National Stock Exchange of India

Circular

Department: Investigation	
Download Ref No: NSE/INVG/55658	**Date: February 17, 2023**
Circular Ref. No: 42/2023	

To All NSE Members,

Sub: **SEBI Order in the matter of Aftek Industries Ltd.**

SEBI vide its Order No. WTM/SM/IVD/ID4/23864/2022-23 dated February 17, 2023, has hereby restrained below mentioned entities from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, for a period mentioned below from the date of this order.

Sr #	Name of the Entity	PAN	Debarment period
1	Aftek Ltd	AAACA4711B	3 years
2	Mr. Ranjit Dhuru	AADPD1238L	1 years
3	Mr. Pramod Broota	AACPB9182C	1 years

Further, all open positions, if any, of the aforesaid entities in the F&O segment of the stock exchange, are permitted to be squared off, irrespective of the restraint/prohibition imposed by SEBI Order.

The order comes into force with immediate effect.

The detailed order is available on SEBI website (http://www.sebi.gov.in).

Further, the consolidated list of such entities is available on the Exchange website http://www.nseindia.com home page at the below mentioned link:

https://www.nseindia.com/regulations/member-sebi-debarred-entities

Members are advised to take note of the above and ensure compliance.

National Stock Exchange of India

In case of any further queries, members are requested to contact the following officials:

Mr. Rishabh Goyal (Extension: 25508), Mr. Anand Jangir (Extension: 22385)
Direct No: 022-26598417/18 Fax: 022-26598195

For and on behalf of
National Stock Exchange of India Limited

Anand Jangir
Manager

Annexure: SEBI Order in the matter of Aftek Industries Ltd.

WTM/SM/ IVD / ID4 / 23864 / 2022-23

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: S. K. MOHANTY, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11B(1) and 11(4) of the Securities and Exchange Board of India Act, 1992

In the matter of GDR issue of Aftek Industries Ltd.

In respect of:

Noticee no.	**Names of the *Noticee***	**PAN**
1.	**Aftek Ltd**	AAACA4711B
2.	**Mr. Ranjit Dhuru**	AADPD1238L
3.	**Dr. S S P Rao**	AADPR7531A
4.	**Mr. V J Masurekar**	AABPM6134G
5.	**Mr. Shrikant Inamdar**	AAAPI0979E
6.	**Mr. Mahesh Naik**	ACCPN9545K
7.	**Mr. Sandip Save**	AAJPS8740E
8.	**Mr. Nitin Shukla**	AAJPS8470M
9.	**Mr. Mahesh Vaidya**	AALPV6153G
10.	**Mr. Pramod Broota**	AACPB9182C

(The aforesaid entities are hereinafter individually referred to by their respective names/*Noticee* nos. and collectively as "*Noticees*", unless the context specifies otherwise)

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted an investigation into the issue of Global Depository Receipts (hereinafter referred to as **"GDR"**) by Aftek Limited (hereinafter referred to as ***"Aftek/ Company/ Noticee no. 1"***).

2. It was observed that *Aftek* had issued 1.33 million (13,33,100) GDR for approximately USD 14.99 million on February 07, 2003. Details of the GDR issue as provided by the *Company* are tabulated below:

Table no. 1

GDR issue date	**No. of GDRs Issued**	**Capital raised (USD million)**	**Local custodian**	**No. of equity shares underlying GDRs**	**Global Depository Bank**	**Lead Manager**	**Bank where GDR proceeds deposited**	**GDRs listed on**
07-Feb-2003	13,33,100	14.997	ICICI Bank Ltd., Mumbai	39,99,300	Deutsche Bank Trust Company Americas	Credo Capital Plc, London	Banco Efisa	Luxembourg Stock Exchange

3. During the investigation, it was revealed that Banco Efisa (hereinafter referred to as ***"Banco Bank"***), a Lisbon based bank, had granted loan of USD 4 million to Kendo Associates Inc. (a company incorporated in the British Virgin Islands with registered number 367818) (hereinafter referred to as **"***Kendo***")**, by way of a Credit Agreement dated February 06, 2003 (hereinafter referred to as the **"Kendo *Credit Agreement*"**). It was further unearthed that *Banco Bank* had granted loan of USD 5 million to Highgrove Ltd. (a company incorporated in the British Virgin Islands with registered number 367803) (hereinafter referred to as **"***Highgrove***")** by way of separate Credit Agreement but even dated February 06, 2003 (hereinafter referred to as the ***"Highgrove Credit Agreement"***). For the purpose of convenience, the afore-

mentioned credit agreements shall together be referred to as the ***"Credit Agreements"***. It was also observed that the aforesaid loans were provided by *Banco Bank* to *Kendo* and *Highgrove* to subscribe to the GDR issued by *Aftek*.

4. Investigation further revealed that the *Company* had pledged its entire GDR proceeds with *Banco Bank* as a security against the aforesaid loan availed by K*endo and Highgrove* (collectively referred to as "***Subscribers***") that they received from *Banco Bank* for subscribing to the GDR of *Aftek*. For this purpose, the *Company* entered into an Account Charge Agreement Pledge dated February 06, 2003 (hereinafter referred to as the ***"Account Charge Agreement"***) with *Banco Bank* and the said agreement was signed by *Noticee no. 10* on behalf of *Aftek*. Investigation also found that *Noticee*s *no. 2 to 10* were not only signatory to the Board Resolution which led to formation of GDR Committee, signing of Power of Attorney authorising the *Noticee no. 10* to enter into the *Account Charge Agreement* on behalf of the *Company*, but were also Directors of *Aftek* during the relevant time of signing of the said *Account Charge Agreement*. It has been noticed that these *9 Noticee*s (*Noticee no. 2 to 10*) participated in the meeting of the Board of Directors (hereinafter referred to as "***Board***") of the *Company* dated November 29, 2002, in which a resolution was passed for constituting a committee of Executive Directors (*GDR Committee*) for *Company's* GDR issue. The *Board* further authorised the aforesaid *GDR Committee* to finalize, accept, approve documents, agreements, etc. for the purpose of GDR issuance. It was further unearthed that on January 28, 2003, the *Noticee no. 2* on behalf of the *Company* issued a Power of Attorney (hereinafter referred to as "***PoA***") in favour of *Noticee no. 10* to sign all documents, including bank account application / loan document or any other documents etc. on behalf of the *Company*. Later on, it has been noticed that the GDR of the *Company* so issued were subscribed by the above two K*endo and Highgrove* and the entire money used to subscribe the GDR were completely financed by the *Banco Bank* only, with which the *Company* has entered into *Account Charge Agreement* against the loan financed by *Banco Bank* to the aforesaid subsribers. In the above factual matrix, it was noticed during the course of investigation, that the *Company* had not disclosed to the

investors about the arrangement so made by it to ensure the successful issuance/subscription/allotment of the GDR by facilitating a loan to *Subscribers* in terms of the aforesaid *Credit Agreements*. Instead of disclosing the details of the arrangement so made with the *Banco Bank* to facilitate the subscribers to make a successful GDR issuance, the *Company* has concealed the above facts from the public including the information that the proceeds of GDR would be kept as security with the *Banco Bank* and would not be made available for the *Company*'s immediate use. The concealment of above material facts from shareholders of the *Company* and investors of the securities market have adversely prevented them from taking an informed decision about the investment in the *Company*. The above acts of concealing material facts and further providing partial and distorted information to the public about issuance of GDR by the *Company* have been observed to be as acts falling in the category of fraudulent acts on the part of the *Noticees* to mislead the shareholders/investors at large.

SHOW CAUSE NOTICE, REPLY AND HEARING:

5. Based on the above narrated findings made in the investigation, a common Show Cause Notice (hereinafter referred to as **"SCN"**) dated June 27, 2017 was issued to all the *Noticee*s. I also note that a supplementary show cause notice was issued on November 07, 2019 (hereinafter referred to as, "**Supplementary SCN**") to all the *Noticees*, wherein *Noticee no. 1* was charged with violations of Section 12A (a), (b) & (c) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, ***"SEBI Act, 1992"***) read with regulations 3, 5 (1) and 6 (a) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 (hereinafter referred to as "***PFUTP Regulations, 1995***") read with regulation 13 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as ***"PFUTP Regulations, 2003"***) and *Noticee no. 2 to 10* were charged with the violations of Section 12A (a), (b) & (c) of the *SEBI Act, 1992* read with regulations 3 and 6(a) of *PFUTP Regulations, 1995*

read with regulation 13 of *PFUTP Regulations, 2003.* For the purpose of convenience SCN and Supplementary SCN are hereinafter collectively referred to as "**SCNs**".

6. From the available records, I note that the SCNs were duly served upon the *Noticees.* Subsequent to the issuance of SCNs, *Noticees no.* 1, 2, and 8 had sought copies of certain documents from SEBI. In this regard, I note from the material available on record that the copies of relevant documents have been provided to the aforesaid *Noticee*s by SEBI vide letter dated February 23, 2018. I also note that Noticees no. 1, 2 and 10 had sought inspection of certain documents which were duly provided by SEBI on June 12, 2018. I further find that the *Noticee*s *no. 1, 2, 4 and 8* have submitted their written replies to the SCNs on merit. In compliance with the principles of natural justice, all the *Noticees* were provided with opportunities of personal hearing, which was fixed on various dates viz; i.e. on November 14, 2018, March 19, 2019, October 27, 2020, However, due to requests received from different *Noticees* citing health issues, personal issues and COVID pandemic and other reasons, etc. from time to time, the personal hearing could not be concluded. Finally, the *Noticees* were heard on August 04, 2022. During the personal hearing, an Authorised Representative (AR1) appeared on behalf of *Noticee no. 4* and argued broadly on the lines of the written of reply filed by him with SEBI. Further, a common Authorised Representative (AR2) appeared on behalf of *Noticees no. 1, 2, 5, 6, 9 and 10* and argued on behalf of them mostly on the lines of reply earlier filed by the *Noticee no. 1 (Company)*. I note from the records that *Noticee no. 3* has expired on 06.09.2018 and Death certificate dated 11.09.2018 has been submitted in this regard. I further note that *Noticee no. 8* has also passed away on 23.02.2019 and Death certificate dated 26.02.2019 has been submitted to SEBI. With regard to *Noticee no. 7,* I note from the material available on record that he has also passed away on 05.04.2022 and a death certificate dated 07.04.2022 has been submitted to SEBI. After completion of their personal hearing, certain *Noticees* have also submitted their respective post hearing written submissions. Details of servicing of SCNs, servicing of hearing notices, replies

filed by the *Noticees* and attendance in the personal hearings, etc. are summarised in the table below:

Table no. 2

Noticee no.	SCN and Supplementary servicing Mechanism	Hearing notice servicing Mechanism	Last known address of *Noticee* on which delivery through Speed Post/ Affixture was attempted and return undelivered (only applicable wherein SCNs / Hearing Notice were served through Newspaper Publication)	Date of Reply	Hearing Attended
Noticee no. 1	Hand Delivery	SPAD/Email	-	08.08.2017, 04.10.2021, 12.11.2018, 02.02.2018, 29.03.2018, 05.09.2022	Yes
Noticee no. 2	Hand Delivery	Hand Delivery /Email	-	08.08.2017, 12.11.2018,	Yes
Noticee no. 3	Affixture	Newspaper Publication dated 08.03.2019	B-117, faculty House, IIT Qtrs, Powai, Mumbai-400076		No
Noticee no. 4	Affixture	Email	7, Neelvarsha Sanawala Agyari Lane Mahim Mumbai 400016	27.10.2020	Yes
Noticee no. 5	Newspaper Publication dated 04.10.2018	Newspaper Publication dated 08.03.2019	A5/903 Karishma Hsg Socy Survy No.17/2/ Sangam Press Road Pune 411029	03.09.2022	Yes

Noticee no. 6	Hand Delivery	Email	-	07.09.2022	Yes
Noticee no. 7	Newspaper Publication dated 04.10.2018	Email	12, Rahul Apartments Vikas Nagar Civil Lines, Solapur 413003		No
Noticee no. 8	Speed Post	-	-	11.08.2017	No
Noticee no. 9	Affixture	Email	-	07.09.2022	Yes
Noticee no. 10	Hand Delivery	Email	-		Yes

7. I have perused the aforementioned written replies submitted by the *Noticee*s, the arguments made on their behalf during personal hearing and also the post-hearing submissions made before me by the *Noticees*. The contentions / submission of the *Noticee*s are briefly summarised as below:

Submissions by the *Noticee no. 1, 2, 5, 6, 9 and 10*

a) *Company* appointed M/s Credo Corporate Finance Limited as Lead Manager to manage its GDR issue and as per advice of the Lead Manager, various documents were executed by *Noticee no. 10* on behalf of the *Company* in good faith and trust of the Lead Manager. It was never specifically pointed out to *Noticee no. 10* about the alleged *Account Charge Agreement.* Therefore, if any *Account Charge Agreement* was signed, same was signed without the knowledge of the *Company*, its *Board* and the *Noticee no. 10*.

b) The date of execution of the *Account Charge Agreement* was on February 06, 2003 and on the said day, *Noticee no. 10* was in India and same can be verified from his immigration documents. He was in London from February 03-05, 2003.

c) SEBI discharged the *Company* and its *Board* in the matter of similar allegations under SCN bearing reference no. AO/EAD-12/SM/JR/29793/2017 dated November 29, 2017.

d) SEBI has relied upon *Account Charge Agreement*, which is just a plain paper agreement as no stamp and seal of the *Company* is affixed on it and therefore the said agreement has no legal sanctity.

e) The utilization of the GDR funds and the dates confirms that there was no lien marked or arrangement subsisting, else the *Banco Bank* would not have allowed the *Company* to fully utilize the GDR proceeds within a period of 4 months from the date of the issue of the GDR. The GDR proceeds were utilized for the purpose such GDRs were issued. In this regard, *Company* has submitted certificate of a Chartered Accountant.

f) The GDR proceeds of USD 11.62 million were fully utilized by the *Company* by July 03, 2003 and the remaining GDR proceeds were utilized by the *Company* by December 12, 2003, however as per the allegations, the alleged loan was outstanding on part of the *Subscribers* with the *Banco Bank.* Further, *Kendo and Highgrove* vide their letters dated September 06, 2003 and October 06, 2003 had requested *Banco Bank* to extend the final payment date for loans availed by them from *Banco Bank* and hence as on June 30, 2003, the loan availed by both *Kendo and Highgrove* was outstanding. This is sufficient enough to prove that the *Company* had not given any collateral or pledged its GDR proceeds against the loans availed by the *Subscribers.* SEBI has not looked into the aspect that if the *Company* had pledged its GDR proceeds to secure the credit facilities of *Subscribers*, how the *Company* was able to utilize / exhaust the entire GDR proceeds before the satisfaction of the debt obligation of Subscribers and how the *Banco Bank* allowed the *Company* to utilize the said GDR proceeds fully without recovering its loans advanced to *Subscribers*.

g) Further, the residual amount of the GDR proceeds worth USD 3.22 million was due because it was retained for meeting cash flow requirements of *Aftek's* overseas entities and the said balance amount was brought into India (*Aftek* Bank a/c no. 22331) in next few months.

h) Neither the shareholder's resolution, nor the *Board* resolution nor the *PoA* had anywhere therein authorized any person including *Noticee no. 10* to pledge or create charge on the assets of the *Company* including GDR proceeds in favour of any third parties.

i) Regarding non-compliance with the Accounting Standard (AS) for non-disclosure of contingent liabilities by the *Company* in its Annual Report is baseless, as the *Company* was never aware about loans availed by the *Subscribers*.

j) GDR were issued by the *Company* in 2003 while SEBI has issued the SCN after 14 years of the GDR and such inordinate delay of around 14 years is unjustified and unfair. SEBI could not explained in the SCN what were the reasons of the delay in starting the investigation and rational behind the delay adjudication.

Additional Submissions by *Noticee no. 9*

k) Designation of the *Noticee* was "Technical Director - Software" in *Aftek* and same is mentioned in the Board Resolution. His role and responsibility was to lead the design, development, testing and support of software products and projects undertaken by *Aftek* for its customers.

l) While the *Noticee no. 9* attended the Board meeting dated November 29, 2002, he was not involved in any task related to the GDR. He resigned from the Board of Aftek on March 31, 2009 and is not associated with *Aftek* since then

Additional Submissions by the *Noticee no. 6*

m) Though, no separate reply has been filed however, during the personal hearing and vide email dated September 02, 2022, he has submitted that the arguments stated by *Noticee no. 4* appropriately covers allegations qua him as well and the same may also be read as reply on his behalf.

Additional Submissions by *Noticees no. 2 and 8*

n) No reply on merit has been submitted by *Noticees no. 2 and 8*. Vide their written submissions, they have sought copies of various documents which have been duly provided by SEBI.

Submissions by *Noticee no. 4*

o) *Noticee* was a non-executive Independent Director in the *Board* of the *Company* and he resigned from the *Board* of the *Company* on December 31, 2013. He was not aware of any alleged fraudulent arrangement regarding the issuance of GDRs by the *Company* and he relied upon the information and representations made to him by the *Company* in good faith. He had no reason to disbelieve the *GDR Committee*, the *Company* or its management.

p) *Noticee no. 4* was not part of the *GDR Committee* which was appointed by the *Board* of the Company to take forward the process of GDR issue.

q) GDR were issued by the *Company* in 2003 while SEBI has issued SCN in 2017 and supplementary SCN in 2019 i.e. after 14 years of the GDR and such inordinate delay of around 14 years has caused prejudice to the *Noticee* while submitted his reply as he is unable to recollect of what transpired in November 2002 *Board* meeting of the *Company*. In this regard, the *Noticee* has, *inter alia*, placed reliance on the observations held in the following cases:

- Hon'ble Supreme Court in the matter of *State of Punjab vs. Chaman Lal (1995, 2 SCC 570);*

- Hon'ble Supreme Court in the matter of *P.V. Mahadevan vs. MD, T.N. Housing Road, (2005, 6 SCC 636);*

- Hon'ble Supreme Court in the matter of *Mahendra Lal Das vs. State of Bihar (2002, 1 SCC 149);*

- Hon'ble Securities Appellate Tribunal (for short "**SAT**") in the matter of *Subhkam Securities vs. SEBI (Appeal No. 73 of 2012)*;

- Hon'ble SAT in the matter of *H B Stockholdings vs. SEBI*;

- Hon'ble SAT in the matter of *Rakesh Kathotia vs. SEBI (DOD: May 27, 2019)*

r) *Noticee* has submitted that the role of an Independent Director is very different from a Whole Time Director or an Executive Director as he is not expected to set out an independent probe of the factual assertions made to him by the management of a company. He has further mentioned that an Independent Director cannot and ought not to be blamed for a fraud for irregularity, especially when he has no knowledge whatsoever of the same. In this regard, *Noticee* has relied upon the following:

  - General Circular no. 1/2020 dated March 02, 2020 issued by Ministry of Corporate Affairs regarding initiating action against Independent Directors in a company;

  - Regulation 25 (5) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015;

  - 37th Report (December, 2016) of Standing Committee on Finance (2016-17).

s) *Noticee* has also submitted that the GDR issue was proposed and approved by the *Board* of the *Company* much before the *Noticee* was appointed as non-executive director in the *Company*. In this regard, he has submitted the following chronology:

- **<u>March 19, 2002</u>**- *Board* meeting of the *Company* for the first time the proposal of GDR was tabled and approved by the *Board* of the *Company*. Noticee no. 4 was not on the *Board* of the *Company* yet;
- **<u>March 20, 2002</u>**- Corporate announcement made by the *Company* stating that the *Board* after its *Board* meeting on March 19, 2002 has decided to convene an EGM on April 15, 2002 to decide on the proposed GDR issue;
- **<u>March 27, 2002</u>**- *Board* meeting the *Company* whereby *Noticee* was appointed as a non-executive director of the *Company* (*in absentia*) alongwith several others;
- **<u>April 15, 2002</u>**- EGM approved the proposed GDR issue alongwith appointment of, *inter alia,* Noticee as a non-executive director of the *Company.*

t) *Noticee* has also placed reliance on the following judgements to further buttress upon the argument of his role as an independent director of the *Company.*

- Hon'ble Supreme Court in the matter of *Chintalapti Srinivasa Raju & Ors. vs. SEBI (Civil Appeal 16805 of 2017, DOD: May 14, 2018)*
- Hon'ble SAT in the matter of *Nipar Financial Services Pvt. Ltd. & Ors. vs. SEBI (Appeal no. 147 of 2004);*
- Hon'ble SAT in the matter of *Rahul Shah & Anr. vs. SEBI (Appeal no. 133 of 2003);*
- Hon'ble SAT in the matter of *Vijay Remedies vs. SEBI (Appeal no. 49 of 2003, DoD: February 11, 2005);*
- SEBI Order dated August 04, 2017 in the matter of *Amazan Capital Limited;*

- SEBI Order dated September 05, 2017 in the matter of *K Sera Sera Limited;*
- SEBI Order dated September 05, 2017 in the matter of *Asahi Infrastructure Projects Limited;*
- SEBI Order dated June 06, 2016 in the matter of *Top Telemedia Limited.*
- SEBI Order dated June 20, 2017 in the matter of *Zylog Systems Limited.*

u) SCNs is silent on the measures proposed to be taken against the *Noticee*. It is incumbent for SEBI to provide notice of what specific measure SEBI is contemplating, so that the Noticee is able to present his case accordingly. In this regard, *Noticee* has placed reliance on the following:

- Hon'ble Supreme Court in the matter of *Gorkha Securities vs. Govt. of NCT of Delhi & Ors. (DoD: August 04, 2014);*
- Hon'ble SAT in the matter of *Royal Twinkle Star Club Pvt. Ltd. vs. SEBI (DoD: February 03, 2016)*

v) The SCNs does not allege knowledge of the said fraud on the *Noticee* but alleges only on account him being present in the *Board* meeting dated November 29, 2022, wherein the *GDR Committee* was set up. In order to be held the *Noticee* liable for fraud, there necessarily must exist knowledge and an active action of deceit or concealment. Therefore, the elements of *"fraud"* as defined under *PFUTP Regulations, 1995* have not been met in allegations made out in the SCNs.

<u>Additional Submissions by *Noticee no. 5*</u>

w) *Noticee* was inducted on the *Aftek* board as an Independent Non- Executive Director in April 2002 and had stepped down in 2007. By the time, the *Noticee* was inducted on the board, the *Company* had already secured approval from earlier board of directors and of shareholders for the GDR scheme.

x) The only participation the *Noticee* had in the matter related to the GDR of *Aftek* was to authorise the Managing Director and CEO of the *Company* to carry out all necessary processes related to the GDR. As independent non-executive directors, I had access only to those documents that were presented to us in quarterly board meetings

8. As already mentioned earlier in this Order, a common Authorised Representative appeared on behalf of *Noticees no. 1, 2, 5, 6, 9 and 10* and argued on the lines of reply filed by the *Noticee no. 1 (Company)*. Therefore, while considering the issues in the subsequent paragraphs qua the *Noticees no. 1, 2, 5, 6, 9 and 10*, I shall be considering replies submitted by *Noticee no. 1*.

ISSUES FOR CONSIDERATION AND FINDINGS:

9. I have perused the SCNs along with their annexures, the replies filed by the *Noticee*s, submissions made during the course of personal hearing and written submissions filed thereafter and find that the pertinent issues that require consideration in this matter are as under:

(i) Whether the Company i.e. Noticee no. 1 has violated Section 12A(a), (b), (c) of the SEBI Act, 1992 read with regulations 3, 5 (1) and 6 (a) of PFUTP Regulations, 1995 read with regulation 13 of PFUTP Regulations, 2003?

(ii) Whether the Noticees no. 2 to 10 have violated Section 12A(a), (b), (c) of the SEBI Act, 1992 read with regulations 3 and 6(a) of PFUTP Regulations, 1995 read with regulation 13 of PFUTP Regulations, 2003?

10. Before I proceed to deal with the issue on merit, it is noted that some of the *Noticees,* apart from refuting the allegations made in the SCNs, have raised some preliminary issues viz; delay in initiating proceedings, applicability of *PFUTP Regulations, 2003*, etc. Before I proceed to examine the allegations made in the SCNs on merit, it is appropriate to first deal with such preliminary issues raised by the *Noticees* in the following paragraphs of this Order.

11. The *Noticees* have contended that the impugned GDR issue took place in 2003 and the SCN is issued in 2017 i.e. after a lapse of almost one and half decade. Hence, the present proceedings ought to be withdrawn on the ground of delay and latches. Noticees have relied upon various judicial judgements including *H B Stockholdings vs. SEBI (supra), Rakesh Kathotia vs. SEBI (supra), Subhkam Securities vs. SEBI (supra),* etc. to support their contention. I note that the *SEBI Act, 1992* does not contain a specific provision that provides limitation period for taking action for the violation of the provisions of the Act or the regulations made thereunder. Further, the issue of delay in initiating action has also come up for consideration before various judicial bodies including the Hon'ble SAT. While dealing with the prayer for quashing of the proceeding on the ground of delay in initiating action, in the matter of *Ravi Mohan & Ors. vs. SEBI* and other connected appeals decided on August 27, 2013, the Hon'ble SAT while referring to its own decision in *HB Stockholdings Ltd. vs. SEBI* (supra) and decision of Hon'ble Supreme Court in *Collector of Central Excise, New Delhi v. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C.)*, has held as under:

> *"....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than <u>8 years in issuing</u> the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if <u>there no statutory bar for adjudicating the matter beyond a particular date</u>, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice...."*

12. The ratio laid down by Hon'ble SAT in the aforesaid case, has been further upheld and reiterated by it, in its order in the matter of *Kunal Pradip Savla & Ors vs.*

SEBI (Appeal no. 231 of 2017, DoD: April 13, 2018). Further, the Hon'ble Supreme Court in the matter of Adjudicating Officer, *SEBI vs. Bhavesh Pabari, (Civil Appeal No. 11311 of 2013 DoD: 28th February, 2019)* observed inter alia as: "*...There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc.*" The instant proceedings pertain to a serious charge of fraud having been perpetrated upon the investors allegedly under a pre-fabricated scheme devised to ensure successful subscription to the GDR through the *Account Charge Agreement* and *Credit Agreements* and therefore *prima facie* cannot be perceived lightly and leniently. Further, it is a settled principle that the period of limitation, *inter alia,* can at best commence from the date of knowledge of an offence / violation and therefore, the mere fact that the alleged fraud was committed much prior to the initiation of investigation, which was triggered only after it came to SEBI's knowledge, would not take away the statutory duty vested in SEBI to do investigation and proceed for taking corrective measure, based on material gathered in the course of investigation.

13. It is noted that based on various complaints, while investigating a few other cases of GDR issues pertaining to the period of such issuance during 2007-2009, SEBI unearthed that in many of the GDR issues, money for subscribing to GDR was availed as a loan by the subscribers, from Bank wherein the issuer company gave security for such loan taken by the subscribers, by pledging/creating charge on the GDR issue proceeds. It was also observed that such subscribers subscribed to the GDRs without any valid consideration and sold the underlying shares in the securities market in India. Accordingly, where ever such *modus operandi* was *prima facie* observed in GDR issues, SEBI initiated investigation as soon as it came to know that such companies have adopted the similar or identical *modus operandi* as referred to above. It is noted that transaction of pledging the GDR proceeds by *Aftek* with *Banco Bank* to secure the loan obtained by GDR subscribers was done in a clandestine manner and the

information of pledging of GDR proceeds with *Banco Bank* was not disclosed to the public. Since, the GDRs are issued abroad and related transactions were carried out outside India, SEBI had to call for information from various entities situated abroad. Such information pertained to and included *inter alia,* the details of (a) issuer companies, (b) custodian of securities, (c) overseas depository, (d) overseas banks, (e) subscribers of GDR issue, (f) lead manager, (g) various transactions, etc. it is noted from the records that such information was not readily forthcoming fro the overseas agencies / authorities. Therefore, SEBI had to approach the foreign regulators for assistance in procuring information from the concerned entities situated outside India. The foreign regulators had also to collect this information from the concerned entities and then furnished to SEBI. Thus, the process of collection of information in the matter was complex, tedious and time consuming. It is noted from SEBI order dated June 16, 2016 that investigation was initiated in respect of 59 GDR issues made by 51 Indian Companies during the period 2002 to 2014. *Aftek* was one such scrip where such *modus operandi* was also *prima facie* observed. Upon commencement of investigation, information was sought from different sources including agencies located outside India and after receiving information through tedious modes, the investigation was completed in 2017. I note that after completion of the investigation, the SCN was issued to the *Noticees* on June 27, 2017. In the above peculiar circumstances, I can observe that the investigation has been conducted and proceedings have been initiated within a reasonable time despite so many challenges. Additionally, the Hon'ble SAT while dealing with a similar fraudulent arrangement concerning GDR issue in the matter of *Jindal Cortex vs. SEBI, (Appeal no. 376/2013; order February 5, 2020)* and in response to a similar contention of delay in issuance of action in that matter has held that *"Arguments on delay in investigation and consequently affecting natural justice are also devoid of any merit in the matter since this Tribunal is aware of the complexity involved in the entire manipulative GDR issue; how long it took SEBI to gain information relating to the various entities from multiple jurisdictions in the matter of PAN Asia Advisors Limited (Supra) and Cals Refineries Limited (Supra) etc.*

14. Keeping the foregoing observations in view, the contentions of the *Noticee*s with respect to delay in initiating action against them are observed to be misconceived and without appreciation of peculiar facts and circumstances of the matter and hence, not maintainable.

15. It has also been submitted by the *Noticee no. 4* that the SCNs are silent on the measures proposed to be taken against the *Noticee*. He has further contended that it is incumbent for SEBI to apprise the *Noticee* of what specific measure SEBI is contemplating, so that the *Noticee* will be able to present his case accordingly. In this regard, *Noticee* has placed reliance on the judgement of the Hon'ble Supreme Court in the matter of *Gorkha Securities vs. Govt. of NCT of Delhi (supra)* and observations of the Hon'ble SAT in the matter of *Royal Twinkle Star Club (supra).* A bare perusal of the *SEBI Act, 1992* shows that a comprehensive list of possible directions have been outlined under Section 11(4) of the *SEBI Act, 1992* which the authority under the *SEBI Act, 1992* is empowered to issue and the aforesaid provision of law has already been specifically referred to in the SCN. The SCN makes a sufficient suggestion about directions that are likely to be issued, once the violations of the provisions are established, and therefore, I see the contention of the *Noticees* as frivolous. In this regard, I note that the SCN contains detailed enumeration of the allegations, the basis of each of those allegations, the documents relied upon for making such allegations as well as the relevant provisions of the Securities Laws supporting those allegations. Without prejudice to the foregoing, the Hon'ble Supreme Court has held in the case of *Fortune Impex Vs. Commissioner* - 2004 (167) ELT A 134 (SC), that "*non-mentioning of particular Section of Customs Act 1962 would not vitiate the proceedings when allegations and charges against all the appellants were mentioned in clear terms in the show cause notice.*" This position has been reiterated by the Hon'ble Supreme Court in several other cases as well. In view of the aforesaid settled proposition of law, even the non-mentioning of the provisions of law in the SCN would not vitiate the present proceedings. I reiterate that in the instant case, the SCN contains detailed charges against each of the *Noticees* and the basis of each allegation duly supported by certain documentary

evidences. Needless to state that in an adjudication proceeding, the exact remedial measures that can be taken or the directions that can be issued against the noticees can be crystallised only after the proceedings reach its conclusion and only after all the explanations and arguments are evaluated *vis-à-vis* the allegations based on the evidences, factual & circumstantial, available before the adjudicating authority. The SCN cannot pre-judge or pre-ordain the remedial or punitive consequences with certainty prior to the commencement of the proceedings, but can acquaint the *Noticees* with the possible outcomes that may emanate from the proceedings based on the allegations of various contraventions brought against them which exactly has been indicated in the SCN to the *Noticees*. Hence, the contention raised by the *Noticees* in this regard lacks any iota of truth or substance worth its merit. Hence, I do not find any merit in contentions that SEBI has not stated in the SCN about the measures it proposes to take in the matter qua the *Noticees.*

16. Further, I find that the case *Gorkha Securities* as cited by the *Noticees* is factually distinguishable and not applicable to the present proceedings, for the following reasons:

a) In *Gorkha Securities* case, the matter pertained to blacklisting of a contractor by a government agency, which resulted in depriving the contractor from entering into any public contracts, thus violating the fundamental rights of such person. There is no such situation arising out of the present proceedings.

b) In *Gorkha Securities* case, the contractor was blacklisted for breaching the terms of the contract, whereas the present SCN has been issued for violation of statutory provisions, and not for violation of any contractual obligations. Further, blacklisting was imposed by way of penalty whereas in the instant proceedings, the purpose of issuing directions, if found necessary, would be preventive and remedial in nature.

c) In *Gorkha Securities* Case, blacklisting of the contractor was provided in the contract itself as a penalty to be imposed in case of breach of terms of contract, whereas in the present matter, provisions of law under which directions are contemplated to be issued, confer discretion to SEBI to take such measure as it may deem fit in the interest of investors and Securities Market

17. Therefore, unlike the facts of the case referred to by the *Noticees*, the SCN has already stated the provisions of law under which the directions proposed to be issued and the specific directions that may be issued by the competent authority can be determined only after the competent authority examines the submissions and explanations of the *Noticees*.

18. I have also perused the order passed by the Hon'ble SAT in *Royal Twinkle case (supra)* and I find that Hon'ble Tribunal in the said case has examined the Gorkha Security case extensively. However, the ultimate decision arrived at is not based on the understanding of the Hon'ble Tribunal of the Gorkha Security case, as it emerged from the said examination. On the contrary, it has been specifically recorded in the order that *"However, applicability of the judgment of Hon'ble Supreme Court in the case of Gorkha to the facts of present case need not be gone into……….".* Thus, the observation regarding Gorkha Security matter in the order passed by the Hon'ble Tribunal in R*oyal Twinkle* matter is only *obiter dicta*. In any circumstance, *Gorkha Security* case is factually distinguishable as observed above. Accordingly, the said contention raised by the Noticees and the reliance upon *Gorkha Securities (supra)* and *Royal Twinkle Star Club (supra)*, by the *Noticee* is untenable both on facts and on law.

ISSUE No. 1: ***Whether the Company i.e. Noticee no. 1 has violated Section 12A(a), (b), (c) of the SEBI Act, 1992 read with regulations 3, 5 (1) and 6 (a) of PFUTP Regulations, 1995 read with regulation 13 of PFUTP Regulations, 2003?***

19. Now I will proceed to examine the afore-stated issue and decide as to whether on the facts of the matter, the aforesaid violations as alleged in SCNs stand

established or not. However, before that, it would be proper to reproduce hereunder, the relevant provisions of the *SEBI Act, 1992*, the SEBI *PFUTP Regulations, 1995* and the SEBI *PFUTP Regulations, 2003* alleged to have been violated by the *Notice*es in the instant matter. The same are reproduced below:

SEBI Act, 1992

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;

PFUTP Regulations, 1995

"Prohibition of certain dealings in securities

3. No person shall buy, sell or otherwise deal in securities in a fraudulent manner.

Prohibition of misleading statements to induce sale or purchase of securities

5. (1) No person shall make any statement, or disseminate any information which-

(a) is misleading in a material particular; and

(b) is likely to induce the sale or purchase of securities by any other person or is likely to have the effect of increasing or depressing the market price of securities, if when he makes the statement or disseminates the information-

(i) he does not care whether the statement or information is true or false; or

(ii) he knows, or ought reasonably to have known that the statement or information is misleading in any material particular.

Nothing in this sub-regulation shall apply to any general comments made in good faith in regard to -

(a) the economic policy of the Government,

(b) the economic situation in the country,

(c) trends in the securities markets, or

(d) any other matter of a similar nature,

whether such comments be made in public or in private

Prohibition on unfair trade practice relating to securities

6. No person shall -

(a) in the course of his business, knowingly engage in any act, or practice which would operate as a fraud upon any person in connection with the purchase or sale of, or any other dealing in, any securities;"

PFUTP Regulations, 2003

"Repeal and savings

13. (1) The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 is hereby repealed.

(2) Notwithstanding repeal of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995, any violation of regulations 3, 4, 5 and 6 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 shall be investigated and proceeded against in accordance with the procedure laid down in these regulations.

(3) Notwithstanding repeal of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995, any investigation pending, at the commencement of these regulations shall be continued and disposed of in accordance with the procedure laid down in these regulations."

20. As noted earlier, the *Company* had issued 1.33 million GDR on February 07, 2003 for raising USD 14.99 million and for this purpose, the *Board* of *Aftek* had passed a Resolution in its Meeting held on November 29, 2002, wherein, *inter alia*, a resolution was passed for constituting a committee of Executive Directors (*GDR Committee*) for *Company's* GDR issue. Relevant extracts of the said *Board* Resolutions are as under:

- *"RESOLVED THAT a committee of Directors comprising the following Executive Directors of the Company, to be called the "GDR Committee", be and is hereby constituted to exercise powers conferred on the Board by the aforesaid special resolution in respect of the Company's proposed issue of Global Depository Receipts.*

  Mr Ranjit Dhuru, Chairman & Managing Director

  Mr Nitin Shukla, Director-Finance

  Mr Mahesh Vaidya, Technical Director-Software

  Mr Sunil Desai, Technical Director-Engineering

  Mr Pramod Broota, Director-Marketing.

- *RESOLVED FURTHER THAT the aforesaid GDR committee be and is hereby authorized to elect a Chairman and to decide and regulate the manner of the functioning*

- *RESOLVED FURTHER THAT for the purpose of ensuring various compliances and to otherwise facilitate the GDR issue, the aforesaid GDR Committee, without affecting the generality of the forgoing and in particular, be and is hereby authorized to finalize, approve, accept, adopt the Listing Particulars, Placing Agreement, Depository Agreement, Master GDR, Escrow Agreement and other various relevant documents, deeds, agreements, letters, undertakings, confirmations, declarations and other papers as may be required and to delegate any of its powers to any of its Member Executive Directors and to do all such things and to take all such steps as may be necessary from time to time in this behalf."*

21. On a perusal of the aforesaid *Board* Resolutions (copy enclosed as annexure-5 to the SCN), I note that the said Resolutions were approved by the *Board* on November 29, 2002 for, *inter alia*, constituting a *GDR Committee* comprising of *Noticees no. 2, 8, 9, 10* and Mr. Sunil Desai and authorizing the said committee to finalize, approve, accept, adopt the Listing Particulars, Placing Agreement, Depository Agreement, Master GDR, Escrow Agreement and other various relevant documents, deeds, agreements, letters, undertakings, confirmations, declarations and other

papers as may be required and to delegate any of its powers to any of its Member Executive Directors and to do all such things and to take all such steps as may be necessary from time to time in this behalf for ensuring various compliances to facilitate the GDR issue.

22. Further, it has come out in the investigation that *Aftek* through its Chairman & CEO Mr. Ranjit Dhuru had executed *PoA* dated January 28, 2003 for short "***PoA***") (copy enclosed as annexure-6 to the SCN) which inter-alia states the following:

"By this Power of Attorney executed at Mumbai this 28th January 2003 by M/s Aftek Infosys Limited, incorporated under the Companies Act and having its Registered Office at Aftek House, 265, Veer Savarkar Marg, Dadar, Mumbai 400 028 (hereinafter called "the Company") and represented by its Chairman & CEO – Mr. Ranjit Dhuru, S/o Late Mr Mohan Dhuru, do hereby appoint, nominate and to constitute the Director Mr Pramod Broota, residing at 601, Amber , Powai Vihar Complex, Powai, Mumbai – 400076 to be its true and lawful Attorney and in the name of the Company and on its behalf to do, perform, exercise and execute all or any of the following acts, deeds, matters, powers, authorities and things that is to say:

1. *To sign all documents/bank account <u>application / loan or any other</u> documents as may be necessary for and on behalf of the Company*
2. *To execute, file the GDR Listing Particulars / Prospectus of the Company with Luxemburg Stock Exchange (LSE) and/or other Exchanges along with all changes and additions thereto*
3. *To take all necessary action and execute all necessary documents with reference to the aforesaid including, without limitation, to prepare and / or cause to be prepared, and to execute with the LSE, any certificates, letters, exhibits and documents in connection therewith.*
4. *To execute and sign the relevant agreement as may be required to complete the GDR allotment*
5. *To sign and deliver share certificates / Allotment advice to the concerned depository and to the concerned Stock Exchange."*

23. From the above, it is evident that the Board of *Aftek* on November 29, 2002 had passed a resolution approving the proposal for the constitution of the GDR Committee and further for enabling the GDR Committee to act in respect of the *Company's* proposed issue of GDR. Through the above resolution, the Board of the *Company* empowered the GDR Committee to elect a Chairman and to decide and regulate the manner of the functioning of the GDR Committee. The above mentioned resolution also authorized the GDR Committee to delegate any of its powers to any of its Member Executive Directors to do all such thing and to take all such steps as may be necessary from time to time in this behalf. Simultaneously, the *Company* through its *PoA* dated January 28, 2003 authorised the *Noticee no. 10* as its Attorney and authorized him to execute various deeds on its behalf. Both *Noticee no. 2* who represented *Aftek* in the PoA and *Noticee no. 10* who was appointed as Attorney of company were part of the GDR Committee as constituted by the Board for performing acts in respect of the proposed acts of issuance of GDR by the *Company*. Accordingly, in pursuance of the above resolution, the *Company* had opened an account no. 6040385 in its name in *Banco Bank*. A comprehensive reading of all the above said *Board* Resolutions and the *PoA* suggest that a decision was taken by the Board of the *Company* as far back as on November 29, 2002, pertaining to the proposed issuance of GDR that includes a decision to authorise its GDR committee to decide and regulate the manner of its functioning and to further delegate its power to any of its member to sign / execute documents and to take steps as may be necessary from time to time in this behalf, including the loan documents.

24. As noted in the beginning, *Kendo* had signed a ***Credit Agreement*** dated February 06, 2003 with *Banco Bank* for availing a loan of up to USD 4 million so as to be in a position to subscribe to the GDR issue of *Aftek* worth of USD 4 million. Similarly, it is also observed that *Highgrove* had also signed a ***Credit Agreement*** dated February 06, 2003 with *Banco Bank* for availing a loan of up to USD 5 million so as to be in a position to subscribe to the GDR issue of *Aftek* worth of USD 5 million. In this regard, having gone through the *Credit Agreement* dated February 06, 2003 executed

respectively by the *Kendo* and *Highgrove*, some of the pertinent and relevant clauses as found to be part and parcel of the said ***Credit Agreements***, are cited as under:

Table no. 3

Kendo *Credit Agreement*	***Highgrove Credit Agreement***
*"**Facility**- Subject to the terms of this agreement, the bank agrees to make available to the borrower a Dollar term loan facility in the maximum principal amount of up to US $4,000,000.*	*"**Facility**- Subject to the terms of this agreement, the bank agrees to make available to the borrower a Dollar term loan facility in the maximum principal amount of up to US $5,000,000.*
***Purpose-** The borrower shall use the proceeds of the advance to subscribe for global depository receipts to the value of up to US $4,000,000 issued by Aftek on the terms of the Listing particulars to be delivered to the Luxembourg Stock Exchange.*	***Purpose-** The borrower shall use the proceeds of the advance to subscribe for global depository receipts to the value of up to US $5,000,000 issued by Aftek on the terms of the Listing particulars to be delivered to the Luxembourg Stock Exchange.*
Conditions precedent – Notwithstanding any other term of this Agreement, the Bank shall not be under any obligation to make the Facility available to the Borrower unless it has notified the Borrower that it has received all the documents listed in Schedule 1 (in form and content satisfactory to tit).	*Conditions precedent – Notwithstanding any other term of this Agreement, the Bank shall not be under any obligation to make the Facility available to the Borrower unless it has notified the Borrower that it has received all the documents listed in Schedule 1 (in form and content satisfactory to tit).*
Afteck Instuction Letter means a letter from Aftek to the Bank in the form attached at Schedule 3	*Afteck Instuction Letter means a letter from Aftek to the Bank in the form attached at Schedule 3*
Deposit Charge means the charge over the deposit made by Aftek Infosys Limited with	*Deposit Charge means the charge over the deposit made by Aftek Infosys Limited with*

Bank date on or around the date of this Agreement	*Bank date on or around the date of this Agreement*
Subscription Agreement means the agreement for the subscription of the GDRs made between the Borrower and Aftek Infosys Limited	*Subscription Agreement means the agreement for the subscription of the GDRs made between the Borrower and Aftek Infosys Limited*
Security Documents means the Deposit Charge and any other guarantee or document creating, evidencing or acknowledging security in respect of any of the obligation and liabilities of any Obligor under any Financing Document.	*Security Documents means the Deposit Charge and any other guarantee or document creating, evidencing or acknowledging security in respect of any of the obligation and liabilities of any Obligor under any Financing Document.*
Default mean any event specified as such in Clause 13.1	*Default mean any event specified as such in Clause 13.1*

25. There is no dispute to the fact that *Kendo* and *Highgrove* had availed loan and the same facility was provided by the *Banco Bank* to subscribe to GDR of the *Company* for which they have entered into their respective *Credit Agreements*. The perusal of the clauses and contents of the respective *Credit Agreements* show that the two are *ad verbatim* same except for the change in name of the borrower and amount. It is also noted that the *Credit Agreements,* apart from specifying the respective rights, duties and obligation also contain certain pre-conditions to be fulfilled before the disbursal of the loan amount. One of the condition that required to be complied with before the disbursal of the loan amount, was furnishing of certain documents as mentioned in schedule 1 to the *Credit Agreements*. A further perusal of the same reveals that among other documents, there were a host of documents pertaining to the issuer *Company* that were required to be furnished by / on behalf of *Kendo* and *Highgrove* to *Banco Bank* prior to disbursal of the said loans. Some of these required documents are viz; certified copy of the certificate of incorporation and the memorandum and articles of

association of *Aftek*, Certified copies of board minutes and resolution of *Aftek* approving and authorising, etc.

26. On a conjoint and holistic reading of the above mentioned clauses of the *Credit Agreements*, it becomes very evident that the *Company* was in advance, aware of the fact that *Kendo* and *Highgrove* would be exclusively subscribing to the GDRs of the *Company* and for the purpose, the above mentioned two subscribers were applying for loan to *Banco Bank* and the *Banco Bank* from its end stipulated the condition that the loan required by the aforesaid two entities to subscribe to the GDRs of the *Company* would be advanced only when the above discussed documents as mentioned in the *Credit Agreements* are furnished to the *Banco Bank*. In addition to the above, as per Schedule 3 of the *Credit Agreements*, the issuer *Company*. i.e. *Aftek* was further required to address a letter to the *Banco Bank* stating therein that it had complied with all the conditions to the listing of the GDRs and also that the monies held in escrow by the *Banco Bank* representing the subscription monies for the GDRs may be transferred to its account held with the *Banco Bank* and the said GDR proceeds will be held in Company's *Banco Bank* account in accordance with the terms of the *Account Charge Agreement* that was dated on or around the date of this letter addressed by *Aftek* to *Banco Bank*. The *Credit Agreements* define the term '*Deposit Charge'* as the charge over the deposit made by Aftek Infosys Limited with the Bank on or around the date of this Agreement i.e. *Credit Agreement*. From the above, it is glaringly evident that the *Company* was not only aware about the fact that *Kendo* and *Highgrove* were availing the loan from the *Banco Bank* but also it went ahead and provided them with the necessary documents about the *Company* for subscribing so that they become successful in availing the credit facility and in subscribing to the GDRs of the *Company* by using the funds of those loans availed from *Banco Bank* in this manner.

27. As noted above, the *Company* was found to have furnished documents and it enabled *Kendo* and *Highgrove* to avail loans from the *Banco Bank* and in the process, *Kendo* and *Highgrove* have executed their respective *Credit Agreements*, which *inter alia*,

further provided, for execution of a document called 'Security Document' and the same has been defined in the *Credit Agreements* to mean *'the Deposit Charge and any other guarantee or document creating, evidencing or acknowledging security in respect of any of the obligation and liabilities of any Obligor under any Financing Document.'* I have also noted above that based on the Board resolution referred to earlier, GDR Committee was constituted and the said resolution also empowered any its members to sign documents on behalf of the *Company.* While exercising the above power, the *Noticee no. 10*, Mr. Pramod Broota was authorised vide *PoA* dated January 28, 2003 and it was he who had signed an *Account Charge Agreement* with *Banco Bank* dated February 06, 2003 therein giving an undertaking on behalf of *Aftek*, to deposit in the designated account of *Aftek* held with *Banco Bank*, an amount not exceeding the loan amounts availed by *Kendo* and *Highgrove* (for subscribing to the GDR of *Aftek)* and further to keep the deposited amount as a security against the loan obligations of *Kendo* and *Highgrove* under the above mentioned *Credit Agreements*. The said *Account Charge Agreement* further defines the term 'Loan Agreements' as the agreements signed between *Highgrove* and the *Banco Bank* and *Kendo* and the *Banco Bank* on or approximately on the date of this Agreement under which, the Bank lent to *Highgrove* and *Kendo* an amount of US 9,000,000 in aggregate. For better and proper appreciation of pros and cons of the execution of the above mentioned *Account Charge Agreement* by the *Company* with *Banco Bank*, some of the relevant clauses of the said *Account Charge Agreement* which was signed by *Noticee no. 10* on behalf of the *Company* with *Banco Bank* are quoted as under:

> ***1. "Credit Agreement****: Credit Agreement means the Credit Agreement signed between Highgrove and the Bank and Kendo and the Bank dated on or around the date of this agreement by* ***which the bank lent to Highgrove and Kendo the amount of US$ 9,000,000 in aggregate.***
>
> ***2. Account Charge:***
>
> ***Upon and Subject to the terms of this agreement, Aftek deposited in the Bank's account number*** *6040385 (hereinafter the Account) the amount of US$ 9,000,000 as*

security for all the obligations of Highgrove and Kendo under the Credit Agreement (hereinafter the Secured Obligations) and with fill title guarantee hereby assigns to and charges by way of first fixed charge in favour of the Bank all the rights, title, interest and benefit in and to the account as well as the moneys from time to time standing to the credit thereof and all interest from time to time payable in respect thereof. Such assignment and charge shall be a continuing <u>security for the</u> due and punctual payment and discharge of the secured obligations.

Upon payment and final discharge in full of all the Secured Obligations, this Agreement and the rights and obligations of the Parties shall automatically cease and terminate and the Bank shall, at the request of Aftek, release the deposit made in the Account.

Aftek covenants with the Bank that it will on demand pay and <u>discharge the secured obligations</u> when due to the Bank.

At any time after the bank shall have demanded payment of all or any of the Secured Obligations the Bank may without further notice apply all or any part of the Deposit against the Secured Obligations in such order as the bank <u>in it's discretion determines</u>.

Aftek hereby irrevocably appoints by <u>way of security the Bank as the attorney of Aftek</u> with full power in the name and on behalf of Aftek to sign, seal and deliver any deed, assurance, instrument or act in order to perfect this charge and at any time after an event of default by Aftek to sign, seal and deliver any deed assurance, instrument or act which may be required for the purpose of exercising fully and effectively all or any of the powers hereby conferred to the Bank to take all necessary action whether in the nature of legal proceedings or otherwise to recover any moneys which may be held in the Account and to give valid receipts for payment of such moneys and also for the purpose of enforcement and realisation of the security hereby created.

Aftek hereby warrants and declares that any and all such deeds, instruments and documents executed on its behalf by or on behalf of the Bank by virtue of this Agreement shall be as good, valid and effective, to all intents and purposes whatsoever, as if the same had been duly and properly executed by Aftek itself and Aftek hereby undertakes *to ratify and confirm all such deeds, instruments and documents lawfully executed by virtue of the authority and power hereby conferred."*

28. On a careful and combined examination of the contents of the relevant clauses of the "*Credit Agreements*" signed by *Kendo* and *Highgrove* with *Banco Bank* and the "*Account Charge Agreement*", signed by *Aftek* with *Banco Bank*, following observations can be made: -

a) The *Account Charge Agreement* was executed mainly to secure the obligations of the borrowers i.e. *Kendo* and *Highgrove*, which were granted an aggregate loan for USD 9 million by *Banco Bank*. The *Account Charge Agreement* also mentions that the *Company* will deposit in its designated account with the *Banco Bank*, an amount not exceeding US $9 million as a security against all the obligations of *Kendo* and *Highgrove* stipulated under their respective *Credit Agreements* and through the said *Account Charge Agreement,* the *Company* assigned all the rights, title, interest and benefit accruing out of its designated account as a continuing security for the payment and discharge of the obligations of *Kendo* and *Highgrove* placed on them under their Credit Agreements with the *Banco Bank.*

b) In terms of the *Account Charge Agreement*, only upon payment of an amount due under the *Credit Agreements* by *Kendo* and *Highgrove*, *Aftek* could withdraw equivalent amount from its designated account and only upon payment and final discharge of all the obligations by *Kendo* and *Highgrove* under their Credit Agreements, the rights and obligations of the parties under the *Account Charge Agreement* shall cease and *Banco Bank* shall release the amount of bank balance lying in the account of the *Company* to *Aftek*.

c) The *Account Charge Agreement* also mentions that *Aftek* has undertaken to pay and discharge the obligations of *Kendo* and *Highgrove* under their *Credit Agreements* to *Banco Bank* and *Banco Bank* will be entitled to apply all or any part of the deposit made by *Aftek* in the designated account against the obligations of *Kendo* and *Highgrove* without further notice.

d) As a consequence to such terms & conditions contained in the *Account Charge Agreement*, *Aftek* had agreed to the covenant under the said agreement which provided that the GDR proceeds would not be at its disposal for its business utilization until repayment of the loan was made by *Kendo* and *Highgrove*.

e) As per clause 3 of the *Credit Agreements* the said loans were sanctioned to *Kendo* and *Highgrove* for the purpose of subscribing to the GDR issue of *Aftek* upto the value of USD 9,000,000. Further, as per the *Credit Agreements*, obligations of the borrower (*Kendo* and *Highgrove*) were secured *inter alia,* by a charge over the deposit made by *Aftek* with *Banco Bank*.

f) It becomes clear that the *Noticee no. 1* (*Company*) had agreed vide its *Account Charge Agreement* that, in all eventuality, in case of any default by the two / or any of the two borrowers, the security including proceeds of GDR to be deposited in its designated account of *Aftek* would be realizable by *Banco Bank*.

g) The *Credit Agreements* and *Account Charge Agreement* were thus inextricably connected and executed in a manner that clearly points out that the *Noticee no. 1* i.e. the *Company*, had consciously facilitated the loan to *Kendo* and *Highgrove* so as to ensure success of issuance of GDR and to create false perception about a good overseas market impact of about the scrip of the *Company*. The above stated acts were performed by the *Company* knowing well that the GDR proceeds cannot be used for its business, until the repayment is made by the two borrowers whose borrowed money got converted into the proceeds of GDR through such an overseas issuance by the *Company*.

29. The execution of *Credit Agreement* and *Account Charge Agreement* on the same day i.e. on February 06, 2003 and just one day before the issuance of GDR, which took

place on February 07, 2003 clearly shows that *Kendo* and *Highgrove* were already pre decided to be the subscribers to the GDR issue and the *Company* was well aware about its would-be subscribers before the actual issuance of GDR. I further find that the *Noticees* have not made any submission nor have furnished any documents to rebut the aforesaid findings that the aforesaid subscribers, i.e. *Kendo* and *Highgrove* were availing the loan from *Banco Bank* with the backing & security provided by the *Company* itself. There is also nothing on record to suggest that the *Company* was not aware of the fact about *Kendo* and *Highgrove* availing loans from *Banco Bank* to subscribe to the GDRs of the *Company* nor has it even tried to show that in the absence of the said loan that the two subscribers have got from *Banco Bank,* they were otherwise also financially capable to subscribe to the GDR issue of *Aftek*. On the contrary, from the materials on record, it is clear that the *Company* was very much aware about it's would be subscribers and rather extended all necessary help to them by furnishing necessary documents pertaining to it as demanded by the *Banco Bank* to enable them to avail the loans from the *Banco Bank*. The clauses of the agreements (two *Credit Agreements* and *Account Charge Agreement*) as cited in the preceding paragraphs further constrain me to observe that the *Company* was also aware that the proceeds to be realized against the issuance of GDR would be kept as security towards the loan amount availed by *Kendo* and *Highgrove* and by executing the *Account Charge Agreement*, *Company* had consciously restrained itself from using the proceeds of the issuance of GDR.

30. It may be recalled at this stage that the *Company* had informed BSE on February 11, 2003 that *"Aftek Info allots Equity Shares against GDRs*." However, despite being aware about the specific entities (*Kendo* and *Highgrove)* who would be subscribing to majority of its GDR issue as per its premeditated arrangement and the crucial material facts surrounding the *Credit Agreements* and *Account Charge Agreement,* the *Company* has knowingly concealed from the investors these aspects of the issuance and subscription of GDRs. The investors were never allowed to know that the *Company* had executed the *Account Charge Agreement* and also facilitated the execution

of *Credit Agreements* and further in terms of the above mentioned agreements, the GDR proceeds would be kept as a security against the loan taken by the subscribers and in case of default by the subscribers, the proceeds would be eventually utilized by the *Banco Bank* to settle the loan obligations of the borrowers/subscribers. Under the extant domestic securities laws, a company listed in India is required to make true, fair and proper disclosures of all material information about its affairs to the shareholders and to the securities market at large. It is now amply clear that the *Noticee Company* has not made its disclosure to the Stock Exchange in a fair manner and has rather concealed the very crucial material information pertaining to its actions & transactions with *Banco Bank* and *Kendo* and *Highgrove* in connection with the GDR issue, from its Shareholders and from the Public at large.

31. It is also observed that after the issuance of GDRs to the two subscribers i.e. *Kendo* and *Highgrove*, the said GDRs were converted into equity shares of *Aftek* and sold in the Indian Securities Market. Thus, it can be observed that misleading inferences and false positive expectations about the shares of the *Company* in the domestic market were caused by the *Company*'s own acts by devising and arranging a scheme through which it artificially ensured a successful issuance of GDR. In fact, by concealment of actual material facts pertaining to the arrangement made by the *Noticees* to ensure a successful subscription to the issue of GDR from the knowledge of its stakeholders, the investors at large were kept in dark about the artifice created by the *Company* through which it enforced the so called successful subscription to its GDR. The disclosure made by the *Company* on the platform of the Stock Exchange about the successful subscription of GDR issue without disclosing the behind-the-scene arrangements undertaken by it with the subscribers/borrowers to ensure full subscription to its GDR by facilitating a loan to the said subscriber, has given an ostensible impression to the domestic investors and the market about the strong potential of the *Company* because of which investors outside India had shown overwhelming interest in subscribing to the securities issued by the *Company*, which

was in reality, an patently false and misleading impression thrusted upon them by the *Noticees* by their deceitful acts as highlighted above.

32. I note that the *Company* has submitted that it had appointed M/s Credo Corporate Finance Limited as Lead Manager to manage its GDR issue and as per advice of the Lead Manager, various documents were executed by *Noticee no. 10* on behalf of the *Company* in good faith and trust in the Lead Manager. It has further submitted that it was never specifically pointed out to *Noticee no. 10* about the alleged *Account Charge Agreement* and therefore, if any *Account Charge Agreement* was signed, same was signed without the knowledge of the *Company*, its *Board* and the *Noticee no. 10.* The submission of the *Noticee* that it blindly trusted the Lead Manager and signed various documents as per its advice does not convince me as there is nothing tangible before me to lend credence to such a submission. The *Noticees* have not produced any correspondence, email or any other tangible efforts having been made by them to contact the Lead Manager nor have they entered into any communication with the *Banco Bank* so as to verify the antecedent of the *Account Charge Agreement* or the Lead Manager. The *Company* had the choice and discretion to open a bank account in any other bank to receive GDR proceeds and to appoint consultants of its own choice for assisting it in executing the GDR issue since, in case of any default on the part of any of its consultants/intermediaries, statutorily it is the *Company* that will be held liable and it can't escape from its responsibility on the ground that it has acted in good faith or trust reposed by it on the advice given by the intermediaries and consultants engaged by it. The *Company* has not submitted any documents to substantiate its claim as to how it got persuaded by the said intermediaries against its own wish, to open an escrow account with the *Banco Bank* only and under what circumstance, it thought it fit and proper to execute the *Account Charge Agreement*, which, *inter alia*, fastened on it, the liabilities of the borrowers (*Kendo and Highgrove*) in terms of the said borrower's *Credit Agreements* with *Banco Bank*. If the contention of the *Noticee* that it was unaware of the *Account Charge Agreement* as well as about the would be subscriber to its GDR issue and that it has signed the said *Account Charge Agreement*

on good faith trusting the Lead Manager is to be believed, then the *Company* was duty bound to take stringent legal action against the Lead Managers for such criminal breach of trust. In my view, instead of projecting themselves as a victim, it is expected that the *Noticee* should have taken strong action against the Lead Manager so as to show their *bonafide*, if the Lead Manager has deceptively fastened a huge liability on them by subjecting its GDR proceeds to be held as securities against the loan taken by the unrelated third parties, with which the *Noticee* claims to have had no connection. However, to my surprise, no action has been initiated either by the *Company* or by any other *Noticees* against any of the intermediaries/consultants so far. I have already discussed in detail that the Account Charge Agreement was not an independent agreement, rather the same incorporates into itself a clear reference to the *Credit Agreements* pertaining to *Kendo* and *Highgrove*. Similarly, the two *Credit Agreements* also mention about the Account Charge Agreement (to be signed by the *Company*) as a document to be lodged with *Banco Bank* in the form of security documents. I have also explained as to how the furnishing of documents were kept as a pre-condition before the sanctioning and disbursal of the loan amount to the two subscribers and there is nothing on record to contradict that no such document was ever furnished or facilitated in favour of *Kendo*/ *Highgrove* or the *Banco Bank*. Under the circumstances, the explanation furnished by the *Noticee Company* pleading therein to shift its culpability on to the shoulders of other entities who have acted as their intermediaries so as to avoid any likely enforcement actions against it for wrongful disclosure to the public at large and for resorting to fraudulent acts against its shareholders as alleged in the SCN, would not be tenable. It is the responsibility of the issuer *Company* and its directors to verify the genuineness of any material information before disseminating the same to the public at large and it is not permissible to take shelter under the excuse that the disclosures made by the *Company* was based on the information received from a third person i.e. Lead Manager in this case.

33. The *Company* has contended that SEBI has discharged the *Company* and its *Board* in the matter of similar allegations under Show Cause Notice bearing reference no. AO/EAD-12/SM/JR/29793/2017 dated November 29, 2017. In this regard, it is pertinent to note that the aforesaid Show Cause Notice was issued to the *Company* to show cause as to why inquiry should not be held against the *Company* and penalty be not imposed under Section 23E of Securities Contract (Regulation) Act, 1956 (for short "SCRA, 1956") for violation of Section 21 of SCRA, 1956 read with clause 36 (7) of the Listing Agreement. Subsequent to the issuance of aforesaid Show Cause Notice, it was noted by SEBI that the Section 23E of SCRA, 1956 came into effect from October 12, 2004 i.e. after the issuance of GDRs by the *Company*. Accordingly, the Adjudication Officer opined that since Section 23E of SCRA, 1956 involved in the Adjudication proceedings came into effect after the period of Investigation, there was no cause survived and the Adjudication Officer disposed of the proceedings without any directions. However, contrary to the above, the action of the *Noticees* in the instant proceedings are alleged to have violated *PFUTP Regulations, 1995*, which were well within place at the time of issuance of GDRs by the *Company*. Therefore, the argument of the *Noticees* advanced with an aim to compare the instant proceedings with the earlier proceedings initiated by the Adjudication Officer under separate provisions of law is nothing but a frivolous attempt to evade the outcome of the present proceedings initiated against their fraudulent acts and hence, the same is rejected.

34. The *Company* has also contended that SEBI has relied upon *Account Charge Agreement*, which is just a plain paper agreement as no stamp and seal of the *Company* is affixed on it and therefore the said agreement has no legal sanctity. In this regard, it is worthwhile to mention that though the *Company* has taken the aforesaid plea to rebut the allegations, nowhere during the proceedings, it has denied that the signatures put on every page of the said agreement by *Noticee no. 10* are forged. Considering the fact that the *Company* vide *PoA* dated January 28, 2003 authorised *Noticee no. 10* to sign all documents including loan documents on its behalf and the fact that the signatures of *Noticee no. 10* on the *Account Charge Agreement* are not

disputed by the *Noticees,* the argument of the *Company* that there is no seal of the *Company* on the *Account Charge Agreement* does not hold any merit and hence the same is rejected. The above contention is also misplaced on facts of this case for the reason that the issue under examination have not the enforceability of the above mentioned *Account Charge Agreement* for want of *Company's* seal or otherwise but whether such arrangements were entered into or not and to that extent, the examination of materials on record and submissions so advanced leave no scope for any doubt that the *Company* had indeed executed the *Account Charge Agreement* through *Noticee no. 10* who executed it under *PoA* duly issued to him by the *Company* and thereby obligated itself to its terms.

35. The *Company* has further submitted that neither the shareholder's resolution, nor the *Board* resolution nor the *PoA* had anywhere therein authorized any person including *Noticee no. 10* to pledge or create charge on the assets of the *Company* including GDR proceeds in favour of any third parties. This submission may superficially appear to be persuasive on its face, however, on a deeper examination of matter, it can be very well observed that the aforesaid submission is false and misleading. In this regard, I would like to refer to the following extracts of the *PoA by which the following authority was given to the Noticee no. 10 by the Company through noticee no. 2:*

> *"By this Power of Attorney executed at Mumbai this 28th January 2003 by* ***M/s Aftek Infosys Limited,*** *incorporated under the Companies Act and having its Registered Office at Aftek House, 265, Veer Savarkar Marg, Dadar, Mumbai 400 028 (hereinafter called "the Company") and* ***represented by its Chairman & CEO – Mr. Ranjit Dhuru****, S/o Late Mr Mohan Dhuru,* ***do hereby appoint, nominate and to constitute the Director Mr Pramod Broota****, residing at 601, Amber , Powai Vihar Complex, Powai, Mumbai – 400076 to be its true and lawful Attorney and in the name of the Company and on its behalf t****o do, perform, exercise and execute all or any of the following acts, deeds, matters, powers, authorities and things that is to say****:*

1. *To sign all documents/bank account application / **loan or any other documents** as may be necessary for and on behalf of the Company."*

emphasis supplied

36. From a bare reading of the aforesaid extracts of the *PoA,* it can be clearly established that the *Noticee no. 10* was nominated or authorised through the *PoA* to sign and execute all the documents including the loan documents on behalf of the *Company*. Even if one is to accept the submissions of the *Noticees* that the *Account Charge Agreement* was executed solely by relying on the advice of the consultants and intermediaries appointed by them and they were unaware of the pledge of their GDR proceeds with *Banco Bank* against the loan granted to *Kendo* and *Highgrove*, I find that the *Noticees* have provided no explanation as to why, the Company which was in the process of raising capital through GDRs suddenly felt the requirement of execution of *Account Charge Agreement*, thereby deliberately preventing its GDR proceeds from being remitted to its accounts in India, by placing them as security against the loans taken by the two subscribers. Therefore, the argument that it had not authorized any person including *Noticee no. 10* to pledge or create a charge on the assets of the *Company* including GDR proceeds in favour of any third parties, is nothing but a blatant lie which does not require any further consideration.

37. *Noticee no. 1* has further submitted that the GDR proceeds of USD 11.62 million were fully utilized by the it by July 03, 2003 and the remaining GDR proceeds were utilized by December 12, 2003. In this regard, the *Company* has contended that as per annexures of the SCN, *Kendo and Highgrove* vide their letters dated September 06, 2003 and October 06, 2003 had requested *Banco Bank* to extend the final repayment date for the loans availed by them from *Banco Bank* implying thereby that as on June 30, 2003, the loans availed by both *Kendo and Highgrove* were outstanding and this is sufficient enough to prove that the *Company* had not given any collateral or pledged its GDR proceeds against the loans availed by the *Subscribers.* It has further submitted that the residual amount of the GDR proceeds worth USD 3.22 million was due, because it was retained for meeting cash flow requirements of *Aftek's* overseas entities and the

said balance amount was brought into India (*Aftek* Bank a/c no. 22331) in next few months.

38. In order to examine the aforesaid submission of the *Company*, it is important to refer to the bank account statement (Copies provided to the *Noticees* as Annexure 10 to the SCN) of the account no. 6040385 opened by the *Company* with *Banco Bank* wherein the proceeds of the GDR were credited and the information received from *Banco Bank* regarding utilization of GDR proceeds by the *Company*. I note from the documents available before me including the submissions of the *Company* that as per the instructions of the *Company*, *Banco Bank* has debited the account no. 6040385 of *Company* and made following payments to Techno Overseas Limited for acquisition of shares in Arexera:

Table no. 4

Date of Transfer	Amount in USD	Amount in EURO
February 20, 2003	-	-
March 10, 2003	-	2,000,000/-
March 25, 2003	2,500,000/-	-
April 11, 2003	2,000,000/-	-
May 06, 2003	2,000,000/-	-
May 20, 2003	986,500/-	-
Total	7,486,500/-	2,100,000/-
Total (in USD)	**9,763,728/-**	

39. It can be noted from the aforesaid table that out of USD 14.58 million credited to the account of *Aftek* with *Banco Bank*, USD 9.76 million were transferred by the *Company* for overseas acquisition. However, despite the fact that the GDR proceeds were available for the use of *Company* from February 11, 2003 itself (date of issuance of GDRs), it took more than 3 months for the *Company* to utilize the aforesaid funds and that too in a staggered manner. Before proceeding further, it is necessary to reiterate that the issue under examination is primarily pertaining to execution of certain documents under an arrangement and concealment of that arrangement from

the knowledge of its own shareholders in particular and from the knowledge of the investors at large. To that extent, I find that the *Noticee Company* has not been able to refute the findings of the investigation and I have already recorded above that the two types of agreements i.e. *Credit Agreements* and *Account Charge Agreement* make cross reference to each other's signed on the same day and further, the execution of *Credit Agreements* was not possible without the *Company* having furnished and facilitated with certain documents (including the *Account Charge Agreement*) as required in terms of Schedule 1 and 3 of the said *Credit Agreements*. Although the *Company* has advanced an argument that by July 03, 2003 it has utilised proceeds upto USD 11.62 million and has relied upon the letters to state that the loans availed by both *Kendo* and *Highgrove* were outstanding, the said submission is not backed by any credible supporting evidence. It has already been observed that there is more than sufficient evidence to establish the execution of *Credit Agreements* and *Account Charge Agreement* and the same get further cemented from the submission of the *Company* acknowledging about the existence of such loans and admitting the fact that the said loans were outstanding as on June 30, 2003 which contradicts its initial stand that it was not aware about any such loans advanced by *Banco Bank* to the two subscribers. Further, the above submission of the *Noticee* that by July 03, 2003 it had utilised USD 11.62 million is not found to have support of any evidence to indicate if the above amount was actually utilised or made available to it to be utilised by *Banco Bank* without repayment of loan by the *Kendo* and *Highgrove*. As observed above, the reliance by the *Company* on the loan outstanding against *Kendo* and *Highgrove* further fortifies my finding that such arrangement was indeed entered into and the *Company* had played an instrumental role in enabling *Kendo* and *H*ighgrove in availing the said loans from the *Banco Bank*. The *Noticee Company* has not furnished any evidence to substantiate that *Banco Bank* had allowed it to utilise the GDRs proceed even without there being any matching repayment of the said outstanding loans by the *Kendo* and *Highgrove*. No details about the exact amounts outstanding as on date June 30, 2003 have been furnished except for making a bald assertion that since loan amounts were outstanding, the *Company* by implication, can be said to have utilised substantial amount as on July 03, 2003. Considering the fact that the *Account Charge Agreement* specifically provided that GDR proceeds would be made available for the use of the *Company* only to the tune of the loans amounts repaid by the subscribers (*Kendo and Highgrove*) and also the fact that the utilization of GDR proceeds by the *Company* was done in a staggered manner, raises suspicion on the intent of the *Company* and contradicts the aforesaid claims put forth by the *Company* without furnishing any support evidences. Further, I also observe that huge amount of the GDR proceeds, out of USD 14.58 million that were raised and credited to aforesaid bank account number 6040385 of *Aftek* with *Banco Bank,* amounting to USD 9.00 million, was put as a security towards the loans availed by *Kendo* and *Highgrove*, meaning thereby, an amount equivalent to USD 5.58 million only was available to the *Company* for its usage without being subjected to any security/guarantee. Therefore, in the absence any supporting detail with respect to the *Company's* claim it had actually utilised an amount of USD 11.62 million without there being any loan re-payment from the side of *Kendo* and *Highgrove*, I find that nothing convincing has been brought on record to rebut the findings and allegation pertaining to execution of *Account Charge Agreement* and non-disclosure of the same from its shareholders and investors in the securities market.

40. Further, with regard to the submission of the *Company* that the remaining GDR proceeds of around USD 3.22 million were credited in next few months in its Indian account no. 22331 held with Bank of India, I note that during the investigation, the following details have been submitted by the *Company*:

Table no. 5

S. No.	Date	Details as provided by the Company	Transfer Amount (USD)
1	3-Mar-03	Fairmay-Solicitor-Legal	3,934.97
2	10-Mar-03	PKF-Valuaver	51,541.12

3	27-Mar-03	To Euro Account	4,530.54
4	20-May-03	Llondenium Trg UK	986,513.28
5	23-Jun-03	Aftek 3G Te-Acquisition Fees	50,000.00
6	4-Aug-03	Transfer to AIL- BOI (Aftek India Limited – Bank of India Account)	274,000.00
7	7-Aug-03	Transfer to AIL- BOI	300,000.00
8	10-Sep-03	Transfer to AIL- BOI	300,000.00
9	15-Oct-03	Transfer to AIL- BOI	250,000.00
10	4-Nov-03	Transfer to AIL- BOI	300,000.00
11	8-Nov-03	Transfer to AIL- BOI	300,000.00
12	12-Dec-03	Transfer to AIL- BOI	250,000.00
13	12-Dec-03	Transfer to AIL- BOI	280,000.00
		Total	**33,69,367.13**

41. It is noted that the aforesaid transfers stated to be made by the *Company* from the *Banco Bank* account did not tally with the *Banco Bank* account statement/transfer. It was also noted that though the amounts mentioned at serial number 7 to 13 were stated to have been transferred by the *Company* to its Bank of India account bearing number 003025100022331, from the records submitted by the Bank of India, the aforesaid account was found to be opened only on October 15, 2003. So the questions of funds getting transferred by *Company's Banco Bank* account to the aforesaid ban account in India prior to October 15, 2003 does not arise. From the above, it can be seen that during the stage of investigation itself, the *Company* had started to give false information to SEBI and tried to mislead SEBI's investigation. It is only in its recent submission (post SCNs), that the *Company* has claimed that the remaining amount of USD 3 million was credited in the next months and it is observed from the CA certificate dated September 14, 2018 submitted by the *Company* that the amount of GDR proceeds was finally realised by it till June 23, 2004. Apart from making bald

claims such as '*the money was retained for meeting cash flow requirements of Aftek's overseas entities*' no logical reason has been submitted by the *Company* that as to why it took more than 15 months to bring the GDR proceeds to its account in India.

42. The above acts of the *Company* in connection with the issue of GDRs in a deceitful manner by devising a scheme to make its GDR issuance a success is nothing but manifestation of fraudulent and unfair trade practice that was inflicted on the Shareholders and also on the innocent investors in the Securities Market at large. The investors including its own Shareholders were made to believe that the shares of the *Company* have a good market abroad and have been very well received by investors abroad, hence, the *Company* has a great value for investment in India as well. Such misleading inferences and deceptively positive expectations about the shares of the *Company* were caused by the *Company*'s own acts by devising and arranging a scheme through which, it ensured a successful issuance of GDR beyond the knowledge of its Shareholders. The investors were not aware about the artifice created by the *Company* through which it enforced the successful subscription to its GDR. In this context, I further find it proper to refer to the observation of Hon'ble Supreme Court of India dated 06.07.2015 in *SEBI vs. PAN Asia Advisors Ltd & anr.,* (2015) 14 SCC 71, wherein Hon'ble Supreme Court, while dealing with issue of GDR by way of a similar arrangement of Loan and *Account Charge Agreement*, have observed the following;

> "*the most relevant fact which is to be borne in mind is that the existence of GDRs is always dependent upon the extent of underlying ordinary shares lying with the Domestic Custodian Bank……………..*
>
> *….that for creation of GDRs which can be traded only at the global level, the issuing Company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing Company in the market and the confidence built up with the investors both internally as well as at global level, the issuing Company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a keen interest to invest in such*

GDRs. Mere desire to raise foreign investments without any scope for the issuing Company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs……….

To put it differently, by artificial creation of global level investment operation, either the issuing Company on its own or with the aid of its lead Manager cannot attempt to make it appear as though there is scope for trading GDRs at the global level while in reality there is none…."

43. I also find it appropriate to refer to a decision by the Hon'ble SAT (*DoD 25.10.2016*) in the case of *PAN Asia Advisors Ltd. & anr. vs. SEBI,* wherein the Hon'ble Tribunal have observed the following:

"The expression 'fraud' is defined under the PFUTP Regulations…………..

………..from the aforesaid definition it is absolutely clear that if a person by his act either directly or indirectly causes the investors in the securities market in India to believe in something which is not true and thereby induces the investors in India to deal in securities, then that person is said to have committed fraud on the investors in India. In such a case, action can be taken under the PFUTP Regulations against the person committing the fraud, irrespective of the fact any investor has actually become a victim of such fraud or not……..

…….Thus, the investors in India were made to believe that in the global market the issuer companies have acquired high reputation in terms of investment potential and hence the foreign investors have fully subscribed to the GDRs, when in fact, the GDRs were subscribed by AP through Vintage which was wholly owned by AP. In other words, PAN Asia as a Lead Manager and AP as Managing Director of PAN Asia attempted to mislead the investors in India that the GDRs have been subscribed by foreign investors when in fact the GDRs were subscribed by AP through Vintage. Any attempt to mislead the investors in India constitutes fraud on the investors under the PFUTP Regulations".

44. I note that the SCNs have alleged that *Noticee no. 1* has acted in a fraudulent manner thereby violating the provisions of *PFUTP Regulations, 1995.* Therefore, it would be apt to refer to the definition of fraud as stated under regulation 2 (c) of the *PFUTP Regulations, 1995,* which is reproduced below:

> *"Fraud" includes any of the following acts committed by a party to ac contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: -*
>
> *(1.) The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;*
>
> *(2.) The active concealment of a fact by one having knowledge or belief of the fact;*
>
> *(3.) A promise made without any intention of performing it;*
>
> *(4.) Any other act fitted to deceive;*
>
> *(5.) Any such act or omission as the law specially declares to be fraudulent;*
>
> *(6.) And "fraudulent" shall be construed accordingly.*

45. Based on the appreciation of material available on record and keeping in view the discussions and observations made in the preceding paragraphs, I find that the entire scheme created by the *Company* (*Aftek*) starting with passing of *Board* Resolution, followed by authorizing *Noticee no. 10* by way of a *PoA,* entering into the *Account Charge Agreement* to permit use of the GDR proceeds deposited in its account with *Banco Bank* as a security against the loans given to the two subscribers of its GDRs and then not disclosing to the Public about the relevant details of *Account Charge Agreement* and its arrangement with the said pre-identified two subscribers to secure the obligation of their loan liability, etc. have cumulatively resulted in misleading the investors at large. Such a scheme and arrangement has in it, all the ingredients that comprise a fraudulent activity in the Securities Market. In view of the above, I hold that by its acts of concealing and suppressing vital material facts about the arrangement done through the *Credit Agreements* and *Account Charge Agreement*, the *Noticee Company* has committed a fraudulent act upon its own existing

Shareholders and also upon all the investors of the Securities Market who might have been induced to deal in the shares of the *Company* due to the artificially created positive outlook that the *Company* had created about the performance of its securities in overseas jurisdiction.

46. Under the circumstances, I find no plausible explanation to convince myself that the *Noticee Company* was blissfully unaware as to how *Banco Bank* had applied its GDR proceeds for securing the loan given to the *Kendo* and Highgrove and the plea of the *Company* that the information pertaining to the subscribers to the GDR issue including information about the GDRs proceeds being used as security against loans advanced to the two subscribers was beyond its knowledge is undeniably a lame excuse, bereft of any credence and merit to rebut the allegations made in the SCN. Rather, it is found from the covenants and clauses of the two *Credit Agreements* which they postulated furnishing a certified copy of the Board Resolutions of the *Company* as a condition precedent for the approval and disbursal of the loan amount to Kendo and Highgrove. From the same, it is evident that the *Company* was very much aware of the fraudulent scheme of facilitating the grant of loan to its 'would – be' subscribers and to facilitate the same, the Board resolutions were readily made available to *Banco Bank* to make them part of the *Credit Agreements*. Subsequently, the *Company* itself took the plunge and entered into an *Account Charge Agreement* with *Banco Bank* whereby, it not only restrained itself from utilising the proceeds of GDR but at the same breath undertook to pay the liability of the two borrowers (subscribers to the GDRS), in case of any default on the part of the said borrowers to repay the loans. Therefore, under no circumstances, it is conceivable that the *Company* was not aware of the existence of the *Account Charge Agreement* which was entered into on its behalf by its own duly authorized Director (*Noticee no. 10*). Therefore, I find the acts of engaging in such practices, devising such a scheme and concealing material information from shareholders to be in violation of provisions of Section 12A(a), (b), (c) of the *SEBI Act, 1992* and regulations 3, 5 (1) and 6 (a) of *PFUTP Regulations, 1995* read with regulation 13 of the *PFUTP Regulations, 2003*.

<u>ISSUE No. 2:</u> *Whether the Noticees no. 2 to 10 have violated Section 12A(a), (b), (c) of the SEBI Act, 1992 read with regulations 3 and 6(a) of PFUTP Regulations, 1995 read with regulation 13 of PFUTP Regulations, 2003?*

47. I note that the SCNs have alleged that during the relevant time of issuance of GDRs, the *Noticee no. 2* was the Chairman and Managing Director of the *Company* while the other *Noticee Directors viz. Noticees no. 3 to 10* were the Directors of the *Company*. I note from the SCN and material annexed therewith that the *Noticees no. 2* to 10 attended the *Board* Meeting held on November 29, 2002. Accordingly, on the basis of the authorization given by the *Board* by passing the enabling resolutions on the said date and on the basis of the *PoA* dated January 28, 2003 executed by the *Company* through its Managing Director (*Noticee no. 2*), the *Noticee no. 10* has signed the *Account Charge Agreement* on behalf of the *Company*, which provided *inter alia*, for GDR proceeds to be kept as a security against the loans availed by the subscribers (*Kendo and Highgrove*) for subscription to the GDR of *Aftek*. I also note that none of these Directors has disputed to his attendance in the aforesaid Board meeting dated November 29, 2002.

48. Admittedly, *Noticee no. 2* was the Chairman as well as Managing Director of the *Noticee Company* and was in-charge of the day to day management of the affairs of the *Company*. I also note that he was part of the Board meeting dated November 29, 2002 wherein GDR committee was appointed. Further, as per the *PoA* dated January 28, 2003, *Noticee no. 2* on behalf of the *Company,* authorized *Noticee no. 10* to sign and execute various documents including loan documents subsequent to which, the GDR proceeds were authorized/permitted to be kept as a security against the loans which were not availed by the *Company* but by the subscribers i.e. *Kendo and Highgrove*. In conformity with the above *PoA*, I find that in the terms of the *Credit Agreements* read with *Account Charge Agreement*, a provision to pledge an amount of USD 09 million (out of USD 14 million) raised through GDR issue with the *Banco Bank* was made and consequently, the said amount was not made available to the *Company* for its immediate utilisation. Further, in terms of the above mentioned agreements, the

Company was free to utilise the GDR proceeds only to the extent of payment that may be made by the two subscribers i.e. *Kendo* and *Highgrove* from time to time. In other words, the two agreements provided that the *Company* would not be able to utilise the GDRs proceed to the extent of the liabilities outstanding qua the two subscribers, who availed the loans for subscribing to the GDRs of the *Company*. In this respect, it is noticed that nothing has been brought in defence to support that the intent of the aforesaid *Board* Resolution and *PoA* was something else and not to ensure subscription to the GDRs through any fraudulent scheme. Therefore, in the absence of any other contingency or business exigency demonstrated by the *Noticee* and keeping in view the observations made by Hon'ble SAT in the matter of *Cals Refineries (supra)* as recorded above, I don't see there could be any other reason to keep the GDR proceeds as a security for any loan that was proposed to be availed by the *Company*. Instead, it is abundantly clear from the aforesaid agreements and conduct of the *Noticees* that as on February 06, 2003, when the *Credit* and *Account Charge Agreement*s were signed, the *Noticee no. 2* being the Managing Director and in charge of the day to day affairs of the *Company* as well as being the representative of the Company to authorise *Noticee no. 10* to sign the *Account Charge Agreement*, knew very well that the GDR subscription amount was liable to be kept as a security against the loans taken by the subscribers of the GDR (*Kendo* and *Highgrove*) from *Banco Bank*. It becomes clear that *Noticee no. 2* was very much seized of the intent behind the *Board* Resolution passed on November 29, 2002 and more particularly about the intent behind the *PoA* dated January 28, 2003 pursuant to which, the *Noticee no. 10* has signed the *Account Charge Agreement* to ensure and secure the loan taken by *Kendo* and *Highgrove* for subscribing to the GDR of *Aftek*. The intent on the part of the *Noticee no. 2*, who was the Managing Director of the *Company* at the relevant period further gets exposed on perusing the contents of the *PoA* dated January 28, 2003. The said *PoA* specifically contains an authorisation in favour of the Noticee no. 10 to sign and execute document *inter alia* pertaining to loan (which was not mentioned in the Board resolution dated November 29, 2002) for which no explanation has been furnished as to how and why the authorisation included execution of document pertaining to loan, especially when the *Company* was raising capital through issuance of GDRs. As already stated above, *Noticee no. 2* was the Chairman and Managing Director of *Aftek* and it was certainly his primary duty to come out completely clean before the *Board* with all the facts, strategy, steps to be followed and compliances to be made with respect to the proposed GDR issue, before moving a Resolution before the *Board*. Being the Managing Director, it was he, who was statutorily required to drive, guide and manage the affaires of the *Company*. He, in his capacity as the Managing Director during the relevant period was indeed in the driving seat of the *Company* and was in charge to steer the proposed issuance and therefore ought to have clarified to the stakeholders about his pre-arrangement with the subscribers and about the proposed *Account Charge Agreement* that was devised to be executed with the Bank. All these facts in the case cumulatively indicate that the *Noticee no. 2* was actively involved in the fraudulent arrangement for ensuring a successful issue of GDR of the *Company.* Therefore, having considered the allegations and the evidence available on record, in my view all the charges made against him in the SCNs are found be established

49. With respect to the role played by *Noticee no. 10*, it is not disputed that he was an Executive Director in *Aftek* during the relevant period of time. *Noticee no. 10* has also not disputed the fact of attending the Board meeting dated November 29, 2002. At the same time, it is also not disputed that *Noticee no. 10* was duly authorized by the *Company* through *Noticee no. 2* by way of passing a resolution and issuing a *PoA* thereby authorizing him to execute various documents including the *Account Charge Agreement* with *Banco Bank* on behalf of *Aftek*. Accordingly, on the basis of such authorization given by the *Company*, *Noticee no. 10* has signed the *Account Charge Agreement* on behalf of the *Company*, which stipulated *inter alia*, that the GDR proceeds shall be kept as a security against the loans provided by *Banco Bank* to *Kendo* and *Highgrove* for making subscription to the GDR of *Aftek*. It also remains an undisputed fact that he remained Director during the period when the *Company* made those incomplete, selective and misleading disclosures to the BSE and suppressed

vital information from its Shareholders. I further note from the SCN that the charge on the *Noticee no. 10* is that of acting as a party to the fraudulent scheme in collusion with the *Company* and other Directors on the Board. In this regard, I note that the *Noticee no. 10* has taken a plea that he was in London from February 03 - 05, 2003 and on the date of execution of the *Account Charge Agreement* i.e. on February 06, 2003, he was in India and same can be verified from his immigration documents.

50. In response to the above, it is noticed that neither the SCNs nor the annexed documents including that the *Account Charge Agreement* make any specific allegation about the place of signing of the above mentioned document, nor even the said document in particular contains any clause about the place of singing of the said *Account Charge Agreement*. In addition to the above, the above submission of the two *Noticees* i.e. *Noticees no. 2* and *10* does not merit consideration, when none of these two persons has disputed the signature of the *Noticee no. 10* on each of the pages of the *Account Charge Agreement*. The aforesaid observation further lacks merit when the same is seen in the backdrop of the fact that the SCN in the matter has been issued on June 27, 2017. Thus, it is more than 5 years since the SCN has been issued, however, there is nothing on record on behalf of the above two *Noticees* to suggest and substantiate that they have engaged in any communication with the Lead Manager and/or the *Banco Bank* seeking any clarification from them about the execution of the *Account Charge Agreement*. Rather, from a careful perusal of the materials, specifically the Board Resolution dated November 29, 2002 and the *PoA* dated January 28, 2003, I find that the said Board Resolution had authorised the constitution of the GDR Committee to act for the purpose of ensuring necessary compliances however, the said Board resolution did not mention the word 'Loan'. It was in the *PoA* that the *Noticee no. 2* had authorised the *Noticee no. 10* to sign all document including loan. Therefore, the contention of the *Noticee no. 10* that he was in India on the said date of signing of *Account Charge Agreement* is nothing but a frivolous attempt to evade from the possible outcome of the instant proceedings as his undisputed signature is very much visible on every page of the *Account Charge Agreement*. He has neither taken a

plea that his signatures have been misused or forged nor has he submitted any signature expert report to contest the said signatures.

51. *Noticee no. 10* has also taken a plea that he was following the Lead Manager and has feigned his ignorance in the matter. Being the Executive Director of the *Company*, having attended the Board meeting dated November 29, 2002 wherein the authority was given to GDR Committee to take further actions with regard to issuance of GDRs and being a member of the GDR Committee as well as a party to the *PoA* and as a signatory to the *Account Charge Agreement, Noticee no. 10* ought to have taken due precautions and diligence before signing various forms and documents with an overseas Bank. However, he went ahead and deliberately signed the said *Account Charge Agreement* only to secure a loan taken by the unrelated third parties as part of a collusive scheme, to ensure successful subscription to its GDR issue. Therefore, the plea of ignorance made by him appears to be an unfounded afterthought exercise and has no credence to rely on. In view of the reasons recorded above and confronted with solid factual evidence that clearly exposes the proactive and collusive role of Noticee No. 10 in getting the *Account Charge Agreement* executed with *Banco Bank*, I am not inclined to accept his plea of ignorance and innocence in the matter, when even after 5 years of issuance of SCN, he has neither engaged in communication nor has taken any action against any of the intermediaries engaged by the *Company* in connection with the GDR issue for such breach of trust, if he actually believed that he has been misled to sign the said agreement by these intermediaries. On the contrary, keeping in view the proactive role played by *Noticee no. 10* in the entire matter as highlighted above, I am convinced that the allegations made in the SCNs for violations as alleged therein, stand established.

52. Moving on to the *Noticee no. 9,* I note that he has submitted that he was a "Technical Director - Software" in *Aftek* and his role and responsibility was to lead the design, development, testing and support of software products and projects undertaken by *Aftek* for its customers. He has further submitted that though he attended the Board meeting dated November 29, 2002, he was not involved in any

task related to the GDR and he resigned from the Board of Aftek on March 31, 2009 and is not associated with *Aftek* since then.

53. Similarly, about the other *Noticees*, who have claimed to be associated as Non-Executive Independent Directors of the *Company* during the relevant time (*Noticee no. 4, 5 and 6*), I note that the allegation against these Directors is that by passing the afore-stated *Board Resolution* dated November 29, 2002 they have facilitated and indulged in a fraudulent arrangement with the *Company* to ensure successful subscription to the GDR issue of the *Company* by signing the Account Charge Agreement through *Noticee no. 10*. I note that apart from *Noticee no. 4*, none of the other 2 *Noticees* (*Noticees no. 5 and 6*) has advanced any detailed argument on merit, however, they have submitted during the personal hearing to consider the arguments of *Noticee no. 4* as their arguments regarding their role as Independent Non-Executive Directors in the *Company.*

54. I note that the these *3 Noticees* (*Noticee no. 4, 5 and 6*) have submitted that the role of an Independent Director is very different from a Whole Time Director or an Executive Director as he is not expected to set out an independent probe of the factual assertions made before him by the management of a company. They have further submitted that an Independent Director cannot and ought not to be blamed for a fraud for irregularity, especially when he has no knowledge whatsoever of the same. In this regard, these *Noticees* have relied upon MCA General Circular no. 1/2020 dated March 02, 2020, which provides that no director shall be held liable for any violation by the company or by any other officer of the company, if the violation occurred without his or her knowledge and without his/her consent/connivance or when he/she has acted diligently, hence, these Independent Director *Noticees* are not liable for the violations alleged in the SCNs.

55. I further note that the these *3 Noticees* (*Noticee no. 4 to 6*) have submitted that they were not part of the *GDR Committee* which was appointed by the *Board* of the *Company* to take forward the process of GDR issue. Additionally, *Noticee no. 4* has also submitted that in the *Board* meeting dated March 19, 2002, for the first time the

proposal of GDR was tabled and approved by the *Board* of the *Company* whereas during the next Board Meeting dated March 27, 2002, *Noticee no. 4* was appointed as a Director of the *Company*.

56. Having gone through the records carefully and having considered the submissions advanced on their behalf, it is overserved that although none of the above four *Noticees* (*Noticees no. 4, 5, 6* and *9*) has disputed his association as a director with the *Company*, they have furnished their own justifications. They have also not disputed their consent to the resolution dated November 29, 2002. It is further observed that the *Noticees no. 4 to 6* were non-executive directors, however the *Noticee no. 9* was an executive director in the *Company*. Being an executive director, *Noticee no. 9* was duty bound to ask relevant questions to the management regarding the issuance of GDR while giving such authority to the Committee, more so when *Noticee no. 9* was himself part of the GDR Committee. Even assuming that he was not involved in GDR process and had no knowledge about the alleged fraudulent scheme and the arrangement, I see that he has not provided any reason as to why he turned a blind eye to the events and developments surrounding the GDR issuance and never bothered to question or get clarifications about the usage of GDR proceeds, delay in bringing the GDR proceeds to *Company's* Indian account, etc.

57. As for the other three *Noticees*, it is observed that they have heavily relied upon the circular issued by MCA to contend that their role is different from an executive director and being non- executive directors, they were not involved in the day to day management of the *Company* hence are not liable for any wrongdoings by the *Company*. After perusing the contents of the said MCA circular, I observe that the said circular primarily relates to initiation of criminal proceedings, whereas the instant matter is a civil proceeding hence, the standard of proof under the two proceedings are different. Thus, I find that the said circular is not of much help to the above *Noticees* since, the present proceedings are civil proceedings for determining the violation of the provisions of securities laws, as alleged in the SCNs. Moving further, I also note that no evidences have been provided by these three Independent Director

Noticees to demonstrate that though they were not associated with the *Company* in executive capacity, but still as independent directors they have exercised reasonable due diligence and have raised pertinent questions to the management from time to time or have always exhibited good conduct either by raising a suspicion before the Board or Management or by protesting against the inaction of the *Company* to bring in the GDR proceeds for *Company's* use.

58. Having said so, I can't ignore certain facts and arguments advanced on their behalf in the matter as well. I have noted above that a careful reading of the Board Resolution dated November 29, 2002 that authorized the constitution of the GDR Committee was conspicuously silent about anything related to loan. It was only in the *PoA* dated January 28, 2003, that the term 'loan' was mentioned. Under the above circumstances and in the absence of any other evidence to the contrary on record a close examination of the submissions made by these four *Noticees* (*Noticees no. 4, 5, 6* and *9*) alongwith the material available on record suggest a preponderance of probability that these directors were most likely not aware of the specific purpose, or about the pre-planned scheme behind the issuance of GDR, nor have they signed any documents or any other correspondence with respect to issuance of GDR. It appears that these *Noticees* have routinely participated in the Board resolutions and did not act in any manner in furtherance of the object of issuance of GDR and have not done anything other than passing of the aforesaid Board resolutions which can be allged to have facilitated the MD of the Company (*Noticee no. 2*) or the *Noticee no. 10* to carry out the scheme of defrauding the investors. *Noticee no. 9* being Technical Director and other three *Noticees* (*Noticees no. 4, 5* and *6*) being independent / nonexecutive directors, have understandably a limited role to play in the entire scheme of arrangement related to issuance of GDRs. As observed above, the Board Resolution passed in the Board Meeting held on November 29, 2002 deal with the steps to be taken and process to be followed in respect of the proposed issuance of GDRs, to which these Directors have signed. However, in the absence of any tangible evidence and considering other attendant facts and circumstances under which the *Account*

Charge Agreement was signed without their knowledge by *Noticee no. 10* on the basis of *PoA* signed by *Noticee no. 2*, there is no concrete evidence to suggest their malicious involvement in the GDR issue hence, the allegation of fraud attributed to these *Noticees* does not hold good, based on the material available on record. Therefore, I am inclined to give benefit of doubt to the *Noticees no. 4, 5, 6* and *9*.

59. However, before parting with, I can't desist myself from observing that being Independent/non-executive directors, the role of the aforesaid three *Noticees* (*Noticees no. 4, 5* and *6*) was akin to trustees of stake holders and in such capacity, it was expected from them to take all such steps and measures necessary in furtherance of the interest of shareholders and to demonstrate highest standards of governance. Ignorance of law or lack of knowledge about securities market is no excuse. The non-executive directors cannot confine themselves to merely lending their names to the company and its resolutions as they have onerous responsibility for the affairs of the company for the protection of interest of all stakeholders, which includes the shareholders. I am of the view that, while the extent of responsibility of an independent/non-executive director may differ from that of an executive director, an independent director has a duty of care and caution. This duty calls for exercise of independent judgment with reasonable care, diligence and skill which is expected to be reasonably exercised by a prudent person with basic knowledge, skill and experience. The independent/non-executive Directors have to discharge the duty of protecting the interest of investors by raising pertinent questions or by seeking clarification from the management on relevant issues affecting the interest of the stake holders and whenever necessary, they should assert themselves with their independent views so that the governance of the Company is perfectly aligned with the interests of the shareholders of the Company and the management does not act in manner detrimental to the interests of the shareholders.

60. In this regard, I find from the records and Board resolution that *Noticees no 4 to 6* have not performed their duties cast upon them as independent /non-executive directors and have not raised any queries or concerns before the Board or the

management pertaining to the GDR issue at the relevant time even though they are claiming before me that they have no knowledge about GDR issue. Though, I find that the material available on record are not sufficient to hold the charge of fraud against these four *Noticees* including the three, who were non-executive directors with the *Company*, however, the conduct of these *Noticees* cannot be said to be as expected of a director of a listed corporate entity. They have apparently acted in a callous and careless manner and have not shown any diligence in performing their role of an independent/non-executive director. *Du*ring the relevant period, they have not only failed to perform diligently, the duties cast upon them and by participating passively and by being not sagacious in their role of acting as custodian of shareholders, they have somehow acted in a manner that facilitated the unscrupulous design of the *Company* to perpetrate a fraud upon its Shareholders as well as on the investors of Securities Market. Under the circumstances, even though I have given benefit of doubt to these directors with regard to the allegation of fraud, I find them to be acting callously and not exercising any due diligence, expected of a director of a listed company. Therefore, by not preventing the management of the *Company*, especially the MD from issuing the GDR in a deceptive & fraudulent manner, these directors have also not acted in the best interest of the shareholders of the *Company*.

61. To sum up the preceding discussions, I find that the *Credit Agreements* were inseparably linked to the *Account Charge Agreement* and vice versa, and both were executed consecutively. The *Account Charge Agreement* was signed by *Noticee No. 10* on behalf of the pledgor i.e., *Aftek* (*Noticee no. 1*). The *Noticee* Directors facilitated the execution of the *Account Charge Agreement* by passing a suitable Board Resolution, formation of GDR committee and by way of the *PoA*. The *Credit Agreements* and *Account Charge Agreement* enabled subscribers (*Kendo* and *Highgrove*) to avail loan from *Banco Bank* for subscription to GDRs of *Aftek*. This was made possible by *Aftek* by providing its GDR proceeds as security for the loan extended by *Banco Bank* to subscribers (*Kendo* and *Highgrove*). The GDR issue would not have been subscribed if *Aftek* had not given such a security against the loan taken by *Kendo* and *Highgrove*. By

entering into such an arrangement, the *Company* and its Directors have led the investors in India to believe that the issuer company i.e. *Aftek* has got a good reputation in terms of investment potential because of which, foreign investors have successfully subscribed to its GDR, whereas in reality, the majority of the GDR were subscribed by *Kendo* and *Highgrove* with the help of the *Company* (*Aftek*) itself. Therefore, in effect, the Directors of the *Company* have facilitated the subscription of GDR by *Kendo* and *Highgrove* through loans obtained by them from *Banco Bank* against which, the GDR proceeds of *Aftek* were kept as security on the basis of the authorization given by the Board of Directors of *Aftek* through the Resolution passed by them on the November 29, 2002 and PoA dated January 28, 2003 and all these transactions and activities were undertaken behind the back of the Shareholders and other investors of the Securities Market. In my view, apart from the issuer *Company* (*Aftek*) i.e. *Noticee no. 1,* Directors i.e. *Noticee no. 2 and 10* who have not only concealed the above information from the Shareholders but have been found to have acted fraudulently upon the other members of the Board and have surreptitiously engaged in acts that finally led to the execution of *Credit Agreements* and the *Account Charge Agreement*, which are certainly fraudulent and in breach of the provisions of Section 12A (a), (b) & (c) of the *SEBI Act, 1992* read with regulations 3 and 6(a) of *PFUTP Regulations, 1995* read with regulation 13 of *PFUTP Regulations, 2003*. However, considering the fact that the *Noticees no. 3, 7 and 8* have expired, the instant proceeding stands abated against the *Noticees no. 3, 7 and 8* and accordingly, the SCNs issued against the *Noticees no. 3, 7 and 8* are disposed of without any further action.

<u>Directions</u>

62. In view of the above discussions and my concluding observations with respect to the two issues that were considered by me in the matter, in exercise of powers conferred upon me under Sections 11, 11B read with Section 19 of the Securities and Exchange Board of India Act, 1992, in order to protect the interest of investors and the integrity of the Securities Market and considering the facts of the case as well as

the specific role played by the respective *Notitee*s and to meet the ends of justice, I hereby issue the following directions:

a) *Noticee no. 1*, the *Company* is restrained from accessing the Securities Market including by issuing prospectus, offer document or advertisement soliciting money from the public and is further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, for a period 03 years from the date of this order.

b) The following *Noticee*s are restrained from accessing the Securities Market and are further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, from the date of this order, for the period as directed below:

Names of the *Noticee*	PAN	(Period in Year)
Mr. Ranjit Dhuru	AADPD1238L	01
Mr. Pramod Broota	AACPB9182C	01

63. It is clarified that during the period of restraint, the existing holding of securities of the *Noticee*s *no. 1, 2* and *10* including units of mutual funds, shall remain frozen.

64. The proceedings qua the *Noticees no. 4, 5, 6* and *9* is disposed of in terms of reasons stated in paragraph 58 of this Order. Further, the proceedings qua the *Noticees no. 3, 7* and *8* is abated of in terms of reasons stated in paragraph 61 of this Order.

65. The Order shall come into force with the immediate effect.

66. Obligation of the aforesaid *Noticees*, in respect of settlement of securities, if any, purchased or sold in the cash segment of the recognized stock exchange (s), as existing on the date of this Order, can take place irrespective of the restraint/prohibition imposed by this Order, only in respect of pending unsettled transactions, if any. Further, all open positions, if any, of the aforesaid *Noticees* in the

F&O segment of the stock exchange, are permitted to be squared off, irrespective of the restraint/prohibition imposed by this Order.

67. A copy of this order shall be forwarded to the *Noticee*s, all the recognized Stock Exchange, depositories and registrar and transfer agents for ensuring compliance with the above directions.

-Sd-

DATE: FEBRUARY 17, 2023 **S. K. MOHANTY**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA