**Draft Notice U/S 138 of NIA**

IN THE COURT OF LD. METROPOLITAN MAGISTRATES

23rd COURT AT ESPLANADE, MUMBAI

CASE No. OF 2006

TRADE WINGS HOTELS LIMITED )

Having its Corporate Office at )

18/20 Dubash Marg, Kalaghoda, )

Fort, Mumbai 400 023 )

Having its Registered Office at )

6 Mascarenhas building )

Mahatma Gandhi Road, )

Panaji, Goa 403 001 )

through Mr. Ajay Vageria )

its Authorised Representative ) COMPLAINANT

V/s

1. ABK Enterprises Pvt. Ltd. )

Having its registered office at )

Chandramukhi Building (Basement), )

Nariman Point, Mumbai 400 0021. )

2. Dr. Ajit B. Kerkar )

[Director and Authorized Signatory] )

of ABK Enterprises Pvt. Ltd. )

Chandramukhi Building (Basement), )

Nariman Point, Mumbai 400 0021. ) ACCUSED

**Charge U/s.138 r/w Sec.141 of the Negotiable Instruments Act, 1881.**

**MAY IT PLEASE YOUR WORSHIP:**

The Complainant through Ajay Vageria, the authorized representative of the complainant company abovenamed, hereby states on solemn affirmation as under:

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| Ex. A  | 1.     The Complainant states that it has duly authorized Ajay Vageria to file this complaint against the accused and that he is conversant with the facts of this case. He is aware of the day to day operations of the Complainant company including the transaction in question and therefore able and competent to depose to the same for and on behalf of the Complainant company. Hereto annexed and marked as **Exhibit A**is the copy of the board resolution authorizing him to file this complaint.2.     The Complainant is a company incorporated under the Companies Act, 1956 having its corporate office at 18/20, K. Dubash Marg, Fort Mumbai 400 023 and having its registered office at 6 Mascarenhas Building, Mahatma Gandhi Road, Panaji, Goa 403 001 carrying on the business of Hotel and Restaurants.3.     The Accused No. 1 is a Private Limited Company. The Accused No. 2 is a director of Accused No.1 company and is also the authorized signatory of the cheque in question issued on behalf of Accused No. 1.  Accused No. 2 is in charge of the company and is responsible for the day to day affairs of the said company.4.     The Complainant states that under an MOU dated 26.4.2000 between Accused No.2, acting on behalf of Tulip Hotels Pvt. Ltd. (THPL) and Dr. Shailendra Mittal, wherein the Accused No. 2 had agreed that THPL will buy 50% of the equity capital of the Complainant by itself or through its nominees within 135 days of the Management of Bogmalo Beach Resort (hereinafter referred to as the said Hotel) being taken over by a Joint Venture consisting of THPL and Trade Wings equally. The Complainant states that the management of the said Hotel was handed over on 15.6.2006. Pursuant to the MOU a Shareholders Agreement dated 9th June 2000 was entered into between THPL , Trade Wings Ltd, the Complainant, Dr. Shailendra Mittal and Accused No. 2. Under the MOU the price of the equity shares of the Complainant was agreed to be in the range of 27 to 30 crores and THPL agreed to purchase 50% of the equity capital of the Complainant through itself or its nominees by 28.10.2000.  The Complainant craves leave to refer to and rely upon the said MOU and shareholders agreement as and when required by this Honble Court.5.     The Complainant states that the Accused No.2 had issued a cheque on behalf of Accused No.1 to the Complainant for a sum of Rs.9,79,70,000/- (Rupees Nine Crores Seventy Nine Lakhs Seventy Thousand only) being the amount towards part payment of 50% of the equity capital of the Complainant as agreed under the MOU. The amount owing to the Complainant on the date of the said cheque was far in excess of Rs. 9,79,70,000/- (Rupees Nine Crores Seventy Nine Lakhs Seventy Thousand only) and though not germane to this complaint, the Accused made certain payments viz. Rs. 30,00,000/- (Rupees Thirty lakhs only) vide a pay order dated 3.11.2006 to Trade Wings Ltd. and Rs. 1,20,00,000/- (Rupees one crore twenty lakhs only) to the Complainant vide a cheque dated 4.11.2006. These payments do not in any way diminish the liability of the accused in respect of the cheque for Rs. 9,79,70,000/- (Rupees Nine Crores Seventy Nine Lakhs Seventy Thousand only) which is subject matter of this Complaint. The Accused No. 1 issued the cheque on behalf of THPL as a nominee of the said THPL and hence has assumed the liability of the said THPL. |
| **Ex. B** |

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6.     The Complainant states that the Accused No.1 and 2 in part discharge of the liability under the MOU towards the Complainant had issued a cheque bearing No.184252 dated 1.11.2006 for Rs.9,79,70,000/- (Rupees Nine Crores Seventy Nine Lakhs Seventy Thousand only) drawn on Industrial Development Bank of India Ltd., Mittal Court, C Wing, Nariman Point, Mumbai 400 021 in favour of the Complainant.  Annexed hereto and marked as **Exhibit B** is the copy of the dishonoured cheque dated 1.11.2006.7.     The Complainant states that the cheque was presented by the Complainant for encashment with the Complainants banker viz. the National Cooperative Bank Ltd., Nariman Point Branch, Mumbai on 31.10.2006 after banking hours so that it could be presented to the bankers of the Accused on 1.11.2006. Subsequently the Complainant received a faxed letter dated 30.10.2006 on 31.10.2006 from the Accused No.2 requesting the Complainant not to deposit the cheque due to delay caused by an inadvertent reason resulting in difficulty in arranging the funds. In fact the letter further goes on to state that they shall make efforts to pay a partial amount before the end of November 2006. The Complainant however was not obliged to comply with the requisition contained in the said letter as the same had been sent dishonestly to merely stall for time. On 1.11.2006 the said cheque was returned dishonoured by a cheque return memo dated 1.11.2006 of Industrial Development Bank of India Ltd. with the remark Refer to Drawer.  Annexed hereto and marked as **Exhibit C** and **C-1** are copies of the letter dated 30.10.2006 and the cheque return memo dated 1.11.2006 respectively.  |
| **Ex. C & C-1** | 8.     The Complainant received the intimation about the dishonour of the cheque from their banker on 1.11.2006.9.     As the said cheque was dishonoured the Complainant issued the statutory notice dated 15.11.2006 through its advocates Dave & Girish & Co. to Accused Nos.1 and 2 calling upon them to make payment of the dishonoured cheque amounting to Rs.9,79,70,000/- within 15 days from the date of receipt of the said notice.  Annexed hereto and marked as **Exhibit D**is the copy of the statutory notice dated 15.11.2006.  |
| **Ex. D** |  10.    The Complainant states that the said notice was sent to the Accused Nos.1 and 2 by registered A/D post and Under Certificate of Posting on 15.11.2006.  Annexed hereto and marked as **Exhibit E collectively**are the copies of the postal receipts of Registered A/D post and Under Certificate of Posting. |
| **Ex. F** |

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11.    The Accused Nos.1 and 2 received the notice dated 15.11.2006 on 16.11.2006. Annexed hereto and marked as **Exhibit F** are the postal acknowledgement receipts which were duly acknowledged by the Accused on 16.11.2006. |
| **Ex. G** | 12.    Although the Accused Nos.1 and 2 have received the notice dated 15.11.2006 they have failed to make the entire payment to the Complainant which the Accused is liable to make within 15 days from the date of receipt of the notice. The Accused No.1 addressed a letter dated 1.12.2006, with a post-dated cheque for Rs.7,29,70,000/- (Rupees seven crores twenty-nine lakhs and seventy thousand) enclosed, purportedly in reply to the Complainants notice dated 15.11.2006 in which it was falsely contended, inter alia, that the Complainants notice is premature, that the payment was in full settlement of the Accuseds liability towards the Complainant, that certain further payments were made to the Complainant in respect of the amount of the dishonoured cheque. The Complainant says and submits that the issuance of a fresh post-dated cheque for a reduced amount in no way constitutes compliance with the Complainants notice u/s 138 of the Negotiable Instruments Act, 1881 and also says and submits that the so-called defense taken by the Accused in their reply dated 1.12.2006 is false and irrelevant and is also a means to stall for time. Annexed hereto and marked as **Exhibit G** is a copy of the letter dated 1.12.2006 sent by the Accused No.1. The Complainant adds that though the said notice makes mention of a pay order of Rs. 1,00,00,000/- (Rupees one crore only) given to Mr. Om Navani and Mr. Ashok Advani, no copy of such pay order was enclosed in the said letter thus demonstrating the dishonesty of the Accused. In fact all the annexures mentioned in the letter are missing except the cheque dated 21.12.2006 bearing no. 184265 for Rs. 7,29,70,000/-. |
| **Ex. G** |

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13.    The complainants cause of action arose on 1.12.2006 i.e. 15 days from the receipt of the notice dated 15.11.2006.14.    The cheque was issued by the Accused in favour of the Complainant towards the part discharge of the liability of THPL towards the Complainant under the MOU and since the Accused No.2 is the authorized signatory of the cheque in question and is responsible for the day to day affairs of the business of Accused No.1 and hence is responsible for the said payment due to the Complainant.  The cheque was issued by Accused No. 2, on behalf of THPL, from the account maintained by the Accused No.1 with its banker for the payment of the amount to the Complainant in part discharge of the liability of THPL and since the cheque was dishonoured for the reasons stated hereinabove the Accused have committed an offence under section 138 read with section 141 of the Negotiable Instruments Act, 1881, as amended.  The Accused Nos.1 and 2 are thus liable to be prosecuted for the offence under section 138 read with section 141 of the Negotiable Instruments Act, 1881, as amended.15.    The complaint has been filed within the period of limitation as prescribed under the Negotiable Instruments Act, 1881 as amended, i.e. within one month from the date on which the cause of action arose.16.    The Complainant has appended a list witnesses that it proposes to examine to prove its case and also craves leave to refer to and rely upon the documents mentioned in the complaint.17.    The Complainant states that the Complainants bank as well as the Accused No. 1s bank are situated within the jurisdiction of this Honorable Court and therefore this Honorable Court has jurisdiction to entertain, try and dispose of the above complaint.  |

In the circumstances aforesaid, the Accused above named are guilty of offences u/s. 138 r/w. 141 of the Negotiable Instruments Act and pray that they be dealt with according to law.

For this Act of kindness, the Complainant in duty bound shall for ever pray.

Solemnly affirmed at Mumbai on )

this 8th day of December, 2006 ) For Trade Wings Hotels Ltd.

Before me

Advocate for the Complainant

**MbsinghDAssociatesHemangiDr. S. Mittal 8 complaint Final.doc**

**LIST OF WITNESSES**

1.                       Mr. Ajay Vageria, the authorized representative of the Complainant.

2.                       Representative of the Complainant Banker, The National Cooperative Bank Ltd., Nariman Point, Mumbai.

3.                       Representative of the Accused Banker, The Industrial Development Bank of India, Nariman Point, Mumbai.

4.                       Dr. Shailendra Mittal, Director of the Complainant Company

5.                       Mr. Om Navani, Director Tulip Hotels Pvt. Ltd.

6.                       Any other witnesses/documents with the permission of this Honble Court.

Advocate for the Complainant

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V/s

1.ABK Enterprises Pvt. Ltd. )

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2.Dr. Ajit B. Kerkar )

[Director and Authorized Signatory] )

of ABK Enterprises Pvt. Ltd. )

Chandramukhi Building (Basement), )

Nariman Point, Mumbai 400 0021. ) ACCUSED

**VAKALATNAMA**

I, Ajay Vageria, the authorized representative of the complainant abovenamed, do hereby appoint, nominate and authorize M/s. Haresh Jagtiani & Associates, Advocates to act, appear and plead on the Complainants behalf in the above matter.

In witness whereof, I have signed this writing on this 8th day of December 2006.

(Complainant)

ACCEPTED

Haresh Jagtiani & Associates,

Advocates

205, Neelkanth

98, Marine Drive

Mumbai 400 002.

N.B. We are not the members of an advocates welfare fund.

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23rd COURT AT ESPLANADE, MUMBAI

CASE No. OF 2006

TRADE WINGS HOTELS LIMITED COMPLAINANT

V/s

1. ABK Enterprises Pvt. Ltd.

2. DR. AJIT B. KERKAR ACCUSED

**I N D E X**

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| **Sr. No.** | **Particulars** |