
BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992

In the Matter of GDR Issue of Sterling Biotech Limited.

In respect of –

Sr. No.	Noticee	PAN/DIN
1.	Sterling Biotech Limited (In Liquidation)	AABCS1946H
2.	Fresia Worldwide Ltd	N.A.
3.	Nitin Sandesara	00255496
4.	Chetan Sandesara	00255671
5.	Rajbhushan Dixit	AACPD9215C
6.	Narendra Patel	01624527
7.	Vilas Joshi	AAAPJ5714A
8.	Priyadarshan B Mehta (P B Mehta)	AAYPEM2209B

1. Background –

1.1. The present matter emanates from an investigation by SEBI into the issuances of Global Depository Receipts (“**GDRs**”) in overseas markets by Indian companies, allegedly with the intention of defrauding Indian investors. During the course of such investigation, it came to SEBI’s knowledge that there were several other GDR issues wherein loan was taken by a foreign entity and the security of the loan was provided by the GDR issuing company by signing an account charge agreement. One such company was Sterling Biotech Ltd. (“**Sterling**”/the “**Company**”).

1.2. The focus of investigation was to ascertain whether the shares underlying the GDRs were issued with proper consideration and whether appropriate disclosures, if any, were made by Sterling with respect to GDRs issued by it on October 01, 2003. The period under investigation was the period around the issuance of GDRs by the Company, i.e. September 01, 2003 to October 31, 2003 (“**Investigation Period**”).

2. Summary of Show-cause Notice(s) - (i) The Scheme (ii) The Modus Operandi and Fund Flow

2.1. Pursuant to the findings of Investigation Report, a common Show-cause Notice dated March 05, 2018 was issued to the Noticees and a Supplementary Show-cause Notice dated April 03, 2019 was issued to Noticee No.1. Hereinafter, the above-mentioned Show-cause Notices are collectively referred to as “**the SCN**”. By way of the SCN, all the Noticees were called upon to show cause as to why suitable

directions should not be issued against them under Sections 11, 11B and 11(4) of the SEBI Act, and Noticee No.1 was also called upon to show cause as to why suitable directions, including the direction to bring back an amount of USD 12.37 million should not be issued against it under Sections 11 (1), 11B and 11(4) of the SEBI.

2.2. In this regard, the SCN relying on the Investigation Report has alleged that the scheme of issuance of GDRs was fraudulent as Noticee No. 1, the Company, had entered into an Account Charge Agreement with the Bank, Banco Efisa (“**Banco**”) for a loan that had been availed by Fresia Worldwide Ltd (“**Fresia**”) towards the subscription of GDRs issued by the Company. The Account Charge Agreement was not disclosed to the stock exchanges, which made the investors believe that the said GDR issue was genuinely subscribed by the foreign investors. Noticee No. 2, Fresia was a party to this Fraudulent scheme. Noticee No.3, Nitin Sandesara, who was the Chairman and Managing Director of Sterling, signed an account charge agreement with Banco and pledged GDR proceeds as collateral against loan availed by Fresia from Banco for subscribing to GDRs of Sterling. Noticee Nos. 4, 5, 6, 7 and 8, namely Chetan Sandesara, Rajbhushan Dixit, Narendra Patel, Vilas Joshi and P. B. Mehta were Directors on the Board of Sterling, and in the board meeting dated August 09, 2003 authorised Nitin Sandesara to sign the agreement pledging the GDR proceeds which acted as security in connection with loan availed by Fresia. The said directors also authorised Banco to use GDR proceeds as security against the loan.

2.2 (I) *The Scheme*

A. The Company came out with the issuance of 2.32 million GDRs amounting to USD 15.37 million on October 1, 2003. Summary of the GDR issuance of Sterling is tabulated below:

Table - 1

GDR issue date	No. of GDRs Issued	Capital raised (US\$mn.)	Price per GDR (US\$)	Underlying shares per GDR	Local custodian	No. of equity shares underlying GDRs	Global Depository Bank	Lead Manager	Bank where GDR proceeds deposited	GDRs listed on
01-Oct-2003	23,28,045	15.37	6.6	6	ICICI Bank Ltd., Mumbai	1,39,68,270	The Bank of New York Mellon, USA	Reliance Corporate Finance Limited, UK	Banco Efisa	Luxembourg Stock Exchange

B. For this purpose, a bank account was opened by Sterling with Banco to deposit the GDR proceeds. Accordingly, a total of USD 15.37 million was credited to this account. Out of the above amount, a total of USD 14,850,000

credited to the GDR proceeds account of Sterling was from Fresia. So, Fresia had subscribed to nearly 96.65% of the GDR issue. Details of the amounts credited to the GDR proceeds account with Banco are tabulated hereunder:

Table - 2

Date of credit of funds	Credit amount (US\$)	Bank
30-09-2003	35,102	Aarguische Kantonalbank
01-10-2003	14,850,000	ContiFina, S.A.
02-10-2003	480,000	Bank Gutmann
Total	15,365,097	

C. It was observed during investigation that on May 06, 2004, an amount of USD 12, 200, 000 was transferred by Sterling to Fresia, the Entity which had subscribed to nearly 96.65% of the GDR issue. Considering that Fresia was one of the subscribers to the GDR issue and the company transferred nearly 80% of GDR proceeds back to Fresia, it was concluded that the GDRs, and the underlying equity shares in turn, to the tune of US\$ 12.27 million, were effectively issued by Sterling to Fresia without any consideration, at the cost of shareholders / investors of Sterling. This is the alleged fraudulent scheme that had been conceived.

2.2 (II) *The Modus Operandi and Fund Flow*

- A. Fresia entered into a credit agreement dated September 29, 2003 with Banco for a term loan facility up to USD 15 million, with the purpose of subscribing to the GDRs being issued by Sterling.
- B. On August 09, 2003, the Board of Directors of Sterling passed a resolution (signed by Kirtidev Khatri, Company Secretary and Nitin Sandesara, Chairman of Sterling) resolving that a bank account to be opened with any Branch of Banco for the purpose of receiving subscription money in respect of the GDR issue of this company, and authorising Banco to use the GDR proceeds as security against loan availed by Fresia.
- C. Consequent to the above, an account charge agreement was executed between Sterling and Banco and the same was signed by Mr. Nitin Sandesara, CMD of Sterling. As per Account Charge Agreement, Sterling shall deposit in its designated account with Banco an amount not exceeding loan availed by Fresia for subscription of GDRs of Sterling as security for all the obligations of Fresia under the Credit Agreement.
- D. The aforesaid account charge Agreement was an integral part of Loan Agreement entered into between Fresia and Banco and vice versa and both were executed concurrently. The account charge agreement had the reference to the credit agreement entered into between Fresia and Banco by virtue of which Banco provided loan to Fresia for the purpose of subscribing to the GDR of Sterling. The

GDR issue would not have been subscribed in its entirety had the company not given security towards the loan taken by Fresia through account charge agreement. Sterling had pledged GDR proceeds to secure the rights of Banco against the loan given to Fresia for subscription to GDR issue.

E. As already stated, the GDR proceeds to the tune of USD 15.37 million were deposited in the Company's Bank Account No. 6127685.15.001 maintained with Banco. Subsequent to the deposit of the proceeds in the said bank account, amounts were transferred from the Company's bank account to various beneficiaries. The details are as follows:

Table-3

SN	Date	Amount (US\$)	Beneficiary	Comments*
1	7-Oct-03	2,500	Banco Efisa	Escrow Agent Fees
2	7-Oct-03	3,14,500	Banco Efisa/Fresia	Internal transfer against Fresia Worldwide Limited (Payment of Bank Charges)
3	7-Oct-03	105,000	Reliance Corporate Finance Limited	Lead Manager Fees
4	8-Oct-03	80,649	Reliance Corporate Finance Limited	Lead Manager Fees (in GBP)
5	02-Feb-04	101,500	Kia International Investments S.A.	Advisory Charges
6	06-May-04	12,200,000	Fresia Worldwide Limited	-
7	07-May-04	70,000	Fresia Worldwide Limited	-
8	11-May-04	2,550,000	American Enterprises	-

	Total	15,424,149		
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*Comments as available in instructions by Sterling to Banco/ bank statement of Sterling

F. It can be seen that an amount of USD 12, 200, 000 was transferred back to Fresia, the Entity which had subscribed to nearly 96.65% of the GDR issue.

2.3. In view of the above acts of the Noticees, the SCN has alleged that Noticee Nos. 2 to 8 have violated the following provisions of the SEBI Act, 1992 and SEBI PFUTP Regulations, 2003: Section 12A(a), 12A(b), 12A(c) of SEBI Act 1992 r /w regulations 3 (a), (b), (c), (d) & 4(1) of SEBI (PFUTP) Regulations, 2003. In addition to the above provisions, the Company (Noticee No. 1) has been alleged to have also violated Regulation 4(2) (f), (k) and (r) of SEBI (PFUTP) Regulations, 2003.

3. Inspection, Personal Hearing, and Replies and Written Submissions from the Noticees

3.1. The SCN was served on all the Noticees. Pursuant to the SCN, some of the Noticees filed their replies. Some of the Noticees also sought inspection of documents. Based upon the request of the Noticees, an opportunity of inspection of the records/ documents (which were relied upon by SEBI for the purpose of the SCN) was provided to the Noticees. Details with respect to the same are provided hereunder:

Table-4

Noticee No.	Noticee	Date of Inspection of Documents	Inspection Conducted By
5	Rajbhushan Dixit	November 11, 2020	Ms. Kritika Nahate, Juris Matrix Partners LLP, Advocates and Solicitors
7	Vilas Joshi		
8	P B Mehta		

3.2. The details of the personal hearings in the matter are tabulated below:

Table- 5

Noticee No.	Name of the Noticee	Date of Hearing	Represented by
1	Sterling Biotech Ltd	November 12, 2020 and February 16, 2021	Ms. Saloni Kothari, Mr. Siddharth Kapoor and Mr. Vivek Maru from the Office of the Resolution Professional appointed by the NCLT (Mr. Sundaresh Bhat)
5	Rajbhushan Dixit	February 16, 2021	Mr. Anil Shah, Juris Matrix Partners LLP, Advocates and Solicitors
7	Vilas Joshi		
8	P B Mehta		

3.3. Noticees Nos. 2, 3, 4 and 6 neither availed the opportunity of personal hearing nor filed any reply in response to the SCN. It has been informed that Noticee No. 6, Narendra Patel has passed away. The details with respect to the service of the SCN and Hearing Notices to the other Noticees are provided hereunder:

Table- 6

Noticee No.	Name of the Noticee	Details
2	Fresia Worldwide Ltd	▪ SCN dated March 05, 2018 was sent by Speed Post to the said Noticee at the address: 3rd floor Felix House, Joseph Riviere Street, Port Louis MAURITIUS. The same could not be delivered. ▪ Service was sought to be effected through the concerned financial regulator i.e, British Virgin Islands Financial Services Commission (the said Noticee was registered in the British Virgin Islands with the registration number 530165). It was informed that the Company has been dissolved.

3	Nitin Sandesara	▪ SCN dated March 05, 2018 was sent by Speed Post to the said Noticee at the address: 329, Sandesara House, Jawahar Nagar, Road No 12, Goregan West, Mumbai-400062. As per the acknowledgement, the same was not delivered. ▪ A copy of the SCN was affixed at the address of the said Noticee on March 27, 2018. ▪ Hearing Notices dated September 21, 2020 and October 16, 2020 for hearing on November 12, 2020 were sent by Speed Post to the said Noticee at the above-mentioned address. As per the acknowledgements, the same were not delivered. ▪ Newspaper publication was carried out on October 23, 2020 intimating the personal hearing scheduled for November 12, 2020 in the Mumbai editions of the Times of India (English daily), Lokmath (Marathi daily) and Navbharat Times (Hindi daily).
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4	Chetan Sandesara	▪ SCN dated March 05, 2018 was sent by Speed Post to the said Noticee at the address: 329, Sandesara House, Jawahar Nagar, Road No 12, Goregan West, Mumbai-400062. As per the acknowledgement, the same was not delivered. ▪ A copy of the SCN was affixed at the address of the said Noticee on March 24, 2018. ▪ Hearing Notices dated September 21, 2020 and October 16, 2020 for hearing on November 12, 2020 were sent by Speed Post to the said Noticee at the above-mentioned address. As per the acknowledgements, the same were not delivered. ▪ Newspaper publication was carried out on October 23, 2020 intimating the personal hearing scheduled for November 12, 2020 in the Mumbai editions of the Times of India (English daily), Lokmath (Marathi daily) and Navbharat Times (Hindi daily).
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3.4. A summary of the replies as submitted by the Noticees is provided hereunder:

Noticee No.1 (Sterling Biotech Limited)

3.4.1. The Noticee in its replies has *inter alia* submitted the following:

- a. the investigation period dates back to the year 2003, and the SCN has been issued after the lapse of almost 15 years;
- b. the Company is a separate legal person from the directors and/or other officers of the Company in the the eyes of the law, so the alleged trades

would have been undertaken by the promoters and directors at their own discretion by virtue of their position;

- c. the Company cannot be held responsible for the negligence or wilful misconduct or contravention of the provisions of law by the promoters and/or directors, and Section 2 (30) provides that an officer of the Company who is in default shall be liable to punishment or penalty;
- d. the Company neither consented nor connived with the promoters and the directors who were in-charge or control of the day-to-day affairs of the Company in transactions creating misleading appearance, and hence the Company can never be held responsible;
- e. therefore, it is only the directors, who are concerned with the day to day management of the Company that should ordinarily be held liable for Company's offences and no liability could be ever cast on the Company;
- f. a Company Petition was filed before the NCLT, Mumbai Division- I by Andhra Bank under Section 7 of the IBC, 2016 for initiation of Corporate Insolvency Resolution Process ("CIRP") , and the said petition was admitted by way of an order dated June 11, 2018;
- g. the Financial Creditors/Committee of Creditors voted to withdraw the corporate insolvency process in lieu of acceptance of a one-time settlement offer from the promoter entity, and an application for withdrawal of the CIRP was filed before the NCLT, which by way of its

order dated May 08, 2019 rejected the withdrawal application and appointed Ms. Mamta Binani as the liquidator;

- h. the Financial Creditors/Committee of Creditors went in appeal before the NCLAT, and the NCLAT by way of its order dated August 27, 2019, while dismissing the May 08, 2019 order of the NCLT, allowed the withdrawal of CIRP subject to the meeting of the OTS terms and requested the Resolution Professional to continue managing the affairs of the Company in the interim;
- i. the NCLAT by way of its order dated November 18, 2019 further clarified that OTS payment must be completed within 30 days from the date of the said order, else the Company to be liquidated;
- j. the promoter entity went in appeal to the Supreme Court against the order of the NCLAT dated November 18, 2019, and the Supreme Court by way of its order dated December 17, 2019 allowed the promoter entity time till March 31, 2020 to make the OTS payment;
- k. the promoter entity again went to the Supreme Court seeking to extend the time to make the OTS payment from March 31, 2020 to March 31, 2021;
- l. the Supreme Court by way of its order dated February 22, 2021 summarily dismissed all appeals pending before it in respect of the Company;

- m. the Company has effectively admitted to liquidation under the IBC;
- n. the promoter director, Nitin Sandesara and Promoter Director Chetan Sandesara have been declared as Fugitive Economic Offenders under the Fugitive Economic Offenders Act, 2018 vide order dated September 28, 2020; and
- o. the Company has been relegated to insolvency proceedings vide order dated June 11, 2018 of the NCLT, Mumbai and is currently under liquidation and therefore, any/all proceedings against the Company be abated.

Noticee No. 5 (Rajbhushan Dixit), Noticee No. 7 (Vilas Joshi) and Noticee No. 8 (P B Mehta)

3.4.2. Rajbhushan Dixit has stated that he was 59 years old and was a graduate, and was appointed as a Non-executive Independent Director on May 15, 1995. Also, Vilas Joshi has stated in his replies that he was 68 years old and was a lawyer and was appointed as a Non-executive Independent Director on May 01, 1993 and resigned from the post with effect from September 28, 2017. Similarly, P B Mehta in his replies has stated that he was 85 years old and held an MA in Economics, and was appointed as a Non-executive Independent Director on May 01, 1993 and resigned from the post with effect from November 24, 2018.

3.4.3. The said Noticees have made submissions on similar lines. The Noticees have by way of their replies *inter alia* stated that —

- a. the investigation period dates back to the year 2003, and the SCN has been issued after the lapse of almost 15 years;
- b. as regards the Board of Directors of Sterling passing a resolution (signed by Kirtidev Khatri , Company Secretary and Nitin Sandesara, Chairman of Sterling) in its meeting dated August 09, 2003 authorising Banco to use the GDR proceeds as security against loan availed by Fresia, no allegation has been purported to be made against them;
- c. they were not aware about the credit agreement between Fresia and Banco, the draw down notice of Fresia, loan availed by Fresia, account charge agreement and the escrow account with respect to the subscription amount towards GDR;
- d. they were also not involved with the compliance requirement of the Company;
- e. they believe that Sterling could not have intended to not inform the stock exchanges about the pledge agreement, and the non-intimation to the stock exchanges about the outcome of the Board meeting dated August 09, 2003 could have been at most a technical lapse;

- f. the pledge agreement was not signed by any of them, though as Non-executive Independent Directors they did not doubt the credibility and legality of the pledge and loan agreements and they were under a bona fide belief that laws of the countries including India, involved in the process of issue of GDR allow Sterling to guarantee the security towards the loan taken by Fresia towards subscription money for the GDR;
- g. Section 5 of the Companies Act, 1956 provides that an officer of the Company who is in default shall be liable for punishment or penalty, and defines an “ officer who is in default” to mean -
 - (a) the Managing Director or Managing Directors;
 - (b)...
 - (g) where any company does not have any of the officer specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified all the directors;
- h. if a company has any officer specified in clause (a), the other officers will not be held as an officer in default as per Section 5 (g) of the Companies Act 1956, and as they were not in-charge or control of the day-to-day affairs of Sterling, they cannot be held responsible; and

- i. the alleged violations were not committed with their consent/knowledge/connivance and they were not negligent.

3.4.4. The said Noticees have in their replies relied on the following authorities:

- i. Order dated September 07, 2012 of the Hon'ble SAT in the matter of Khandwala Securities Ltd.;
- j. Order dated July 25, 2012 of the Hon'ble SAT in the matter of Subhkam Securities Private Limited V. SEBI, Appeal No. 73 of 2012;
- k. Order dated November 28, 2011 of the Hon'ble SAT in the matter of Aditi Dalal V. SEBI, Appeal No. 143 of 2011;
- l. Order dated September 07, 2012 of the Hon'ble SAT in the matter of HB Stockholdings Ltd. V. SEBI;
- m. Order of the Hon'ble SAT in the matter of Libord Finance Ltd., Appeal No. 37 of 2008;
- n. Mansaram V. S.P. Pathak and Others , Civil Appeal No. 1262 (N) of 1978;
- o. Girdhari Lal Gupta Case, 1970 SCC (2) 530;
- p. R.K. Khandelwal V. State, (2004) 55 SCL 416;
- q. SAT Order in Sayanti Sen ;
- r. Agritech Hatcheries and Food Ltd. V. Valuable Steels India Pvt. Ltd., (1999) 96 Com Cases 534 (Mad);

- s. Smt. G. Vijaylakshmi and Ors. V. SEBI, (2010) 100 Comp Cases 726 (AP);
- t. Ravindra Narayan V. ROC, Jaipur, (1994) 81 Com Cases 925 (Raj);
- u. Order dated April 16, 2019 of the Hon'ble SAT in the matter of Yogesh Gemawat;
- v. Order dated February 14, 2019 of the Hon'ble SAT in the matter of Pritha Bag;
- w. SEBI V. Gaurv Varshney , (2016) 14 SCC 430;
- x. C.V. Siva Prasad V. Registrar of Companies , (1997) 2 Comp J 205 (AP);
- y. G Vijaylakshmi V SEBI , (2000) 25 SCI 183 (AP);
- z. Mahalderam Tea Estate Pot. Ltd V. D.N. Prodhan, 1979 49 CompCas 529;
- aa. Circular No. 2/13/2003/CL-V dated March 25, 2011 issued by the Ministry of Corporate Affairs;
- bb. RBI circular under reference DBR. No. CID. BC. 89/20.16.001/2014-15 dated 23.04.2015;
- cc. Circular No. 27 dated February 28, 2002 issued by the Office of the Chief Metropolitan Magistrate , Esplanade, Mumbai;

- dd. Order No. WTM/GA/54/ISD/02/06 dated 16.02.2006 of the WTM
SEBI in the matter of Home Trade Limited;
- ee. Order of the Hon'ble SAT in the matter of Rahul Shah, (2004) 55 SCL
416;
- ff. State of Haryana V. Brijlal Mittal, (1998) 5 SCC 343;
- gg. SMS Pharamaceuticals , AIR 2005 SC 3512;
- hh. SS Thakur V. SEBI , SEB/MANU/DE/1024/2013; and
- ii. Circular No. List/JJB/DSS/2000 dated April 11, 2000 issued by the
Stock Exchange, Mumbai.

4. Relevant Provisions

4.1. Provisions of the SEBI Act —

Section 12 A (a), (b), (c)

***Prohibition of manipulative and deceptive devices, insider trading
and substantial acquisition of securities or control.***

“12A. No person shall directly or indirectly—

(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder”

4.2. Provisions of the SEBI (PFUTP) Regulations, 2003 —

Regulation 3(a), (b), (c) and (d)

3. Prohibition of certain dealings in securities

“No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.”

Regulation 4 (1) and 4(2)

4. Prohibition of manipulative, fraudulent and unfair trade practices

“(1)Without prejudice to the provisions of regulation 3, no person shall indulge in a manipulative, fraudulent or an unfair trade practice in securities markets.

(2)Dealing in securities shall be deemed to be a manipulative fraudulent or an unfair trade practice if it involves any of the following:—

(a) ... ;

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(r) planting false or misleading news which may induce sale or purchase of securities.”

5. Issues

I. Whether Sterling by allowing the GDRs proceeds to be used as security for a loan that had been availed by Fresia Worldwide Ltd towards the subscription of GDRs issued by Sterling , and not disclosing the same to the stock exchanges had devised a scheme with Fresia to defraud the investors ?

II. Whether the Directors of Sterling, namely Nitin Sandesara (Noticee No.3) Chetan Sandesara (Noticee No.4) , Rajbhushan Dixit (Noticee No 5), Narendra Patel (Noticee No.6), Mr. Vilas Joshi (Noticee No.7), and P. B. Mehta (Noticee No.8), who authorized Banco to use GDR proceeds as security in connection with loan, and Nitin Sandesara, who signed the account charge agreement acted as party to the fraudulent scheme ?

6. Consideration and findings –

Issue I- Whether Sterling had devised a scheme with Fresia to defraud the investors?

6.1. The SCN has alleged that issuance of GDRs by Sterling was fraudulent as the Company had entered into an Account Charge Agreement with the Bank, Banco for a loan that had been availed by Fresia towards the subscription of GDRs issued by the Company. The Account Charge Agreement was not disclosed to the stock exchanges which, the SCN alleges, made the investors believe that the said GDR issue was genuinely subscribed by the foreign investors.

6.2. The Company by way of its replies has refuted the allegations made in the SCN and has presented its submissions in defence. The same have been captured in the previous part of this order, and accordingly are not being reproduced in toto here. It shall, however, be relevant to briefly mention herein the fundamental grounds of defence taken by the Company. The said grounds are:

- a. the investigation period dates back to the year 2003, and the SCN has been issued after the lapse of almost 15 years, which is a violation of the principles of natural justice;
- b. the Company has been relegated to insolvency proceedings vide order dated June 11, 2018 of the NCLT, Mumbai and is currently under liquidation, and therefore any/all proceedings against the Company be abated; and
- c. the Company neither consented nor connived with the promoters and directors who were in-charge or control of the day-to-day affairs of the Company in transactions creating misleading appearance, and hence the Company can never be held responsible.

6.3. With respect to the submission of the Noticee that there has been delay in the proceedings, it is seen from the record that investigation in the matter was concluded in October, 2017. Pursuant to the completion of the investigation in the matter, the SCN was issued to the Noticees on March 05, 2018. Subsequent to the issuance of SCN, Settlement Applications were filed by Vilas Joshi, P.B. Mehta and Rajbhushan Dixit. After the disposal of the Settlement Applications, opportunity of inspection was granted on November 11, 2020. Also, opportunities of personal

hearing were granted on October 28, 2020, November 12, 2020 and February 16, 2021.

6.4. It is stated that in the case of ***Government of India V. Citedal Fine Pharmaceuticals, Madras and Others*** [AIR 6 (1989) SC 1771], the Hon'ble Supreme Court held that in the absence of any period of limitation, the authority was required to exercise its powers within a reasonable period. The court further held that the reasonable period would depend on the facts of each case, and that no hard and fast rule could be laid down in this regard. In this regard, reference is made to the Order dated March 17, 2020 of the Hon'ble Securities Appellate Tribunal in the matter of ***Pooja Vinay Jain V. SEBI*** [Appeal No. 152 of 2019]. By way of the said appeal, an Order passed by SEBI against the Appellant for having been involved in fraudulent trading in shares was challenged. The Appellant claimed that since the proceedings were launched by SEBI after a period seven years, she should be exonerated on that ground. The Hon'ble SAT, considering the above-mentioned principle enunciated by the Hon'ble Supreme Court, held that for want of any prejudice, the proceedings cannot be quashed simply on the ground of delay in launching the same. So, I do not find that the delay in issuance of the SCN can be a ground for disposing of the SCN without any adjudication, in view of the gravity and seriousness of the violations alleged in the SCN.

6.5. Now coming to the question of abatement of the present proceedings owing to the status of Sterling as a company in liquidation, I shall refrain from passing any directions against the Company. However, I am of the view that it does not preclude me from adjudicating the matter against the Company.

6.6. As regards the allegation in the SCN that Sterling had devised a fraudulent scheme with Fresia, it has been asserted by the Company that the Company neither consented nor connived with the promoters and directors who were in-charge or control of the day-to-day affairs of the Company in transactions creating misleading appearance, and hence the Company can never be held responsible. Building on this argument, the Company asserts that the Company being a separate legal person from the directors and/or other officers of the Company in the eyes of the law, and the alleged transactions being undertaken by the promoters and directors at their own discretion by virtue of their position, and it is they who should be held liable and not the Company as per Section 2 (30), which provides that an officer of the Company who is in default shall be liable to punishment or penalty.

6.7. The above assertions made by the Company are not tenable in law. It is trite law that a company works through its directors. In this respect, Section 291 of the Companies Act, 1956 reads as: “...*the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do*”. It is in this clearly laid out structure that a company operates. In the present case, the acts carried out by the Company i.e., open an account with Banco to park the GDR proceeds and enter into an Account Charge Agreement with the Bank, Banco for a loan that had been availed by Fresia towards the subscription of GDRs issued by the Company, were pursuant to a resolution of the Board of Directors dated August 09, 2003. Also, the proposal for the issue of international offering in the form of GDRs or FCCBs had been part of the special resolution passed at the

Extra-ordinary General Meeting of the Company held on March 29, 2003. Further, the proposal for the issue of international offering in the form of GDRs or FCCBs came to fruition by way of a resolution passed at the board meeting dated October 01, 2003, whereby the Company allotted 2,328,045 GDRs, each representing 6 underlying equity shares of Rs. 2 for an aggregate value of USD 15,365,097. Thus, it is seen that all decisions of the Company with respect to the issue of GDRs, the receipt of the subscription money and placing the subscription account as security for the loan availed by Fresia were taken by the Board of the Company. Thus, the Company cannot avoid the liability with respect to the acts authorised to be done by the Board of Directors in view of the Latin maxim, “*Qui facit per alium facit per se*”, which means that he who acts through another does the act himself.

6.8. Having brought out the acts undertaken by the Company, it remains for examination as to whether the acts of the Company in respect of the GDR issue were fraudulent, as alleged in the SCN. In this regard, it is relevant to place a chronology of the events associated with the GDR issue. On **August 09, 2003**, the Board of Directors of Sterling passed a resolution whereby it resolved to open an account with Banco to park the GDR proceeds and to use the GDR proceeds as security. It shall be instructive to place excerpts of the said Board Resolution hereunder:

“ A. RESOLVED THAT a bank account to be opened with any Branch of Banco Efisa. ... for the purpose of receiving subscription money in respect of the GDR issue of this company..

B. RESOLVED FURTHER THAT Mr. Nitin Sandesara, Chairman or Mr. Chetan J. Sandesara, Director be and hereby are individually authorized to sign, execute any application, agreement, escrow agreement, document, undertaking,... and other paper(s) from time to time as may be required by the Bank ...

C. RESOLVED FURTHER THAT Mr. Nitin J. Sandesara, Chairman or Mr. Chetan J. Sandesara, Director be and are hereby severally authorized to draw cheques and the documents,...and generally to take all such steps and do all such things as may be required from time to time on behalf of this Company.

D. RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow agreement or similar arrangements if and when so required.”

On **August 10, 2003**, the Company passed another resolution *inter alia* constituting a committee of executive directors, comprising of Nitin Sandesara, Chairman and Managing Director and Chetan Sandesara, to be called the “International Offerings Committee” to exercise powers conferred on the Board by the special resolution in respect of the Company’s proposed issue of GDRs, FCCBs or any other international offerings.”

On **September 29, 2003**, Sterling entered into an agreement with Banco whereby a deposit of USD 15 million was made by Sterling in an account maintained with Banco, which was to form the security for all the obligations of Fresia under the loan agreement.

On **September 29, 2003**, Fresia entered into a credit agreement with Banco for availing a loan facility of USD 15 million with respect to the subscription of GDRs issued by Sterling.

On **October 01, 2003**, in the Escrow Account maintained by Sterling with Banco to receive the proceeds of the GDR issue, three deposits were made totalling to USD 15,365,097. Out the said amount, USD 14,850,000 had been deposited by Fresia for subscription of 96.66% of the GDR issue.

On **May 06, 2004**, a letter was issued by Sterling to Banco with respect to the deposit account maintained by it with Banco having a balance of USD 12,200,000. By way of the said letter, it was informed that the deposit account be closed and the balance amount of USD 12,200,000 be transferred to Fresia.

6.9. The above chronology brings out that once necessary concurrence was received from the shareholders by way of a special resolution in the Extra-ordinary General Meeting, a plan of action was put in place to execute this fraudulent scheme. In this regard, specific mention is made of the credit agreement entered into by Fresia with Banco for availing a loan facility of USD 15 million on September 29, 2003. It is pertinent to note that in this credit agreement, the credit facility granted to Fresia has been stated to be “...secured by the interests and rights granted in favour of the Bank under the Security Documents.” Security Documents have been defined in the said credit agreement as “...the deposit charge and any other guarantee or document creating, evidencing, or acknowledging security in respect of any of the obligations and liabilities of any **Obligor** under any Financing Document.” And an Obligor under the said agreement

means the borrower (Fresia) and Sterling. Lastly, the credit agreement, requires the fulfilment of the condition that “*Each security document duly executed by the parties to such Security Document together with all documents deliverable with each Security Document*”, before the credit facility is activated. Thus, from a conjoint reading of the above-mentioned terms of the credit agreement, it is quite clear that a deposit of USD 15 million made by Sterling in an account maintained with Banco, and then entering into an account charge agreement with Banco so as to allow the said deposit account to be used as security for all the obligations of Fresia under the credit agreement, was a pre-condition for the grant of the credit facility to Fresia. It was as if Sterling was itself financing the subscription of its own GDR issue. As soon as the credit facility was activated, an amount of USD 14,850,000 was received from Fresia on October 01, 2003 in the Escrow Account maintained by Sterling in Banco for the GDR proceeds. However, as already mentioned, on May 06, 2004, a letter was issued by Sterling to Banco requesting it to transfer an amount of USD 12,200,000 from its account to Fresia. This effectively meant that a substantial part of the consideration received from Fresia, for the GDRs subscribed by it, was returned to it. It must be stated that the concurrence given by the shareholders, by way of a Special Resolution passed at the Extra-ordinary General Meeting held on March 29, 2003 to the proposal for international offerings by the Company through the issuance of GDRs/FCCBs, was on the belief that the said international offerings would bring fresh capital into the Company and create investor value. However, as seen from the above, there was in fact a diversion of the GDR

proceeds away from the Company, which is a fraud played on the shareholders of the Company.

6.10. Thus, it is established that Sterling in connivance with Fresia devised a fraudulent scheme whereby Fresia received GDRs without paying any consideration for 80% of the GDRs, at the cost of shareholders / investors of Sterling. Accordingly, I find that Sterling and Fresia have clearly violated Section 12A(a), 12A(b), 12A(c) of SEBI Act 1992 r /w Regulations 3 (a), (b), (c), (d) & 4(1) of SEBI (PFUTP) Regulations, 2003.

6.11. Additionally, it has been alleged that Sterling had made wrong disclosures to the stock exchanges regarding the investment in GDRs by foreign investors. As already brought out, the account charge agreement had reference to the credit agreement entered into between Fresia and Banco, based on which Banco provided a credit facility to Fresia for the purpose of subscribing to the GDRs of Sterling. So, the GDR issue would not have been subscribed in its entirety had the Company not given security towards the loan taken by Fresia through the account charge agreement. The true nature of the obligations contained in the account charge agreement and the fact that the Company was an Obligor i.e., it had obligations and liabilities in respect of the credit agreement entered into between Fresia and Banco should have been reported to the Stock Exchanges. However, the company reported to the stock exchanges that “... it has on October 01, 2003, closed the issue of GDRs...”. The Company making a corporate announcement that the GDRs were successfully subscribed, without disclosing the arrangement that had in fact brought about the subscription of the GDR issue might have made investors

believe that the said GDR issue was genuinely subscribed. Therefore, such publication/disclosure of information, as seen above, was misleading, distorted and incomplete, and might have influenced the decision of the investors and could have induced investors to deal in the shares of Sterling. Accordingly, I also find that Sterling has violated Regulation 4(2) (f), (k) and (r) of SEBI (PFUTP) Regulations, 2003.

Issue II. Whether all the Directors of Sterling can be held liable for the fraudulent scheme

6.12. The Report on Corporate Governance of the Company for the calendar year 2003, which was submitted by the Company to SEBI, states that during the year 2003 there were a total of six directors, out of which one director, namely Nitin Sandesara (the Chairman and Managing Director) was an Executive Director, while the rest, viz. Chetan Sandesara, Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit were Non-Executive Directors. It is, however, seen that in the Board Resolution dated August 10, 2003 a reference is made to a committee of Executive Directors, comprising of Nitin Sandesara, Chairman and Managing Director and Chetan Sandesara. In view of the above, the liability of the Directors is examined in two parts i.e., the liability of Nitin Sandesara and Chetan Sandesara on the one hand and the liability of Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit, on the other.

6.13. During the investigation period, Nitin Sandesara was the Chairman and Managing Director of the Company. By way of the Board Resolution dated August 09, 2003, Nitin Sandesara was authorized to sign, execute any application, agreement, escrow agreement, document, undertaking etc. as may be required by the Bank, i.e. Banco. He was also authorised to draw cheques and generally to take all such steps and do all such things as may be required from time to time on behalf of this Company. By way of the said Board Resolution, Chetan Sandesara was also provided with similar powers. Similarly, by way of the Board Resolution dated August 10, 2003, a committee of executive directors, comprising of Nitin Sandesara, Chairman and Chetan Sandesara, to be called the “International Offerings Committee”, was formed to exercise powers conferred on the Board by the special resolution in respect of the Company’s proposed issue of GDRs, FCCBs or any other international offerings.

6.14. It is further noted that the Account Charge agreement entered into by Sterling with Banco, whereby a deposit account of Sterling maintained with Banco having USD 15 million was given as security for all the obligations of Fresia under the credit agreement and the same was signed by Nitin Sandesara on behalf of Sterling. The letter from Sterling requesting Banco to transfer an amount of USD 12,200,000 from its account to Fresia have also been signed by Nitin Sandesara. Lastly, it is seen that many of the Board Resolutions and letters of instruction to Banco in respect of account(s) of Sterling have either been signed by Nitin Sandesara or Chetan Sandesara.

6.15. It is stated that both Nitin Sandesara and Chetan Sandesara have neither submitted any replies in response to the SCN nor have appeared before me during the opportunities of personal hearing granted to them. Nitin Sandesara and Chetan Sandesara have also been declared as Fugitive Economic Offenders under the Fugitive Economic Offenders Act, 2018 vide order dated September 28, 2020 in CC No. 22/2017 of Case No. 32/2017 by the Addl. Sessions Judge-02, New Delhi District. So, on the basis of the information and documents available on record, I find that Nitin Sandesara and Chetan Sandesara were fully involved in the day-to-day activities of the Company, and had complete knowledge of the activities of Company during the process of issuance of GDRs, which were patently illegal. Accordingly, I find that Nitin Sandesara and Chetan Sandesara have violated Section 12A(a), 12A(b), 12A(c) of the SEBI Act 1992 r /w Regulations 3 (a), (b), (c), (d) and 4(1) of the SEBI (PFUTP) Regulations, 2003.

Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit.

6.16. The above-named Noticees have been specified in the Report on Corporate Governance of the Company for the calendar year 2003 as Non-executive and Independent Directors, and from the documents on record, it does not appear that there is any discrepancy as regards the said categorisation.

6.17. In this regard, it is stated that Narendra Patel has passed away, hence no replies have been received from him in response to the SCN. The other Noticees, namely Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit have filed their replies. The said Noticees by way of their replies have refuted the allegations made

in the SCN and have presented their submissions in defence. The same have been captured in the previous part of this order, and accordingly are not being reproduced in toto here. It shall, however, be relevant to briefly mention herein the fundamental grounds of defence taken by the said Noticees, who have submitted replies on similar lines. The said grounds are:

- a. the investigation period dates back to the year 2003, and the SCN has been issued after the lapse of almost 15 years, which is a violation of the principles of natural justice;
- b. they were not involved with the compliance requirement of the Company, though they believe that Sterling could not have intended to not inform the stock exchanges about the pledge agreement;
- c. they were not in control of the functioning of the Company, and as such cannot be considered as ‘officers in default’, so no liability flows; and
- d. the pledge agreement was not signed by any of them, though as Non-executive Independent Directors they did not doubt the credibility and legality of the pledge and loan agreements and they were under a bona fide belief that laws of the countries including India, involved in the process of issue of GDR allow Sterling to guarantee the security towards the loan taken by Fresia towards subscription money for the GDR.

6.18. The ground taken by the said Noticees that there has been delay in the issuance of the SCN has already been addressed in the paragraph nos. 6.3. and 6.4. of this

Order, and as such, no specific discussion on the same is required herein. Further, it is seen from the documents on record that the said Noticees were, in fact, not in control of the functions of the Company. That having been said, the principal point that requires examination is whether the said Notices had knowledge of the ‘scheme’, and exercised due care and diligence in carrying out their duties as Non-executive Independent Directors of the Company for acting in the best interest of the Company and the shareholders.

6.19. The Noticees, namely Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit have in their replies emphasised that as Non-executive Independent Directors they did not doubt the credibility and legality of the pledge and loan agreements and they were under a *bona fide* belief that laws of the countries including India, involved in the process of issue of GDRs, allowed Sterling to guarantee the security for the loan taken by Fresia towards subscription money for the GDRs.

6.20. To examine the assertions of the above-named Noticees that they did not doubt the credibility and legality of the pledge and loan agreements, it is relevant to the bring out the important terms of the Credit Agreement entered into between Fresia and Banco, and the Account Charge Agreement signed between Sterling and Banco. The credit agreement states that the credit facility granted to Fresia has been “...secured by the interests and rights granted in favour of the Bank under the Security Documents.” Security Documents have been defined in the said Credit Agreement as “...the deposit charge and any other guarantee or document creating, evidencing, or acknowledging security in respect of any of the obligations and liabilities of any Obligor under any

Financing Document.” And an Obligor under the said agreement means the Borrower (Fresia) and Sterling. Lastly, the credit agreement, requires the fulfilment of the condition that “*Each security document duly executed by the parties to such Security Document together with all documents deliverable with each Security Document*”, before the credit facility is activated. Thus, it is quite evident that Sterling by signing the Account Charge Agreement, whereby a deposit of USD 15 million made by Sterling in an account maintained with Banco, was used as security for all the obligations of Fresia under the credit agreement, was for financing its own GDR subscription through Fresia. The above terms in the Credit Agreement and the Account Charge Agreement also bring out another very essential fact, i.e. the ability of Fresia to move the consideration amount that it paid to Sterling on October 01, 2003 back to itself. This is because the consideration paid by Fresia for the subscription of the GDRs was procured through a loan from Banco, and this loan was secured by a deposit of USD 15 million made by Sterling.

6.21. Further in respect of the liability of Non-executive Directors, I would like to refer to the Order dated November 27, 2019 of the Hon’ble SAT in ***G. Unnikrishnan Nair and Others V. SEBI [Appeal No. 05 of 2018]*** wherein it was held that “an independent director shall be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge, consent or connivance or where the independent director had not acted diligently.” The said principle was reiterated by the Hon’ble SAT in its Order dated February 07, 2020 in Dr. Venkadasamy Venkataramanujan V. SEBI (Appeal No. 254 of 2019). It must be emphasised that the role of independent directors is to work as a watchdog,

help in managing risk and safeguard the interests of minority shareholders. Thus, it stated that from a perusal of the Credit Agreement (where Sterling has been made as an ‘Obligor’ to the terms of the agreement) and the Account Charge Agreement, it is clear that the terms are onerous and lopsided vis-a-vis Sterling, and effectively the GDRs to the only and major subscriber without the subscriber passing on the consideration to the Company. Looking at these terms no reasonable person can have a *bona fide* belief that the laws of India would allow Sterling to guarantee the security for the loan taken by Fresia towards subscription money for the GDRs issued by Sterling. It is not in doubt that the said Noticees had clear knowledge of the Credit Agreement and the Account Charge Agreement. Having the said knowledge, the Noticees should have acted with diligence and due care so as to safeguard the interests of the shareholders. However, this was not the case. Accordingly, I find that Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit have violated Section 12A(a), 12A(b), 12A(c) of the SEBI Act 1992 r /w Regulations 3 (a), (b), (c), (d) and 4(1) of the SEBI (PFUTP) Regulations, 2003.

7. Conclusion –

7.1. Thus, from the above it is concluded that Sterling in connivance with Fresia devised a fraudulent scheme whereby Fresia received GDRs without paying any consideration for 80% of the GDRs, at the cost of shareholders / investors of Sterling. Further, the directors, Nitin Sandesara and Chetan Sandesara, are liable for the above mentioned fraudulent scheme as they were fully involved in the day-to-day activities of the Company, and had complete knowledge of the activities of

the Company during the process of issuance of GDRs. The directors, namely Vilas Joshi, P.B. Mehta, Narendra Patel and Rajbhushan Dixit, who even though were Non-executive Independent Directors, had clear knowledge of the terms of the Credit Agreement and the Account Charge Agreement. Having the said knowledge, the Noticees should have acted with diligence and due care so as to safeguard the interests of the shareholders. However, this was not the case. I note that Sterling Biotech Limited, Noticee No.1 is in liquidation, and pursuant to the same, a public announcement dated February 26, 2021 has been made, under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, seeking claims from the stakeholders of the Company. Further, with respect to Noticee No.2, Fresia Worldwide Ltd (registered in the British Virgin Islands with the registration number 530165), it has been informed by the concerned regulator i.e, British Virgin Islands Financial Services Commission that Noticee No. 2 has been dissolved. Furthermore, it has been informed by Sterling that Narendra Patel, Noticee No. 6 has passed away. In this respect, a copy of the death certificate has been submitted to SEBI. I, therefore, dispose of the proceedings against Noticee No. 6, without passing any directions.

8. Directions –

8.1. I, in exercise of powers conferred upon me under sections 11(1), 11 (4) and 11B the Securities and Exchange Board of India Act, 1992 hereby pass the following directions:

8.1.1. In view of the findings in para 7.1. above, the present proceedings initiated against Noticee No. 1 (Sterling Biotech Limited) vide the Show-cause Notice

dated March 05, 2018 and Supplementary Show-cause Notice dated April 03, 2019, and Noticee Nos. 2 (Fresia Worldwide Ltd) and 6 (Narendra Patel) vide the Show-cause Notice dated March 05, 2018 are disposed of.

8.1.2. Noticee No. 3 (Nitin Sandesara) and Noticee No. 4 (Chetan Sandesara) shall be restrained from accessing the securities market, and further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, and associating with the securities market in any manner, whatsoever, for a period of 5 years ;

8.1.3. Noticee Nos. 3 and 4 shall also be restrained for a period of 5 years from holding any position of Director or key managerial personnel in any listed company or any intermediary registered with SEBI, and during the said period shall be restrained from associating themselves with any listed public company or a public company which intends to raise money from the public or any intermediary registered with SEBI;

8.1.4. Noticee No. 5 (Rajbhushan Dixit), Noticee No. 7 (Vilas Joshi) and Noticee No. 8 (Priyadarshan B Mehta) shall be restrained from accessing the securities market, and further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, and associating with the securities market in any manner, whatsoever, for a period of 3 years ; and

8.1.5. Noticee Nos. 5, 7 and 8 shall also be restrained for a period of 3 years from holding any position of Director or key managerial personnel in any listed company or any intermediary registered with SEBI, and during the said period

shall be restrained from associating themselves with any listed public company or a public company which intends to raise money from the public or any intermediary registered with SEBI.

8.2. The above directions shall come into force with immediate effect.

8.3. A copy of this order shall be served upon the Noticees immediately. A copy shall be served on the recognised Stock Exchanges and the Depositories for necessary action.

Place: Mumbai

Date: June 22, 2021

G. MAHALINGAM

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA