

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: RAJEEV KUMAR AGARWAL, WHOLE TIME MEMBER**

ORDER

IN THE MATTER OF PROPOSED ACQUISITION OF EQUITY SHARES OF M/S. SURYA PHARMACEUTICAL LIMITED– EXEMPTION APPLICATION FILED UNDER REGULATION 3(1)(I) READ WITH 4(2) OF SECURITIES AND EXCHANGE BOARD OF INDIA(SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997.

Date of Hearing: December 07, 2011

Appearances:

For Applicant: 1. Mr. Rajansh Thukral, Authorized Representative

For SEBI: 1. Mr. Susanta Kumar Das, Asst. General Manager, and
2. Mr. Amitesh Kumar, Asst. Legal Adviser

1. Surya Pharmaceuticals Limited (hereinafter referred to as ‘the target company’) is a company incorporated under the Companies Act, 1956, having its registered office at 911, 9th Floor, Surya Kiran Building, 19, K. G. Marg, Connaught Place, New Delhi. The equity shares of the target company are listed on the National Stock Exchange of India Ltd. and the Bombay Stock Exchange Ltd. in India and on Luxemberg Stock Exchange abroad.
2. Futuristic Garments Private Limited (hereinafter referred to as ‘the acquirer’), who is part of the promoter group of the target company, had filed an application dated April 7, 2008 with the Securities and Exchange Board of India (SEBI) under regulation 3(1)(I) read with regulation 4(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Takeover Regulations). By this application the acquirer had sought exemption from the applicability of the provisions of regulations 11 and 12 of Takeover Regulations in respect of the proposed acquisition of control of two companies viz; Mangal Kamna Buildwell Pvt. Ltd. and Dynamic Finvest Services Pvt. Ltd. which were collectively holding 14.30% equity shares in the equity share capital of the target company and direct acquisition of 10.41% equity shares of the target company from another body corporate viz: Creative Capital Services Ltd. by way of an off-market deal. The acquirer had claimed that these proposed acquisitions were for increasing the shareholding of the acquirer to 51% in terms of

the sanction of working capital facility of Rs. 38 crore extended to the target company by IDBI Bank vide its letter dated March 19, 2008. SEBI, vide order dated September 24, 2008 declined the grant of exemption in the matter. In the Appeal No 152 of 2008 filed by the acquirer before the Hon'ble Securities Appellate Tribunal (SAT) challenging this order of SEBI, the acquirer contended that that target company shall make preferential allotment in favour of the acquirer and the acquirer shall file a fresh exemption application with the SEBI. Vide order dated January 5, 2009, Hon'ble SAT directed SEBI that in case the acquirer files a complete application seeking exemption, the same shall be heard and disposed of in accordance with law within the time limit prescribed under regulation 4 of the Takeover Regulations.

3. Subsequently, the target company filed an exemption application dated January 14, 2009 with respect to preferential allotment of 47,00,000 Zero Coupon Convertible Share Warrants (hereinafter referred to as 'the warrants') to the acquirer. These 47, 00,000 warrants were convertible into 4, 70, 00,000 equity shares of the target company at the option of the acquirer. SEBI vide order dated June 16, 2009 rejected the request for exemption since this case did not fall into category where SEBI grants exemption on case to case basis in respect of proposed acquisition of shares or voting rights by way of preferential allotment and grant of exemption would not be in the interest of the public shareholders of the target company. The target company filed an Appeal No 174 of 2009 before SAT challenging this order of SEBI. Hon'ble SAT *prima facie* found that reasons mentioned in para 6.3 of SEBI order were not tenable. Vide its order dated December 22, 2009 Hon'ble SAT disposed of the appeal holding that application seeking exemption was premature and that if the acquirer exercises the option to get the warrants converted into equity shares, after they are allotted, it shall be open to the target company or the acquirer, as the case may be, to apply to the SEBI seeking exemption from the provisions of Takeover Regulations.
4. The target company, vide letter dated May 28, 2011 filed the instant exemption application with SEBI on behalf of the acquirer seeking exemption from obligation under regulations 10, 11 and 12 of the Takeover Regulations (*since repealed*). This application is for consideration before me. The target company has submitted that after obtaining in-principle approval from the concerned stock exchanges (in India) it has made preferential allotment of 47,00,000 warrants to the acquirer on April 29, 2010 . These warrants are convertible into 4,70,00,000 equity shares within the period of 18 months from the date of allotment i.e. before October 28, 2011. The acquirer

has converted 9,50,000 warrants into 95,00,000 equity shares on March 31, 2011 (during the Financial year 2010-11) and 10,00,000 warrants into 1,00,00,000 equity shares on April 7, 2011 (during the Financial year 2011-12). Pursuant to these conversions of warrants, the shareholding of the promoters in the target company increased from 31.52% to 34.90% during financial year 2010- 11 and to 38.11% during financial year 2011-12. These acquisitions are within creeping limit permitted under regulation 11 (1) of the Takeover Regulations (*since repealed*).

5. On May 4, 2011, the acquirer expressed its desire to convert the remaining 27,50,000 warrants into 2,75,00,000 equity shares of the target company. Pursuant to this proposed conversion of warrants into equity shares, promoters' shareholding in the target company would increase from 38.11% to 45.50%. The shareholding pattern of the target company before and after the proposed acquisition is as under:

Shareholders Category	Before the proposed allotment		After the proposed allotment	
	No. of shares	% of shares total share capital	No. of shares	% of shares total share capital
PROMOTER GROUP EXCLUDING THE ACQUIRER	52476450	25.88	62476450	22.79
Acquirers (also part of promoter group)	24787180	12.23	52287180	22.71
Sub Total	77263630	38.11	104763630	45.50
PUBLIC SHAREHOLDING				
Financial Institutions/ Banks	42650	0.02	42650	0.02
Bodies corporate	45960249	22.67	45960249	19.96
Individual shareholders	38060574	18.77	38060574	16.53
Trust	1000	0.00	1000	0.00
Clearing Members	191625	0.09	191625	0.08
NRI	2663652	1.31	2663652	1.16
Shares held by custodian against which Depository receipts have been issued	38569000	19.02	38569000	16.75
Sub Total (B)	125488750	61.89	125488750	54.50
GRAND TOTAL (A+B)	202752380	100.00	230252380	100.00

6. Since increase in promoters' shareholding pursuant to proposed acquisition of 2,75,00,000 equity shares by the acquirer is beyond permissible creeping limit (5%) under regulation 11(1) of the Takeover Regulations, the exemption has been sought *inter-alia* on following grounds:

- a. The IDBI Bank has sanctioned Fund based and Non -Fund Based facilities of Rs.38 crore to the target company with stipulation that the promoters shall increase their stake in the target company to a minimum of 51% shares of the total paid up capital. In view of this stipulation, the promoters are required to increase their stake in the target company to the extent that the promoters continue to hold a minimum of 51% share in the extended paid up capital of the target company. The control of the target company is already with the promoter group of which the acquirer is a part. The objective of the proposed acquisition is the consolidation of promoters' holding in view of this stipulation of the IDBI Bank.
 - b. After considering the submissions of the acquirer regarding urgency of obtaining exemption in the time bound manner, Hon'ble SAT, vide its order dated January 05, 2009, directed SEBI to dispose of the application in terms of para. 5.8 of SEBI order dated September 24, 2008. Further, in its order dated December 23, 2009, Hon'ble SAT observed that the reasons mentioned in para 6.3 of SEBI order dated June 16, 2009 do not appear to be tenable.
 - c. The allotment of 47, 00,000 warrants to acquirer by the target company was as per SEBI regulations and Companies Act, 1956.
 - d. The proposed acquisition is not in any way detrimental to the interest of the shareholders. The shares of the company have always remained strong in the market and have always remained above the share issue price. Further, there is no fear relating to exit for the shareholders as there is excellent liquidity in the scrip.
 - e. The proposed allotment of equity shares upon conversion of share warrants shall not in any way affect the rights of existing shareholders rather it shall help the company to run its business more effectively and efficiently by raising the additional finance to meet its ever growing working capital requirements as there is consistent growth in the progress of the company.
7. The Takeover Panel examined the application dated May 28, 2011 and other information furnished by the target company vide its letter dated July 23, 2011. The Panel in its report dated September 28, 2011 made following recommendation :-

"Preferential allotment of equity shares or convertibles is not exempt under the SEBI (SAST) Regulations. In the past, the Panel has recommended grant of exemption only in such cases where preferential allotment of shares or convertibles was being resorted to improve financial health of a Company pursuant to CDR package or otherwise. The underlying factor in all those cases was either sickness or poor financial health of

the companies which could not be cured without infusion of funds by the Promoters/ Acquirers. In those cases, the effort to turn around the companies by infusion of funds by promoters was considered to be in the interest of all stake holders particularly the public shareholders. The Panel did not observe any such compelling reason in the instant case which may show that the proposed acquisition by the Promoters would be in the interests of public shareholders. Target Company's financial health is not bad and as such if the promoters want to increase their shareholding in the company they must do so in compliance with open offer requirements under SEBI (SAST) Regulations. Mere compliance with a condition stipulated by a bank for increase of Promoters stake in the Company to protect the lender's interest or perhaps, the promoters' interest against hostile takeover, cannot be a ground for exemption to such acquisition. Regulations aim to protect the interest of small investors in the security market by providing them equal opportunity. Denial of equal opportunity to them may hamper the growth of securities market in India and end up in serving the vested interests of the promoters or lenders.

Against the aforesaid background, the panel was of the view that the instant case is not a fit case for grant of exemption."

8. SEBI sought further information and documents from the target company which it furnished vide its letter dated September 28, 2011.
9. Mr. Rajansh Thukral, the authorized representative of the target company appeared before me on December 7, 2011 and made oral as well as written submissions. The learned authorized representative reiterated the grounds for exemption mentioned in the application and emphasized that in para 5.8 of order dated September 24, 2008, SEBI itself stated that the target company was free to make preferential allotment to the acquirer for satisfying the stipulation of IDBI Bank . Further, the decline of exemption in the case would cause undue financial hardship on the target company as it shall be under obligation to refund the 25% money received at the time of allotment of warrants to the acquirer in addition to the deprivation of the opportunity to receive finance from IDBI Bank.
10. It is also contended that in the past, in various cases, SEBI had granted exemption from Regulations 10, 11 and 12 of the Takeover Regulations where sickness or poor financial health of the company was not involved. In support of this contention, the target company has relied upon following SEBI orders with special emphasis on the order dated September 18, 2008 in the matter of M/s. Parenteral Drugss (India) Ltd.-

- a. Order dated September 22, 2008 in the matter of M/s. Carol Info Services Ltd.,
 - b. Order dated April 15, 2011 in the matter of Deccan Chronicle Holdings Ltd.,
 - c. Order dated April 27, 2010 in the matter of Expo Gas Containers Ltd.,
 - d. Order dated April 21, 2010 in the matter of Pacific Cotspin Ltd.,
 - e. Order dated January 09, 2008 in the matter of TTK Healthcare Ltd. and
 - f. Order dated September 28, 2010 in the matter of Southern Petrochemical Industries Corporation Ltd.
11. I have carefully considered the application dated May 28, 2011, oral as well as written submissions made on behalf of target company, the documents submitted by the target company vide letter dated September 28, 2011, the report of the Takeover Panel and other relevant material available on record. Before proceeding to examine the facts of this case, I deal with the issue whether the earlier SEBI and SAT orders in this case, suggest that exemption should be granted in this matter merely on the basis of fact that preferential allotment of warrants has been made and the exemption application has been filed by the target company.
12. I observe that para. 5.8 of SEBI order dated September 24, 2008 deals with the argument of the acquirer that it proposed to acquire two companies which held shares in the target company (indirect acquisition) and to acquire shares from one shareholder of the target company (direct acquisition) because the preferential allotment of shares to the promoters and PACs is not exempted under regulation 3(1) of the Takeover Regulations and preferential allotment shall again necessitate exemption from SEBI besides affecting capital structure. I note that in para 5.8 of this order SEBI has only clarified the position of the regulations to the extent that the target company was free to make preferential allotment to the acquirer and the acquirer could seek exemption under regulation 3(1)(i) before the preferential allotment of equity shares. SEBI has not advised that it shall grant exemption if the target company makes preferential allotment to the acquirer. I note that in order dated January 05, 2009, Hon'ble SAT has only taken note of the observations in para. 5.8 of the SEBI order and submission of the acquirer that the target company would make preferential allotment to the acquirer and the acquirer shall file a fresh exemption application. While dealing with the apprehension of the acquirer that SEBI may not decide its application within the time limit prescribed in regulation 4 of the Takeover Regulations, Hon'ble SAT directed SEBI that in case the acquirer files a complete exemption application the same shall be heard and disposed of in accordance of law within the time limit

prescribed in regulation 4. I find that by the order dated January 05, 2009, SAT has not curtailed the discretion of SEBI to dispose of the request of exemption on merits once the exemption application is filed by the acquirer.

13. I note that in the order dated December 22, 2009 Hon'ble SAT *prima facie* found that reasons mentioned in para 6.3 of SEBI order dated June 16, 2009 were not tenable. Hon'ble SAT has not given any final finding on the merits of the case and held that application seeking exemption at that time was premature. Hon'ble SAT has further clarified that if the acquirer exercises the option to get the warrants converted into equity shares, after they are allotted, it shall be open to the target company or the acquirer, as the case may be, to apply to the SEBI seeking exemption from the provisions of Takeover Regulations.
14. In view of the aforesaid examination, I find that neither SEBI nor SAT orders suggest grant of exemption merely because preferential allotment has been made and exemption application has been filed. Such exemption applications are considered and decided in accordance with regulation 3(1)(f) read with regulation 4 of the Takeover Regulations. SEBI decides the exemption applications considering the facts and circumstances of each case. I, therefore, proceed to examine the instant application on the basis of facts and circumstances, as they exist in this case.
15. I note that in the past, depending on the facts and circumstances of a particular case, SEBI had been granting exemptions in respect of acquisition of shares through preferential allotment. The grounds of exemption in few cases are as under:
 - a. the preferential allotment to promoters/acquirers is pursuant to stipulation under CDR package,
 - b. where the target company has suffered losses and the preferential allotment was for survival and strengthening the financial position of the target company,
 - c. where the preferential allotment to promoters/acquirers is to secure the disbursement of loan already sanctioned by the banks/financial institutions for funding the projects of the target company,
 - d. where the preferential allotment to promoters/acquirers is to bring the margin money towards the cost of project/expansion plan by way of equity share capital

from promoters as advised by banks/financial institutions before they sanction the financial assistance to target company.

16. In the instant case, it is noted that in the sanction letter dated February 19, 2008 the IDBI Bank as a general covenant of the financial assistance reserved the right to withdraw the loan facility in the event of the promoters'/directors'/relatives' stake in the target company falling below 51%. The implementation of this covenant is at the discretion of IDBI Bank. In fact, the IDBI Bank has already sanctioned and released the entire amount of working capital loan of Rs. 38 crore to the target company even though the promoters have not increased their stake to 51%. Even after the conversion of all 47, 00,000 warrants the shareholding of the promoters in the target company would reach only to 45.50%. Vide a letter dated September 24, 2011 the IDBI Bank has advised the target company to ensure the compliance of the stipulation regarding maintenance of shareholding level of the promoter's/directors/relatives during the currency of IDBI Bank's financial assistance. I find that IDBI Bank had not stipulated this covenant as a condition precedent for sanction and release of financial assistance of Rs. 38 crore to the target company and has not insisted on the withdrawal of the said financial assistance already released to the target company even though the promoters' stake in the target company has not been increased and maintained at 51%.
17. From the annual report of the target company for the year 2010-11, it is observed that the target company's gross sales has been growing at a rate of more than 40% during the financial years 2008-09, 2009-10 and 2010-11. The profit after tax (PAT) has been growing at a rate of more than 30% during these last three financial years with the PAT for the year 2010-11 alone stood at Rs.100.16 crore. From these figures, it is observed that the target company is in good financial health which is also admitted by the target company.
18. The present case does not fall in any category of the cases where SEBI had granted exemption in case of acquisition of shares through preferential allotment in the past. In this case, the stipulation by the IDBI Bank by way of a general covenant was not the condition precedent for sanction of the financial assistance. The IDBI Bank had already released the entire sanctioned amount of Rs.38 crore and even if IDBI Bank decides to call back loan amount of Rs.38 crore released to the target company, it will not have any adverse impact on the financial health of the target company.

19. I also find that the orders of SEBI on which reliance has been placed by the target company in support of its contentions were passed in different facts and circumstances which differ from the ones in the present case. The orders in the matter of Carol Info Services Ltd., Deccan Chronicle Holdings Ltd. and TTK Healthcare Ltd., relate to passive increase in shareholding of the acquirers/promoters pursuant to buy-back of shares by the concerned companies. In the matters of Pacific Cotspin Ltd. and Southern Petrochemical Industries Corporation Ltd., the proposed preferential allotment of equity shares to the promoters of the companies was pursuant to CDR package. In the matter of Expo Gas Containers Ltd., the target company was a loss making company and was not in a good financial health. The target company had outstanding debts with IDBI and Union Bank of India, which it could not repay from its operations. The promoters/ acquirers were required to bring fresh funds and take equity shares in the company to honour the One Time Settlement (OTS) with the Banks.
20. The facts of Parental Drugs (India) Ltd. on which much emphasis was placed by learned representative of the target company, are also different from those of the present case. In Parental Drugs case, a major expansion programme of the company was part financed by Banks and balance cost of project was to be financed by equity participation. The company allotted equity shares and warrants to few independent entities and warrants to the acquirer/ promoter. The promoter's shareholding in the target company was 70.64% before such allotment. By virtue of acquisition of equity shares by independent entities the promoters' shareholding in the target company was reduced from 70.64% to 57.04% in the enhanced capital of the target company. Pursuant to the acquisition of equity shares on conversion of the warrants by the acquirer/promoter, the promoters' shareholding increased from 57.04% to 58.35% in the share capital of the target company. On conversion of warrants by the acquirer/promoter, the marginal increase in promoters' shareholding from 57.04% to 58.35% in the enhanced capital of the target company was considered merely technical as it had occurred because the allottees other than the acquirer had already subscribed to equity shares of the target company. After acquisition of equity shares and conversion of all warrants by independent entities and the acquirer/promoter, the promoters' shareholding in the enhanced capital of the target company had actually reduced from 70.64% to 58.35% and there was no increase in the shareholding/voting rights of the promoters pursuant to the proposed transactions.

21. I further note that in case a warrant holder does not exercise the option to take equity shares against any of the warrants held by him, the upfront 25% consideration paid in respect of such warrants shall be forfeited by the issuer in terms of regulation 77 (4) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. Therefore, the argument that if the target company is not permitted to allot equity shares by granting this exemption, it shall be under obligation to refund the 25% money received at the time of allotment of warrants is not correct. The target company would rather be entitled to forfeit the amount of 25% of the consideration paid for the allotment of warrants, in case the acquirer decides not to convert the same. The argument of the target company that it shall be deprived of the opportunity to receive the finance from IDBI Bank is also not tenable since the target company has already received the sanctioned loan amount of Rs.38 crore from IDBI Bank.
22. The contention of the target company that the open offer does not result in infusion of funds and involves high amount of expenses and a time consuming process is not acceptable since these factors are not relevant for compliance of open offer obligations under the Takeover Regulations.
23. The objective of Takeover Regulations is fair and equal treatment of all shareholders and protection of interest of shareholders by offering them exit opportunity at the best offer price. The exemptions are granted where the exemption is in the interest of investors or the exemption would not compromise the interest of the investors. I note that presently, 62% shareholding in the target company is held by the public shareholders. In the facts and circumstances of this case, if the acquirer is permitted to consolidate its holding beyond the specified threshold limits of Takeover Regulations without making open offer to the public shareholders, the large number of public shareholders of the target company would be denied of exit opportunity and the grant of exemption under the facts and circumstances of this case would defeat the objectives of Takeover Regulations. I, therefore, agree with the recommendations of the Takeover Panel reproduced in para 7 above and am of the view that this is not a fit case for grant of exemption under regulation 4 of the Takeover Regulations, 1997.
24. I note that the application has been filed and considered under the erstwhile Takeover Regulations, 1997. These regulations have been repealed by the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover

Regulations, 2011) with effect from October 22, 2011. By virtue of regulation 35 of Takeover Regulations, 2011 this order shall be deemed to have been passed under regulation 11 of the Takeovers Regulations, 2011 read with regulation 4 (6) of the Takeover Regulations 1997. Further, on and from October 22, 2011, any acquisition beyond threshold limit prescribed under the Takeover Regulations, 2011 would attract the obligations under these regulations.

25. In view of the above findings, I, in exercise of the powers conferred upon me by virtue of Section 19 of the SEBI Act, 1992 and regulation 11 of the Takeover Regulations, 2011 read with regulation 4(6) of the Takeover Regulations, 1997, do not grant exemption to the acquirer, Futuristic Garments Private Limited in respect of the proposed acquisition of 2,75,00,000 equity shares of Surya Pharmaceutical Limited pursuant to conversion of 27,50,000 zero coupon convertible share warrants as submitted vide application dated May 28, 2011.
26. I have noted that the last date of conversion of zero coupon convertible share warrants was October 28, 2011. Since, the instant application has been under consideration of SEBI and the last date of conversion has expired, the acquirer/target company, as the case may be, are permitted to exercise the conversion option and allot equity shares, if they so desire, within one month from the date of this order. However, the acquisition of equity shares by the acquirer pursuant to conversion of warrants shall be made in compliance with the open offer obligations under regulation 3(2) of Takeover Regulations, 2011.

DATE: January 9, 2012
PLACE: MUMBAI

RAJEEV KUMAR AGARWAL
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA