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**SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY**

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 09 of 2011

Muhammad Hanif Y. Bawany

Chief Executive of Bawany Management (Pvt.) Limited Appellant

Versus

Director (SMD)

Securities and Exchange Commission of Pakistan Respondent

Date of hearing

28-04-11

ORDER

Present:

For the Appellant:

Mr. Iqbal, Advocate

Mr. Sohail Razzak

Respondent:

Mr. Imran Inayat Butt, Director

Department representatives:

Mr. Muhammad Ali, Deputy Director

Mr. Kapeel Dev, Assistant Director



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1. This order shall dispose of appeal No. 09 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 29-12-10 (the "Impugned Order") passed by the Respondent.
2. Bawany Air Products Limited ("BAPL") is a public limited company listed on the Karachi Stock Exchange (Guarantee) Limited ("KSE") and the Appellant is Chief Executive Officer (the "CEO") and director of BAPL. The Appellant is also the CEO and director of Bawany Management (Pvt.) Limited ("BML"). The Board of Directors (the "BoD") of BAPL as on 31-12-09 included: the Appellant, Ms. Momiza Kapadia, Mr. Vali Mohammad M. Yahya, Mr. Danish Amin, Mr. Wazir Ahmed Jomezai, Mr. Zakaria A. Ghaffar and Muhammad Ashraf. Moreover, the Appellant and Mr. Vali Mohammad Y. Baway are the only directors/shareholders of BML holding 5,000 shares each.
3. On perusal of the KSE trading data from 01-01-10 to 23-02-10 (the "Review Period"), it was observed that the share price of BAPL witnessed a gradual surge from Rs. 4.70 on 04-01-10 to Rs. 8.79 on 23-02-10. BAPL announced its financial results for the half year ended 31-12-09 on 24-02-10, which exhibited its positive financial outlook, declaring Earning per Share ("EPS") of Rs. 5.97. The EPS for half year ended 31-12-09 had considerably improved as compared to EPS of Rs. 0.26 announced in the first quarter ended 30-09-09. The improved half yearly financial results of BAPL had positive impact on the scrip price which closed at upper circuit breakers for the next two trading sessions i.e. on 24-02-10 and 25-02-10 and also closed on higher price of Rs. 11.78 on 26-02-10. The declaration of half yearly financial results is regarded as 'price sensitive



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information' due to its positive effect on the price of BAPL. The review of historical trading data of BAPL shows that it is thinly traded scrip. The year wise volume of BAPL scrip from 2007 till 2009 is given in the following table.

Year	Volume	Avg. Daily Volume	High Price (Rs.)	Low Price (Rs.)
2007	547,000	4,973	20.90	10.30
2008	3,540,500	24,587	23.65	2.99
2009	1,487,686	7,998	6.39	2.05

The analysis of trading data of BAPL scrip showed that out of total volume of 253,388 shares during the Review Period, BML purchased 125,101 shares (49% of total market volume) at average rate of Rs. 7.06 through its trading account with Live Securities (Pvt.) Limited ("LSL"). Out of 125,101 shares purchased by BML 45,272 shares were bought on 23-02-10 between the time 1:48:13 p.m. to 1:55:26 p.m. which was before the conclusion of BoD meeting of BAPL, wherein, half yearly accounts for the period ended 31-12-09 were approved. The BoD meeting of BAPL concluded after the end of trading session at KSE, therefore, BAPL disseminated aforesaid financial results to KSE on the following day i.e. 24-02-10.

4. Show cause notice dated 28-07-10 ("SCN") was issued to the BML to explain as to why action may not be taken under section 15A of the Securities and Exchange Ordinance, 1969 (the "Ordinance"). The Appellant on behalf of BML filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellant and in exercise of the powers conferred under section 15E (1) of the Ordinance, passed the Impugned Order and imposed a fine of Rs. 600,000/- (Rupees six hundred



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thousand only) on BML for the contravention of section 15A (1) of the Ordinance.

5. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant's counsel argued:

- a) the intention behind the purchase of BAPL shares at lower price was to mitigate the losses incurred by the Appellant, while he was acting as an underwriter of BAPL shares. The Appellant as an underwriter of BAPL shares purchased shares at higher price of Rs 10, whereas, in the market it was quoted at Rs 4. In order to cover up the losses incurred while acting as underwriter of BAPL shares, the Appellant purchased the shares at lower price;
- b) the Appellant had only brought the shares of BAPL and not a single share was sold by the Appellant. The Appellant cannot be charged with 'insider trading' as no gain was made in the transaction;
- c) the actual EPS of BAPL was Rs 1/- only and the balance was result of adjustment of deferred tax and reversal of financial liabilities due to settlement / compromise with the banks and financial institutions, who had waived certain portion of liabilities of BAPL, as such, no illegality was committed by the Appellant;
- d) the Appellant did not purchase 125,101 shares during the restricted period i.e. between 17-02-10 to 23-02-10, which can be confirmed from the Central Depository Company Account Statement (the "CDC Account Statement") of BML. The Respondent failed to take into consideration this critical information while deciding the case.



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6. The Respondent argued that:

- a) the Appellant as CEO of BML could not have recouped losses incurred by him as an underwriter of BAPL shares by indulging in insider trading;
- b) the realization of gain is not an ingredient of insider trading. The Appellant purchased shares on lower price based on inside information and before it became public, as such, the Appellant had indulged in insider trading;
- c) the rise in EPS due to adjustment in deferred tax and reversal of financial liabilities was an 'inside information' and was only available to the BoD of BAPL and BML. An important component of EPS was improvement in gross profit of BAPL, which increased from Rs. 9.179 million as on 30-09-09 to Rs 22.730 million on 31-12-09. The above information was in the knowledge of the Appellant as CEO of BAPL, who used the 'inside information' and thus indulged in insider trading;
- d) the Review period was the time during which the trading at KSE was monitored by the Respondent and was entirely different from the closed period as is referred by the Appellant. The Appellant traded in the shares even during the closed period i.e. between 17-02-10 to 23-02-10 which was violation of regulation 35 (xxvi) of the Listing Regulations of KSE. The reference to the closed period is irrelevant and the purchase of 125,101 shares during the Review Period stands established from the CDC Account Statement.



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7. We have heard the parties. Section 15A (1) (2) (a), 15 (B) (1) (a), 15(C) (1) (a) and 15(E) (3) of the Ordinance is reproduced for ease of reference:

15A. Probation of insider trading. (1) No person shall indulge in insider trading.

- (2) *Insider trading shall include*
(a) *an insider person transacting any deal, directly or indirectly, using inside information involving listed securities to which the inside information pertains , or using others to transact such deals*

15B. Inside information.- (1) The expression "inside information" means,-

- (a) *Information which has not been made public relating, directly or indirectly, to listed securities or one or more issuers and which , if it were made public , would be likely to have an effect on the prices of those listed securities or on the price of related securities;*

15C. Insiders.- (1) Insiders shall include,-

- (a) *Sponsors, executive officers and directors of an issuer;*

15E Liability for contravention.

- (3) *Where an insider person discloses inside information to any other person who is not required to possess such information for any reason, the insider person shall be liable to fine, to be imposed by the Commission, which may extend to thirty million rupees*



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The Appellant as CEO of BAPL attended the BoD meeting of BAPL in which half yearly accounts for the period ended 30-12-09 were approved and was an 'insider' in terms of section 15C (1) (a) of the Ordinance. The half yearly accounts were 'price sensitive information' as they exhibited positive financial outlook: EPS of Rs. 5.97 as on 30-12-09 had considerably improved as compared to EPS of Rs. 0.26 announced in the first quarter ended 30-09-09. The information was, therefore, 'inside information' in terms of section 15B (1) (a) of the Ordinance. The Appellant traded in the shares of BAPL just before the conclusion of the BoD meeting of BAPL through its trading account with LSL. The Appellant, as an 'insider' traded in shares of BAPL, while in possession of 'inside information' and had indulged in 'insider trading' in terms of section 15A (2) (a) of the Ordinance.

The argument of the Appellant's counsel that since the Appellant incurred losses as an underwriter to the BAPL and was recouping the losses is not valid. The Appellant cannot be allowed to recover the losses by indulging in 'insider trading', which is strictly prohibited under the Ordinance. The argument of the Appellant's counsel that the Appellant cannot be charged with 'insider trading' since Appellant had only brought the shares of BAPL and not a single share was sold by the Appellant is baseless. The requirement of making a gain or avoiding a loss is not an ingredient of 'insider trading'. The fact that the Appellant indulged in 'insider trading' is sufficient to invoke the penal provisions of section 15(E) of the Ordinance. The Appellant on behalf of BML indulged in 'insider trading' by passing/ disclosing 'inside information' regarding the financial results of BAPL to BML, while the information was not made public, as such, the penalty under section 15E (1) of the Ordinance was rightly imposed on

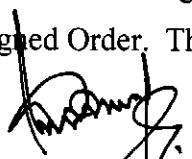


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BML. The issue of actual EPS and the closed period are factual by the Respondent in para 6 (c) and (d) above.

We are of the view that 'insider trading' damages market integrity and efficiency and effects the public confidence in the stock market. Corporate insiders, in every jurisdiction, face hefty fines and/or prison sentences for trading securities on the basis of inside information. In the United States of America, 'insider trading' is punishable by monetary penalties and imprisonment. Reference is made to the case of *Securities & Exchange Commission v. Milken*, 1990 WL 455346, Fed. Sec. L. Rep. where Mr. Milken pleaded guilty to six counts of insider trading. Mr. Milken was fined 600 million dollars; sentenced to ten years in prison and was permanently barred from the securities industry by US, Securities and Exchange Commission. Reference is also made to the recent case titled *U.S. v. Rajaratnam*, 1:09-cr-01184, U.S. District Court, Southern District of New York (Manhattan) in which Raj Rajaratnam, the hedge-fund tycoon and Galleon Group LLC co-founder, was found guilty of all 14 counts against him in the largest illegal stock-tipping case and faces up to 19 years in prison.

The Respondent has already taken a lenient view by not imposing fine which could have been three times the amount of gain made by BML. In view of the foregoing, we do not find any reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.


(MUHAMMAD ALI)
Chairman


(TAHIR MEHMOOD)
Commissioner (CLD)

Announced on: 12th August 2011