BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

(ADJUDICATION ORDER NO: Order/KS/VC/2020-21/7742-7743)

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995 AND SECTION 23-I(1) OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 2005

In respect of:

1. **Asahi Infrastructure & Projects Ltd.**

   PAN: AAACA8777F

2. **Mr. Laxminarayan Jainarayan Rathi**

   PAN: ABDPR9730L

In the matter of

GDR Issues of Asahi Infrastructure & Projects Ltd.

FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**'), upon receipt of alerts in its surveillance system, started investigation in regards to certain companies which had come out with their respective issues of Global Depository Receipts (**GDR**). During the course of investigation, it was observed that Asahi Infrastructure & Projects Ltd. (hereinafter referred to as

'**Asahi**'/'**Noticee 1**') had come up with its GDR issue on April 29, 2009. In this regard, it is observed that one Pan Asia Advisors Ltd (hereinafter referred to as '**Pan Asia**') was the Book Running Lead Manager for the said GDR issue of Asahi. Further, it was also observed that one Mr. Arun Panchariya (hereinafter referred to as '**AP**') was the founder, director as well as 100% shareholder of Pan Asia. It is alleged in the Investigation Report (**IR**) that the complete process of GDR issuance by Asahi was devised and structured by AP in connivance with Asahi to the detriment of the Indian investors wherein AP arranged for loans for the subscription of GDRs of Asahi by Vintage FZE (hereinafter referred to as '**Vintage**'), another company wherein AP was Managing Director, 100% shareholder and Authorized Signatory, and, thereafter, using certain Foreign Institutional Investors (**FIIs**), got the GDRs converted into underlying shares and sold them in the Indian securities market with the help of certain domestic entities connected to him. It is further alleged that the money received from the sale of underlying shares was used to pay the loans of Vintage, thereby, fraudulently making Indian investors pay for such GDR issue of Asahi.

2. On the basis of the said investigation, it is alleged by SEBI that Asahi and its Managing Director, Mr. Laxminarayan Jainarayan Rathi (hereinafter referred to as '**Noticee 2**'/ '**Rathi**' and hereinafter collectively referred to as '**Noticees**'), by being part of the abovementioned scheme to defraud Indian investors, have violated the provisions of Section 12A(a), (b) and (c) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') read with Regulations 3(b), (c), (d), 4(2)(c), (f), (k) & (r) of the SEBI (Prohibition of

Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as '**PFUTP Regulations**'). Further, it is also alleged that the Noticees had failed to submit certain information demanded by SEBI and also submitted false information and, by doing so, have violated the provisions of Section 11C(3) read with 11C(6) of SEBI Act. Further, it is also alleged that Asahi had failed to disclose details of outstanding GDRs in its quarterly disclosures of shareholding pattern to BSE and, therefore, has violated the provision of Clause 35 of Equity Listing Agreement (hereinafter referred to as '**Listing Agreement**').

APPOINTMENT OF ADJUDICATING OFFICER

3. Shri Suresh Gupta was appointed as the Adjudicating Officer vide Order dated June 15, 2016 under Section 19 read with Section 15-I(1) of the SEBI Act read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as '**SEBI Adjudication Rules'**) and Section 23-I(1) of Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as '**SCRA**') read with Rule 3 of Securities Contracts (Regulation) (Procedure For Holding Inquiry And Imposing Penalties) Rules, 2005 (hereinafter referred to as '**SCRA Adjudication Rules**') to inquire into and adjudge under the provisions of Section 15A(a) & Section 15HA of the SEBI Act and Section 23E of SCRA, the violations of the relevant provisions of SEBI Act, PFUTP Regulations and Listing Agreement, alleged to be committed by the Noticees. Subsequently, the undersigned was appointed as the Adjudicating Officer vide order dated July 05, 2018.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING:

4. A common Show Cause Notice ref. A&E/EAD-8/KS/VB/8172/2019 dated March 28, 2019 (hereinafter referred to as '**SCN'**) was issued to the Noticees under the provisions of Rule 4(1) of SEBI Adjudication Rules and Rule 4(1) of SCRA Adjudication Rules, to show cause as to why an inquiry should not be held against them and why penalty, if any, should not be imposed on them under Sections 15A(a) and 15HA of the SEBI Act and Section 23E of SCRA for alleged violation of the relevant provisions of law.

5. The relevant part of SCN including details in respect of alleged violations by the Noticees are as given below:

   a. *It is observed from the Investigation Report (hereinafter referred to as "IR") that AIPL issued 29,91,000 GDRs (amounting to US$5.98 million) and issue closed on April 29, 2009. Further, Pan Asia Advisors Ltd. (herein after referred to as 'Pan Asia') was the Lead Manager of GDR issue of AIPL. Summary of the GDR issues as provided by AIPL is tabulated below:*

Table 1

GDR issue close date	***No. of GDRs Issued***	***Capital raised (US mn.)***	***Local custodian***	***No. of equity shares underlying GDRs***	***Lead Manager***	***Bank where GDR proceeds were deposited***
April 29, 2009	*29,91,000*	*5.98*	*ICICI Bank limited*	*299,100,000*	*Pan Asia Advisors Ltd.*	*EURAM Bank, Austria*

   b. *The following were the investors in the GDR issue of AIPL as submitted by AIPL.*

Sl. No.	***Name of Subscriber***	***Address***	***Amount paid (US$)***	***GDRs Subscribed***	***% to total GDR issue***
		Hong Kong			
1.	*Greenwich Management Inc. (herein after referred to as '**Greenwich**')*	*Floor - 18, One International Finance Centre, 1 Harbour view Street, Central, Hong Kong.*	*29,82,000*	*14,91,000*	*49.85*
		Singapore			
2.	*Tradetec Corporation (herein after referred to as '**Tradetec**')*	*Level 47, Prudential Tower, 30 Cecil Street, Singapore – 049712*	*30,00,000*	*15,00,000*	*50.15*

Sl. No.	Name of Subscriber	Address	Amount paid (US$)	GDRs Subscribed	% to total GDR issue
		Email: bw@tradeteccorporation.com.			
Total			59,82,000	29,91,000	100

Loan & Pledge Agreement signed among Asahi, Vintage & Euram.

c. *It is alleged that the entire GDR issue was subscribed by only one subscriber Vintage FZE (Now known as Alta Vista International FZE) (hereinafter referred to as 'Vintage') which signed a Loan Agreement bearing No.K210409-003 dated April 21, 2009 with European American Investment Bank AG (hereinafter referred to as 'Euram Bank') wherein Euram Bank lent Vintage, an amount of US$ 5.982 million (exactly the same amount raised by Asahi through its GDR issue) for payment to subscribe GDRs of Asahi. The loan agreement was signed by one Shri Arun Panchariya (herein after referred to as 'AP') on behalf of Vintage, in the capacity of its Managing Director on April 22, 2009.*

d. *The following was inter-alia mentioned in the Loan agreement:*

"6.1 In order to secure all and any of the Bank's claims and entitlements against the Borrower, arising now or in the future out of or in connection with the Loan or any other obligation or liability of the Borrower to the Bank, including without limitation other loans granted in the future , it is hereby irrevocably agreed that the following securities and any other securities which may be required by the Bank from time to time shall be given to the Bank as provided herein or in any other form or manner as may be demanded by the Bank

- *Pledge of certain securities held from time to time in the Borrower's account no. 540 030 at the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.*

- *Pledge of the account no. 540 030 of the Borrower held with the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement."*

e. *Further, a Pledge Agreement dated April 21, 2009 was signed between Noticee-1 and EURAM Bank. The agreement was signed by the Noticee 2 on April 28, 2009, on behalf of Asahi as Managing Director of Asahi. The following Resolution was passed by the Board of Directors of Asahi at its meeting dated January 31, 2008:*

RESOLVED THAT a bank account be opened with Euram Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.

RESOLVED FURTHER THAT Shri Laxminarayan Jainarayan Rathi, Managing Director, of the Company, be and is hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.

RESOLVED FUTHER THAT Shri Laxminarayan Jainarayan Rathi, Managing Director of the Company, be and is hereby severally authorized to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Euram Bank or any of branch of Euram Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company.

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

f. *Further, it is alleged that the Noticee 2 and his other family members are also promoters of Asahi. The aforesaid Pledge Agreement was an integral part of Loan Agreement entered into between Vintage and EURAM Bank. The preamble of the aforesaid Pledge Agreement states*

"By loan agreement K210409-003 (hereinafter referred to as "Loan Agreement") dated April 21, 2009, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahmadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates ("the Borrower") in the amount of $ USD 5,982,000.00 million[1]. The Pledgor has received a copy of the Loan Agreement and acknowledges and agrees to its terms and conditions."

g. *Further, the pledge created in the Pledge Agreement is stated below: -*
" 2. Pledge

2.1 In order to secure any and all obligations, Present and future, whether conditional or unconditional of the Borrower towards the bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement – including those limited as to condition or time or not yet due – irrespective of whether such claims have originated from the account relationship, from bills of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or

[1] It appears that 'million' has been wrongly inserted in the Loan agreement. The loan amount was only USD 5,982,000.00.

have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount of $ USD 5,982,000.00 existing from time to time at present or hereafter on the securities account(s) no. 540 030 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2 all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 540 030 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account ") and all amounts credited at any particular time therein.

(the Pledged securities account and the Pledged Time Deposit account hereinafter referred to as the "Pledged Accounts", the Pledged Securities and the Pledged Accounts hereinafter collectively referred to as "Collateral")

2.2 The Pledgor agrees to deposit with the Bank all dividends, interest and other payments, distributions of cash or other property resulting from the Pledged Securities and funds."

h. *Further, following condition have been put in the Pledge agreement for the realization of the pledge.*

6. Realization of the Pledge

6.1 In the case that the Borrower fails to make payment on any due amount, or default in accordance with the Loan Agreement, The Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts

to settle the Obligations. In such case the Bank shall transfer the funds on the Pledged Accounts, even repeatedly, to an account specified by the Bank

6.2 Notwithstanding the foregoing, in the case that the Borrower fails to make payment on any due amount, or defaults in providing or increasing security, the Pledgor herewith grants its express consent and the Bank is entitled to realize the Pledged Securities (i) at a public auction for those items of Pledged Securities for which no market price is quoted or which are not listed on a recognized stock exchange or (ii) in a private sale pursuant to the provisions of Section 376 Austrian Commercial Code unless the Bank decides to exercise its rights through court proceedings. The Pledgor and the Bank agree to Realize those items of the Pledged Securities for which a market price is quoted or which are listed on a stock exchange through sale by a Broker Publicly authorized for such transactions, selected by the Bank.

6.3 The Bank may realize the Pledge rather than accepting payments from the Borrower after maturity of the claim if the Bank has reason to believe that the Borrower's payments may be contestable.

i. *It is noted that the bank account no. 540030 is the account which Asahi has maintained with Euram Bank to keep the proceeds of GDRs, thus it is alleged that Asahi has pledged money received through issuance of GDRs to secure rights of Euram Bank against the loan given by Euram Bank to Vintage for subscription of GDR issue (as mentioned in Loan agreement of Vintage). This account (540030) is also referred to as borrowers (Vintage) account in the Loan Agreement. It is alleged that the common ownership of a bank account which belongs to both the borrower/ subscriber and the Issuer Company in which the GDR proceeds are received added to a guarantee by Issuer Company for the loan taken by subscriber to its GDRs. It*

is alleged that these agreements enabled Vintage to avail the loan from Euram Bank for subscribing GDRs of Asahi and the GDR issue would not have been subscribed had Asahi not given such security towards the loan taken by Vintage. It is also alleged that the Noticees did not inform Bombay Stock Exchange or shareholders of the company about signing the Pledge Agreement.

Acquisition, Cancellation and Sale of GDRs:-

j. It is noted that pursuant to the issuance of GDRs, Vintage became the sole holder of the GDRs issued, thereby becoming the majority shareholder of Asahi. As on April 29, 2009, Vintage held 29,91,000 GDRs of Asahi, which made Vintage 88.94% shareholder of the company. These GDRs were then transferred through over the counter transactions to funds based in Mauritius which are registered with SEBI as Sub-Account viz. India Focus Cardinal Fund(herein after referred to as 'IFCF')and KII Ltd. (herein after referred to as 'KII'). Following table gives the details of transfer of GDRs from account of Vintage (maintained with Euram) to that of IFCF and KII.

Date of Transaction	***Name of Acquirer***	***Name of Seller***	***Quantity of GDRs acquired***	***Value of GDR Acquired ($)***	***Trading Platform***	***Value per GDR ($)***
17-08-09	*IFCF*	*Euram*	*44,000*	*1,10,000*	*OTC*	*2.50*
24-08-09	*IFCF*	*Euram*	*1,11,000*	*2,38,650*	*OTC*	*2.15*
16-11-09	*KII*	*Euram*	*35,000*	*63,504*	*OTC*	*1.81*
03-12-09	*IFCF*	*Euram*	*50,000*	*94,500*	*OTC*	*1.89*
17-12-09	*IFCF*	*Euram*	*76,000*	*1,49,720*	*OTC*	*1.97*
21-01-10	*KII*	*Euram*	*65,000*	*1,20,557*	*OTC*	*1.85*
02-02-10	*IFCF*	*Euram*	*1,50,000*	*2,77,500*	*OTC*	*1.85*
09-05-10	*IFCF*	*Euram*	*1,00,000*	*3,02,000*	*OTC*	*3.02*
13-08-10	*IFCF*	*Euram*	*2,00,000*	*4,10,000*	*OTC*	*2.05*
05-10-10	*IFCF*	*Euram*	*50,000*	*91,000*	*OTC*	*1.82*

12-10-10	*IFCF*	*Euram*	*50,000*	*96,500*	*OTC*	*1.93*
21-10-10	*IFCF*	*Euram*	*50,000*	*93,000*	*OTC*	*1.86*
27-10-10	*IFCF*	*Euram*	*1,00,000*	*1,85,000*	*OTC*	*1.85*
06-11-10	*IFCF*	*Euram*	*1,00,000*	*1,86,000*	*OTC*	*1.86*
09-03-11	*IFCF*	*Euram*	*50,000*	*1,12,153*	*OTC*	*2.24*
10-03-11	*IFCF*	*Euram*	*1,00,000*	*2,23,152*	*OTC*	*2.23*
26-04-11	*IFCF*	*Euram*	*1,50,000*	*3,03,000*	*OTC*	*2.02*
15-06-11	*IFCF*	*Euram*	*1,70,000*	*2,32,900*	*OTC*	*1.37*
	Total		***16,51,000***	***32,89,136***		***1.99***

k. It is alleged that AP is 100% shareholder of IFCF through its company Cardinal Capital Partners Ltd. AP and his family members are major investors in the fund through their associate companies. AP was director of IFCF until October 28, 2010.It is noted that Credo Investments Holding Ltd, an associate company of KII was found to have an agreement with Vintage. According to this agreement, Vintage provided a Loan of USD 20,00,000.00 to Credo to further lend it to KII, to enable KII to purchase securities of several Indian companies including those of Asahi, either in India or overseas market. As per the agreement, KII got GDRs converted into underlying shares and sold the resultant shares in the Indian Markets. The sale proceeds were then to be used to purchase further securities to repeat the said process until KII decided to terminate the agreement. The agreement also ensured that Vintage take full liability of the dealings of KII in the GDRs of Indian companies and any loss incurred by KII to be borne by Vintage only. The agreement was signed by AP on behalf of Vintage.

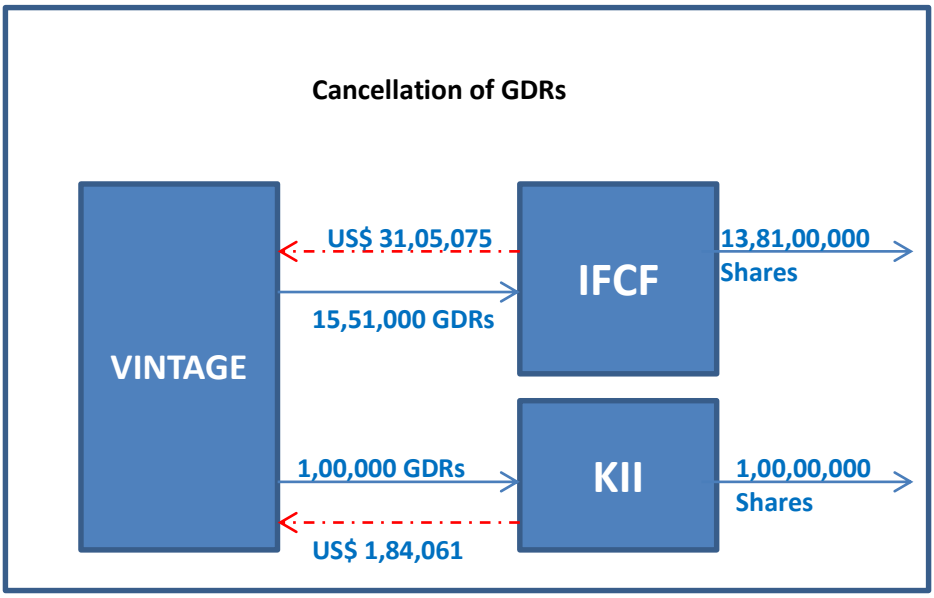
l. The cancellation of the GDRs of Asahi started from August 19, 2009 till June 14, 2011. Following are the details of cancellation requests completed till June 30, 2012.

Transaction Date	***Entities cancelling GDRs on behalf of FIIs/Sub-Accounts***	***GDRs Cancelled***	***Shares Released***
19-08-2009	*Euram*	*44,000*	*44,00,000*
25-08-2009	*Euram*	*1,11,000*	*1,11,00,000*
23-11-2009	*J.P. Morgan Clearing Corp.*	*35,000*	*35,00,000*
04-12-2009	*Euram*	*50,000*	*50,00,000*
18-12-2009	*Euram*	*76,000*	*76,00,000*
27-01-2010	*Jefferies & Co, Inc*	*65,000*	*65,00,000*
02-02-2010	*Euram*	*1,50,000*	*1,50,00,000*
09-08-2010	*Euram*	*30,000*	*30,00,000*
11-08-2010	*Euram*	*20,000*	*20,00,000*
12-08-2010	*Euram*	*50,000*	*50,00,000*
24-08-2010	*Euram*	*20,000*	*20,00,000*
09-09-2010	*Euram*	*50,000*	*50,00,000*
20-09-2010	*Euram*	*25,000*	*25,00,000*
22-09-2010	*Euram*	*35,000*	*35,00,000*
05-10-2010	*Euram*	*50,000*	*50,00,000*
01-03-2011	*Euram*	*1,00,000*	*1,00,00,000*
20-04-2011	*SIX SIS AG*	*33,450*	*33,45,000*
26-04-2011	*Euram*	*65,000*	*65,00,000*
31-05-2011	*Euram*	*1,45,000*	*1,45,00,000*
03-06-2011	*Euram*	*1,45,000*	*1,45,00,000*
07-06-2011	*Euram*	*74,500*	*74,50,000*
14-06-2011	*Euram*	*1,40,500*	*1,40,50,000*
	Total	***15,14,450***	***15,14,45,000***

m. The shares were released and credited to the demat accounts of IFCF and KII as detailed below.

Date of receiving shares	*Name of entity receiving shares from GDR cancellation*	*No. of shares received*
20-08-2009	*INDIA FOCUS CARDINAL FUND*	*44,00,000*
26-08-2009	*INDIA FOCUS CARDINAL FUND*	*1,11,00,000*
25-11-2009	*KII LTD*	*35,00,000*
07-12-2009	*INDIA FOCUS CARDINAL FUND*	*50,00,000*
21-12-2009	*INDIA FOCUS CARDINAL FUND*	*76,00,000*
28-01-2010	*KII LTD*	*65,00,000*
03-02-2010	*INDIA FOCUS CARDINAL FUND*	*1,50,00,000*
10-08-2010	*INDIA FOCUS CARDINAL FUND*	*30,00,000*
12-08-2010	*INDIA FOCUS CARDINAL FUND*	*20,00,000*
13-08-2010	*INDIA FOCUS CARDINAL FUND*	*50,00,000*
25-08-2010	*INDIA FOCUS CARDINAL FUND*	*20,00,000*
13-09-2010	*INDIA FOCUS CARDINAL FUND*	*50,00,000*
21-09-2010	*INDIA FOCUS CARDINAL FUND*	*25,00,000*
23-09-2010	*INDIA FOCUS CARDINAL FUND*	*35,00,000*
06-10-2010	*INDIA FOCUS CARDINAL FUND*	*50,00,000*
07-03-2011	*INDIA FOCUS CARDINAL FUND*	*1,00,00,000*
27-04-2011	*INDIA FOCUS CARDINAL FUND*	*65,00,000*
27-04-2011	*BANK SARASIN AND CO. LTD*	*33,45,000*
01-06-2011	*INDIA FOCUS CARDINAL FUND*	*1,45,00,000*
06-06-2011	*INDIA FOCUS CARDINAL FUND*	*1,45,00,000*
08-06-2011	*INDIA FOCUS CARDINAL FUND*	*74,50,000*
15-06-2011	*INDIA FOCUS CARDINAL FUND*	*1,40,50,000*
	Total	***15,14,45,000***

n. 14,81,000 GDRs (49.51% of total 29,91,000 GDRs issued) were cancelled by IFCF and KII during the period August 20, 2009 to June 15, 2011, of which 13,81,000 GDRs were cancelled by IFCF. The following chart depicts the complete process of acquisition of GDRs by IFCF and KII from Vintage and cancellation and conversion of these GDRs into underlying shares.



o. *The underlying shares received by IFCF and KII were sold. The details of the counterparties to these sales during the period January 01, 2009 to September 21, 2011 are given below:-*

FII	CP PAN	CP NAME	Sell Volume	Sell Value (Rs.)	% of Total sale by IFCF
IFCF	AACCI3088H	Indravarun Trade Impex Pvt Ltd (INDRAVARUN)	65,99,900	3,39,36,012	28.53
IFCF	AAACB4324K	BASMATI	1,90,52,069	2,80,81,895	23.60
IFCF	ACRPP5552H	SV	34,11,300	35,02,024	2.94
		Others	**3,54,18,377**	**5,34,47,388**	**44.93**
		Total sale by IFCF	**6,44,81,646**	**11,89,67,319**	**100.00**

FII	CP PAN	CP NAME	Sell Volume	Sell Value (Rs.)	% of Total sale by KII
KII	ACRPP5552H	SV	20,00,000	20,00,000	57.14
KII	AAACB4324K	BASMATI	7,50,755	7,50,755	21.45
		Others	**7,49,245**	**7,49,245**	**7.09**
		Total Sale by KII	**35,00,000**	**35,00,000**	**100.00**

p. *Considering the consolidation of shares by Asahi on November 04, 2010, IFCF sold 12,39,71,646 shares of Asahi for Rs. 11,89,67,319, out of 13,81,00,000 shares received by it post cancellation of GDRs.*

Utilisation of GDR proceeds by Asahi:-

q. *With respect to the utilization of proceeds of GDR issue received by Asahi, the following is observed from the records:-*

Utilisation	***Amount (in Rs. crore)***
Transferred to Asahi FZE	*20.96*
GDR Expense.	*1.369*
Utilised in India	*5.886*
Dividend Payment	*1.7*
Total Capital Raised	*29.915*

It is noted from the above table that Rs. 20.96 crore (approx USD 4.7 million) out of total issue size of Rs. 29.915 crore (approx USD 5.96 million) i.e. around 70% was transferred by Asahi to its subsidiary in Dubai Asahi FZE. It is observed from records submitted by Asahi that Rs. 20.96 crore was transferred to Asahi FZE for trading purpose. Asahi FZE received and paid money for trading in cement, aluminium, iron, construction and so on. The account statement of Asahi FZE reflected transactions with K Sera Sera Production FC LLC (Asahi FZE received USD 19,97,955), Ababil Star General Trading (Ababil), CAT Technologies, Vintage etc. Asahi FZE had transactions with companies like Beckons Industries Ltd, Cybermate Infotek and CAT that have issued GDRs with Panasia as Lead Manager. It is noted from records that Asahi FZE paid USD 20,73,000 to Vintage and USD 600,000 to Ababil from its Dubai Bank accounts. It is observed that on adding USD 26,73,000, transferred to Vintage and Ababil, by Asahi FZE to the funds which Vintage received by selling the GDRs (USD 32,89,136) to FIIs, the total amount comes to be USD 59,62,136, which is around 99.66% of total loan taken by Vintage from Euram Bank for subscribing to GDR issue of Asahi. Out of Rs. 20.96 crore (approx USD 4.7 million) transferred to Asahi FZE, USD 2.67 million was transferred back to AP Entities like Vintage and

Ababil. Thus Asahi transferred 44.68% of the GDR issue proceeds back to AP entities which is alleged to be utilised to repay the loan taken by Vintage under Loan Agreement.

r. *In view of the above, it is alleged that the Noticees had made fraudulent claims of subscription of GDRs by two foreign investors while it was only purchased by the AP related entity and thereafter mislead investors by making false corporate announcements regarding successful subscription of GDRs by foreign investors, provided misleading information in a way that the investors are induced to deal in the securities of AIPL and also compensated Vintage at the cost of its shareholder. By doing so, AIPL advertised/ published/ reported information in a distorted manner or published misleading information which was not true resulting in influencing the decision of the investors. Therefore, it is alleged that the Noticees have violated Sections 12A(a), (b) and (c) of the SEBI Act read with regulations 3(b), 3(c), 3(d), 4(2)(c), 4(2)(f), 4(2)(k) and 4(2)(r) of the PFUTP Regulations.*

Non-furnishing of information and misleading submissions by Asahi:-

s. *In terms of Section 11C(3) read with 11C(6) of the SEBI Act, it is obligatory on any person so summoned to produce the necessary documents / information / appear in person to/ before the Investigating Authority. It is alleged that during the course of investigation, summons were issued under Section 11C(3) read with 11C(6) of the SEBI Act to the Noticee 1 for production of documents regarding utilisation of GDR proceeds by the company. It is alleged that the Noticees only partially complied with the summons and didn't submit all the documents sought by the SEBI. Following documents/information sought vide summons / emails / letters.*

- *Important details with respect to Asahi FZE viz. address, contact person and contact no. was not provided by Noticee 1to SEBI.*

- *Asahi was specifically asked to explain the rationale behind all the payments done by Asahi FZE which were above USD 25,000. However, Noticee 1 did not provide rationale for payments done by Asahi FZE.*
- *Details of purchases and expenses incurred by Asahi FZE were not provided.*

t. *Apart from not providing aforementioned critical information to SEBI, wrong information was also provided by Asahi. The wrong submissions of Asahi were particularly related to Pledge and Loan Agreements to which Asahi was one of the party. It is alleged that Asahi has made following wrong/misleading submissions to SEBI in the matter :*

- *It was confirmed by Asahi in its submissions that there were no conditions prescribed under any Agreement with Euram Bank with regard to withdrawal of funds from GDR Account.*
- *Asahi denied having any other agreement with Euram other than Escrow Account agreement.*
- *Asahi also denied having any agreement with Vintage or AP.*
- *Asahi denied having any agreement with any entity regarding financing of subscription of GDR Issues.*
- *The submission by Asahi that it did not have any other agreement with Euram, Panasia, Vintage or AP is false as Pledge was signed by the Managing Director of the company with Euram. Further, this Pledge Agreement is part of the Loan Agreement between Vintage and Euram. Similarly it is mentioned in the Pledge Agreement that the Pledgor has received the Loan Agreement and agrees to its conditions.*
- *Asahi informed BSE that GDR issue was fully subscribed by certain other foreign investors namely, Greenwich Management Inc and Tradetec Corporation.*

Similar submission was also made by Asahi (vide letters dated November 17, 2009 and November 2, 2011) to SEBI during the course of investigation. It was further observed that the addresses of the initial investors viz. Greenwich Management Inc. and Tradetec Corporation were found to be invalid by the foreign regulators in those jurisdictions.

- *Asahi also made a false submission of no restriction/condition on its GDR Account for withdrawal of funds. From the perusal of Pledge Agreement it is observed that the GDR Account is a collateral against the Loan taken by Vintage and therefore funds can only be withdrawn when the loan is repaid by Vintage.*

u. In view of the observation(s) mentioned at above paragraph, it is alleged that the Noticees has violated the provisions of Section 11C(3) read with 11C(6) of the SEBI Act

v. It is also alleged that Asahi failed to disclose details of outstanding GDRs in its quarterly disclosures of shareholding pattern to BSE. As per BSE website (www.bseindia.com), the equity held with custodian i.e. ICICI Bank Limited is shown as nil for Asahi during the period June 01, 2009 to September 21, 2011. Therefore, it is alleged that the Noticee 1 has violated Clause 35 of the Listing Agreement read with Section 23E of SC(R)A.

6. I note that the SCN was sent to the respective addresses of the Noticees as per available records. Thereafter, vide letter dated September 20, 2019, Noticee 2 was advised to submit his reply to the SCN on or before September 30, 2019. Further, Noticee 2 was also provided with an opportunity of personal hearing on October 09, 2019. The said letter was delivered to the address of Noticee 2 by way of Speed Post Acknowledgement due (**SPAD**). Thereafter, vide letter dated September 28, 2019, Noticee 2 requested for inspection of documents.

The said request of Noticee 2 was forwarded to the concerned department of SEBI vide letter dated September 30, 2019. The said letter was delivered to Noticee 2 by digitally signed Email and the same was also acknowledged by him vide his Email dated October 03, 2019. I note that two separate opportunities of inspection were provided to Noticee 2. However, the concerned department of SEBI informed that Noticee 2 failed to avail of the said opportunities of inspection. Accordingly, vide letter dated November 20, 2019, Noticee 2 was provided with second and final opportunity to submit his reply to the SCN on or before December 06, 2019. Further, second and final opportunity of personal hearing was also provided to Noticee 2 on December 12, 2019. However, I note that Noticee 2 failed to avail of the said opportunity of personal hearing.

7. Similarly, upon receipt of the SCN, vide letter dated May 02, 2019, Noticee 1 requested for extension of 30 days for submission of its reply to the SCN. Thereafter, vide letter dated September 20, 2019, Noticee 1 was advised to submit its reply to the SCN on or before September 30, 2019. Further, Noticee 1 was also provided with an opportunity of personal hearing on October 09, 2019. The said letter was delivered to Noticee 1 by way of a digitally signed Email and the same was acknowledged by Noticee 1 by its Email dated September 26, 2019. Thereafter, vide letter dated September 28, 2019, Noticee 1 requested for inspection of documents. The said request of Noticee 1 was forwarded to the concerned department of SEBI vide letter dated September 30, 2019. The said letter was delivered to Noticee 1 by digitally signed Email

and the same was acknowledged by Noticee 1 vide its Email dated October 03, 2019. I note that two separate opportunities of inspection were provided to Noticee 1. However, the concerned department of SEBI informed that Noticee 1 had failed to avail of the said opportunities of inspection. Accordingly, vide letter dated November 20, 2019, Noticee 1 was provided with a final opportunity to submit its reply to the SCN on or before December 06, 2019. Further, an opportunity of personal hearing was also provided to Noticee 1 on December 12, 2019. I note that Noticee 1, vide its Email dated December 06, 2019, requested for another opportunity of inspection of documents. The said request was again forwarded to the concerned department of SEBI vide letter dated December 09, 2019. The said letter was also delivered to Noticee 1 by way of a digitally signed Email and Noticee 1, vide its Email dated December 11, 2019, acknowledged the receipt of the said letter. I note from the material on record that one more opportunity of inspection of documents was again provided to Noticee 1 and the same was availed by the Authorized representative of Noticee 1. Thereafter, vide letter dated January 03, 2020, Noticee 1 was provided with a final opportunity to submit its reply to the SCN on or before January 20, 2020. Further, Noticee 1 was also provided with a final opportunity of personal hearing on January 27, 2020. The said letter was delivered to Noticee 1 by way of a digitally signed Email on January 06, 2020. The Noticees vide letter dated January 22, 2020, submitted a common reply to the SCN. The submissions, in brief, are being reproduced below:

a. *It is most humbly submitted that Noticee No. 1 is a BSE listed company, and engaged in business of real estate and infrastructure development. One of its major business activities is to undertake construction of low cost affordable houses. Till date Noticee No. 1 has constructed more than 10,000 affordable and low cost housing units in 25 towns of Maharashtra. Noticee No. 1 is also dedicated to develop and promote public hygiene and in this respect Noticee No. 1 have constructed 5000 precast ferro-cement toilets in 10 rural areas, under various government schemes.*

b. *As per our understanding and experience no financial assistance is available for purchase of land in light of restrictions as per RBI guidelines. Noticee No. 1 were facing shortage of availability of developable land parcels. Though there is great demand for affordable houses (about 20 million units), however due to the abovesaid shortfalls the Company was unable to go forward. Therefore, Noticee No. 1 thought of raising funds via GDR route.*

c. *On the balance 50% land, the Company has now commenced construction of 500 flats (Ground +7 story towers) at cost ranging between Rs.8.00 lac to Rs.20.00 lac, under the Prime Minister Awas Yojana. Along with this, the company has also started construction of Commercial Mall covering an area of 2.00 lac Sq. ft. out of which 40% premises is already booked 3 years in advance.*

d. *Thus, with a fund of Rs. 7 - 8 Crores, the Company has already done business of more than Rs.50/- Crores. Out of the memo of bills raised by*

the Company towards work done, the Government has already released Rs. 44 Crores as on date. This acknowledges and establishes the Company's bonafides and commitment towards its objective.

e. *With this background, we would like to submit that the allegations levelled against us are baseless, unjustified and unwarranted.*

f. *It is submitted that there has been a complete violation of the principles of natural justice, as neither has the entire material collected during the investigation by SEBI, nor has the entire material relied upon by SEBI, been made available to the Noticees. The Company had vide various letters had requested for inspection and disclosure of certain specific documents which are in fact referred to in the SCN itself, yet the same have not been furnished till date. It is respectfully submitted that various judgments of the Hon'ble Securities Appellate Tribunal ("SAT"), various High Courts and the Hon'ble Supreme Court, have clearly held that full disclosure of all relevant documents is a fundamental requirement of natural justice.*

g. *At the outset, it is submitted that the Noticees are faced with extreme hardship in defending themselves against the allegations levied in the SCN on account of the considerable quantum of time that has passed between the alleged date of purported violations and the date of notice. It is submitted that it is onerous at this stage to reconstruct the records and to find out details of a transaction that took place more than Ten years ago. Therefore, initiation or continuance of the proceedings by themselves*

would be a gross violation of principles of natural justice as well as all canons of reasonableness, fairness and justness.

h. *Furthermore, it is settled law that where the allegation of fraud is to be adjudicated, all concerned persons/parties to the fraud must be before the concerned authority. Deciding the issue of fraud in the absence of all parties allegedly involved in the fraud would be in breach of the principles of natural justice. Moreover, if separate proceedings are initiated against the persons allegedly involved in the fraud, there is likelihood that different conclusions may be drawn and it is possible that there may be conflicting decisions as to the alleged commission of fraud. Since it has been alleged that the Noticees committed fraud on Indian Investors in collusion with Euram Bank and Overseas Depository Banks, it is imperative that these entities were made parties to the SCN.*

i. *The notice suffers from manifest errors, in as much as, proper investigation has not been carried out with reference to the records of the concerned overseas Depository Banks viz. Deutsche Bank Trust Company, USA to find out as to who were the original subscribers or original allottees of GDRs at the time of their issue. No action has been initiated against those depository banks and no enquiry has been initiated in respect of initial subscribers to whom GDRs were issued.*

j. *In this context, we humbly submit that at paragraph 4 of the SCN, it has been stated the loan and pledge agreements were not disclosed to the stock exchange in a true and complete manner but as 'misleading news' to*

the stock exchange which contained information in a distorted manner. The above finding is unjustified as the Company, by SEBI's own admission, reported the issuance of equity shares towards GDRs, which were listed on the Luxembourg Stock Exchange. So, since the GDR issue was already disclosed to the Exchange and shareholders. Therefore, the fact of the Noticee No. 1 disclosing the issuance of equity shares towards GDRs is indicative of the lack of any malafide intentions of the Noticees.

k. *It is our humble submission that all requisite disclosures were made and relevant approvals were obtained from the shareholders of the Company while undertaking the GDR issue. Furthermore, the authority to EURAM Bank to use the funds of the company as security was a standard condition provided and required by EURAM Bank to act as banker to the GDR issues.*

l. *The Noticees were never a part of any alleged fraudulent scheme devised for the issue of GDRs nor were they beneficiaries to any illegitimate benefits, if any derived from the said GDR issues.*

m. *As regards the names of the subscribers to the GDR issue, the same was*

n. *provided in the subscription letter issued by the Deustche Bank, who was the Depository to the GDR issue.*

o. *As per information received from PAAL regarding the entities who have subscribed to the issue, we have forwarded the said information to the stock exchanges, which did not raise any query at that time. The Company had no role to play in the allotment of GDRs nor was it aware of the identity of the holders of the GDRs.*

p. *The information submitted by Asahi were based on reliable sources /depository to issue/ merchant banker. The allegations in the SCN are misplaced and unfounded.*

q. *Without prejudice, even if GDR issue had only one subscriber, it does not make GDR issue violative of any provision of SEBI Act and Rules / Regulation made thereunder.*

r. *However, it is submitted that the GDR issue and its procedural requirements and compliances were not our expertise. As a novice, we did as were advised by the responsible recognized professional advisors therein the foreign land who were advising us for the GDR issue.*

s. *With respect to the pledge Agreement it is submitted that the amounts were kept in an interest-bearing fixed deposit on which the Company earned interest. It is erroneous to state that there was no free capital for the issuance of the GDRs. The statement from EURAM Bank reflecting the interest earned on the fixed deposit was already provided to the investigating officer.*

t. *Further, there is no substance in the allegation that non-disclosure of the pledge and loan agreements misled any investors, as there was negligible change in the share price of the company.*

u. *The present Notice issued to us is completely without jurisdiction. As per the settled position of law in this regard laid down by the Hon'ble Supreme Court in the case of SEBI v. Pan Asia Advisors Ltd. that SEBI has jurisdiction to take action against companies issuing GDRs only if such*

issue has an adverse impact on the Indian securities markets. In other words, unless it is shown by SEBI that the issue of GDRs by a company adversely impacted the Indian securities market, it would have no jurisdiction to proceed against a company for alleged manipulation or violations committed it in respect of a GDR issue.

v. *It is most respectfully stated that the SCN does not contemplate as to how the Noticees have violated the aforementioned Sections of the SEBI Act as well as PFUTP Regulations. In this regard, we wish to submit as under:*

- *In so far as the alleged violation of Section 12(A)(a) of the SEBI Act is concerned, it is submitted that we have throughout our conduct of business and as a matter of company policy maintained highest standards of compliance, fairness, integrity and ensured the interests of our investors. We have never, directly or indirectly, employed any manipulative or deceptive device or contrivance, in relation to the issue, purchase or sale of any shares listed or proposed to be listed on a recognized stock exchange. Therefore, the Notice has completely erred in alleging that we have violated Section 12A (a) of the SEBI Act.*
- *In so far as the alleged violation of Section 12(A)(b) of the SEBI Act is concerned, we have never, directly or indirectly, employed 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 recognized stock exchange.*

- *In so far as the alleged violation of Section 12(A)(c) of the SEBI Act is concerned, we have never, directly or indirectly, engaged ourselves in any act, practice, course of business which operates as or would operate as a fraud or deceit upon any person, in connection with the issue or dealing in securities which are listed or proposed to be listed on a recognized stock exchange, in contravention of the SEBI Act and rules or regulations made thereunder.*
- *In so far as Regulation 3(b) of the PFTUP Regulations is concerned, we have never, directly or indirectly, employed any manipulative or deceptive device or contrivance, in relation to the issue, purchase or sale of any shares listed or proposed to be listed on a recognized stock exchange, in contravention of the SEBI Act and rules or regulations made thereunder.*
- *In so far as the alleged violation of Regulation 3(c) of the PFUTP Regulations is concerned, we have never, directly or indirectly, employed 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 recognized stock exchange.*
- *In so far as the alleged violation of Regulation 3(d) of the PFUTP Regulations is concerned, we have never, directly or indirectly, engaged ourselves in any act, practice, course of business which operates as or would operate as a fraud or deceit upon any person, in connection with the issue or dealing in securities which are listed or*

proposed to be listed on a recognized stock exchange, in contravention of the SEBI Act and rules or regulations made thereunder.

- *In so far as the alleged violation of Regulation 4(2)(c) of the PFUTP Regulations is concerned, it is submitted that we have neither advanced nor agreed to advance any money to any person thereby inducing any other person to offer to buy security in any issue only with intention of securing minimum subscription to such issue;*
- *In so far as the alleged violation of Regulation 4(2)(f) of the PFUTP Regulations is concerned, we have not published or caused to be published or caused to be reported by any person dealing in securities any information which is not true or which we did not believe to be true prior to or in the course of dealing in securities. It is reiterated that any information furnished by us to the BSE was under the bona fide belief of its truth and accuracy and on the basis of the valid documents.*
- *In so far as the alleged violation of Regulation 4(2)(k) of the PFUTP Regulations is concerned, it is submitted that we have never carried out any advertisement that was misleading or that contained information in a distorted manner and which could influence the decision of the investors.*
- *In so far as the alleged violation of Regulation 4(2)(r) of the PFUTP Regulations is concerned, it is submitted that we have never planted any news which could induce sale or purchase of securities.*

w. *In the notice it is erroneously alleged that Noticee No. 1 has transferred 44.68% of the GDR issue proceeds back to AP entities which is alleged to be utilised to repay the loan taken by Vintage under the loan agreement. Merely because Noticee No. 1 and Vintage had bank account in the same bank and funds were transferred from one entity to another it cannot be said that there is no receipt of payment on issuance of GDRs.*

x. *That one of the object of the issue of GDR, as per the offering circular, was to establish overseas subsidiary. The Company has received all the funds raised through the GDR issues either in India or in its foreign subsidiaries and the same has been utilised for the purposes mentioned in the offer documents or otherwise for the benefit of the Company and its shareholders.*

y. *Further we would like to state that names of persons who initially subscribed to the GDRs and whether such persons had subscribed to the GDRs out of their own funds or out of borrowed funds is of no consequence. There is no requirement in law that the subscriber must disclose the details of loan availed or such other facts to us or to any other person. Equally, there is no requirement for us to disclose any such information to public at large.*

z. *None of the clauses of the listing agreement as well as the provisions of the erstwhile Companies Act, 1956 mandate and cast an obligation on a Company to disclose the number of allottees in a GDR issue. The Company*

has duly disclosed the number of shares allotted underlying the GDR issues.

aa. *Order dated 25.10.2016 of the Hon'ble Securities Appellate Tribunal in the matter of PAN Asia Advisors Ltd. & Anr. V SEBI, fastens the primary liability on PAN Asia as the Lead Manager.*

bb. *Further with regards to the allegation of not providing information by us, it is vehemently denied that Asahi has prima facie sought to mislead SEBI and also not cooperated with the investigation by withholding crucial information. It is reiterated that Asahi has provided all the information available with it as per its understanding of the queries raised by SEBI.*

cc. *It is vehemently denied that Asahi has intentionally failed to disclose details of outstanding GDRs in its quarterly disclosures of shareholding pattern to BSE. Due to inadvertence it was not disclosed and therefore no adverse inference can be drawn against the Noticees for the same.*

8. I note that Mr. Saurabh Bachhawat, advocate appeared as authorized representative (**AR**) of the company on January 27, 2020 and reiterated the submissions made by Noticee 1 vide its letter dated January 22, 2020. Further, the AR requested time to make additional submissions. Accordingly, he was given time till February 03, 2020 to make additional submission. However, I note from the available records that no additional submission was made by Noticee 1.

CONSIDERATION OF ISSUES AND FINDINGS:

9. I have taken into consideration the facts and circumstances of the case, the material available on record. I note that the allegations levelled against the Noticees are as below:

   a. The Noticees, in connivance with entities connected/related AP, had executed the scheme of fraudulent issuance of GDR wherein they had issued GDRs and pledged the GDR proceeds with Euram Bank so that Vintage can take loan for the subscription of GDRs and thereafter certain FIIs had converted the GDRs into underlying shares and had sold them in the Indian securities market by help of the entities connected with AP. Therefore, it is alleged that the Noticees have violated the provisions of Section 12A(a), (b) (c) of SEBI Act read with 3(b), (c), (d), 4(2)(c), (f), (k) & (r) of PFUTP Regulations.

   b. The Noticees, by their failure to submit the required information as well as by making false submissions before SEBI, have violated the provisions of Section 11C(3) read with 11C(6) of SEBI Act.

   c. Noticee 1, by its failure to disclose regarding the outstanding GDRs in the quarterly shareholding pattern submitted to BSE, has violated the provisions of Clause 35 of Listing Agreement.

10. In view of the above, the issues for consideration before me are:-

   a. Whether the Noticees, in light of their role in GDR issue of Asahi, were responsible for fraudulent issue of GDRs and, therefore, have violated the

provisions of Section 12A(a), (b) (c) of SEBI Act read with 3(b), (c), (d), 4(2)(c), (f), (k) & (r) of PFUTP Regulations?

b. Whether the Noticees have violated the provisions of Section 11C(3) read with Section 11C(6) of SEBI Act?

c. Whether Noticee 1 has violated the provision of Clause 35 of Listing Agreement?

d. If yes, whether the Noticees are liable for penalty?

e. If yes, what should be the quantum of penalty that should be imposed on the Noticees?

11. Before moving forward, the relevant extracts of the provision of law, allegedly violated by the Noticees, are mentioned as under-

SEBI Act

Investigation.

11C.

(3) The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorised by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

(6) If any person fails without reasonable cause or refuses—

…….

(b) to furnish any information which is his duty under sub-section (3) to furnish; or

he shall be punishable with imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with

both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

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

12A. No person shall directly or indirectly—

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

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

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

PFUTP Regulations

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

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

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

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

4. Prohibition of manipulative, fraudulent and unfair trade practices

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:—

(c) advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;

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

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

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

12. Before moving forward, I would deal with certain preliminary issues raised by the Noticees in their common reply dated January 22, 2020.

13. In the beginning, the Noticees have contended that SEBI lacks jurisdiction in the GDR issues. Citing the judgment of Hon'ble Supreme Court of India in the matter of SEBI vs. Pan Asia Advisors Ltd., the Noticees have contended that SEBI has jurisdiction to take action against companies issuing GDRs only if

such issue has an adverse impact on the Indian securities markets. However, I note that in the said matter, the issue under consideration was whether SEBI has jurisdiction in respect to GDR issues of 6 companies, including Asahi. In the said matter, SEBI had filed an appeal against SAT order dated September 30, 2013 wherein it was held that SEBI does not have jurisdiction in the matter of GDR issues. The said appeal of SEBI was allowed by Supreme Court of India and it was held that SEBI has jurisdiction in the matter of GDR issues of the companies. While discussing the definition of 'securities' as per SCRA, Supreme Court of India observed that:

"*63. Going by the definition under Section 2(h)(i) 'security' would include other marketable securities of a like nature of any incorporated company. Therefore reading Section 2(h)(i) and 2(h)(iii) together and apply the same to GDRs, having regard to the fact that the issuance of GDRs are always based on the underlying Indian shares deposited with the Domestic Custodian Bank and thereby the GDRs possess in it right, as well as, interest in the shares, scripts etc., it will have to be straight away held that all GDRs would fall within the definition of 'securities' as defined under Section 2(h) of the 1956 Act.*"

I note that Hon'ble Supreme Court of India also made the following observations:

"*We are therefore convinced that having regard to the nature of allegations in the interests of investors in securities as well as the statutory obligation/duty cast upon SEBI to protect their interests, SEBI has got every jurisdiction to proceed against the respondents as well as the issuing company.*"

Therefore, in terms of above observations of Hon'ble Supreme Court of India, I hold that it is a settled position that SEBI has jurisdiction in respect of GDR issue as the same falls within the definition of 'securities' under SCRA.

14. It is also contended by the Noticees that entire material collected by SEBI during the investigation or the entire material relied upon by SEBI has not been made available to them. In this regard, I note that Hon'ble SAT, in its order dated February 12, 2020, in the matter of Shruti Vora vs. SEBI had made the following observations:

"*A bare reading of the provisions of the Act and the Rules as referred to above do not provide supply of documents upon which no reliance has been placed by the AO, nor even the principles of natural justice require supply of such documents which has not been relied upon by the AO. We are of the opinion that we cannot compel the AO to deviate from the prescribed procedure and supply of such documents which is not warranted in law. In our view, on a reading of the Act and the Rules we find that there is no duty cast upon the AO to disclose or provide all the documents in his possession especially when such documents are not being relied upon.*"

In this regard, I note that all the documents, relied upon by me in the present matter have already been provided to the Noticees along with the SCN. Further, an inspection of the said documents was also provided to the Noticees by providing three separate opportunities of inspection to them.

15. I note that the Noticees have also contended that the present adjudication proceedings suffer from gross delay on part of SEBI and the same is violation of principles of Natural justice. In this regard, I note that the GDRs under consideration in the present proceedings were issued in March 2009. However,

I note that the present matter is complex involving investigation of various entities registered under foreign jurisdiction. The same, *inter alia*, required collaboration with foreign regulators by SEBI and collection of information. In this regard, I note that Hon'ble SAT in its order dated February 05, 2020 in the matter of Jindal Cotex Ltd. vs. SEBI had made the following observations:

"*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.*"

In this regard, I also note that proceedings in respect of the GDR issue of Asahi were initiated by SEBI as early as 2011, wherein SEBI passed an interim order dated September 21, 2011. Thereafter, pursuant to complete investigation in the matter, vide Final order dated September 05, 2017, directions were passed against the Noticees. Before issuing final direction by SEBI vide its order referred *supra*, SEBI had sought the replies of the Noticees on merits. Therefore, the contention of the Noticees that it was an onerous task to reconstruct the records and trace the transactions of an old matter is of no merit as the Noticees had already replied on merits before the Whole Time Member of SEBI.

16. The Noticees have also contended that all concerned persons/parties in relation to the GDR issue of Asahi must have been before the concerned authority and deciding the issue of fraud in the absence of all parties allegedly involved in the

fraud would be a breach of principle of natural justice. However, in this regard, I note that the said contention was raised before Hon'ble SAT in the matter of Pan Asia Advisors Ltd. vs. SEBI and SAT in its order dated October 25, 2016 had made the following observations:

"*Similarly, if fraud is said to have been committed by AP on the investors in India by subscribing to the GDR outside India by entering into Loan Agreement/ Pledge Agreement outside India through the entities with which AP was connected, then, even if the GDRs were validly issued and even if the Loan Agreement/ Pledge Agreement were valid, proceedings could be initiated against AP for committing fraud on the investors in India without impleading the entities who issued the GDRs and without impleading the entities who were parties to the Loan Agreement/ Pledge Agreement. In other words, whether the Loan Agreement/ Pledge Agreement were validly entered into or not, proceedings could be initiated against AP if the very act of AP in subscribing to the GDRs through his connected entities constituted fraud on the investors in India. In such a case, the entities which issued the GDRs viz. Overseas Depository Banks or the entities who were parties to the Loan Agreement/ Pledge Agreement are not required to be impleaded as parties to the proceedings initiated against AP for committing fraud on the investors in India. Therefore, the argument of the appellants that without impleading the Overseas Depository Banks/ parties to Loan Agreement & Pledge Agreement as parties to the proceedings initiated against the appellants, no order could be passed against the appellants cannot be accepted.*"

Therefore, in light of the above observation of Hon'ble SAT, the contention of the Noticees has no merit and the same cannot be accepted.

a. Whether the Noticees, in light of their role in GDR issue of Asahi, were responsible for fraudulent issue of GDRs and, therefore, have violated the provisions of Section 12A(a), (b) (c) of SEBI Act read with Regulations 3(b), (c), (d), 4(2)(c), (f), (k) & (r) of PFUTP Regulations?

17. I note from the IR that, before the issuance of GDR, Asahi had an issued share capital of Rs. 3,71,96,000 represented by 3,71,96,000 fully paid up equity shares of Re. 1/- each. Thereafter, by appointing Pan Asia as Lead Manager, Asahi decided to raise funds from investors outside India through the issuance of GDRs. Consequently, on April 29, 2009 Asahi issued 29,91,00,000 equity shares which resulted in allotment of 29,91,000 GDRs having total value of USD 5.98 Million. The said GDRs, issued by Asahi, were fully subscribed and the issue closed on April 29, 2009 itself. Summary of the aforesaid GDRs issued by Asahi as submitted by Asahi vide its letter dated November 17, 2009 (Annexure VII to the SCN), is tabulated below:

GDR issue date	**No. of GDRs Issued (mn.)**	**Capital raised (USD mn.)**	**Local custodian**	**No. of equity shares underlying GDRs**	**Global Depository Bank**	**Lead Manager**	**Bank where GDR proceeds deposited**	**GDRs listed on**
April 29, 2009	29,91,000 at USD 2.00 each	$ 5.98	ICICI Bank Ltd.	29,91,00,000	Deutsche Bank	Pan Asia Advisors Ltd.	Euram Bank, Austria	Luxembourg Stock Exchange

18. I also note the following details regarding GDR issue of Asahi from the IR:

Sr. No	Issuer	Date of GDR Issue	Pre GDR equity ('000)	Shares issued under GDR ('000)	% GDR to Pre GDR equity	Market Cap prior to GDR issue(Rs Crore)	Capital raised by GDR Issue(Rs. Crore)	% Capital raised to pre GDR Market Cap
1	Asahi	29-04-09	37,196	2,99,100	804	2.64	32.99	1137.94

Thus, I note from the above data that the capital raised under the GDR issue was 1137.94% of market capital of the company prior to GDR issue.

19. I note from the IR that SEBI, on the basis of investigation in the scrip of Asahi, alleged that the complete process of GDR issuance by Asahi was devised and structured by AP in connivance with Asahi to the detriment of the Indian investors, wherein AP arranged for loans for the subscription of GDRs by his connected entity Vintage, a Dubai based company 100% owned and controlled by AP. Asahi, in turn, helped AP in arrangement of those funds by signing a pledge agreement with Euram Bank, thereby, providing security for such loan taken by Vintage. Thereafter, these GDRs were converted into underlying shares and sold to Indian investors with the help of certain FIIs registered with SEBI or their Sub-Accounts as well as certain Indian entities connected to AP. At the same time, Asahi misled the Indian investors by not disclosing information regarding pledge agreement signed by Noticee 2 whereby the funds received by Asahi under the GDR issue were given as collateral for the loan taken by Vintage. In light of this, it is alleged that the activities of Asahi and its Managing Director, Rathi, in connivance with AP and his connected entities, involved in the whole scheme, created a wrong impression before the Indian investors that foreign investors were interested in investing in Asahi due to its reputation and future prospects and therefore, defrauded them.

20. In the background of the allegations as mentioned above, I proceed to note in the ensuing paragraphs the scheme of events that took place in respect of the above GDR issuance by Asahi.

21. Firstly, I note that the Board of Directors of Asahi, in its meeting dated January 31, 2008, had passed the following resolution:

RESOLVED THAT a bank account be opened with Euram Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.

RESERVED FURTHER THAT Shri Laxminarayan Jainarayan Rathi, Managing Director of the Company, be and is hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.

RESOLVED FU(R)THER THAT Shri Laxminarayan Jainarayan Rathi, Managing Director of the Company, be and is hereby severally authorized to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Euram Bank or any of branch of Euram Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company.

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

I note from the above resolution that Board of Directors of Asahi had resolved to open a bank account with European American Investment Bank AG ('**Euram**

Bank') for its GDR issue and had authorized Noticee 2, who was the Managing Director of Asahi, to sign any document in this regard. I further note that Euram Bank was also authorized to use any funds deposited with it as a security to any loans.

22. I further note from the subscriber's side, as part of the GDR scheme that, eight days prior to the issuance of the aforesaid GDRs, Vintage entered into a loan agreement ref. K210409-003 dated April 21, 2009 with Euram Bank by which Euram Bank advanced loan to Vintage expressly for subscribing to the GDRs to be issued by Asahi which observation I note from the covenants of the loan agreement brought out in subsequent paragraph(s). The said loan agreement was signed by AP on behalf of Vintage as its Managing Director. I further note from the IR that AP was the founder and director of Vintage and Alkarni, a company registered in British Virgin Island with its entire share capital held by AP and his family, is the 100% shareholder of Vintage. In view of these facts, I hold that Vintage was controlled by the AP during the relevant period of time.

23. As noted above, on perusal of the Loan Agreement, I note that the following has, *inter alia,* been mentioned therein –

    1. *<u>Currency and the amount of facility:</u>*
       USD 5,982,000/-
       (The amount is exactly the same amount raised by Asahi through the said GDR offering.) (Explanation supplied).
    2. *<u>Nature and purpose of facility:</u>*
       To provide funding enabling Vintage FZE to take down GDR issue of Asahi Infrastructure & Projects Limited's Luxembourg public offering and may

only be transferred to Euram account nr. 540 030, Asahi Infrastructure & Projects Limited."

(The specific purpose of the loan/ draw down was for the purpose of subscribing to the GDR issue of Asahi. 540 030 is the client account number of Asahi.)(Explanation supplied).

6. *Security*

6.1 In order to secure all and any of the Bank's claims and entitlements against the Borrower, arising now or in the future out of or in connection with the Loan or any other obligation or liability of the Borrower to the Bank, including without limitation other loans granted in the future , it is hereby irrevocably agreed that the following securities and any other securities which may be required by the Bank from time to time shall be given to the Bank as provided herein or in any other form or manner as may be demanded by the Bank: "

- *Pledge of certain securities held from time to time in the Borrower's account no. 540 030 at the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.*
- *Pledge of the account no. 540 030 held with the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.*

From the aforesaid Loan Agreement, I note that Vintage had availed of a loan facility to the extent of USD 5.982 Million from Euram Bank solely for the purpose of subscribing to the GDRs of Asahi.

24. At the same time, Asahi opened its account (A/c No. 540 030) with Euram Bank for the purpose of credit of proceeds of GDR Issue. I also note that, on the day when Vintage had entered into loan agreement with Euram Bank, as discussed in pre-paragraphs, Asahi also entered into a pledge agreement with Euram

Bank which was signed by Noticee 2 as the Managing Director of Asahi. By the said pledge agreement, Asahi pledged the proceeds of its GDR issue with Euram Bank as security for the loan given by Euram Bank to Vintage for subscribing to its GDRs. The salient Clauses of the Pledge Agreement *inter alia* are as under:

1. *Preamble*

   By loan agreement K210409-003 (hereinafter referred to as the "Loan Agreement") dated April 21, 2009, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates ("the Borrower") in the amount of $ USD 5,892,000.00 million. The Pledgor has received a copy of the Loan Agreement and acknowledges and agrees to its terms and conditions.

2. *Pledge*

   2.1. In order to secure any and all obligations, present and future, whether conditional or unconditional of the Borrower towards the bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement – including those limited as to condition or time or not yet due – irrespective of whether such claims have originated from the account relationship, from bills of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

      2.1.1. all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the

balance of funds up to the amount of $ USD 5,982,000.00 existing from time to time at present or hereafter on the securities account(s) no. 540 030 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2. all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 540 030 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account ") and all amounts credited at any particular time therein.

(the Pledged securities account and the Pledged Time Deposit account hereinafter referred to as the "Pledged Accounts", the Pledged Securities and the Pledged Accounts hereinafter collectively referred to as "Collateral")

2.2. The Pledgor agrees to deposit with the Bank all dividends, interest and other payments, distributions of cash or other property resulting from the Pledged securities and funds.

6. Realisation of the Pledge:

6.1. In the case that the Borrower fails to make payment on any due amount, or defaults in accordance with the Loan Agreement, the Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts to settle the Obligations. In such case the Bank shall transfer the funds on the Pledged Accounts, even repeatedly, to an account specified by the Bank.

6.2. Notwithstanding the foregoing, in the case that the Borrower fails to make payment on any due amount, or defaults in providing or increasing security, the Pledgor herewith grants its express consent and the Bank is entitled to realize the Pledged Securities (i) at a public auction for those items of Pledged Securities for which no market price is quoted or which are not listed on a recognized stock exchange or (ii) in a private sale pursuant to the provisions of

Section 376 Austrian Commercial Code unless the Bank decides to exercise its rights through court proceedings. The Pledgor and the Bank agree to realize those items of the Pledged Securities for which a market price is quoted or which are listed on a stock exchange through sale by a broker publicly authorized for such transactions, selected by the Bank.

6.3. *The Bank may realize the Pledge rather than accepting payments from the Borrower after maturity of the claim if the Bank has reason to believe that the Borrower's payments may be contestable.*"

25. I note that the Pledge Agreement refers to the Loan Agreement dated April 21, 2009 between the borrower i.e. Vintage and Euram Bank, whereby Vintage was granted a loan of USD 5,982,000 and it is stated that the Pledger i.e. Asahi had received a copy of the said Loan Agreement and had also acknowledged and agreed to the terms and conditions of the said loan agreement. Therefore, I observe that, while signing the Pledge Agreement, Asahi was clearly aware that Vintage had acquired loan only to subscribe to the GDR issue of Asahi. Further, as the pledge agreement was signed by Noticee 2 on behalf of Asahi, in his capacity as the Managing Director of Asahi, I note that he had, as clearly mentioned in the pledge agreement, acknowledged receiving the said loan agreement and agreed to its terms and conditions after perusing the said agreement. On perusal of the contents of the Pledge Agreement, it is noted that Asahi had agreed to pledge all its rights, title and interest in and to the securities deposited in the Pledge Securities Account and funds in Pledged Time Deposit Account so as to secure the present and future obligations of Vintage. The Pledge Agreement also expressly states that:

"*In the case that the Borrower fails to make payment on any due amount, or defaults in accordance with the Loan Agreement, the Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts to settle the Obligations*".

I note from the perusal of the Pledge Agreement and the Loan Agreement that both of them are dated April 21, 2009. Further, I note that

- Clause 6.1 of the Loan Agreement specifies that the Pledge Agreement was an integral part of the Loan Agreement.
- The preamble of the pledge agreement clearly mentions that the pledge is being created for the purpose of the loan agreement.

Therefore, in view of the above points, I hold that both the loan agreement and pledge agreement are intertwined with each other and support each other. Therefore, one cannot be read in isolation of the another.

26. I note that the Noticees have not disputed the Pledge Agreement dated April 21, 2009 (described in the previous paragraphs), signed by Noticee 2 in his capacity as the Managing Director of Asahi. However, I note from the reply of the Noticees that they have generally argued that they did not have the expertise in GDR issue and that they relied upon the professional advisors of foreign land. I also note that Asahi being a listed company and Noticee 2 being its Managing Director are expected to ensure adherence and compliance with the provisions of securities laws. Hence, I do not find merit in such contention of the Noticees and the same appears to be an attempt to evade the consequences of this proceeding by exhibiting ignorance without any basis. Further, I am of the view that the Noticees had purposefully entered into pledge

agreement in order to secure loan in favour of Vintage so that the GDR issue could be fully subscribed.

27. With regard to the Noticees' contention that they did not possess expert knowledge relating to GDR issue,

28. The Noticees have further contended that the amount was kept in an interest-bearing fixed deposit on which the company had earned interest. However, I note from clause 4.2 of the pledge agreement that "*any withdrawal from the Pledged Time Deposit Amount shall only be possible with prior written approval of the Bank*". Therefore, I am of the view that the GDR proceeds of Asahi was not freely held unencumbered fund and further Asahi was not allowed to withdraw the same without prior written approval of Euram Bank. In this regard I note it relevant to rely upon the observations of the Hon'ble SAT, incorporated in its Order dated October 25, 2016 in the matter of Pan Asia Advisors Limited vs. SEBI as follows:

"*28.... there can be no dispute that the GDR subscription amounts running into several million US $ were not available to the issuer companies till the loan taken by Vintage for subscribing to GDRs were repaid to Euram Bank. Admittedly, the loans were repaid by Vintage after a long period of time. Therefore, in the facts of present case, findings recorded by SEBI that in reality there was no fund movement after the GDRs were subscribed, cannot be faulted.*"

29. Further, I am of the view that the GDRs are not issued for the purpose of generating fixed interest. The only reason the funds remained unemployed was because the same were pledged with Euram Bank and the Noticee 1 was not allowed to withdraw the same without prior written approval of Euram Bank.

30. Further, I note from the corporate announcements available on BSE website that Asahi had informed BSE on May 04, 2009 that the GDR Issue for USD 5.98 million had been fully subscribed and had closed on April 28, 2009 and that the allotment of 29,91,000 Global Depositary Receipts underlying 29,91,00,000 Equity shares of Re. 1/- each at par was made by the Board in its meeting held on April 29, 2009. Further, Asahi, on June 01, 2009 informed BSE that the following were the investors in the GDR issue of Asahi (similar information was given to SEBI by Asahi and signed by Noticee 2):

Sl. No.	Name of Subscriber	Address	Amount paid (US$)	GDRs Subscribed	% to total GDR issue
		Hong Kong			
1.	Greenwich Management Inc. (herein after referred to as '**Greenwich**')	Floor - 18, One International Finance Centre, 1 Harbour view Street, Central, Hong Kong.	29,82,000	14,91,000	49.85
		Singapore			
2.	Tradetec Corporation (herein after referred to as '**Tradetec**')	Level 47, Prudential Tower, 30 Cecil Street, Singapore – 049712 Email: bw@tradeteccorporation.com.	30,00,000	15,00,000	50.15
		Total	**59,82,000**	**29,91,000**	**100**

31. I incidentally note from the IR that the above entities were also subscribers in other GDR issues also. In order to contact these initial investors, SEBI had sent emails to their available (Email) addresses and also had issued summons to their contact addresses as per records. However, all the Emails and summons returned undelivered. Thereafter, SEBI contacted the respective Financial Markets Regulators of Hong Kong and Singapore. In this regard, I note that following:

(i) The Securities and Futures Commission of Hong Kong, vide its Email dated July 31, 2012, informed SEBI that Greenwich Management Inc. is not present at the address given above.

(ii) The Monetary Authority of Singapore, vide its Email dated July 27, 2012, informed SEBI that the building Prudential Tower, where Tradetec Corporation is supposed to have an office at Level 47, does not have a Level (floor) 47. The highest floor is Level 30.

I note that copies of the above referred email letters have been shared with the Noticees vide annexure 8 to the SCN. In this regard, I note that the Hon'ble SAT in the matter of Pan Asia Advisors Ltd. vs. SEBI, observed the following in its order dated October 25, 2016:

"*It is equally interesting to note from the investigation carried out by SEBI that the alleged initial subscribers to the GDRs were nonexistent entities because, e-mails and summons issued to those entities were return back undelivered. Moreover, the respective securities market regulators of the Countries in which the alleged initial subscribers were supposed to be situated have informed SEBI that the addresses of the initial subscribers are either non-existent or do not belong to those entities. In case of Tradetec the address shown was 'level 47, Prudential Tower, 30 Cecil Street, Singapore, 049712'. Investigation carried out by SEBI through the Monetary Authority of Singapore revealed that there was no level 47 and the highest floor of Prudential Tower was level 30 and that Tradetec is not even listed in the office directory of Singapore. One of the alleged initial subscriber known as Rexflex Ltd. was found to be controlled by AP and admittedly the name of Rexflex Ltd. has now been changed PAN Asia Management Ltd. Even in case of other issuer companies, the WTM of SEBI has recorded a finding in para 15 of the impugned order that those entities do not exist at the given address and the names of those entities do not exist in the official directory of the Countries in which the said entities were supposed to be situated. In these circumstances, findings recorded in the impugned order that the names of initial subscribers exist only in fiction and that the appellants*

have artificially sought to create an impression that the GDRs were initially subscribed by foreign investors other than Vintage cannot be faulted."

32. The abovementioned information, forwarded by the respective Securities Market Regulators of Hong Kong and Singapore clearly show that the initial subscribers, submitted by Asahi to SEBI and BSE, do not exist and that Asahi had submitted wrong information. In this regard, Asahi has contended that it had only forwarded the information which it had received from Pan Asia and Deutsche Bank. However, I do not accept the above contention of Asahi as Noticee 2, on behalf of Asahi, had signed the pledge agreement corresponding to the loan agreement between Vintage and Euram Bank wherein it was clearly mentioned that the loan was being given to Vintage only to subscribe to the GDR issue of Asahi and the proceedings of the loan agreement may only be transferred to Euram Account no. 540 030 (bank account of Asahi). Therefore, in view of the scheme of the GDR issue as described in the initial paragraphs of this order, I note that, from the beginning, the Noticees were aware of the fact that Vintage was the only initial subscriber of the GDR issue. In light of the whole scheme of things as explained it only stands to reason that despite clear knowledge of the subscriber to the GDR issue the Noticees have disclosed non-factual information which buttresses their *malafide* intention behind withholding the correct actual information. The Noticees' argument that, the capital underlying the GDR issue has been informed to the BSE and the same shows bonafides, is also not acceptable for the reasons stated above.

33. Therefore, in light of the above observations and the fact that Asahi itself had secured the loan taken by Vintage for the subscription of its GDR and the documents related to that were signed by Noticee 2 himself, I am of the view that, from the initial stage, the Noticees were well aware that the GDRs were subscribed only by Vintage.

34. Incidentally, I also note from the IR and the disclosures available on Bombay Stock Exchange (**BSE**) website dated April 30, 2009, May 04, 2009 & June 01, 2009 that the loan agreement and pledge agreement which were instrumental in the whole scheme of GDR issue were not disclosed to the BSE. In this regard, I note that the Hon'ble SAT, in its order dated February 05, 2020, in the matter of Jindal Cotex Ltd. vs. SEBI, has clearly delineated the importance of disclosure of loan agreement and pledge agreement in the following terms:

"*The contention that Pledge Agreement was not required to be disclosed under the Listing Agreement is not correct as the Listing Agreement, which forms the very basis of a disclosure based regulatory regime, requires every material information to be disclosed to the Stock Exchange at the earliest, sometime in a matter of minutes and others in a matter of days. When the company has lent the entire proceeds of the GDR issue to the tune of US$ 38.75 million as security for a third party abroad to avail a loan on the basis of that security and thereby potentially jeopardizing the entire proceeds is not a non-event but an important material information affecting all the stakeholders. We would hold that such events have to be disclosed in bold letters so that the investors of the company as well as those who are subscribing to its GDR issue etc. should be fully aware of those highly material facts.*

…… The basic question to be answered is whether the issue was subscribed by a loan taken by Vintage on the basis of pledging the proceeds of the GDR

issue as security for the said loan taken by a third party and that too a party located abroad and whether sufficient disclosures of material events associated with the issue was properly done. We are of the considered view that the method adopted by the appellants was vitiated through fraud……"

Therefore, in light of the above observations of Hon'ble SAT, I am of the view that the non-disclosure of actual initial investor, loan agreement and pledge agreement were done so as to create a fraudulent impression in the minds of the public investors that the said GDR issue was genuine in nature and the company had received the funds and the same were available for the free use of Asahi.

35. In the same context, I also note that Hon'ble Supreme Court of India, in its judgment dated July 06, 2015, in the matter of SEBI vs. Pan Asia Advisors Ltd. & Ors, had explained the object of creating and trading in GDRs outside India in the following terms:

"*60. On a consideration of the 2000 Regulations, the 1993 Scheme and the Master Circular issued by RBI periodically one can discern 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. In fact for creating of GDRs apart from the desire of the issuing company to raise foreign funds, the marketability of such shares in the form of GDRs should have an applicable potential at the global level. 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. The above fact has to be kept in mind when dealing with an issue relating to creation of GDRs, in as much as, when the GDRs gets fully subscribed at the global level providing scope for huge foreign investment, the same will have a serious impact at the internal investment market in the form of high appreciation of share value whereby the issuing company and the investor will be greatly benefited mutually. Such a real growth structurally and financially is the underlying principle in the creation and trading of GDRs at the global level."

Therefore, I observe that the company has issued GDRs without disclosing the actual subscribers would clearly give an impression that the company has 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. The same not only provides scope for huge foreign investment but may also lead to high appreciation of share value.

36. In this regard, the Noticees have contended that even if GDR issue had only one subscriber, it would not make GDR issue violative of any provision of SEBI Act and Rules / Regulation made thereunder. However, I am unable to accept this contention of the Noticees as the above wrong disclosure clearly shows the *malafide* intention on the part of the Noticees. Further, the purpose behind such wrong disclosure has been elaborately explained by the Hon'ble SAT, in its

order dated October 25, 2016 in the matter of Pan Asia Advisors Ltd. vs. SEBI, in following words:

"*It is apparent that the appellants knew that if the investors in India come to know that the GDRs of the issuer companies have not been subscribed by foreign investors but by the entities controlled by the Managing Director (AP) of PAN Asia, then it would not generate interest in minds of the investors in India to subscribe to the shares of issuer companies. Therefore, in order to create an artificial impression that global investors have shown keen interest in investing in the issuer companies by subscribing to the GDRs, appellants by a dubious method introduced fictitious and non-existent initial subscribers to the GDRs of the issuer companies so as to mislead the investors in India in believing that the global investors have shown keen interest in investing in the GDRs of issuer companies. In these circumstances, decision of SEBI that the appellants attempted to committed fraud on the investors in India by introducing fictitious initial subscribers cannot be faulted.*"

In view of this, I hold that the deliberate act on the part of the Noticees to submit wrong information was an important part of the whole scheme and the same was done only for the purpose of defrauding Indian investors by creating an impression that the GDRs of Asahi have been subscribed by genuine foreign entities on the basis of its fundamentals and future prospects.

37. I further note from the letter dated April 10, 2012 of Financial Market Authority of Austria received by SEBI that Euram Bank had sold those GDRs on behalf of Vintage by way of Over the counter (**OTC**) transactions to FIIs and their sub-accounts such as India Focus Cardinal Fund ('**IFCF**'), KII and others. In this regard, I note from the IR that IFCF was an entity connected with AP. I further note that, vide an agreement dated July 13, 2009, Vintage had given a loan of

US $ 20,00,000 to Credo Investment Holding Ltd., holding company of KII for onward lending to KII, *inter alia*, to purchase GDRs of Asahi. Thereafter, I note that the said GDRs were converted into underlying shares by IFCF and KII. Pursuant to the said conversion, IFCF and KII sold these shares in Indian Securities Market to the entities connected with AP. However, I note from the investigation report that no role, whatsoever, has been identified of the Noticees in respect of the above leg of the scheme.

38. To put the entire discussion in a nutshell, I find that Asahi, by appointing Pan Asia as the lead manager, issued GDRs. A loan agreement entered into between Vintage and Euram Bank to the extent of the whole GDR proceeds of Asa, secured by a corresponding pledge agreement between Asahi and Euram Bank, was instrumental in the subscription of the complete GDR issue by Vintage. I note that the two agreements were drawing strength from each other. At the same time, Asahi did not disclose the aforesaid loan agreement and pledge agreement. Thereby, Asahi created an impression that the GDRs were genuinely subscribed by foreign entities. Thereafter, the said GDRs were sold in OTC trades to certain FIIs by Vintage which converted the same and sold them in Indian Securities Market. Thus, I note that the issuance of GDRs by adopting the explained *modus operandi* and the consequential misleading and false disclosure renders the whole scheme of things a fraudulent act orchestrated by the Noticees with the help of AP and associates.

39. In view of the above, I further hold that the fraudulent impression, created before the investors in Indian securities market, showed Asahi as a company to be of

international reputation and better investment opportunity. I am of the view that the said impression was made possible only through an elaborate fraudulent plan detailed above.

40. In view of the foregoing, I find that the fraudulent GDR scheme crafted; false and misleading corporate announcements made and material and price sensitive information viz., (i) execution of pledge agreement dated April 21, 2009 by Asahi in favour of Euram Bank pledging the GDR proceeds for providing security to the loan taken by Vintage, (ii) execution of loan agreement dated April 21, 2009 by Vintage for obtaining loan from the Euram Bank for subscribing the GDR issue of Asahi and (iii) Vintage was the only subscriber of GDR issued by Asahi, suppressed by Asahi are price sensitive information and have the strength to impact the scrip price of Asahi.

41. I further note that Asahi has also contended that no investors were harmed due to this scheme. However, I note that the Hon'ble SAT, in its order dated October 25, 2016 in the matter of Pan Asia Advisors Ltd. vs. SEBI, has made the following observations:

"*From the aforesaid definition (of fraud) 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. In other words, under the PFUTP Regulations, SEBI is empowered to take action against any person if his act constitutes fraud on the securities*

market, even though no investor has actually become a victim of such fraud. In fact, object of framing PFUTP Regulations is to prevent fraud being committed on the investors dealing in the securities market and not to take action only after the investors have become victims of such fraud. Therefore, in the facts of present case, if fraud is committed by the appellants on the investors in India, then without making the investors as party to the proceedings, SEBI could take action against the appellants."

Therefore, in light of the above observation of SAT, the contention of the Noticees has no merit.

42. I further note that Asahi has denied that it has violated Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3 (b), (c), (d) and 4(2)(c), (f), (k), (r) of PFUTP Regulations for certain reasons. In this regard, I note that the facts of the present matter and the *modus operandi* employed in the present GDR issue are similar to facts and *modus operandi* in the GDR issue of Cals Refineries Ltd. wherein the Hon'ble SAT vide its order dated October 12, 2017 has made the following observations:

"*In these circumstances, the conclusion drawn by SEBI that opening a bank account with Banco and executing the Account Charge Agreement were the acts done by Cals through its directors to finance Honor for subscribing the GDRs issued by Cals in gross violation of Section 77(2) of the Companies Act, 1956 and the provisions contained in the SEBI Act and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for convenience), cannot be faulted.*"

43. In this regards, the following observations made by the Hon'ble SAT in matter of V. Natarajan vs. SEBI(Order dated June 29, 2011 in Appeal No.104 of 2011) are worth mentioning:

"*... we are satisfied that the provisions of Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 were violated. These regulations, among others, prohibit any person from employing any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on an exchange. They also prohibit persons from engaging in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities that are listed on stock exchanges. These regulations also prohibit persons from indulging in a fraudulent or unfair trade practice in securities which includes publishing any information which is not true or which he does not believe to be true. Any advertisement that is misleading or contains information in a distorted manner which may influence the decision of the investors is also an unfair trade practice in securities which is prohibited. The regulations also make it clear that planting false or misleading news which may induce the public for selling or purchasing securities would also come within the ambit of unfair trade practice in securities.*"

44. I further note that the Noticees have contended that they had not planted any news which could induce purchase or sale of shares. However, I have already discussed as to how the corporate announcements made by Asahi had the capacity to create an impression of a genuine subscription of its GDR issue and its impact on Indian investors. Therefore, in view of this, I am unable to accept the contentions of the Noticees.

45. I incidentally note from the IR that SEBI had attempted to examine the utilization of the funds of GDR. In this regard, it is noted that around 70% of funds raised from the GDR issue were transferred to Asahi FZE, a wholly owned subsidiary of Asahi in Dubai, and Asahi FZE had fund transactions with Ababil Star

General Trading LLC (**Ababil**), K Sera Sera Productions FC LLP, CAT Technologies Ltd., Vintage and some other companies which had issued GDRs with Pan Asia as manager. Out of this, a total of $26,73,000 were transferred to Vintage and Ababil which amounts to 44.68% of the total GDR Issue. Ababil is alleged to be an entity related to AP. However, I note from the IR that, due to the lack of evidences including the important details with respect to Asahi FZE viz. address, contact person and contact number, rationale behind all the payments above $25,000 as well as details of purchases and expenses incurred by Asahi FZE, SEBI could not investigate the end use of GDR proceeds..

46. In view of the above, I note that the scheme of arrangement of Asahi, in allotting GDR issue to only one entity i.e. Vintage which subscribed to the GDR issue by obtaining loan from Euram Bank and which was secured by Asahi by pledging its GDR proceeds, seen along with the false and misleading corporate announcements made by Asahi during the period April-June 2009 stating that the GDR was issued and allotted without disclosing the crucial details pertaining to the aforesaid Loan and Pledge Agreements which were price sensitive information, lead to a conclusion that the same were done in a fraudulent manner. Therefore, I find that Asahi has violated the provisions of Section 12A(a), (b), (c) of SEBI Act read with Regulations 3(b), (c), (d) and 4(2)(c), (f), (k), (r) of PFUTP Regulations.

47. I further note that Noticee 2 was the promoter and managing director of Asahi at the relevant period. Further, Noticee 2 along with his family members was

holding 9.43% of total shareholding of the Company. At the same time, the pledge agreement was signed by Noticee 2 in his capacity as the Managing Director of Asahi. He was also the authorized person on behalf of Asahi to execute other documents in relation to the GDR issue. In this regard, as the Managing Director of Asahi, Noticee 2 was central to the whole scheme on part of Asahi. I note that, by virtue of the provisions of Section 2(26) of the Companies Act, 1956 (Section 2(54) of the Companies Act, 2013), Noticee 2, being the Managing Director of Asahi, has been vested with substantial powers of management. Noticee 2 was also in charge of and responsible for the conduct of the business of Asahi, an artificial juridicial person and he assumes the character as “officer in default” for any violation. In this regard it is pertinent to rely upon the provisions of Section 5 of the Companies Act, 1956 (section 2(60) of the Companies Act, 2013) read with Section 27 of the SEBI Act. Additionally, I would also like to quote the observations of the Hon'ble Supreme Court of India in the matter of Shri N. Narayanan vs. SEBI decided on 26.04.2013, wherein it was observed that - *"... Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence.".* Further, Hon’ble High Court of Madras in Madhavan Nambiar vs Registrar of Companies (2002 108 CompCas 1 Mad) has held that – “*… Section 5 of the Companies Act defines the expression "officer who is in default". The expression means either (a) the managing director or managing directors ; (b) the whole-time director or whole-time directors ; (c) the manager ; (d) the secretary ; (e) any person in accordance with whose directions or instructions the board of directors of the company is accustomed to act;*

(f) any person charged by the board with the responsibility of complying with that provision ; (g) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors.

… Section 29 of the Companies Act provides the general power of the board….Therefore it follows there cannot be a blanket direction or a blanket indemnity in favour of the petitioner or other directors who have been nominated by the Government either ex officio or otherwise. Hence the second point deserves to be answered against the petitioner…. There may be a delegation, but ultimately it comes before the board and it is the board and the general body of the company which are responsible..."

48. Further, I note that Section 27 of SEBI Act also deals with offences by Companies. In the said provision, Section 27(1) says that, in case of a default by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

49. In light of the above discussions regarding the scheme of GDR issue of Asah, I am of the view that Noticee 2 had played the major role from the side of Asahi as, by virtue of the Board Resolution dated January 31, 2008, he was given sole authority to open the bank account with Euram Bank and sign any other document necessary for the GDR issue. Further, I note that it is Noticee 2 who had signed everywhere on behalf of Asahi be it KYC document or the pledge agreement. Further, Noticee 2 was given the sole authority to operate the said bank account with Euram Bank.

50. Therefore, in view of the above I hold Noticee 2 to be equally liable for the abovementioned fraud carried out by Asahi, in collusion with AP, on the Indian investors and has violated the provisions of Section 12A(a), (b), (c) of SEBI Act read with Regulations 3(b), (c), (d) and 4(2)(c), (f), (k), (r) of PFUTP Regulations.

b. Whether the Noticees have violated the provisions of Section 11C(3) read with Section 11C(6) of SEBI Act?

51. It is alleged that the Noticees, by their failure to submit the complete and correct information regarding the GDR issues of Asahi have violated the provisions of Section 11C(3) read with 11C(6) of SEBI Act. In this regard, it is observed that there are two allegations against the Noticees viz.:

- Wrong submission of information
- Non-submission of information

52. I note that Section 11C(3) of SEBI Act requires any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before the Investigating Authority or any person authorised by it in this behalf which the investigating authority considers relevant or necessary for the purposes of its investigation.

53. In this regard, I note that SEBI had issued three different summons to Noticee 2, in his capacity as Managing Director of Asahi, on January 12, 2012, March 28, 2012 and April 20, 2012, wherein he was advised to submit certain documents listed therein. Further, vide the summons dated March 28, 2012 referred above, Noticee 2 was advised to appear in person. I also note that

another summons dated May 03, 2012 was issued to Mr. Ravi Ramaiya in his capacity as Authorized Representative of Asahi wherein he was advised to submit certain details mentioned therein.

54. In this regard, it is alleged that the Noticees, in their replies to the Summons, submitted certain wrong information. Therefore, adjudication proceedings under Section 15A(a) has been initiated against the Noticees. The details of the said alleged wrong information is given as below:

    a. Vide summon dated January 12, 2012, Noticee 2 was advised to mention conditions regarding the withdrawal of funds from accounts with Euram Bank. I note that Asahi, in its letter dated April 11, 2012, submitted that no conditions prescribed under any Agreement with Euram Bank regarding withdrawal of funds. However, upon perusal of the Pledge Agreement, I note that the proceeds of GDR issue were held as collateral against the Loan taken by Vintage and therefore funds could only be withdrawn when the loan is repaid by Vintage. Therefore, the said information of Asahi was false and wrong.

    b. Vide the same summon, Noticee 2 was advised to submit copy of any other agreement with Euram bank apart from those related to GDR issues. At the same time, Noticee 2 was also advised to submit details of any other agreement Asahi had AP or Vintage. In this regard, Asahi, vide its letter dated April 11, 2012, denied having any other agreement with Euram other than Escrow Account agreement. Further, Asahi also denied having any agreement with Vintage or AP. However, from the perusal of material

available on record, I note that the said submissions of Asahi are false as Pledge agreement was signed by Noticee 2 as the Managing Director of Asahi with Euram. Further, as already discussed in pre-paragraphs, this Pledge Agreement was part of the Loan Agreement between Vintage and Euram. Similarly, it is mentioned in the Pledge Agreement that "*the Pledgor has received the Loan Agreement and agrees to its conditions*". Therefore, the Noticees were well aware of the said agreements and have deliberately submitted the wrong information to SEBI.

c. Vide summons dated March 28, 2012, Noticee 2 was advised to submit details of any agreement with any entity regarding financing for the purpose of subscription by initial investors of GDRs. Vide letter dated April 11, 2012, Asahi denied having any agreement with any entity regarding financing of subscription of GDR Issues. However, as already discussed in pre-paragraphs, the whole arrangement of loan agreement and pledge agreement among Vintage, Asahi and Euram was only for the purpose of arranging funds for Vintage to subscribe the GDR issue of Asahi. Therefore, the said information submitted by Asahi was false.

In this regard, I note that the said letter dated April 11, 2012 by which all the above mentioned wrong information was submitted by Asahi to SEBI, was signed by Noticee 2 in his capacity as MD of Avon.

55. At this juncture, it is relevant to mention that the Hon'ble Supreme Court of India, in Civil Appeal No. 5859 of 2006 in the matter of Bonanza Biotech Ltd Vs SEBI and other connected appeals examined the issue as to whether the

Adjudicating Officer (AO) under section 15A of the SEBI Act is authorized to impose penalty when the documents/information called for and furnished are false or whether the power of the said AO to impose penalty on the person/entity is limited and exercisable only in the event of failure to furnish information/details/documents. I note that the above appeal was filed in the context of an Order dated June 16, 2008 in the matter of Bonanza Biotech Ltd vs SEBI wherein Hon'ble SAT had upheld the levy of penalty imposed by the AO on Bonanza Biotech Ltd (the appellant) under section 15A for submission of false information /details to the investigating authority of SEBI. In its order dated March 7, 2017, in Civil Appeal No 5859 of 2006, the Hon'ble Supreme Court, *inter alia*, referred to the observation of the expert group constituted by SEBI under the chairmanship of Late Mr. Justice M. H. Kania, former Chief Justice of India, which was relied upon by the appellant, which mentioned that-

"*as per the provisions of Chapter VIA of SEBI Act, SEBI can impose monetary penalty for failure to furnish information or delay in furnishing the information. However, there is no provision for monetary penalty for giving false information*"

56. The Hon'ble Supreme Court of India, in its judgment dated March 07, 2017 had observed the following: -

"*It appears that the only question in this matter is whether the Adjudicating Officer Under Section 15A of the Securities and Exchange Board of India Act, 1992, is authorized to impose penalty on the ground that the documents which have been asked for and have been furnished are false or whether power of the Adjudicating Officer to impose penalty is limited and can be exercised only in the event of failure to furnish documents.*

We have perused the order passed by the Adjudicating Officer. It appears from the order which was passed that the Adjudicating Officer had specifically stated

in para 31 'that the Appellant has already furnished the materials which are available on record'. Since the materials have already been furnished, in our opinion, the said section is not attracted on the given facts."

57. Having regard to the above mentioned observations, the Hon'ble Supreme Court, set aside the Order dated June 16, 2008 of Hon'ble SAT as not sustainable. Therefore, in view of the above observations and in the context of the present proceedings against the Noticees, the allegation levelled in the SCN that the Noticees have violated the provisions of sections 11C(2) & 11C(3) of SEBI Act by furnishing false information/details to the IA w.r.t details sought through the summons (three summons) issued to the Noticees by the IA is not sustainable. Accordingly, no penalty can be levied on the Noticees u/s 15A(a) of the SEBI Act, as existing at the time of occurrence of cause of action, for furnishing false information/details sought through the summons issued by the IA. Therefore, I dispose of the SCN against the Noticees limited to the allegation of furnishing of wrong information.

58. In this regard, it is also alleged that the Noticees have failed to submit the following information to SEBI despite repeated issuance of summons:

- Important details with respect to Asahi FZE viz. address, contact person and contact no. was not provided by the Noticees to SEBI.
- The Noticees were specifically asked to explain the rationale behind all the payments done by Asahi FZE which were above USD 25,000. However, the Noticees did not provide rationale for payments done by Asahi FZE.
- Details of purchases and expenses incurred by Asahi FZE were not provided.

59. I note that the Noticees have submitted before investigating authority that Asahi FZE is a company registered with Government of Sharjah Hamriyah Free Zone Authority (UAE). The Noticees have, vide letter dated May 09, 2012, have submitted, *inter alia,* that Asahi FZE had stopped all operations w.e.f. June 21, 2011 and the relevant persons have left Dubai. However, I note that Asahi FZE was a wholly owned subsidiary of Asahi and, by virtue of this, it was under complete control of Asahi. Therefore, I find the replies of the Noticees to be evasive in nature.

60. Further, I note from the IR, that a part of the GDR proceeds had admittedly gone to Asahi FZE. In this regard, I note that the details regarding information mentioned above regarding Asahi FZE (wholly owned subsidiary of Asahi) and certain fund transactions done by it were very important for the purpose of present investigation as the same were required to examine the use of funds raised by Asahi by way of GDR issue. The IR carries remarks that due to the failure of the Noticees to submit the said information, SEBI could not examine the end use of the funds and establish complete cycle of flow of funds. Further, I note from the IR that SEBI had suspicion that Asahi FZE was used by Asahi and AP to route funds back to Vintage and other AP connected entities. However, due to the deliberate non-submission of the above information by the Noticees, SEBI could not investigate the said angle and the same has hampered a very crucial aspect of investigation in GDR issue of Asahi.

Therefore, I hold that the Noticees have failed to furnish the above lightedsought information and thereby hampered the investigation of SEBI. In view of the above, have violated the provision of Section 11C(3) of SEBI Act.

61. However, I note that the power to try an entity and punish accordingly, if required, under Section 11C(6) lies with some other forum and the same is outside the purview of an Adjudication Proceedings. Therefore, I hold that the provisions of Section 11C(6) of SEBI Act will not be applicable in the present adjudication proceedings.

c. Whether Noticee 1 has violated the provision of Clause 35 of Listing Agreement?

62. It is also alleged that Asahi failed to disclose details of outstanding GDRs in its quarterly disclosures of shareholding pattern to BSE. As per BSE website, the equity held with custodian i.e. ICICI Bank Limited is shown as nil for Asahi during the period June 01, 2009 to September 21, 2011. Therefore, it is alleged that the Noticee 1 has violated Clause 35 of the Listing Agreement read with Section 23E of SCRA.

63. In this respect, I note that Asahi had issued GDRs on April 29, 2009. Thereafter, Asahi was required to disclose shares proportionate to outstanding GDR issue under the heading ‘Shares held by Custodians and against which Depository Receipts have been issued’ to the stock exchange. However, I note from the quarterly shareholding pattern for the quarters ended June 2009 to September 2011, as submitted by Asahi to BSE under Clause 35 of Listing Agreement, that Asahi had admittedly failed to disclose the details of shares proportionate to

outstanding GDRs as 'Shares held by Custodians and against which Depository Receipts have been issued' continuously for a period of 10 quarters.

64. In this regard, Asahi has contended that the same was due to inadvertent error. However, I am unable to accept the contention of Asahi as the same error had continued for a period of 10 quarters. Therefore, I hold that Noticee 1 has admittedly violated the provision of Clause 35 of Listing Agreement read with Section 23E of SCRA.

d. If yes, whether the Noticees are liable for penalty?

65. As established in the pre-paragraphs, the Noticees have violated the provisions of Section 12A(a), (b), (c) of SEBI Act read with Regulations 3(b), (c), (d) and Regulations 4(2)(c), (f), (k) and (r) of PFUTP Regulations. Therefore, the Noticees are liable for a penalty under Section 15HA of SEBI Act. The text of the said provision of law is being reproduced below:

SEBI Act

Penalty for fraudulent and unfair trade practices.

15HA. *If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.*

66. It has further been established that the Noticees have violated the provisions of Section 11C(3) of SEBI Act. Therefore, the Noticees are liable for penalty under Section 15A(a) of SEBI Act. The text of the said provision of law is being reproduced below:

SEBI Act

Penalty for failure to furnish information, return, etc.

15A. *If any person, who is required under this Act or any rules or regulations made there under,—*

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

67. It has also been established that Asahi has violated the provisions of Clause 35 of Listing Agreement read with Section 23E of SCRA. Therefore, Asahi is liable for penalty under Section 23E of SCRA. The text of the said provision of law is being reproduced below:

SCRA

Penalty for failure to comply with provision of listing conditions or delisting conditions or grounds.

23E. *If a company or any person managing collective investment scheme or mutual fund, fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof, it or he shall be liable to a penalty not exceeding twenty-five crore rupees.*

68. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the SEBI Adjudication Rules as well as provisions of Section 23J of SCRA and Rule 5 of the SCRA Adjudication Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

69. With regard to the above factors, it may be noted that the investigation report has not quantified the profit made or the loss caused to general investors on account of the violations committed by the Noticees. Further, I note that the violation of Asahi under Clause 35 of Listing Agreement was a repeated violation on account of its failure to disclose correct shareholding pattern for 10 quarters. However, rest of the violations are not repetitive in nature.

70. Further, in light of recent order dated August 02, 2019 of Hon'ble SAT in the matter of P G Electroplast vs SEBI, I also note that, vide Order dated September 05, 2017, Hon'ble Whole Time Member of SEBI has debarred Noticee 1 from issuing equity shares or any other instrument convertible into equity shares or any other security for a period of ten years. Further, vide the same order, Noticee 2 was also prohibited from accessing the capital market directly or indirectly, and dealing in securities or instruments with Indian securities as underlying, in any manner whatsoever, for a period of ten years.

ORDER

71. After taking into consideration the facts and circumstances of the case, material/facts on record and also the factors mentioned in the preceding paragraphs, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of SEBI Adjudication Rules and Section 23-I of SCRA read with Rule 5 of SCRA Adjudication Rules, hereby impose the

following penalty on the Noticees under Section 15A(a) & 15HA of the SEBI Act and Section 23E of SCRA for their violation of the provisions of SEBI Act, PFUTP Regulations and Listing Agreement, as discussed in this order:

Name of the Noticee	Provision	Penalty
Asahi Infrastructure & Projects Ltd.	Section 15HA of SEBI Act	Rs. 10,00,00,000 (Rupees Ten Crore)
	Section 23E of SCRA	Rs. 15,00,000 (Rupees Fifteen Lakh)
Mr. Laxminarayan Jainarayan Rathi	Section 15HA of SEBI Act	Rs. 1,00,00,000 (Rupees One Crore)

I further impose a penalty of Rs. 10,00,000 (Rupees Ten Lakh only) on the Noticees under Section 15A(a) of SEBI Act. which is payable jointly and/or severally.

72. I am of the view that the above penalty is commensurate with the lapse/omission on the part of the Noticees. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order through online payment facility available on the website of SEBI, i.e., www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -> Orders of AO -> PAY NOW.

73. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under Section 28A of the SEBI Act for realization of the said amount of penalty along with interest

thereon, *inter alia*, by attachment and sale of movable and immovable properties.

74. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to the Noticees viz. Asahi Infrastructure & Projects Ltd. & Mr. Laxminarayan Jainarayan Rathi and also to the Securities and Exchange Board of India.

Place: Mumbai **K SARAVANAN**

Date: May 26, 2020 **CHIEF GENERAL MANAGER**

AND ADJUDICATING OFFICER