WTM/SKM/EFD1-DRAI/ 11 /2018-19

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: S K MOHANTY, WHOLE TIME MEMBER

ORDER

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

In the matter of Commex Technology Ltd.

S.No.	Names of the Noticee	PAN
1.	**M/s. Commex Technology Ltd.**	**AABCG0986D**
2.	**Mr. Adi Cooper**	**AAFPC0271N**
3.	**Mr. Hemant Sonawala**	**AAEPS7121E**
4.	**Mr. Kishore Hegde**	**AAFPH2481K**

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") conducted investigation into the Global Depository Receipts (hereinafter referred to as "GDR") issue by M/s. Commex Technology Limited, formerly known as IT

People (India) Limited (hereinafter referred to as "Commex/Company/Noticee no. 1") for the period May 01, 2009 to June 30, 2009.

2. It was observed that Commex had issued 19,06,790 GDR (raising USD 9.99 million, approximately Rs.50.53 crore) on May 25, 2009. Details of the GDR issue as provided by the Company is tabulated below:

Table no. 1

GDR issue date	**No. of GDR issued (mn.)**	**Capital raised (USD mn.)**	**Local custodian**	**No. of equity shares underlying GDR**	**Global Depository Bank**	**Lead Manager**	**Bank where GDR proceeds deposited**	**GDR listed on**
May 25, 2009	1.91	9.99	Deutsche Bank AG	9,53,39,500 (50 Shares for each GDR)	Deutsche Bank Trust Company Americas	Pan Asia Advisors Ltd., London	EURAM Bank, Austria	Luxembourg Stock Exchange

3. Pan Asia Advisors Ltd. was the Lead Manager to Commex for the GDR issue. Vide letter dated May 26, 2015, Commex was, *inter-alia*, advised to provide list of subscribers to its GDR. Commex, vide letter dated June 22, 2015, has provided the following information:-

Table no. 2

S.No	**Name of the subscriber**	**Number of GDRs**	**Face Value**	**Amount**
1	Dynamic Holdings Investment	5,00,000	5.24	$2,620,000.00

2	Flagstaff Investment Ltd.	4,00,000	5.24	$2,096,000.00
3	Tradetec Corporation	5,00,000	5.24	$2,620,000.00
4	Echelon India Investments Ltd	2,70,000	5.24	$1,414,800.00
5	Knightbridge Management Inc.	2,36,790	5.24	$1,240,779.60
Total		19,06,790	5.24	$9,991,579.60

4. The investigation revealed that European American Investment Bank AG (hereinafter referred to as "EURAM Bank") granted loan to Vintage FZE (hereinafter referred to as "Vintage") by way of a Loan Agreement dated May 5, 2009 (hereinafter referred to as the "Loan Agreement") for payment of USD 9.99 million towards subscription to GDR of Commex. The loan amount was the same as the gross value of GDR issue i.e., USD 9.99 million. It was observed that the entire 1.91 million GDR (amounting to US$9.99 million) were subscribed by only one entity, i.e. Vintage, and that Commex had not submitted correct list of GDR subscribers to SEBI.
5. It was further observed that the Company pledged its entire GDR proceeds as a security for the loan availed by Vintage from EURAM Bank for subscribing to GDR of Commex, by separately entering into a Pledge Agreement dated May 5, 2009 with EURAM Bank (hereinafter referred to as the "Pledge Agreement"). The aforesaid Pledge Agreement was made an integral part of Loan Agreement entered into between Vintage and EURAM Bank and both the agreements were executed concurrently, before the issue of GDR.
6. It was further observed that Vintage after receiving the GDR from Commex, had transferred 10,52,516 GDR to India Focus Cardinal Fund, Jermyn Capital Partner, London and Standard Bank of Mauritius. The GDR were subsequently converted into equity shares and sold in the Indian Capital Market. It was also observed that only after Vintage repaid its loan in installments, on almost the same day, an equal amount of money was transferred from Commex's EURAM Bank account to its

(Commex's) UAE subsidiary a/c. It was therefore observed that the release of GDR proceeds from Commex's EURAM Bank account was dependent on the repayment of the loan by Vintage to EURAM.

7. As detailed above, it was observed that the Loan Agreement and Pledge Agreement, enabled Vintage to avail loan from EURAM Bank for subscribing to GDR of Commex. The GDR issue would not have been subscribed, had Commex not given such security towards the loan taken by Vintage. The bank account in which GDR proceeds were held, was in the name of the Commex but the amount deposited in the account was not at the disposal of the Company as the same was pre-pledged as a security even prior to issuance of GDR against the loan availed by Vintage.
8. This entire arrangement- involving the Company entering into the Pledge Agreement dated 5th May 2009, making corporate announcement on May 26, 2009 that the GDR were successfully subscribed concealing the fact that a Pledge was created on the GDR proceeds and the fact that its GDR subscription was actually financed by a Loan arrangement with the backing of the issuing company was not disclosed to the investors of the Company. Hence, suppression of true facts is alleged to have resulted in disclosing misleading news to the stock exchange, thereby causing a fraud on the investors. It is seen that the Board of Directors of Commex had passed a resolution dated January 30, 2008, authorizing EURAM Bank to use the GDR proceeds deposited with its EURAM Bank a/c as a security in connection with loan and on the basis of the same, the Company had entered into the aforesaid Pledge Agreement with EURAM Bank. The Company did not inform BSE about the outcome of the Board meeting held on January 30, 2008. The directors of Commex, Noticees no. 2 to 4, who attended this Board Meeting and authorized the CMD to sign the Pledge agreement with EURAM Bank are also alleged to have acted as party to the fraudulent arrangement through which GDR were issued and also for having

concealed material information and allowing wrong & misleading information to be disclosed through the Exchange. The above act of concealing the actual facts from the shareholders at large and issuing GDR through a fraudulent arrangement of the Pledge and Loan Agreements by the Noticees behind the back of innocent investors have been alleged to be in violation of provisions of SEBI Act, 1992 (hereinafter referred to as "SEBI Act") and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as "PFUTP Regulations").

SHOW CAUSE NOTICE, REPLY AND HEARING

9. Keeping the aforesaid in view, a Show Cause Notice (hereinafter referred to as "SCN") dated June 21, 2017 was issued to all four Noticees No. 1 to 4, calling upon them as to why suitable directions should not be issued against them under Sections 11, 11B and 11(4) of the SEBI Act. The Company (Noticee no. 1) submitted a reply vide letter dated July 18, 2017. Mr. Adi Cooper (Noticee no. 2) replied vide letter dated July 12, 2017, and Mr. Kishore Hegde (Noticee no. 4) replied vide letter dated July 31, 2017. However, no reply was received from Noticee no. 3, Mr. Hemant Sonawala. In the interest of principles of natural justice, opportunity for personal hearing was given to all the four Noticees on November 13, 2018. In response, only Noticees No. 2 and 4 viz:- Mr. Adi Cooper and Mr. Kishore Hegde attended before me and reiterated the submissions already made in their written replies. Mr. Kishore Hegde was further advised to produce copies of reports/minutes of audit committee (of which he was admittedly a part) for the period 2008-2010. Mr. Hegde has submitted another reply vide letter dated November 16, 2018.
10. In its written submission, the Company (Noticee no. 1) has stated the following:-

- Mr.Ketan Sheth, the late CMD had co-operated and replied to queries of SEBI in 2015-16. Due to sudden demise of Mr. Ketan Sheth, other than the GDR related information already submitted to SEBI, for rest of the information, the Company neither has any further information nor is in a position to retrieve information if any, and is completely unaware of further details of the GDR issue.
- They understand that Mr. Hemant Sonawala has also expired and Mr. Adi Cooper had resigned from the Company in October, 2008. Mr. Hegde being an independent director at that time was not involved in operations or GDR related company matter. The staff of the Company has also completely changed.
- The Company is making all efforts for a quick revival and in current state is almost non-operational, hence, has requested for pardon as late Mr. Ketan Sheth was the Founder and was running the Company and in his absence, the Company is helpless.

11. The submissions made by Mr. Adi Cooper (Noticee no. 2) are summarized in brief as below:
    - He is unable to deal with the case on merits as he is not in possession of relevant documents. The notice has been issued after 9 years from his resignation, hence there was no justification for taking action against him at such belated stage and that he is 74 years old senior citizen. He has not violated any law as director. The GDR were issued on May 25, 2009 when he ceased to be director. The Company had passed another resolution on March 13, 2009 during which he was not a director and the alleged acts of non-

disclosure, etc. had occurred after he ceased to be a director and has no knowledge of the same.

- He was director of the Company from October 11, 2005 to October 10, 2008 and has enclosed snapshot of his directorship from MCA website. He submitted that he was not director during 2009 and can't be responsible for conduct of the business of the Company after his resignation and denied violation of PFUTP Regulations.
- He was invited to be on the Board due to his unblemished track record with other companies where he was director and since his resignation from the Board, he does not have contacts with the Company anymore. He admitted that he was director when the resolution dated January 30, 2008 was passed, however, the resolution (to which he was a signatory) merely authorized the Company to use funds deposited in the bank as security in connection with loan, which must necessarily be read as loan, if any, by the Company in accordance with law and that no authorization was given by the Board under the said resolution to use the GDR proceeds as security for loan given by EURAM to Vintage.

12. Mr. Kishore Hegde (Noticee no. 4) has put forth the following arguments in his submissions:-

- He was not a director with stake in the Company and not involved in day to day operations of the Company and was not regular in attending board meetings of the Company.
- He was a director when the purported resolution was passed but he has not attended the relevant Board meeting dated January 30, 2008 and has enclosed copy of attendance register of that meeting.

- He also submitted that he did not attend the next board meeting dated April 30, 2008 where the minutes of earlier board meeting would have been read out. He should not be held responsible for matter conducted in the board meetings he has not attended. Further an independent director is not privy to day to day operations of the Company. As regards the later meetings in 2009, he is not sure if he was present during those meetings as he was not regular in attending Board meetings of the Company and the Company has not provided him with attendance registers for 2009.
- The resolution gave authority for use of funds as legitimate security against loans that may be availed by the Company in its normal course of business. He further submitted that from perusal of the Board minutes, it can be observed that the authorization was not given by the board for using the GDR proceeds as security for loan given by EURAM Bank to Vintage. The Loan Agreement and Pledge Agreement were never placed before the Board in any of the aforesaid meetings and that all the omissions alleged in the SCN was without the knowledge of the Board.
- In his second submissions pursuant to hearing, he reiterated that he had no knowledge of the alleged violations. He has enclosed certified copies of the attendance register. Regarding the minutes of the Audit Committee of which he was a member, he submitted that he had sent email to Company for the same and will forward it on receipt. He has enclosed a copy of page no. 44 of the offer document of GDR issued by the Company (copy enclosed with SCN issued to him by Adjudicating Officer), showing that one of the objects to utilize the funds was for payment for current acquisition and investment and loan to subsidiary.

13. As pointed out earlier the Noticee no. 3, Mr. Hemant Sonawala has neither appeared before me nor has made any submissions for consideration. In the interest of justice, one more hearing opportunity on January 9, 2019 was granted to the Company at their new address (same address as on BSE website wherein the Company is listed) and also to Mr. Hemant Sonawala. However, no one appeared for both the Noticees on the date of hearing. I also find that intimation of prior hearing in respect of Mr. Hemant Sonawala and the Company was published in the newspapers, however there was no response by these two Noticeees. Under these circumstances, I find that adequate opportunities have been granted to all the Noticees to make their submissions and defend their cause before me, hence principles of natural justice have been complied with. I, therefore, proceed to decide the case on merit on the basis of facts available on records and the submissions made by the Noticees and accordingly record my findings in following paragraphs.

ISSUES FOR CONSIDERATION AND FINDINGS

14. I have considered the SCN dated June 21, 2017 alongwith all the Annexures referred to in the SCN, the replies received from the Noticees in response to the SCN and the submissions made by the Noticees during the personal hearing granted to them; and all other relevant material available on record. I find that there are two main issues for consideration in this case:

(i) Whether the Company i.e. Noticee no. 1 has violated Sections 12A(a), (b), (c) of the SEBI Act read with Regulations 3 (a), (b), (c), (d) and 4(1), 4(2) (f), (k), (r) of PFUTP Regulations?

(ii) Whether the directors i.e. Noticee nos. 2 to 4 have violated Sections 12A(a), (b), (c) of the SEBI Act read with Regulations 3 (a), (b), (c), (d) and 4(1) of PFUTP Regulations?

ISSUE NO. 1: *Whether the Company i.e. Noticee no. 1 has violated Sections 12A(a), (b), (c) of the SEBI Act read with Regulations 3 (a), (b), (c), (d) and 4(1), 4(2) (f), (k), (r) of PFUTP Regulations?*

15. The aforesaid provisions of SEBI Act and PFUTP Regulations alleged to be violated by the Noticees are read as under:

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;

3. Prohibition of certain dealings in securities

No person shall directly or indirectly-

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

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

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

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

4. Prohibition of manipulative, fraudulent and unfair trade practices-

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

(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:-

(a) ……

(b) …….

…….

(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.

16. In this case, the Company after being duly authorized by the Board, had issued 1.91 million GDR on May 25, 2009 for raising 9.99 million US$. From a perusal of Table 1 on page no. 2, I note that the number of underlying shares issued by the Company under the GDR issue was 9,53,39,500 shares (the ratio of number of GDR to equity shares of the Company being 1:50).

17. In this regard the Board of Commex had passed a resolution in its meeting on January 30, 2008, inter-alia, authorizing EURAM Bank to use the GDR proceeds as security against loan if any. Relevant extracts of the Board Resolution are as under:

"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 Ketan Sheth, Chairman & Managing Director of the Company, be and is hereby authorized to sign, execute, any application, agreement, escrow agreement, documents, 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 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 (emphasis supplied) as well as to enter into any Escrow Agreement or similar arrangements if and when so required."

18. On perusal of the above Board Resolution, a copy of which is enclosed as Annexure -3 to the SCN, I find that the said Resolution was approved for opening a bank account with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue of the Company. Further, Shri Ketan Seth, Chairman and Managing Director of the Company was authorized to sign, execute any application, agreement,….etc. as may be required by the Bank. It was further resolved by the Board to authorize the Bank to use the funds so deposited in the bank account as a security in connection with the loans if any. From the resolution as stated above, I find that the Company and the Board of Directors had already decided as back as on

January 30, 2008 to go for a GDR issue and had even decided at that very stage to open a bank account with EURAM for receiving the GDR proceeds. Also in the same Board resolution it had already been contemplated that the GDR proceeds may be used as a security for loans although the nature and purpose of the proposed loans to be availed was not specified in the said resolution. However, no information with regard to such intentions of the Board was disclosed to the shareholders and rather the Company misled the investors by concealing such an important disclosure from them.

19. As noted earlier, Vintage had signed a Loan Agreement No. K050509 -003 dated May 5, 2009 with EURAM Bank for a loan of 9.99 million US$ to pay for the subscription amount of US$9.99 million for the GDR issue of Commex. Vintage had opened an exclusive loan account (a/c no. 540012-017-3 titled as Loan J09050001 IT People K050509-003) with EURAM Bank for receiving the loan and making subscription to GDR of Commex. The following stipulations, *inter-alia,* in the Loan agreement are notable:

> "2. *Nature and purpose of facility*:
>
> *To provide funding enabling Vintage FZE to take down GDR issue of IT People (India) Limited Luxembourg public offering and may only be transferred to Euram account no. 540 025, IT People (India) Limited.*
>
> 3. *Draw down*:
>
> *The Bank makes the Facility available to the Borrower subject to the fulfillment of the conditions precedent as set out in section 9 of this Loan Agreement and solely for the purpose as set forth above…….*
>
> ……
>
> *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 a/c no. 540 025 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. 540 025 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…….*

……"

20. On a perusal of clause 2 and 3 of the Loan Agreement which has been enclosed as Annexure-2 to the SCN, I find that the said loan was availed exclusively by Vintage for the purpose of subscribing to the GDR issue of Commex and the loan amount could only be transferred to EURAM Account No. 540025 of Commex. I further note that in terms of clause 6 of the said Loan Agreement, the EURAM Bank A/C no. 540025 of Commex will be pledged as security for the loan taken by Vintage from EURAM as set out in detail in the Pledge Agreement. The said Loan Agreement with EURAM Bank was signed by Mr. Arun Panchariya, M.D. of Vintage to which, a Pledge Agreement signed by the MD Late Shri Ketan Sheth of Commex on the same day, was annexed (as Annexure -2) thereby making it as an integral part of the said Loan Agreement. The execution of Loan Agreement dated May 5, 2009

prior to the GDR issue on May 25, 2009 shows that Vintage was already pre-decided by Commex to be the sole subscriber to the GDR issue. It was also pre-decided that Vintage will subscribe to the GDR by taking a loan equivalent to the total amount of the whole of GDR issue of Commex. This clearly indicates that Company was aware much before the issuance of GDR that the proceeds to be realized against the issuance of GDR would be held as security towards the loan amount sanctioned by EURAM Bank to Vintage to enable it to pay the subscription amount. Effectively, by devising such a scheme, the Noticees have restrained Commex from using the proceeds of the issuance of GDR for a considerable period for the stated purpose for which the fund was raised through issue of GDR. Prima facie, this does not appear to be a normal loan transaction between EURAM Bank and Vintage, rather, it appears to be a peculiar transaction wherein under the garb of loan agreement, the amount is merely rotated on paper from the Bank to the borrower and from the borrower to the Company's a/c in the same bank where it is kept as a security against the said loan availed by the borrower. The net result is that the Company is not really able to utilize the proceeds of GDR, as the same is pledged as security against the loan taken by the borrower to pay for the GDR subscription. Thus the money/fund only rotates on paper from one a/c to another but remains in the Bank in an encumbered state.

21. As pointed out earlier, on the basis of authorization given by the Board, Mr. Ketan Sheth had signed a Pledge Agreement with EURAM Bank dated May 05, 2009 under which he had pledged the GDR proceeds as security against loan availed by Vintage from EURAM Bank for subscribing to GDR of Commex. The preamble of the Pledge Agreement states as under:

"By Loan Agreement K050509-003 (hereinafter referred to as the "Loan Agreement") dated May 5, 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 9,991,579.60. The pledgor has received a copy of the Loan Agreement no. K050509-003 and acknowledges and agrees to its terms and conditions."

22. The pledge created in the Pledge Account stated as under:

"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 bill 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 US$ 9,991,579.60 existing from time to time at present or hereafter on the securities account(s) no. 540025 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. 540025 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein….

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.

2.3 The Bank herewith accepts the pledges established pursuant to section 2.1 hereof."

23. Further, following condition has been put in the Pledge Agreement for realization of the pledge.

"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 Pledger 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 transaction, 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."

24. On a perusal of the Pledge Agreement (enclosed as Annexure – 4 to the SCN) between the Company and EURAM Bank, one would clearly find that the said agreement was executed only to secure the obligations of the borrower, Vintage, on the basis of which it was granted a loan for 9.99 million USD from EURAM Bank. However, the Pledge Agreement also mentions that the Pledgor received copy of the Loan Agreement and acknowledges the terms of the Loan Agreement. This cross reference of Loan Agreement in Pledge Agreement and vice-versa indicates that Commex had, much before the actual issuance of GDR pre-decided on the future subscriber and the entire modus operandi through which GDR were issued by facilitating financing the subscriber and there was no intention to immediately bring the GDR proceeds to India to utilize for the stated needs of the Company. One interesting aspect of the entire matter is the timing of execution of Loan Agreement between EURAM Bank and the borrower i.e. Vintage and execution of Pledge Agreement between the said bank and the issuer company i.e. Commex. Both these agreements were dated 5th May, 2009. Since the Pledge Agreement has been incorporated in the Loan Agreement and made part of it as an annexure in terms of sequence of events, it appears that Pledge Agreement must have been signed first by Commex and handed over to Vintage to offer it to the Bank to enable it to sanction the loan. Accordingly, the bank has made the Pledge Agreement as a part of the Loan Agreement with Vintage.

25. The above observation is evident from the Pledge Agreement which states that the Pledgor (Commex) pledges to EURAM Bank, all the rights, title and interest in the securities deposited and balance of funds upto 9.99 million USD in the A/C no. 540025 with EURAM Bank (hereinafter referred to as "as Pledge Accounts"). I note that account no. 540025 was the escrow account where the GDR proceeds of Commex were deposited. This shows that Commex had pre-pledged to the EURAM

Bank, its entire GDR proceeds as security for the loan to be disbursed to a third party, viz:- Vintage, for making subscription to GDR of Commex on May 5, 2009, much before the actual GDR issue that took place on May 25, 2009. Thus, evidently Commex already knew in advance who would be subscribing to its entire GDR issue, for which Commex drew up a premeditated plan to facilitate its GDR issue in the manner as described above much before the actual GDR issue, with the prior approval of the Board of Directors of Commex which had passed necessary resolution to this effect enabling the CMD to execute the plan.

26. Further, from the clause 6 of the Pledge Agreement (pertaining to Realization of the Pledge), also extracted in preceding pages, I note that Commex had given consent to the Bank to apply the funds in the Pledged Accounts in case of default of repayment by the Borrower, Vintage for settling their obligations. As a consequence, even after the GDR issue, Commex did not have the GDR proceeds at its disposal until repayment of the loan made by Vintage. Further, on examination of the Bank A/C statement of Commex no. 540025 (enclosed as Annexure -5 to the SCN) and Vintage's Loan A/C no. 540012, I find that Vintage repaid the loan to EURAM Bank in several installments from June 8, 2009 to September 23, 2010 and each time, only after repayment of a loan installment by Vintage, on almost the same day of repayment, an equal amount of money was transferred from Commex's EURAM Bank A/c to its UAE subsidiary's A/c. Thus the Company did not actually receive the GDR issue proceeds till repayment of loan by Vintage. Therefore, in essence, the money equivalent to the GDR issue amount rotated within the EURAM Bank first as a loan in the name of Vintage and then it travelled as GDR proceeds to the account of Commex but there was actually no transfer of money to the Company against the GDR issue as on May 25, 2009 for the purpose of utilization. Details of receipt of GDR proceeds in the Commex 's bank a/c (maintained with EURAM Bank in

Austria, Annexure 5) as well as details of transfer of funds by Commex from its EURAM Bank Retail account to its UAE subsidiary and a summary of repayment of loan by Vintage are tabulated below:

Table no. 3

Date of credit of funds (GDR issue)	**Credit amount (USD) In Pledge Account**
May 22, 2009	9,991,579.60

Table no. 4

Date	Amount (USD) repaid by Vintage	Date	Amount (USD) of money transferred from Commex's a/c to its UAE subsidiary's a/c	Other transactions
08-Jun-09	200,000	09-Jun-09	200,000	
03-Aug-09	600,000	04-Aug-09	600,000	
20-Jan-10	223,000	21-Jan-10	220,000	
04-Feb-10	1,000,000	04-Feb-10	1,000,000	
08-Feb-10	1,000,000	08-Feb-10	1,000,000	
12-Feb-10	1,000,000	15-Feb-10	1,000,000	
09-Mar-10	1,000,000	09-Mar-10	1,000,000	
23-Mar-10	1,000,000	23-Mar-10	1,000,000	
30-Mar-10	105,000	30-Mar-10		-105,000*
15-Sep-10	1,000,000	15-Sep-10	1,000,000	
16-Sep-10	1,300,100	16-Sep-10	1,300,000	
		23-Sep-10		+423,542
23-Sep-10	1,563,480	23-Sep-10	1,987,022#	
Total	9,991,580		10,307,022	+318,542

27. On a perusal of corporate announcements made by Commex to BSE, it was observed that on May 26, 2009, the Company informed BSE that it had successfully completed placement of GDR and the Board, at its meeting held on May 25, 2009, approved & allotted equity shares of Rs. 2 each represented in the said GDR. Given

the way GDR were issued to one subscriber in a pre-planned manner as discussed above, I find that the Company, by making a disclosure on May 26, 2009 that GDR have been successfully subscribed tried to give a misleading impression to the Investors and to the market at large, about the potential of the Company, without disclosing the actual arrangement undertaken to ensure successful subscription to its GDR. The above disclosures are fraught with fraudulent intentions and is an example of an unfair trade practice which was inflicted by the Company on the shareholders and investors at large. The Company had successfully misled the Investors to believe that the shares of the Company have a good market abroad and have been very well received by foreign investors hence, its shares may be of great value in India as well as abroad.

28. Hon'ble Supreme Court in their judgment dated July 6, 2015 in *SEBI v. PAN Asia Advisors Ltd & anr.,* while dealing with issue of GDR by way of a similar arrangement of Loan and Pledge Agreement, observed that:-

"*the most relevant fact which is to be borne in mind is that the existence of GDRs is always dependent upon the extent of underlying ordinary shares lying with the Domestic Custodian Bank……..*

….that for creation of GDRs which can be traded only at the global level, the issuing company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing company in the market and the confidence built up with the investors both internally as well as at global level, the issuing company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a keen interest to invest in such GDRs. Mere desire to raise foreign investments without any scope for the issuing company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs…….

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

29. I find that despite having granted several hearing opportunities to make submissions, the Company has not furnished any explanation on merit and has not rebutted the allegations levelled against it in the SCN. As discussed above at para 10, the Company has merely expressed its helplessness in submitting any information because of the sudden demise of Mr. Ketan Sheth. As the record suggests, though the Company had long back decided in its board meeting held on January 30, 2008 to raise money by way of issuance of GDR and had also authorized the EURAM Bank to use the GDR proceeds as security in connection with loan that may be availed in connection with the subscription of the GDR, the Company never thought it important enough to disclose these facts to the exchange for dissemination to its shareholders and public at large. Interestingly, the Company has furnished a list of GDR subscribers to SEBI vide letter dated June 22, 2015, whereas actually the entire 1.91 million GDR (amounting to US$9.99 million) was subscribed by only one entity, i.e. Vintage. Thus Commex had submitted a blatantly false list of the subscribers. As discussed above in detail, the GDR issue would not have been subscribed by Vintage had Commex not given the required security towards the loan taken by Vintage from the EURAM Bank. However, the Company, through its misleading disclosures to BSE and at the same time by suppressing the facts from the Public view about its arrangement with EURAM Bank to facilitate financing of the GDR subscription by Vintage, has created a misleading and overrated impression about the potential of the Company in the market. I find that the entire scheme comprising a sequence of events starting from the non-disclosure of the resolution passed by the Company in

its meeting held on January 30, 2008, entering into a Pledge Agreement with EURAM Bank, making corporate announcement on May 26, 2009 about successful subscription of the GDR and not disclosing the pledge and loan arrangement to the investors, has resulted in disclosure of misleading and distorted information to the stock exchanges. All the above acts of the Company qualify to be called as fraudulent activity and unfair trade practice under the relevant provisions of securities law.

30. In this respect, I note that the Hon'ble Supreme Court in the case of *SEBI v. PAN Asia Advisors Ltd & anr.* has held that:

" Any Act which caused any infringement in such trading of those underlying shares by virtue of any malfeasance or misfeasance or misdeeds committed by any person under the Act which worked against the interests of the investors in securities and the securities market, the SEBI was entitled to proceed against such persons who are involved in any of those allegations"

31. Further, Hon'ble Securities Appellate Tribunal (hereinafter referred to as "SAT") in its order dated October 25, 2016 in the case of *PAN Asia Advisors Ltd. & anr. v. SEBI*, observed the following:

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

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

…….Thus, the investors in India were made to believe that in the global market the issuer companies have acquired high reputation in terms of investment potential and hence the foreign investors have fully subscribed to the GDRs, when in fact, the GDRs were subscribed by AP

through Vintage which was fully owned by AP. In other words, PAN Asia as a Lead Manager and AP as Managing Director of PAN Asia attempted to mislead the investors in India that the GDRs have been subscribed by foreign investors when in fact the GDRs were subscribed by AP through Vintage. Any attempt to mislead the investors in India constitutes fraud on the investors under the PFUTP Regulations"

32. In view of the above, I have no hesitation in holding that the acts of concealing and suppressing of material facts about the fraudulent arrangements made through a Pledge and Loan Agreement with a foreign bank to issue GDR by the Company is nothing but fraud committed upon the innocent investors of the securities market and therefore such acts are in violation of provisions of Section 12A(a),(b),(c) of the SEBI Act and Regulations 3(a),(b),(c),(d), 4(1),4(2)(f),(k),(r) of PFUTP Regulations, as have been alleged in the SCN.

ISSUE NO. 2: *Whether the directors i.e. Noticee nos. 2 to 4 have violated Sections 12A(a), (b), (c) of the SEBI Act read with Regulations 3 (a), (b), (c), (d) and 4(1) of PFUTP Regulations?*

33. I note from the minutes of the Commex's Board Meeting dated January 30, 2008 that the directors of Commex namely Mr. Ketan Sheth (who, as per the information provided by the Company, passed away on October 09, 2016) Mr. Adi Cooper (Noticee No.2), Mr. Hemant Sonawala (Noticee No.3) and Mr. Kishore Hegde (Noticee No.4) had attended the said Board Meeting and authorized the EURAM Bank to use the Commex's GDR proceeds deposited with EURAM Bank as security in connection with loan. The relevant extracts of the resolution passed in the said Board meeting is as under:-

"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 (emphasis supplied) as well as to enter into any Escrow Agreement or similar arrangements if and when so required."

34. I would now deal with the replies and submissions made by the Directors of the Company in their defence. I note that Mr. Adi Cooper (Noticee no. 2) has admittedly attended the Board Meeting dated January 30, 2008, but before me he has submitted that he has not violated any law as a director. Mr. Cooper has stated that the GDR were issued on May 25, 2009 and on the said date he had ceased to be a director of the Company. Prior to that the Company had passed another resolution on March 13, 2009 and on that date too he was not a director hence, the alleged acts of non-disclosures and misleading disclosures by the Company etc. occurred after he ceased to be a director about which he has no knowledge. It may be stated here that Noticee no. 2, Mr. Cooper is shown as the Whole-Time director as per the MCA record submitted by Mr. Cooper as enclosure to his reply and on perusal of the same, it is observed that Mr. Cooper has indeed ceased to be a Whole-Time director of Commex w.e.f. October 10, 2008. However, the fact remains that as a Whole-Time director, he has attended the meeting of the Board held on January 30, 2008 and in the said Board meeting the GDR proceeds were authorized to be placed as security for loan. As discussed earlier the authorization given by the Board to use the GDR proceeds as security for loan was the starting point of the fraudulent arrangement through which the Company facilitated the financing of GDR subscription by Vintage, and neither such an arrangement nor the resolution passed by the Board authorizing such an arrangement was disclosed to the shareholders of the Company or the investors of the securities market through BSE. Under the provisions of

Companies Act, a Whole-Time director is a director in the whole time employment of the company. Under these circumstances, being a part of the Board which authorized such a fraudulent arrangement as discussed above, Mr. Cooper is liable to be held as a party to the fraudulent act of the Company pledging of the GDR proceeds as collateral for loan taken by Vintage for making subscription to the GDR.

35. Mr. Cooper's contention is that the resolution merely authorized the Company to use funds deposited in the bank as a security in connection with loan, which must necessarily be read as a loan, if any, to be taken by the Company in accordance with law and that by passing the said resolution the Board did not authorize to use the GDR proceeds as security for loan to be given by EURAM to Vintage. However, this explanation offers no sound reason as to why any Company or its Directors would at all decide at the time of planning to raise funds through an issue of GDR, to keep the same as a security for any loan, when even thought of availing any loan against the future GDR proceeds was not in anybody's mind. By passing such a resolution, the Board has explicitly indicated that the GDR proceeds were not meant to be brought in India but to be kept as a security against a loan the details of which was not meant to be disclosed to anyone at that time. Hence, Mr. Cooper cannot absolve himself fully from the burden of adverse consequences of the said resolution even though he was not present in the Company at the time of GDR issue and execution of the Loan and Pledge Agreement. In this regards, I refer to the order of Hon'ble SAT in case of *Ketan Parekh v. SEBI*, wherein Hon'ble SAT had categorically held that in order to find out whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism, will depend upon the intention of the parties which could be inferred from the attending circumstances of the cases, because direct evidence in such cases may not be available. I also find it pertinent to make reference

to judgment of Hon'ble Supreme Court in *SEBI v. Kishore Ajmera;* Civil Appeal No. 2818 of 2008 (dated February 23, 2016) in this regard:

"It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion…"

36. Considering that Mr. Adi Cooper was the Whole Time Director of the Company and has admittedly participated in the Board meeting dated January 30, 2008, prior to passing the said resolution it was his duty to ask the management a pertinent question as to why GDR proceeds should be kept as security for any loan when the same was being raised to meet the stated objectives of the Company and if it is to be kept as security, how would the GDR proceeds be used to meet the stated objectives of the issue. His subsequent resignation does not absolve him completely from his acts discharged during his tenure as a director of the Company, which cast a responsibility to act diligently, in the interest of Company and the shareholders. Needless to point out here that the phrase 'acting diligently' embodies in itself the duty not be careless and casual in approach while taking decisions. The Hon'ble Supreme Court in *Official Liquidator v. P.A. Tendolkar (1973) 1 SCC 602* has observed that

"*A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of*

dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially".

37. In view of the above, I find that Mr. Adi Cooper (Noticee no. 2) has to be held liable for the violation charged under the SCN.
38. Moving on to the independent director of the Company Mr. Hegde (Noticee no. 4), he has submitted that he was not attending the Board meetings of the Company quite regularly and cannot recall if he attended any Board meetings held in 2009. He stated that he cannot furnish the details of his attendance as Company has not provided him with access to the attendance registers for 2009 onwards.
39. The Noticee no. 4 has not disputed his directorship in the Company during the period of issue of GDR but has submitted that he had not attended the Board Meeting dated January 30, 2008 during which the above-discussed resolution pertaining to GDR was passed. He has enclosed a certified copy of the attendance register of the said Board meeting to support his claim of absence, whereas the minutes of the meeting as made available by the Company during investigation and which has been enclosed to the SCN served on Mr. Hedge find the name of Mr. Hedge as one of the directors who attended the meeting. To this, no satisfactory reply has been put forth by Mr. Hegde to explain how his name appears in the minutes of the meeting. I also note that the document i.e attendance register produced by Mr. Hedge to prove his absence in the above Board Meeting is titled as "Attendance of the Directors at the Board Meeting of IT People (India) Limited held on 30th January, 2008." The document is hand written and as per its title, it is supposed to capture the name of only those who were present and attended the meeting of the board held on 30th January, 2008. I see no reason as to why the attendance sheet would mention the names of even those who were absent, or would list out the names of all the directors including the absentee directors. Had it been the

case, the title of the attendance register would have been probably "Directors of the Company." The documents submitted by Mr. Hedge raises serious suspicion on its credibility when confronted with the minutes of the Board meeting held on 30th January 2008, which bears his name as a director who was present in the meeting.

40. I further find that Mr. Hedge was also the Chairman of the Audit Committee of the Company. During the course of hearing, Mr. Hedge was asked to furnish minutes of the meetings of the Audit Committee, for the above relevant period when the Company was planning to raise funds by issuing GDR. However, he has submitted that he has written to the Company and will forward the same on receipt. On a perusal of the Annual Report of the Company pertaining to the period 2009-10, I find that Mr. Hegde has been shown to have attended all 11 meetings of the Board including the one held on May 25, 2009 during which the Company informed the Board about successful placement of GDR. It is also difficult to understand as to how the minutes of the Board meetings of the Company could show the Noticee no. 4 to be present on two consecutive meetings on January 30, 2008 and April 30, 2008, while according to the attendance register of the Company produced by Mr. Hegde, it shows otherwise. It is also not clear why the Noticee no. 4 did not take any objection to the same till date and complain to the management or Company Secretary of the Company for false reporting about his attendance in Board Meetings. On this background, I cannot persuade myself to accept that Noticee no. 4 was unaware of the above-discussed manner in which the Company went for GDR issue. I find that Mr. Hedge has failed to submit documents satisfying his innocence and to convince me that in the capacity of a director, and as the Chairman of the Audit Committee he had taken all possible and expected steps to clarify himself about all the aspects of the proposed GDR issue by asking the management all pertinent questions viz; whom the GDR were allotted, why the GDR proceeds did not reach the Company and how

were the proceeds utilized, whether the proceeds were used as security against any loan etc. One of the objects as per the offer document for GDR of Commex was to utilize the funds for payment for current acquisition and investment and loan to subsidiary. I find that no records have been submitted by the Company to prove the utilization of funds in terms of the objects of the issue nor the directors have ever caused to verify the utilization of such proceeds from the management. By maintaining silence and not raising any query at any point during his tenure I find the Noticee no. 4 is equally liable for the fraudulent acts committed by the Company and hence is liable to be issued directions as per the SCN.

41. As regards Noticee no. 3, Mr. Hemant Sonawala, the Company in its letter dated July 18, 2017 and also other Noticees who appeared before me have stated that Mr. Hemant Sonawala has since expired.

42. Keeping in view the above discussions, I can observe that Noticees no. 2 to 4 can be stated to be part of a scheme through which issue of the GDR by the Company was effected through a fraudulent arrangement of Loan Agreement and Pledge Agreement. Hence I find the conduct of these directors to be inimical to the interests of the Company, and their dubious conduct and unscrupulous acts during the relevant period are in violation of provisions of Section 12A(a),(b),(c) of the SEBI Act and Regulations 3(a),(b),(c),(d), 4(1) of PFUTP Regulations.

43. The Company and the Noticees have used the GDR mechanism to dupe the Indian investors. The Company has not divulged the details of the underlying fraudulent arrangement of the Loan Agreement and Pledge Agreement in the GDR issue in its disclosure in the Indian market and by stating that the GDR were successfully placed, it has deliberately given a misleading appearance of great value and potential of the Company in the markets. Such a misleading disclosure and specious representation about the affairs of the Company tantamount to fraud on the investors with a motive

to further the interest of the Company in the securities markets at the cost of innocent investors interest.

44. Herein, I rely on the judgment of Hon'ble Supreme Court in the case of *SEBI v. Rakhi Trading, holding* that Regulation 4(1) of PFUTP Regulations in clear and unmistakable terms has provided that *"no person shall indulge in a fraudulent or an unfair trade practice in securities"* and while referring to its own judgment in *SEBI v. Shri Kanhaiyalal Baldevbhai Patel and Ors*, further held that

> *"31 Although unfair trade practice has not been defined under the regulation, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear cut generalized definition of the 'unfair trade practice' may not be possible to be culled out from the aforesaid definitions. Broadly trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions. It is to be noted that unfair trade practices are not subject to a single definition; rather it requires adjudication on case to case basis. Whether an act or practice is unfair is to be determined by all the facts and circumstances surrounding the transaction. In the context of this regulation a trade practice may be unfair, if the conduct undermines the good faith dealings involved in the transaction. Moreover the concept of 'unfairness' appears to be broader than and includes the concept of 'deception' or 'fraud'……..*
>
> *……Having regard to the fact that the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not have to labour much on the meaning of unfair trade practices in securities. Contextually and in simple words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market."*

45. Hon'ble Supreme Court, further, in the case of Rakhi Trading has appreciated that fairness, integrity and transparency are the hallmarks of the stock market in India and the stock market is not a platform for any fraudulent or unfair trade practice. Hon'ble

Court has observed that *"The SEBI Act, 1992 was enacted to protect the interest of the investors in securities. Protection of interest of investors should necessarily include prevention of misuse of the market."* The Noticees' conduct amounts to misuse of the market and abuse of the GDR mechanism to project a misleading financial prospect about it to the Indian investors some of whom might have fallen prey to it and invested in its shares without knowing the truth behind the GDR issue. Such a fraudulent conduct has to be sternly dealt with for the protection of interest of the securities market.

DIRECTIONS

46. In view of the above, in exercise of powers conferred upon me under Sections 11, 11B read with Section 19 of the Securities and Exchange Board of India Act, 1992, in order to protect the interest of investors and the integrity of the securities market and considering the facts of the case as well as the specific role played by the respective Noticees as detailed in previous paragraphs and to meet the ends of justice, I hereby restrain the following Noticees from accessing the securities market and further prohibit them from buying, selling or otherwise dealing in securities, directly or indirectly, for the period mentioned below, from the date of this order. During the period of restraint, the existing holding of the Noticees including units of mutual funds, shall remain frozen:

S.No.	Names of the Noticee	PAN	Number of years
1.	**M/s. Commex Technology Ltd.**	**AABCG0986D**	**Five years**
2.	**Mr. Adi Cooper**	**AAFPC0271N**	**Two years**
3.	**Mr. Kishore Hegde**	**AAFPH2481K**	**Two years**

47. As stated above, the Company in its reply and the Noticees during the hearing on November 13, 2018 submitted that Noticee no. 3, Mr. Hemant Sonawala has expired, hence, no direction is passed against Mr. Hemant Sonawala.

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

49. A copy of this order shall be forwarded to the Noticees, all the recognized stock exchange, depositories and registrar and transfer agents for ensuring compliance with the above directions.

-Sd-

DATE: FEBRUARY 28, 2019 **S. K. MOHANTY**

PLACE: MUMBAI **WHOLE TIME MEMBER**