinvest 1,34,905 shares (which constitutes 1.17% of the equity capital over and above the 5% limit) of the target company, Heritage Foods (India) Limited as provided under Regulation 44(a) of the aforesaid Regulations, within a period of two months from the date of this Order and transfer the profits, if any, arising out of such disinvestment to the Investor Protection Funds of the concerned stock exchanges.

8. Nirvana Holdings Private Limited, for the purpose of carrying out such disinvestment, shall appoint a merchant banker, who shall file a report to the Securities and Exchange Board of India detailing the compliance of the above direction within two weeks from the date of such compliance.

9. Nirvana Holdings Private Limited is further directed to take effective steps to classify its shareholding in the target company, Heritage Foods (India) Limited, under the promoter category of the said company.

DR.K.M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

PLACE: MUMBAI

DATE: NOVEMBER 9, 2010