WTM/ AB /EFD-1/DRA-1/11/2019-20

SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: SHRI ANANTA BARUA, WHOLE TIME MEMBER

ORDER

Under Sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 in the matter of Aksh Optifibre Ltd.

In respect of: -

Noticee No.	Name of the Noticees	PAN
1	M/s. Aksh Optifibre Ltd.	AAACA0062F
2	Mr. Kailash S Chaudhary	AAHPC7797B
3	Mr. P.F. Sundesha	AAAPF1710G
4	Mr. B. R. Rakhecha	AAEPR7923D
5	Mr. Narendra Kumbhat	AAJPK8470D
6	Mr. Arun Sood	AAJPS3837J

The aforesaid entities are hereinafter individually referred to by their respective names/noticee numbers and collectively as "the Noticees".

Background:

1. SEBI investigated the issuance of Global Depository Receipts ('**GDRs'**) in the overseas market by Aksh Optifibre Ltd. ("**the Company/ AOL**") during the period August 01, 2010 to September 30, 2010 which revealed that AOL issued 1,165,750 GDRs (amounting to USD 25.00 million, approximately Rs. 117.20 crore) on September 1, 2010 on the Luxembourg Stock Exchange, representing 5,82,87,500 equity shares as underlying. Summary of the GDR issue of AOL 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
01-Sep-2010	1.17 (at USD 21.45 each GDR)	25.00	DBS Bank, Mumbai	5,82,87,500	The Bank of New York Mellon	Prospect Capital Ltd., London	EURAM Bank, Austria	Luxembourg Stock Exchange

Show Cause Notice, Reply and Personal Hearing:

2. A Show Cause Notice dated May 23, 2018 ('**SCN**') containing the findings of the investigation was issued to the Noticees asking them to show cause as to why action should not be taken for the alleged violation of the provisions Section 12A (a), (b), (c) of the Securities and Exchange Board of India Act, 1992 ('**SEBI Act'**) read with Regulations 3 (a), (b), (c), (d) and of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('**SEBI (PFUTP) Regulations'**). Along with the SCN, copies of following documents relied on to substantiate the allegations, were enclosed as Annexures:

Annexure No.	Details of Annexure
1	Letter from AOL dated 06/05/2015 to SEBI.
2	Copy of the Minutes of the Board meeting of AOL held on May 17, 2010, authorizing opening of bank account for GDR issue.
3	List of Corporate Announcements made by AOL on BSE from 30/11/2009 to 02/09/2010.
4	Copy of Loan Agreement dated August 16, 2010 executed between Euram Bank and Vintage.
5	Copy of Pledge Agreement dated August 16, 2010 executed between AOL and Euram Bank.

6	Copy of Escrow Account Statement of AOL with Euram Bank.
7	Copy of Loan account statement of Vintage with Euram Bank.
8.	Copy of Retail Account Statement of AOL with Euram Bank.
9.	Extract of relevant provisions of law alleged to have been violated.

3. The aforesaid SCN contained following allegations:

a. AOL issued 1,165,750 GDRs (amounting to USD 25 million) on September 1, 2010, equivalent to 5,82,87,500 equity shares.

b. Vintage FZE ("**Vintage**") was the only entity who had subscribed to 1,165,750 GDRs (amounting to USD 25 million) of AOL and the subscription amount was paid by obtaining loan from European American Investment Bank AG ("**EURAM Bank**").

c. AOL provided security towards the loan obtained by Vintage, through Pledge Agreement signed between AOL and EURAM Bank on August 16, 2010 ('**Pledge Agreement'**) (enclosed as Annexure 5 to the SCN), wherein AOL pledged GDR proceeds against the loan availed by Vintage for subscription of GDRs of AOL.

d. Noticee no. 2, Managing Director of AOL, executed the Pledge Agreement with EURAM Bank (i.e. AOL provided security for loan availed by Vintage from EURAM Bank for subscription of GDRs of AOL). The aforesaid Pledge Agreement was an integral part of Loan Agreement entered into between Vintage and EURAM Bank on August 16, 2010 ('**Loan Agreement'**) (i.e. Vintage availed loan of USD 25 million from EURAM Bank for subscription of GDRs of AOL). These agreements enabled Vintage to avail the loan from EURAM Bank for subscribing to GDRs of AOL. The GDR issue would not have been subscribed, had AOL not given any such security towards the loan taken by Vintage.

e. The Company reported to the stock exchange (BSE) on September 02, 2010 that *"…the Company has successfully closed its GDR issue of US$ 25Mn and the Board of Directors of the Company in its meeting held on September 01, 2010, has allotted 58,287,500 equity shares underlying 1165750 GDRs…."* which might have made investors believe that the said GDR issue was genuinely subscribed. Further, AOL furnished wrong information to SEBI by providing false list of GDR subscribers. Therefore, the entire scheme involving entering into Pledge Agreement, making corporate announcement that the GDRs were successfully subscribed without disclosing the arrangement to the investors resulted in publication of misleading news to the stock exchanges which contained information in distorted manner and which might have influenced the decision of the investors. Such announcements misled Indian retail investors and induced investors to deal in shares of AOL in Indian capital market. Therefore, the scheme of issuance of GDRs was fraudulent and thus AOL was alleged to have violated the provisions of section 12A (a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d), 4(1), 4(2)(f), (k), (r) of SEBI (PFUTP) Regulations and Noticee no. 2 to 6 are alleged to have violated section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of SEBI (PFUTP) Regulations.

4. The Noticees were advised to file their reply within a period of 21 days from the date of receipt of the SCN. In response to SCN, the Noticees vide letter dated 22/06/2018, had requested for copy of the investigation report and asked for physical inspection of the original documents relied upon in the SCN. The Authorised Representatives of the Noticees were granted physical inspection of documents on 12/07/2018. However, the Authorised representatives expressed their dissent on not providing inspection of investigation report and not being able to inspect the originals of documents such as Escrow Agreement, Pledge Agreement, Loan Agreement

or copies of letter/communication by which the aforesaid agreements were obtained by SEBI. The Noticees have filed their reply dated 11/01/2019 on 14/01/2019. The Noticees were granted personal hearing on 16/01/2019 and the Advocates representing all the Noticees were heard on the said date. The Noticees filed their written submissions dated 25/01/2019. The contentions raised by the Noticees are as follows:

a. That the documents and records annexed to the SCN are mere photocopies and they are not duly authenticated as being photocopies of the originals. They further contend that it is trite law that a document cannot be considered as evidence of a fact unless it satisfies the requirement of Indian Evidence Act, 1872 and the annexures to the SCN do not satisfy the requirement of Indian Evidence Act, 1872. Reliance is placed on the judgments of the Hon'ble Supreme Court in the matters of *M Chandra vs. M. Thangamuthu & Anr (2010) 9 SCC 712, Ashok Dulichand v. Madhvilal Dube & Anr (1975) 4 SCC 664* and *Narbada Devi Gupta vs. Birendra Kumar Jaiswal & Anr (2003) 8 SCC* .745.

b. That the present proceedings are contrary to the principles of natural justice, since, they have not been provided with the copies of the documents and records relied upon by SEBI, including but not limited to the investigation report and the originals of Loan Agreement, Escrow Agreement and Pledge Agreement, for verification.

c. That the SCN does not disclose the precise action that is proposed to be taken against the Company and other noticees and therefore, denies the Noticees an opportunity to make submissions regarding the appropriateness of such action. Reliance is placed on the decision of the Hon'ble Supreme Court in the matter of Gorkha

Security Services v. Government (NCT of Delhi) & Ors. 2014 (9) SCC 105.

d. Noticee no. 1 submits that the allotment of GDR's was made by the Company as per the list of subscribers provided by the Lead Manager and the list of subscribers that was received from the Lead Manager was provided to SEBI during investigation. Noticee no. 1 denies that they have provided information which they knew to be wrong to SEBI and that there was no reason to suspect that the list of subscribers provided to it by the Lead Manager was not correct.

e. The Noticee no. 1 and 2 deny to have executed any Pledge Agreement. Noticee no. 1 submits that the Board of Directors did not authorize EURAM Bank to consider deposits in the Company's account to be considered as security for a third party's loan. Noticee no. 1 further submits that the records of the Company, especially the minutes of the meeting of the Board of Directors and Shareholders, shows that the Company did not consent to or authorize the creation of any Pledge on the deposits of the bank account in favour of EURAM Bank.

f. Noticee no. 1 contend that it was not aware of any restriction on the use of funds – being proceeds of the GDR issue deposited in the Company's account and that they did not face any such restriction when they instructed EURAM Bank to transfer funds to AOL FZE, their subsidiary company based in Dubai.

g. Noticee no. 1 submits that even as per the terms of the purported Loan Agreement between Vintage and EURAM Bank, the loan was provided to Vintage to 'take down' the GDR's issue of the Company and not to subscribe to the same. Noticee no. 1 argues that 'take down' is a financial term that denotes an arrangement between the subscriber to securities issued and the entity that takes down the issue wherein by paying the subscription monies payable by the

subscribers, the securities issued are transferred to take down entity. Noticee no. 1 submits that SEBI has not enquired with either Vintage or the subscribers regarding the aforesaid take down arrangement and erroneously alleged that Vintage had availed the loan facility to subscribe to the GDR's of the Company.

h. Noticee no. 5 and 6 submit that they were the independent directors of the Company and not involved in the day to day management of the affairs of the company. Noticee no. 3 and 4 also contend that they were/are not the executive directors of the Company.

i. The Noticees contend that the impugned GDR issue took place in 2010 and the SCN is issued in May 2018, no reasons are given for the delay of nearly 9 years in making allegations regarding one of the 3 GDR issues brought by the Company. Hence, the present proceedings ought to be withdrawn on the ground of delay and latches.

j. The Noticees contend that after the corporate announcement on 2/9/2010, regarding successful closure of GDR issue in 2010, the price of the scrip of the Company fell by 1.66% on BSE and 1.43% on NSE on 3/09/2010. This clearly shows that investors were not influenced or prejudiced by the corporate announcement made by the Company.

k. It is contended by the Noticees that the Loan Agreement does not inspire confidence regarding its credibility since, it contains two dates of execution i.e. 16/08/2010 on the 1st page and 26/08/2010 on the last page. Similarly, it is contended that the credibility of the Pledge Agreement is doubtful because it does not contain the common seal of the Company and the signature of Noticee no. 2 is only on the last page of the Pledge Agreement.

***Consideration of issues and findings*:**

5. I have considered the SCN along with the findings of the Investigation and all the Annexures to the SCN, replies received to the aforesaid SCN and submissions made by the Noticees pursuant to the hearing granted to them; and all other relevant material available on record.

6. Before proceeding further, the relevant provisions of law are reproduced hereunder:

***SEBI Act* –**
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;

SEBI (PFUTP) Regulations, 2003

Regulation 3. Prohibition of certain dealings in securities

"No person shall directly or indirectly

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

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

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

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

Regulation 4. 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:—

(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.

7. It is noted that Vintage had opened a loan account (a/c no. AT36193400**5400120441**) with EURAM Bank and AOL had opened a retail account (a/c no. AT24193400**5800270101**) with EURAM Bank. SCN observed that Vintage obtained loan of USD 25 million by entering into a Loan Agreement dated August 16, 2010 with EURAM Bank. The Loan Agreement was signed by Mr. Arun Panchariya in his capacity of Managing Director of Vintage for subscription of GDRs of AOL. I note that Loan Agreement states: *"Nature and purpose of facility" is "To provide funding*

enabling Vintage FZE to take down GDR issue of 1,165,750 Luxembourg public offering and may only be transferred to Euram account no. 580027, Aksh Optifiber Limited." I note that this account is same where AOL deposited its GDR proceeds. Further, with regard to securities for the loan, the Loan Agreement states: "*....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:*

1) ----------
2) *Pledge of the account no. 580027 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."*

8. From the above clauses of the Loan Agreement, I note that Vintage had availed the loan facility to the extent of USD 25 million from EURAM Bank to subscribe to GDRs of AOL.

9. I note that a Pledge Agreement dated August 16, 2010 was entered into between AOL (as Pledger) and EURAM Bank (as Pledgee). Pledge Agreement was signed by Noticee no. 2 (Managing Director of AOL). The preamble of the Pledge Agreement states as under:

> *"By loan agreement K160810-002 (hereinafter referred to as the "Loan Agreement") dated 16 August 2010, 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 25,005,337.50. The Pledgor has received a copy of the Loan Agreement No. K160810-002 and acknowledges and agrees to its terms and conditions."*

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 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 USD 25,005,337.50 - existing from time to time at present or hereafter on the securities account(s) no. 580027 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. 580027 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein. The interest rate on deposit in the amount of the facility amount of the Loan Agreement will be fixed at 1.00% p.a.

(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.

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

Further, following conditions were provided 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 Account 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 transaction, a 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."

10. From perusal of the Pledge Agreement, it is observed that, the account no. 580027 of AOL, maintained with EURAM Bank, was opened to keep the GDR proceeds and it is evident that AOL pledged GDR proceeds before issuance of GDRs to secure the rights of EURAM Bank against the loan given by EURAM Bank to Vintage for subscription of GDR issue of AOL.

11. Perusal of the aforesaid Loan Agreement and Pledge Agreement reveals that EURAM Bank granted loan to Vintage specifically for subscription of GDRs of AOL.

12. I note that the Noticees have raised certain doubts about the credibility of the Loan Agreement since, it contains two dates of execution i.e. 16/08/2010 on the 1st page and 26/08/2010 on the last page. I note that the Loan Agreement was executed on one single day itself .i.e. 16/8/2010, however, the date entered by Mr. Arun Punchariya, while signing on behalf

of Vintage on the last page of the Loan Agreement could have been inadvertently mentioned as 26/8/2010 instead of 16/8/2010. This is evident from the reference made in the 'Preamble para' of the Pledge Agreement which clearly makes a reference to the Loan Agreement as dated 16/08/2010. Further, if it is assumed that the Loan Agreement was executed on 26/08/2019, then it leads to absurdity, as to how would the Pledge Agreement which lays down the details of security to be created for the Loan arrangement, be executed prior to the execution of the Loan Agreement itself. Hence, I note that date of execution of the Loan Agreement is 16/8/2010 and the date appearing on the last page of the Loan Agreement could be an inadvertent error. Further, the Pledge Agreement specifically refers and identifies the Loan Agreement by way of its unique number i.e. 'K160810-002', which is the same Loan Agreement that is enclosed as Annexure 4 to the SCN. Hence, there is no confusion with regards to the identity/credibility of the Loan Agreement. In any case, there is the existence of the Pledge Agreement executed by Noticee no. 1 (signed by Noticee no. 2 on behalf of Noticee no. 1), which proves that AOL had pledged its GDR proceeds with EURAM bank, for the loan taken by Vintage to subscribe to the GDR of AOL.

13. I observe that subscription of GDRs was done through loan availed by Vintage from EURAM Bank. The Escrow account statement of AOL maintained with EURAM Bank shows that GDR subscription money was received from only one entity i.e. Vintage. Further, it is observed that the retail bank account in which GDR proceeds were deposited, was in the name of AOL but the amount deposited in the account was not at the free disposal of AOL as the same was kept as collateral prior to issuance of GDRs for the loan availed by Vintage. This is also evident from the following table which shows that AOL's retail bank account no. AT24193400**5800270101** held with EURAM Bank where GDR proceeds were deposited was debited on the same day with almost the same amount when Vintage's loan was repaid.

Date of transfer of funds	Amount repaid by Vintage (USD)	Amount of funds transferred from AOL's EURAM Bank a/c to 1) AOL's UAE subsidiary's bank a/c and 2) Other entities
29.10.2010	600,000.00	597,300.00
09.11.2010	2,000,000.00	2,000,000.00
24.11.2010	5,000,000.00	5,000,000.00
07.12.2010	4,000,000.00	4,000,000.00
14.12.2010	4,000,000.00	4,000,000.00
21.12.2010	2,500,000.00	2,500,000.00
28.12.2010	812,000.00	811,811.00
15.02.2011	2,000,000.00	1,999,998.32
16.02.2011	1,400,000.00	1,400,000.00
24.02.2011	250,000.00	250,000.00
28.02.2011	400,000.00	
02.03.2011		400,000.00
04.03.2011		2,488.98
17.03.2011	2,043,337.50	2,120,000.00
Total	**25,005,337.50**	**25,081,598.30**

14. It is clear from the above table that it is not a mere co-incidence that only after Vintage repaid the loan amount, more or less equal amount of money was transferred from AOL's EURAM Bank account to 1) AOL's UAE based subsidiary's bank account and 2) certain entities for payments. From the above table, it is evident that the amount transferred from AOL's EURAM Bank account was dependent on the repayment of the loan by Vintage. Thus, funds kept in AOL's retail bank account were not at the free disposal of AOL.

15. It is argued by the Noticees that the funds kept in AOL's retail EURAM Bank account were invested in money market instruments and interest was earned on them. Hence, they contend that if there was any restriction on use of funds, then investments in money market instruments would not have been possible. I note that though the funds in the retail bank account of AOL were invested in money market instruments by EURAM Bank, neither the securities (credited through money market instruments), nor the funds in the retail bank account, were at free disposal of AOL. It is pertinent to refer to Clause 2.1.1 of the Pledge Agreement in this regard, which states as under:

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 USD 25,005,337.50 - existing from time to time at present or hereafter on the securities account(s) no. 580027 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

Thus, the securities as well as the funds in the AOL's bank account with EURAM Bank were continued to be pledged till Vintage made repayments into its Loan account with EURAM bank.

16. Further on perusal of certified copy of AOL's Board Resolution dated May 17, 2010, provided by EURAM Bank, I find that, the said resolution pertains to opening of bank account with EURAM Bank, Austria for GDR issue. The said resolution states 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."

Resolution also states that:

"RESOLVED FURTHER THAT Dr. Kailash S. Chaudhari, Managing Director and Mr. Satyendra Gupta Chief Financial Officer and Mr. Gaurav Mehta, the Company Secretary of the Company, be and are 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."

Resolution further states that:

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

Emphasis added

17. Thus, in accordance with the aforesaid board resolution as provided by EURAM Bank and also furnished by AOL, the board of directors of AOL authorized EURAM Bank to use the AOL's GDR proceeds deposited with EURAM Bank as security in connection with loan if any and authorized Mr. Kailash S. Chaudhari, Managing Director (Noticee no. 2), Mr. Satyendra Gupta Chief Financial Officer and Mr. Gaurav Mehta, the Company Secretary to sign, execute, any application, agreement etc. as may be required by the bank. I note that, copy of the resolution available with EURAM Bank was certified by Mr. Narendra Kumbhat (Noticee no. 5) and Mr. Arun Sood (Noticee no. 6). I also note that Noticee no. 2 to 6 were also present in the said board meeting wherein the aforesaid board resolution was passed.

18. I note that based on the aforesaid copy of Board resolution submitted to EURAM Bank, Mr. Kailash S. Chaudhari (Noticee no. 2), Managing Director of AOL signed a Pledge Agreement dated 16/08/2010, wherein AOL pledged GDR proceeds as collateral against loan availed by Vintage from EURAM Bank. Thus, Company's authorization to EURAM Bank to use the funds so deposited in the said bank account as security in connection with loan, if any, depicts that the said board resolution was to provide security in connection with this loan.

19. However, I note that Noticee no. 1 and 2 have denied the execution of the Pledge Agreement. Noticee no. 1 submits that the Board of Directors did not authorize EURAM Bank to consider deposits in the Company's account to be considered as security for a third party's loan. They also contend that the purported Pledge Agreement does not contain the common seal of the Company, neither does the Pledge Agreement bear the signature of Noticee no. 2 on all pages of the purported Pledge Agreement. In this connection, I note that section 54 of the Companies Act, 1956 specifically provides as under:

"Save as otherwise expressly provided in this Act, a document or proceeding requiring authentication by a company may be signed by a director, the manager, the secretary or other authorised officer of the company, ***and need not be under its common seal."***

Emphasis added

Thus, it is evident from the said provision of the Companies Act, 1956 that application of common seal was not the mandatory requirement of law, unless it was specifically provided in the said Act. I also note that signature of the executing parties on all pages of a deed/agreement is a matter of practice, but does not vitiate/invalidate the other clauses of the agreement/contract where signatures are not affixed on each page. In the instant case, the Pledge Agreement bears the signature of Noticee no. 2, acting on behalf of Noticee no. 1, only at the last page of the Pledge Agreement. However, a closer look at the practice followed by EURAM Bank in all the Arun Panchariya linked GDR cases shows that affixing of signatures only at the last page (as opposed to initials on all pages) of a contract was the standard practice that was followed by EURAM Bank.

20. I note that Noticee no. 1 and 2 have plainly denied the execution of the Pledge Agreement without providing any cogent proof in support of such claim. On the other hand, the existence of the Pledge Agreement is also corroborated by the attending circumstances such as the board resolution of AOL, dated May 17, 2010 authorizing EURAM Bank to use the GDR proceeds as security in connection with loan if any, and also the evidence that shows that the funds kept in AOL's retail bank a/c. with EURAM Bank were not at the free disposal of the Company (as shown in para 13 and 14 above), cogently support the existence and execution of the Pledge Agreement. Further, the existence of the Pledge Agreement is also further corroborated from a letter from EURAM Bank dated 21/03/2011 which was addressed to Vintage, confirming the repayment of the Loan taken by Vintage. The said letter emphatically stated that as a consequence of the

repayment of Loan by Vintage, the securities as defined in the Pledge Agreement dated 16/08/2010 were no longer blocked as security in connection with the said loan. I note that, a copy of the said letter was also marked as 'CC' to Noticee no. 1. Further, on close observation of the signatures of Noticee no. 2 on the 1) Authorization letter addressed to SEBI authorizing M/s. Joby Mathews & Associates to appear before SEBI on behalf of Noticee no. 2, 2) the Pledge Agreement and 3) the Escrow Agreement dated August 16, 2010, I find that, the signature of Noticee no. 2 on all these documents appears to be same and no distinction can be made out. I also note that even after service of SCN, alongwith the copy of Pledge Agreement and Loan Agreement as annexures, neither Noticee no. 1, nor Noticee no. 2 (MD whose signature is found on the Pledge Agreement), has taken any steps to complain with any authority or initiate any legal action in this regard. None of the said Noticees, have filed any documentary proof to show that any such legal action has been taken. Hence, I do not find any merit in the contention raised by the said Noticees that Noticee no. 1 and 2 have not executed the Pledge Agreement.

21. It is contended by the Noticees that the documents and records annexed to the SCN are mere photocopies and these have not been duly authenticated as being photocopies of the originals. They further argue that it is trite law that a document cannot be considered as evidence of a fact unless it satisfies the requirement of Indian Evidence Act, 1872 and the annexures to the SCN do not satisfy the requirement of Indian Evidence Act, 1872. I note that the proceedings under section 11(4) and 11B of the SEBI Act, 1992 are in the nature of quasi-judicial proceedings wherein the provisions of Indian Evidence Act, 1872 are not strictly applicable. Notwithstanding the applicability of the said Act, section 65 (a) of the said Act itself allows admissibility of a document as secondary evidence when the original is in possession of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court (EURAM Bank in the instant case). Since, the documents such as the Pledge Agreement, Escrow Agreement

etc. were executed by Noticee no. 1, through Noticee no. 2, the originals/copies of the same should be available with them. Further, in accordance with section 66 (6) of the Indian Evidence Act, 1872, it is not required to give notice to produce the secondary evidence if the person in possession of the document is not subject to the process of the court (EURAM Bank in the instant case). Thus, I find that even in accordance with the provisions of the Indian Evidence Act, 1872, the copies of the Pledge Agreement, Loan Agreement, Escrow Agreement, account statement of bank/loan accounts maintained with EURAM Bank are admissible as secondary evidence in the present proceedings. Further, I note that, copies of the documents relied upon, were obtained by SEBI during investigation, through overseas securities market regulators in exercise of powers under section 11(2)(ib) of the SEBI Act, 1992. Hence, I do not find any merit in the contention raised by the Noticees in this regard. Therefore, the case laws cited by the Noticees will not in any way help the Noticees to dispute the existence of the documents relied upon in the SCN.

22. The Noticees argue that the present proceedings are contrary to the principles of natural justice, since they have not been provided with the copies of the documents and records relied upon by SEBI, including but not limited to the investigation report and the originals (for verification) of Loan Agreement, Escrow Agreement and Pledge Agreement. I note that the the Authorised Representatives of the Noticees were granted physical inspection of documents on 12/07/2018. I note that as stated in para 2 of this order, copies of the following documents relied upon in support of the SCN have been provided along with SCN and the reasons for not acceding to the request to provide original documents is as under:

Sr. No.	**Original of documents sought for inspection which are Annexed to the SCN**	**Whether request for the Inspection of original documents is tenable**
1	Company's letter to SEBI dated June 05, 2015 (Annexure 1 to SCN)	This letter was written by AOL (Noticee No. 1) itself to SEBI. Request for the inspection of original is untenable.
2	Minutes of the Board meeting of AOL held on May 17, 2010, authorizing opening of bank account for GDR issue. (Annexure 2 to SCN)	The minutes were prepared by AOL (Noticee No. 1) itself. The original of the document must be available with AOL. Original not available with SEBI. Request for inspection of original is untenable.
3	List of Corporate Announcements made by AOL on BSE from 30/11/2009 to 02/09/2010. (Annexure 3 to SCN)	The corporate announcements were made by AOL (Noticee No. 1) itself. The details of the document must be available with AOL. Request for inspection is untenable.
4	Loan Agreement dated August 16, 2010 executed between Euram Bank and Vintage. (Annexure 4 to SCN)	This document was signed and executed outside India by parties located outside India. Original of the document is not available with SEBI. Request for inspection of the original is untenable.
5	Pledge Agreement dated August 16, 2010 executed between AOL and Euram Bank. (Annexure 5 to SCN)	The Pledge Agreement was executed between AOL and EURAM Bank, and signed by Noticee no. 2, on behalf of Noticee No. 1. Copy of the

Sr. No.	**Original of documents sought for inspection which are Annexed to the SCN**	**Whether request for the Inspection of original documents is tenable**
		document, as procured through overseas market regulator from EURAM Bank, was provided to the Noticees. Original of the document is not available with SEBI. Request for inspection of original is untenable.
6	Loan Account Statement of Vintage held with Euram Bank (Annexure 7 to SCN)	The said account statement issued by EURAM Bank belongs to Vintage, a company registered outside India. Copy of the document, as procured through overseas market regulator from EURAM Bank, was provided to the Noticees Original of the document is not available with SEBI. Request for inspection of original is untenable.
7	Escrow Account Statement of AOL held with Euram Bank (Annexure 6 to SCN)	These are account statements of Noticee no. 1, AOL, itself issued by EURAM Bank. The original of the document must be available with AOL. Original not available with SEBI. Request for inspection of original is untenable.
8	Retail Account Statement of AOL held with Euram Bank (Annexure 8 to SCN)	

23. I note that as regards correspondences exchanged between SEBI and financial regulator of Austria i.e. Financial Market Authority (FMA) whereby FMA has provided copies of documents such as Loan Agreement (annexure 4 to SCN), Pledge Agreement (annexure 5 to SCN), bank account statements held with EURAM Bank (annexures 6, 7 and 8 to SCN) etc., I note that copies obtained through such correspondence which were relevant for the GDR issue of AOL have been furnished to the Noticees as annexures to the SCN. I note that the aforesaid request for inspection is roving and fishing in nature as the same has been made without citing any particular document. Further, correspondences/ letters seeking information exchanged between SEBI and FMA i.e. two regulators are confidential in nature governed by the confidentiality clause of the MoU entered between them. These correspondence also contain third party information pertaining to other GDR issues. I note that the copies of all the documents relied upon in support of the SCN have been furnished to the Noticees. Therefore, the request for inspection of the original of the correspondence between SEBI and FMA, not relied upon in the SCN, is untenable. On similar grounds, inspection of the investigation report being sought by the Noticees, which, I note, is not directly relied upon in the SCN, is untenable.

24. The Noticees have contended that the SCN does not disclose the precise action that is proposed to be taken against the Company and other noticees and therefore, denies the Noticees an opportunity to make submissions regarding the appropriateness of such action. In this regard reliance has been placed upon the judgment of Hon'ble Supreme Court in *Gorkha Security Services Vs. Govt. of NCT of Delhi & Ors.(2014) 9 SCC 105*. On a perusal of the said judgment of the Hon'ble Apex Court, I find that the same is factually distinguishable and not applicable to the present proceedings. This is for the reasons that in Gorkha Security case, the matter pertained to blacklisting of a contractor by a government agency, which resulted in depriving the contractor from entering into any

public contracts with government, thereby violating the fundamental rights of equality of opportunity in the matter of public contract of such person. Further, in Gorkha Security case, the contractor was blacklisted for breaching the terms of the contract. On the other hand, the present SCN has been issued for breach of provisions of law. In Gorkha Security case, blacklisting was imposed by way of penalty, whereas in the instant proceedings, the purpose of issuing directions, if found necessary, would be preventive and remedial in nature. In Gorkha Security Case, blacklisting of the contractor was provided in the governing contract itself as a penalty to be imposed in case of breach of terms of contract, whereas, in the present matter provisions of law under which directions are contemplated to be issued, confer discretion to SEBI to take such measure as it thinks fit in the interest of investors and securities market. Keeping in view the above points that clearly distinguishes the facts and circumstances of Gorkha Security case from the facts of the present proceedings, reliance placed by Noticees on Gorkha Security matter is misplaced.

25. It is further noted that the measures prescribed in section 11(4) and 11B of SEBI Act, 1992 are merely illustrative that may be taken by the Board in furtherance of its duties to attain the object of the statue, without affecting the generality of provisions of sub-section (1). The Board has such powers and is duty bound to take measures in any manner as it may deem fit to prohibit, unearth and deal with fraudulent and manipulative acts in securities markets to protect the interests of investors. The SCN issued to the Noticees have spelt the provisions under which the desired preventive/remedial/debarring directions, if found necessary, would be issued. The SCN also clearly indicates the specific nature of violations that have been alleged against the respective Noticees in terms of different provisions of SEBI Act and SEBI (PFUTP) Regulations, which if eventually found to be breached, would require issuance of suitable directions under specific provisions as mentioned under the SCN. Thus, it is manifest that the specific

allegations were unambiguously conveyed to the Noticees and they were given opportunities for tendering their responses thereto. It is, therefore, incumbent on the part of the Noticees to explain their position with support of relevant evidence in response to various allegations made against them in the SCN. Only after examining and considering the explanation offered by the Noticees to the allegations levelled under the SCN, it would be imperative for the competent authority to determine as to if and what direction is required to be issued against the Noticees, depending on the gravity of violation committed by the Noticees. It is to be noted here that the provision of Sections 11, 11B of the SEBI Act, 1992 vest in the quasi-judicial authority plenary power to issue wide ranging directions as it may deem fit, in the interest of securities market which cannot be anticipated before-hand without considering the explanations of the Noticees. Therefore, it is incorrect to contend that the SCN should specify the exact nature of direction that may be issued to the Noticees without taking into the consideration the explanation and evidence that may be produced by the Noticees to prove their innocence. This would be wholly premature, presumptive and conjectural in nature. Accordingly, the said contention raised by the Noticees is untenable both on facts and on law.

26. The Noticees contend that the impugned GDR issue took place in 2010 and the SCN is issued in May 2018, no reasons are given for the delay of nearly 9 years in making allegations regarding one of the 3 GDR issues brought by the Company. Hence, the present proceedings ought to be withdrawn on the ground of delay and latches. I note that SEBI initially investigated the GDR issues by seven Indian companies in overseas market and the investigations revealed that a Dubai based Non Resident Indian, Mr. Arun Panchariya perpetrated fraudulent schemes in connivance with the promoters/ directors of those issuer companies. While examining the bank account statements of Vintage in connection with its involvement in other GDR issues, it was observed by SEBI in the

year 2014 that Vintage has dealt with the GDRs of several other companies and where the Lead Managers were also common in many of the said suspected companies, SEBI found similar modus operandi in many such GDR issues, hence, scrip-wise investigation has been carried out against the entities involved. AOL was one such scrip where such a fraudulent scheme was also observed and the investigation was completed in March 2018. I also note that collation of information/documents and examination of evidence received from various entities outside India, through the assistance of various international agencies including securities market regulators from different jurisdictions was a time consuming and tedious process. I note that after the investigation was completed, the SCN was issued to the Noticees in May 2018.

27. I note that there is no provision in the SEBI Act, which may have the effect of prohibiting SEBI from taking action beyond a particular period of time in a given case. In *Ravi Mohan & Ors. v. SEBI* and other connected appeals decided on 27.08.2013, the Hon'ble Securities Appellate Tribunal (hereinafter referred to as 'SAT') while referring to its own decision in *HB Stockholdings Ltd. v. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013)* and decision of Hon'ble Supreme Court in *Collector of Central Excise, New Delhi v. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C.)*, held as under:

> *"....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court*

in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice...."

The ratio laid down by Hon'ble SAT in the aforesaid case, was upheld and reiterated by it, in a recent order in the matter of *Kunal Pradip Savla & Ors v. SEBI (Appeal no. 231 of 2017) decided on 13/04/2018*. Therefore, I am unable to accept the contention of the Noticees in the facts and circumstances of the case as elaborated above, more particularly in para 26 of this order.

28. Noticee no. 1 submits that the allotment of GDR's was made by the Company as per the list of subscribers provided by the Lead Manager. The same list of subscribers that was received from the Lead Manager was provided to SEBI during investigation. Noticee no. 1 denies that they have provided information which they knew to be wrong to SEBI. The Company submits that there was no reason to suspect that the list of subscribers provided to it by the Lead Manager was not correct. I note that the Noticees in their replies dated 11/01/2019, have annexed copy of email correspondence as Annexure C, claimed by the Noticees to have been received by Noticee no. 1 from their Lead Manager – Prospect Capital, London. However, on perusal of the said email, I observe that the said email attaching the list of allottees to GDR issue was sent to the officers of Noticee no. 1 not from the Lead Manager, but from another person by the name of Neha Dua of 'Aljabha Group', from the email id listing@aljabhagroup.com. Hence, I find that Noticee no. 1, ought to have raised a red flag when the list of allottees was not received from the Lead Manager, but from some third person. Further, the Lead Manager was not the only source to get the list of subscribers. The list of subscribers to the GDR issue may also have been sought from the Overseas Depositry Bank

appointed by AOL, in connection with the impugned GDR issue. Furthermore, the list of subscribers could also have been verified/cross checked from the entries of funds credited into the Escrow Account maintained with EURAM Bank during GDR issue. In the instant case, while AOL has provided a list of eight allottees to the GDR issue, to SEBI during investigation, but I note that at the time of GDR issue the funds were received into the EURAM Bank Escrow A/c. of AOL only from one subscriber i.e. Vintage. Therefore, I find that, AOL had provided incorrect 'list of allottees' of GDR to SEBI during investigation.

29. Noticee no. 1 submits that even as per the terms of the purported Loan Agreement between Vintage and EURAM Bank, the loan was provided to Vintage to 'take down' the GDR issue of the Company and not to subscribe to the same. Noticee no. 1 argues that 'take down' is a financial term that denotes an arrangement between the subscriber to securities issued and the entity that takes down the issue wherein by paying the subscription monies payable by the subscribers, the securities issued are transferred to take down entity. Noticee no. 1 submits that SEBI has not enquired with either Vintage or the subscribers regarding the aforesaid take down arrangement and erroneously alleged that Vintage had availed the loan facility to subscribe to the GDR's of the Company. I note that 'Take Down' is a financial jargon having different meaning in different circumstances. I note that by raising this contention Noticee no. 1 seem to indicate that Vintage was not the original subscriber of GDR, but merely an intermediary like an underwriter, who would purchase the GDR at a discount from the issuer and then sell it to the subscribers at the original issue price. However, I note that Vintage was not an underwriter for the impugned GDR issue, since no such disclosure was made by AOL in its Offering Circular for the impugned GDR issue. I also note that Vintage had paid the full offer price of USD 25,005,337.50 for subscribing to entire 1,165,750 GDR's of AOL. This proves that Vintage was not an underwriter who would purchase the GDR at discount and then sell it to the subscribers at the offer price, rather in the instant case Vintage paid the

entire offer price into AOL's Escrow Account. Hence, the words 'Take Down' as used in the Loan Agreement do not deduce the meaning that Noticee no. 1 seem to ascribe to it. In any event, whether for 'take down' or 'subscription', the loan was ultimately taken by Vintage for acquiring the GDR's of AOL.

30. I note that, AOL made a corporate announcement to the stock exchange (BSE) on September 02, 2010 that *"…the Company has successfully closed its GDR issue of US$ 25Mn and the Board of Directors of the Company in its meeting held on September 01, 2010, has allotted 58,287,500 equity shares underlying 1165750 GDRs….."* This announcement did not give a true picture of the GDR issue. The said corporate announcement did not disclose the fact that there was a subsisting Pledge Agreement that facilitated the subscriber to subscribe to the GDR issue or the GDRs were allotted to, or subscribed by, a single entity. The said corporate announcement rather tends to give a message to the market that there was considerable demand for its GDR in the overseas market and the same were successfully subscribed. I, thus, find that the corporate announcement made by AOL on September 2, 2010, regarding allotment of GDR issues was distorted and might have misled/induced the investors, dealing in securities, and/ or created a false impression in the minds of the investors that the GDR issue was fully subscribed whereas the AOL itself had facilitated subscription of its GDR issue wherein the subscriber (Vintage) obtained loan from EURAM Bank for subscribing the GDR issue of AOL, and AOL secured that loan by pledging the GDR proceeds with the EURAM Bank. In view of the above, I find that Noticee no. 1 has violated Reg 4(2) (f), (k) and (r) of SEBI (PFUTP) Regulations, 2003.

31. The Noticees contend that after the corporate announcement on 2/9/2010, regarding successful closure of GDR issue in 2010, the price of the scrip of the Company fell by 1.66% on BSE and 1.43% on NSE on 3/09/2010. This clearly shows that investors were not influenced or prejudiced by the corporate announcement made by the Company. I note

that the price of a script on a particular day may be influenced by many extraneous factors such as the macro-economic outlook, sectorial policy initiatives, international geo-political events, etc., which may not be related to the reference scrip. Further, net increase/decrease in closing price of the script may not take into account the volatility in the script throughout the trading day. I also note that the incomplete corporate announcement about the successful placement of GDR without revealing the backdoor arrangement of Pledge Agreement that facilitated the successful placement of GDR could have impacted the price of the scrip negatively. I further note that, notwithstanding the incomplete disclosure by AOL, the fact that impugned GDR issue was facilitated by AOL by entering into the Pledge Agreement with EURAM Bank, that ensured and enabled the subscriber (Vintage) to subscribe to the GDR and without the Pledge Agreement Vintage would not have been able to subscribe to the GDR issue of AOL, itself is a violation of section 12A(a), (b), (c) of SEBI Act, 1992 and Regulations 3(a), (b), (c), (d) and Reg 4(1) of SEBI (PFUTP) Regulations, 2003.

32. I note that Noticee no. 3 to 6 have contended that none of them were executive directors of AOL and that they were not informed by the Company of any Pledge Agreement to be executed with EURAM Bank or of any pledge to be created over the deposits of the Company with EURAM Bank to secure the loan given by the bank to Vintage. The said Noticees further argue that no such proposal was brought before the board of directors and no approval was given by the Board of Directors during the relevant period for creation of such a pledge. I note that minutes of the board meeting dated 17/05/2010 of AOL, do not specifically mention the factum of intended execution of the Pledge Agreement, however, the Pledge Agreement was entered into on the basis of the said resolution authorizing the opening of bank account with EURAM Bank. The relevant part of the resolution reads 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 *as well as to enter into any Escrow Agreement or similar arrangements if and when so required."*

Emphasis added

I note that, it was on the basis of the aforesaid resolution that the Pledge Agreement was executed by Noticee no. 2, on behalf of Noticee no. 1 with EURAM Bank as the counterparty.

33. I note that Noticee no. 3 to 6 have not disputed their directorship during the relevant period of GDR issue or their presence in the Board meeting held on May 17, 2010. It also remains undisputed that they remained directors during the period when the Company made those incomplete, partial, distorted and misleading disclosures to the BSE and to the public at large. The claims that they have resigned subsequently (except by Noticee no. 4) would not have any relevance to their liability as charged under the SCN served on them.

34. On close examination of the submissions made by Noticees no. 3 to 6 along with the material available on record, it appears that the Noticee nos. 3 to 6 might have merely and routinely participated in the Board meeting dated May 17, 2010. I do not find any material on record to show that Noticee nos. 3 to 6 have acted in furtherance to passing of the Board resolutions to facilitate the MD (Noticee no. 2) to carry out the scheme of defrauding the investors. Further, upon perusal of the Board resolution passed in the Board Meeting held on May 17, 2010, I note that the proposal discussed therein relates to authorize EURAM Bank to use the funds deposited in the new account as security in connection with loans, and there was no mention about the intended Pledge Agreement in connection with loan by a third party (like Vintage in the instant case). Hence, on the basis of this resolution, Noticee no. 3 to 6 may not have had the knowledge about the fact of execution of Pledge Agreement.

35. However, being Independent/non-executive directors, the role of Noticee nos. 3 to 6, was akin to trustees of stake holders and in such capacity, it was expected from them to take all such steps and measures necessary in furtherance of the interest of shareholders and to demonstrate highest standards of governance. The non-executive directors cannot confine themselves to merely lending their names to the Company and its resolutions as they have onerous responsibility for the affairs of the company for the protection of interest of all stakeholders, which includes the shareholders. I am of the view that, while the extent of responsibility of an independent/non-executive director may differ from that of an executive director, however, an independent director has a duty of care and caution. This duty calls for exercise of independent judgment with reasonable care, diligence and skill which is reasonably expected to be exercised by a prudent person with basic knowledge, skill and experience. The independent/non-executive Directors have to discharge the duty of protecting the interest of investors by raising pertinent questions or by seeking clarification from the management on relevant issues affecting the interest of the stakeholders and whenever necessary, they should assert themselves with their independent views so that the governance of the Company is perfectly aligned with the interests of the shareholders of the Company and the management does not act in manner detrimental to the interests of the shareholders. In this regard, I find that the independent/ non-executive directors of AOL have not acted with due care and diligence to see to it that the proposals/ resolutions put forth before the Board of Directors do not lead to violation of any law. I also find from the records and Board resolution that Noticee nos 3 to 6 have not performed their duties cast upon them as independent /non-executive directors and have not raised any queries or concerns before the Board or the management pertaining to the requirement/necessity of keeping the GDR proceeds as security in connection with loans. Noticees nos. 3 to 6 should have questioned the need for loan, when funds were being raised by the Company through GDR. I do not find any material on record (including the minutes of board

meeting) that shows that the said Noticees have raised any of these concern/queries. Hence, though, I find that the material available on record may not be sufficient to hold the charge of fraud against these Noticees who were non-executive/independent directors with the Company, however, the conduct of these Noticees cannot be said to be as expected of an independent/non-executive director of a listed corporate entity. They have not shown any diligence in performing their role of an independent/non-executive director, in respect of the impugned GDR issue.

36. As noted in the preceding para 30, failure to disclose the Pledge Agreement and the entire backend arrangement of facilitating the subscription of its own GDR issue, was fraudulent. The incomplete disclosure of alleged 'Successful Placement of GDR' on BSE on September 2, 2010 was incomplete, distorted and misleading and also did not give a complete picture of the GDR issue. The said disclosure might have induced the investors in India to invest in AOL. It would be appropriate to refer to the Order of the Hon'ble SAT dated October 25, 2016 in Appeal No. 126 of 2013 (Pan Asia Advisors Limited vs. SEBI) wherein, while interpreting the expression of 'fraud' under the PFUTP Regulations, 2003, it was observed that:

> *".....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."*

37. Similarly, in the matter of *Kanaiyalal Baldevbhai Patel v. SEBI (2017) 15 SCC 1*, the Hon'ble Supreme Court has observed as under:

> *"if Regulation 2(c) of the 2003 Regulations was to be dissected and analyzed it is clear that any act, expression, omission or concealment committed, whether in a deceitful manner or not, by any person while dealing in securities to induce another person to deal in securities would amount to a fraudulent act. The emphasis in the definition in Regulation 2(c) of the 2003 Regulations is not, therefore, of whether the act, expression, omission or concealment has been committed in a deceitful manner but whether such act, expression, omission or concealment has/had the effect of inducing another person to deal in securities".*
>
> 26. *There is no dispute as to the fact that fraud is jurisprudentially very difficult to define or cloth it with particular ingredients. A generalized meaning may be difficult to be attributed, as human 27 ingenuity would invent ways to bypass such behaviour. It is to be noted that fraud is extensively used in various regulatory framework which mandates me to take notice of the conceptual and definitional problem it brings along. Fraud is among the most serious, costly, stigmatizing, and punitive forms of liability imposed in modern corporations and financial markets. Usually, the antifraud provisions of the security laws are not coextensive with common-law doctrines of fraud as common-law fraud doctrines are too restrictive to deal with the complexities involved in the security market, which is also portrayed by the changes brought in through the 2003 regulation to the 1995 regulation.*
>
> 27. *On a comparative analysis of the definition of "fraud" as existing in the 1995 regulation and the subsequent amendments in the 2003 regulations, it can be seen that the original definition of "fraud" under the FUTP regulation, 1995 adopts the definition of "fraud" from the Indian Contract Act, 1872 whereas the subsequent definition in the 2003 regulation is a variation of the same and does not adopt the strict definition of "fraud" as present under the Indian Contract Act. It includes many situations which may not be a "fraud" under the Contract Act or the 1995 regulation, but nevertheless amounts to a "fraud" under the 2003 regulation.*

38. In view of the above, I find that AOL had misled the investors into believing that the GDR issue was successful, whereas at the backend, there was only one subscriber i.e. Vintage and subsisting arrangement of Loan Agreement (between Vintage and EURAM Bank) and Pledge Agreement (between AOL and EURAM Bank) which made the GDR issue

successful. Had AOL not given security for the loan taken by Vintage, Vintage would not have got finance to subscribe to GDR's, consequently the GDR issue would not have been successful as Vintage was the only allottee to the issue. By entering into the Pledge Agreement for facilitating the subscription of its own GDR's, AOL has played a fraud on the securities market and misled the investors and created a false impression about the Company in the securities market. Hence, I find that, AOL has violated the provisions of section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d), Regulations 4(2) (f), (k), (r) and 4(1) of SEBI (PFUTP) Regulations, 2003. Further, Noticee no. 2 who executed the Pledge Agreement and was the Managing Director/ Chairman of AOL, acted as party to fraudulent scheme. Thereby, Noticee no. 2 is also in violation of Section 12A (a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of SEBI (PFUTP) Regulations, 2003.

39. Further as discussed in para 34 and 35, I find Noticee nos. 3 to 6, to be acting callously and not exercising any due diligence, expected of a director of a listed company. These four non-executive directors have not acted in the best interest of the shareholders of the Company.

DIRECTIONS:

40. In view of the above, and in the peculiar facts and circumstances of the matter, I, in exercise of the powers conferred upon me under section 19 read with sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992, hereby direct as under:

(a) The Noticee no. 1 and Noticee no. 2 are hereby restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities including units of mutual funds, directly or indirectly, or being associated with the securities market in any manner, for a period of five years from the date of this

order. During the period of restraint, the existing holding including units of mutual funds of these Noticees shall also remain frozen.

(b) The Noticee no. 3, Noticee no. 4, Noticee no. 5 and Noticee no. 6 are hereby prohibited from buying, selling or otherwise dealing in securities including units of mutual funds, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of six months from the date of this order. During the period of restraint, the existing holding including units of mutual funds of these Noticees shall also remain frozen.

41. This order shall come into force with immediate effect.

42. A copy of this order shall be served on all recognized stock exchanges, all depositories and all RTA's of Mutual funds to ensure compliance with above directions.

Sd/-

Date: June 28, 2019 **ANANTA BARUA**

Place: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA