WTM/SM/IVD/ID4/6887/2019-20

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: S. K. MOHANTY, WHOLE TIME MEMBER

ORDER

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

In respect of:

Noticee No.	Names of the Noticee	PAN
1.	Resurgere Mines and Minerals India Ltd.	AAACE0111B
2.	Mr. Subhash Sharma	AXCPS8189D
3.	Mr. Amit Sharma	AVRPS2826C
4.	Mr. I. D. Agarwal	AAAPA9527G
5.	Mr. Burzin Somandy	AIEPS6910P
6.	Mr. Nitin Sethi	ADUPS1603C

In the matter of M/s. Resurgere Mines and Minerals India Ltd.

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

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted an investigation pertaining to issuance of Global Depository Receipts (hereinafter referred to as **"GDR"**) by M/s. Resurgere Mines and Minerals India Ltd (hereinafter referred to as **"Resurgere/Company/Noticee no. 1")** for the period from June 1, 2010 to July 15, 2010.

2. The investigation revealed that the Company had engaged in a fraudulent arrangement for facilitating the financing of its GDR issue and made misleading disclosures to the investors at large. Accordingly, a common Show Cause Notice dated June 27, 2017 (hereinafter referred to as **"SCN"**) was issued to the Company (Noticee no. 1) and its Directors, Noticees no. 2 to 6 for the alleged 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"**), calling upon them to show cause as to why suitable directions shall not be issued against them under Sections 11, 11B and 11(4) of the SEBI Act.

3. It is noted that pursuant to receipt of the SCN, Noticee no. 1 (on its behalf and on behalf of Noticees no. 2 and 3) and Noticee no. 5 had sought copies of various documents relied upon in the SCN which have been provided to them vide letters dated January 18, 2018 and November 24, 2017. I note from the records that Noticees no. 5 and 6 have submitted written replies to the SCN vide letter dated October 10, 2018 and September 29, 2017 respectively. Subsequently, all Noticees were provided with an opportunity of personal hearing before me on November 13, 2018. Noticee no. 5 requested for a short adjournment of the hearing and appeared on November 14, 2018 with his Authorised Representative and presented his arguments on the lines of his submissions made in his written reply. Another opportunity of Personal hearing was accorded to all the remaining Noticees on March 12, 2019. I note from the records that Noticee no. 1 (Company) and Noticees no. 2 and 3 (Mr. Subhash Sharma and Mr. Amit Sharma) have submitted their respective written replies, vide letters dated March 8, 2019. Further, a common Authorised Representative appeared and made oral submissions on behalf of Noticees no. 1, 2, 3 and 6 on March 12, 2019. They

were also asked to provide their responses to some of the queries raised during the hearing. The Noticees were provided with the correct annexure-3 to the SCN (as a different annexure was inadvertently enclosed to the SCN served upon them) during their Personal hearing. Subsequently, Noticee no. 4 also submitted a written reply dated July 7, 2019 and requested for an opportunity of personal hearing. Accordingly, Noticee no. 4 appeared for the personal hearing before me on August 29, 2019 and presented his arguments on the lines of his written reply. I also note that the Company has filed an additional written reply dated April 5, 2019. The explanations offered and arguments advanced by each of the Noticees through their Personal hearing as well as written replies have been perused and shall be taken up for consideration in due course while discussing the issues arising out of the allegations made in the SCNs in the subsequent paragraphs.

ISSUES FOR CONSIDERATION AND FINDINGS:

4. I have perused the SCN dated June 27, 2017 including all the annexures as referred to in the SCN, replies received from Noticees to the aforesaid SCNs and all other relevant material available on record, and find that the pertinent issues that require consideration in this matter are reproduced as under:

(i) Whether the Company i.e. Noticee no. 1 has violated Section 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 Noticees no. 2 to 6 have violated Section 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 Section 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?*

5. Before I proceed to examine the afore stated issues and decide as to whether on the facts of the matter, the aforesaid violations alleged in SCN stand established or not, it would be proper to reproduce hereunder, the relevant provisions of SEBI Act and PFUTP Regulations alleged to have been violated by the Noticees in the instant matter and the same are reproduced 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.

6. I note that the Company had issued 5.21 million GDR on June 25, 2010 for raising 53.75 million US$. The number of underlying shares issued by the Company against the said 5.21 million GDR issue, were 3,12,49,998. Vide letter dated June 18, 2013, Resurgere provided to SEBI the list of following entities as subscribers to its GDR issue.:

S. No.	Name of the subscribers	Country of subscriber
1	Creative Stone Ltd.	Hong Kong
2	New Jersey Ltd.	France
3	Tieze Limited	Netherlands
4	Trapezius Trading Limited	Germany
5	Chromestar Limited	Hong Kong
6	Kingsly Holding Ltd.	New Zealand
7	Cruise Waterford Ltd.	UK

7. SEBI wrote to the respective foreign regulators to seek details about the above mentioned seven subscribers. From the replies received, it was noticed that either no such companies/ entities were in existence at the respective jurisdictions or their status/existence was not ascertainable. It was therefore observed that Resurgere had furnished incorrect information to SEBI by providing, a false list of GDR subscribers.

8. Investigation conducted by SEBI into the matter revealed that the Board of Directors of Resurgere had passed a Resolution in its Meeting on May 28, 2010, wherein *inter alia*, a decision was taken to open an account with European American Investment Bank AG (hereinafter referred to as **"EURAM Bank/Bank"**) and also to authorize the 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 European American Investment Bank AG ("the Bank") or any branch of European American Investment Bank AG Bank including the off-shore branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.*
>
> *RESOLVED FURTHER THAT Mr. Subhash Sharma, Chairman & Managing Director of the Company, be and is hereby authorized to sign, execute any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other papers 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 Mr. Subhash Sharma, Chairman & Managing Director of the Company, be and is hereby authorized to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said European American Investment Bank AG or any of branch of European American Investment Bank AG, including the off-shore branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company.*
>
> *RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required." (Emphasis supplied)*

9. On a perusal of the aforesaid Board Resolutions (copy enclosed as annexure -5 to the SCN), I note that the said Resolutions were approved by the Board on May 28, 2010 authorising the Company inter alia, 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, in

terms of the said resolutions, Noticee no. 2, Mr. Subhash Sharma, Chairman & Managing Director of the Company was authorized to sign, execute any application, agreement, etc. as may be required by the EURAM Bank. Accordingly, the Company had opened an account no. 580025 in its name in EURAM Bank. As stated earlier, it was further resolved by the Board to authorize the EURAM Bank to use the funds so deposited in the said bank account as security in connection with loans, if any. A comprehensive reading of all the above said Board Resolutions indicates that a decision was taken as early as on May 28, 2010, about the proposed issuance of GDR and at that very stage itself a decision was taken to open a bank account with EURAM Bank. Moreover, the Board had also contemplated on the date of passing of the said Resolution itself, that the funds/proceeds of the proposed GDR to be received in their EURAM Bank account would be used as a security for loans. Passing of such a Resolution by the Board thereby deciding about the future use of the GDR proceeds as a security against a loan, indicates that the Company did not intend to utilize the GDR proceeds immediately for the objects for which the GDRs were to be issued. In this regard, I note that the information with regard to the aforesaid Board Resolutions, particularly the resolution about keeping the GDR proceeds as security, was not disclosed to the Shareholders. Consequently, the Company had misled the investors by concealing such an important information from them.

10. It was further observed that EURAM had granted a loan to Vintage FZE (hereinafter referred to as **"Vintage"**) by way of a Loan Agreement dated June 16, 2010 (hereinafter referred to as the **"Loan Agreement"**) for making payment towards subscription to the GDRs to be issued by Resurgere. Thus the entire 5.21 million GDR were subscribed by only one entity, i.e. Vintage. In this regard some of the relevant clauses of the said Loan

Agreement signed by Vintage with EURAM Bank which are worth quoting, are cited as under:

> *"1. Currency and Amount of Facility*
> *USD 53,749,996.56*
>
> *2. Nature and Purpose of Facility*
> *To provide funding enabling Vintage FZE to take down GDR issue of 52,08,333 Luxembourg public offering and may only be transferred to EURAM account no. 580025, Resurgere Mines & Minerals 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 account no. 540012 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. 580025 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.*
>
> ……"

11. I also note that on the strength of afore-stated authorization given by the Board to *"use the funds so deposited in the aforesaid bank account as security in connection with loans if any"* the Noticee no. 2, Mr. Subhash Sharma, Chairman & Managing Director (CMD) of the Company had signed a Pledge Agreement with EURAM Bank dated June 16, 2010 (hereinafter referred to as the **"Pledge Agreement"**), whereby it was agreed to pledge its entire GDR proceeds as security against the loan availed by Vintage from EURAM Bank

for subscribing to GDR of Resurgere. Some of the relevant clauses of the Pledge Agreement signed by the Company with EURAM Bank are quoted as under:

"1. Preamble

"By Loan Agreement K160610-002 (hereinafter referred to as the "Loan Agreement") dated 16 June 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 53,749,996.56. The pledgor has received a copy of the Loan Agreement no. K0160610-002 and acknowledges and agrees to its terms and conditions."

2. Pledge

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

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount USD 53,749,996.56 existing from time to time at present or hereafter on the securities account(s) no. 580025 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. 580025 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein….

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

…….

6. Realisation of the Pledge

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

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

12. On a careful and combined examination of the contents of clauses of the "Loan Agreement" and the "Pledge Agreement", following observations are made: -

a) The Pledge Agreement was executed mainly to secure the obligations of the borrower i.e. Vintage, which was granted a loan for USD 53.75 million by EURAM Bank. The preamble of the Pledge Agreement mentions that the Pledgor received a copy of the Loan Agreement and acknowledges the terms of the Loan Agreement. Further, the Pledge Agreement also mentions that the Pledgor (Resurgere) pledges to EURAM Bank, all the rights, title and interest in the securities deposited and balance of funds up to 53.75 million USD in the A/C no. 580025 maintained with EURAM Bank (hereinafter referred to as "Pledged Accounts"). I note that account no. 580025 was the account of the Company where the GDR proceeds of Resurgere were to be deposited and the same was pledged by Resurgere as security against the loan taken by Vintage, vide Pledge Agreement dated June 16, 2010 executed by Resurgere much before the actual GDR issue that took place on June 25, 2010.

b) In terms of the clause 6 of the Pledge Agreement (pertaining to realization of the Pledge), Resurgere had given consent to the EURAM Bank to apply the funds in

the Pledged Accounts in the event of default of repayment by the borrower, i.e. Vintage for settling their obligations as a borrower.

c) As a consequence, to such pledge terms, I note that even after the GDR issue, Resurgere could not get the GDR proceeds at its disposal for utilization until repayment of the loan was made by Vintage.

d) Further, on a perusal of Annexure -7 to the SCN, I note that Vintage has repaid its loan in several instalments from August 5, 2010 to December 29, 2010. It is also noticed that immediately after repayment of each loan instalment by Vintage, almost identical sum of money was transferred from Resurgere's EURAM Bank A/C to its Indian Bank account or the account of its subsidiary company. The manner in which GDR proceeds were received by the Company in its Indian bank account/subsidiary bank account indicates that the utilisation of GDR proceeds by the Company was conditionally attached to the repayments made by Vintage.

e) It is noted that both the agreements (viz:- the Loan Agreement and the Pledge Agreement) are dated June 16, 2010. The Pledge Agreement was also incorporated in the Loan Agreement and was annexed to the Loan Agreement.

f) As per clause 2 and 3 of the Loan Agreement, the said loan was sanctioned only for the purpose of subscribing to the GDR issue and the sanctioned amount could be transferred only to the account of Resurgere with EURAM Bank bearing Account No. 580025. Further, clause 6 of the Pledge Agreement authorized the EURAM Bank to realize the proceeds lying in the account of Resurgere to settle the loan liability of Vintage, in the event of default by the borrower. The clause further authorized the EURAM Bank to realize the said GDR proceeds lying as security in the account of the Company even in the event when the Bank has a reason to believe

that the payment by borrower/subscriber is contestable. Thus, the Noticee Company has, vide the Pledge Agreement authorized that in all eventuality, in case of any default by the borrower, the security including proceeds of GDR to be deposited in its escrow account would be realizable by EURAM Bank to satisfy its outstanding loans made to the borrower. The Loan Agreement and Pledge Agreement were inextricably connected in a manner that clearly points out that the Noticee Company, Resurgere (the Pledgor) had consciously facilitated the loan to Vintage so as to ensure sure success of issuance of GDR and to create a good market impact about the stock of the Company, knowing well that the GDR proceeds cannot be used for its business, until the repayment is made by the borrower.

13. I will now deal with the contentions raised by Noticee no. 1. Noticee no. 1 (Company) has contended that initiation of Adjudication Proceedings arising from the same set of facts amounts to double jeopardy and is in violation of Article 20 (2) of the Constitution of India, causing mental trauma as well as increasing its legal costs. In my view such a reaction from the Noticee has arisen on account of lack of understanding of the legal framework embodied in the SEBI Act. It is to be noted here that Adjudication Proceedings and the instant proceedings under Section 11B are two different quasi-judicial proceedings/actions envisaged under the provisions of SEBI Act. It is a trite law that provisions under SEBI Act, permits for initiation of multiple proceedings under different provisions of the SEBI Act, and there is no bar for initiation of multiple proceedings under the said Act. I further note that the two proceedings referred to above are aimed to achieve distinct and different objectives/outcome. In this regard, Hon'ble SAT in the matter of *Sunita Gupta vs SEBI (DoD- 21.04.2017)* has held that *"SEBI Act itself contemplates that where a person violates*

SEBI Act and the regulations made thereunder, then apart from imposing penalty under Chapter VIA, it would be open to the Board to issue such directions at it deems fit under Chapter IV of SEBI Act." Moreover, the instant proceedings are civil in nature and the doctrine of double jeopardy is related to criminal proceedings. Also Article 20 of the Constitution provides for protection against prosecution and punishment for more than once for the same offence. For the above stated reasons, I find that the contention raised by the Noticee is misplaced on facts and also unfounded in law.

14. The Noticees have relied on judgements of SAT viz:- *HB Stockholdings Ltd. v. SEBI*, to contend that the instant proceedings deserve to be dropped on account of the fact that the same has been initiated after a lapse of more than seven years which prejudices their ability to defend themselves. In this regard, from the records I note that investigation in the present matter was initiated pursuant to receipt of a complaint and further, while investigating few other cases of GDR issues, it was noticed by SEBI that one Mr. Arun Panchariya, in connivance with different issuer companies and their promoters/directors, had conceived fraudulent schemes to help those companies to issue GDRs in certain overseas markets. While investigating those cases, information were sought from several entities including the Regulators of other countries. After analysing those information received from various sources, it was noticed that similar modus operandi was also followed in several other GDR issuances by the Companies listed in India. Under the circumstances, the investigations were escalated further and a scrip wise investigation was undertaken by SEBI into a large number of GDR issue cases spanning over different years. In view of the fact that a large number of scrips and issues were taken up for investigation collectively for which information had to be collected from different entities, mostly from the authorities situated

outside India through regulatory coordination/arrangements with different overseas Regulators, it required adequate time for completion of investigation after which, SCNs had to be issued to a large number of such GDR issuer-companies. I note that major portion of relevant information in this regard was received from Financial Market Authority, Austria (Austrian Financial Regulator) in March 2015. In this regard, I further note that SEBI has passed an order dated June 16, 2016 in which it has recorded that investigation was initiated in respect of 59 GDR issues made by 51 Indian Companies during the period 2002 to 2014. It is seen that Resurgere was also one such scrips in respect of which the investigation was completed in February 2017 and SCN was issued to the Noticees on June 27, 2017. Therefore, the time taken for completion of collective investigation into a large number of similar cases and also for issuing SCNs to a large number of Noticees is fairly understandable. Without prejudice the above factual observation, I find that no provision under SEBI Act, prescribes time limit for taking cognizance of the alleged breach of provisions of SEBI Act, and rules and regulations made thereunder. Notwithstanding the above, in order to ascertain as to whether there has been actually any delay in the matter, the date when the violation came to the notice of the SEBI would be the relevant point and not the date of violation. Whether a delay in a particular case is justified or not depends on the facts and circumstances of that case. The order passed by Hon'ble SAT in *HB Stockholdings Ltd. v. SEBI* (Appeal no. 114 of 2012 decided on August 27, 2013), as relied upon by the Noticees, has been perused. It is noted that this decision also endorses the legal position regarding the delay, as stated above. In fact, in HB Stock Holding's case (supra), Hon'ble SAT has held that delay is not fatal in each and every case. Further, in the case of *Ravi Mohan & Ors. v. SEBI* (SAT Appeal No. 97 of 2014 decided on 16.12.2015) Hon'ble SAT, while referring to its own decision in HB Stockholdings case (supra) and the decision

of Hon'ble Supreme Court in Collector of Central Excise, *New Delhi vs. Bhagsons Paint Industry (India)* reported in 2003 (158) ELT 129 (S.C.) has held as under:

> *".....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 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....."*

15. In view of the above, the contention of the Noticee with respect to delay in initiating action against it is misconceived, hence not maintainable. Additionally, the Hon'ble SAT while dealing with a similar fraudulent arrangement concerning GDR issue in the matter of *Jindal Cortex v. SEBI,* (Appeal no. 376/2013; order February 5, 2020) has held that *"Arguments on delay in investigation and consequently affecting natural justice are also devoid of any merit in the matter since this Tribunal is aware of the complexity involved in the entire manipulative GDR issue; how long it took SEBI to gain information relating to the various entities from multiple jurisdictions in the matter of PAN Asia Advisors Limited (Supra) and Cals Refineries Limited (Supra) etc."*

16. The Company has further contended that the list of subscribers provided by the Company to SEBI was true to the best of their knowledge and was based on the information received from the Lead Manager (Prospect Capital Ltd.). The Company did not have an independent verification mechanism and due to the secrecy laws in other jurisdictions, it was not possible to directly know the subscribers. Further, Noticees have also denied violation of

PFUTP Regulations on their part by stating that they are themselves victims rather than offenders as alleged in the SCN considering the fact that the Lead Manager has not only manipulated the Indian investors but has also misled the Company by providing them with false information. They have stated to have relied upon the expertise of the Lead Manager considering the cross border nature of transactions and registration requirement with reputed foreign authority and have signed all agreements in good faith as part of the procedure.

17. It is submitted that the Noticees have tried to contact the Lead Manager, however, it could not be contacted and no action could be taken by the Company against the Lead Manager. Considering these entities are foreign based, the cost of initiating proceedings against them would be very high and would result in foreign exchange outflow thereby adversely affecting the Indian Shareholders. Noticees have placed reliance on the judgement of *SEBI v. PAN Asia Advisors Ltd & anr.,* (2015) 14 SCC 71 rendered by Hon'ble Supreme Court to state that despite having the judicial backing, SEBI has not taken action against the Lead Manager 'Prospect' in gross violation of Article 14 of the Constitution of India. Further, SEBI has merely debarred Mr. Arun Panchariya (who has signed the Loan Agreement for Vintage as its Managing Director) for his role in market manipulation using GDR mechanism in the matter of PAN Asia Advisors for 10 years and no other actions/penalty has been imposed on him. The next submission of the Company is that they cannot be held liable for the averments in the Loan Agreement as they were not signatories to the said Agreement and that they were not aware about the Loan/Pledge Agreements. They have denied that the GDR proceeds were not at free disposal of the Company and have stated to have transferred the GDR proceeds from their EURAM Bank account to their

India/subsidiary account as and when needed and were not aware about the repayment of loan by Vintage to EURAM Bank. It has also been contended by the Company that the Board Resolution dated May 28, 2010 does not specify that the GDR proceeds are to be pledged against the loan availed by Vintage, hence, no adverse inference should be drawn against them. The Company did not intend that the GDR funds should be used to secure any loan given for the GDR subscription and had authorised only one person to carry out the necessary formalities in that regard diligently. Further the Company has contended that the conditions of the Pledge Agreement will not get activated till the time subscription money is received in the account opened for receiving GDR proceeds. Therefore, the Company could have been able to provide security against subscription proceeds only when subscription is first received and not before that, hence, the Pledge Agreement was void.

18. The aforesaid arguments advanced by the Company have been carefully considered but are found to be neither backed by factual evidence nor are carrying any plausible reasoning to merit any favourable consideration. The Noticee Company seems to be making an attempt to deflect the attention from present proceedings against it to other entities who are not part of the Proceedings. In any case, one who seeks equity must come with clean hands and it is not permissible to the Noticee to shift its burden to defend itself against the allegations levelled in the SCN by claiming that the violations committed by certain overseas entities have not been appropriately acted upon by SEBI. The Noticee should note that the scope of the instant proceedings is to determine as to whether or not, based on the evidences available on record and after having considered its explanations/replies in response to the allegations made under the SCN, those allegations would sustain against the Noticee. Accordingly, my findings should be confined to the issue involved in the instant proceeding

only pertaining to all the Noticees. Therefore, to make any observation *qua* a person or an entity whom the Noticee holds responsible for the violations alleged against it in the SCN would not be fair since such person or the entity concerned is not a part of the present proceedings. Nonetheless, assuming without admitting the submission of the Noticee as true, the mere fact that action has not been initiated against certain entity like the Lead Banker in this case, cannot be taken as a ground for the Noticees to escape their own liability for the fraud committed on its shareholders and other investors in India. In this regard, to address the aforesaid grievance of the Noticee, I rely on the findings of Hon'ble SAT in the case of *Systematix Shares & Stocks India Limited v. SEBI (2012)* in which the Hon'ble SAT also had the occasion to deal with a similar argument advanced by the appellant contending that the Board (i.e SEBI) should have proceeded against all wrong doers and the action against the appellant and a few entities alone was discriminatory. The Hon'ble SAT observed that *"We cannot subscribe to this view since the Board has set its own benchmark in selecting cases for action and, in any case, the appellant cannot plead himself innocent or his trades as lawful."* The Noticee no. 1 being a listed company in India, its Directors owe the shareholders and other investors in the Indian Securities market an onerous duty to conduct its functioning in a transparent manner and to ensure that the money being raised from the public is protected against all perils. Instead of clearing the air as to how the Noticees have performed the said duty while dealing with the GDR issue and instead of trying to come clean on the allegations levelled against them in the SCN, I find the Noticees are raising other extraneous issues to distract the thrust of the present proceedings, against them.

19. The submission that the Noticee could not trace/ contact the Lead Manager despite making attempts does not convince me as there is nothing before me to lend credence to such submissions. The Noticee has not produced any correspondence, email or any other tangible effort made by it to contact the Lead Manager nor has it produced any communication with the EURAM Bank so as to verify the antecedent of the Pledge Agreement or the Lead Manager. The Company had the choice and discretion to have a bank account and consultants of its own choice for assisting it in executing the GDR issue since, in case of any default on the part of any of its consultants/intermediaries, statutorily it is the Company that will be liable and it can't escape from its responsibility on the ground of acting in the good faith on the advice of the intermediaries and consultants. The Company has not submitted any documents to substantiate its claim as to how it got persuaded by the said intermediaries against its wish to open an escrow account with the EURAM Bank only and under what circumstance, it thought it fit and proper to execute the Pledge Agreement, which inter alia, fastens on it, the liabilities of the borrower (Vintage) in terms of its Loan Agreement with EURAM Bank. If the contention of the Noticees that they are unware of the Pledge Agreement and have signed the said agreement on good faith trusting the Lead Manager is to be believed, then they were duty bound to take stringent legal action against the Lead Managers for such criminal breach of trust. The Noticee has cited high cost of litigation as a reason for not initiating any action against the Lead Manager which is not acceptable, given the severity of the harm caused to the Company by the Lead Manager and other intermediaries. In my view, instead of projecting themselves as a victim, it is expected that the Noticees should have taken strong action against the consultants and Lead Managers so as to show their bonafide, if the consultants and Lead Manager have deceptively fastened a huge liability on them by subjecting its GDR proceeds

to be held as securities against the loan taken by an unrelated third party, with which the Noticees claim to have no connection. However, to my surprise, no action has been initiated by the Company or other Noticees against any of the intermediaries/consultants so far. Under the circumstances, the explanation furnished by the Noticees pleading therein to shift their culpability on to other entities who have acted as their intermediaries so as to avoid any likely enforcement actions against them for wrongful disclosure to the public at large and for resorting to fraudulent acts against the shareholders as alleged in the SCN, would not be tenable. It is the responsibility of the issuer Company and directors to verify the genuineness of any material information before disseminating the same to the public at large and it is not permissible to take shelter under the excuse that the disclosures made by the Company was based on the information received from a third person i.e. Lead Manager/Intermediaries in this case. When I consider the passing of the Board Resolution dated May 28, 2010 and consequent signing of the Pledge Agreement followed by receipt of GDR proceeds into the Company's Indian account in tranches corresponding to the tranches of repayment made by Vintage, I find it extremely improbable to accept the contentions of the Noticee that it had not knowingly executed the Pledge Agreement or that the Board Resolution did not intend to pledge the GDR proceeds for securing the loan sanctioned to Vintage by EURAM Bank. I find the aforesaid submissions made by the Noticees to be merely an afterthought exercise to evade the adverse consequences of the present proceedings. I also find the argument advanced by the Noticee that the GDR proceeds could be pledged against a loan only after receiving the said proceeds in the account and not before that and hence, the Pledge Agreement was void, to be of no consequence and a mere hypothetical observation. In the present case, the GDR proceeds were duly received by the Company in its account with EURAM Bank and in compliance

with the Pledge Agreement have been actually pledged to aid its sole GDR subscriber to obtain loan from the same Bank and the Company was very much aware of the same. I further note that the aforesaid points of argument raised by Noticees have also come for consideration before the Hon'ble SAT in the matter of *Cals Refineries Limited Vs SEBI* (Appeal No 04 of 2014- Date of Decision 21.10.2017), wherein the Company and Directors had claimed that they are the victim of fraud and not a vehicle of fraud. The Hon'ble SAT after having heard the parties at length, was pleased to find their submission as unsustainable. Relevant observations of Hon'ble SAT in the *Cals Refinaries (supra)* are as under:

"*.....(f) Fact that the minutes as per the minute book of Cals does not contain any resolution to open a bank account with Banco cannot be a ground to infer that Cals had not intended to open an account with Banco because, firstly, on the basis of the Board resolution dated 30/10/2007 certified by Sundararajan, director of Cals, an account was in fact opened in the name of Cals with Banco for depositing the GDR subscription amount. Secondly, on issuance of GDRs, the GDR subscription amount was in fact deposited in the said account of Cals with Banco. Thirdly, apart from the Board resolution dated 30/10/2007 certified by Sundararajan, there is no other resolution passed by Cals to open an account for depositing the GDR subscription amount. Fourthly, the GDR subscription amount deposited in the said bank account with Banco has been withdrawn by Cals in installments from time to time which is in consonance with the Account Charge Agreement executed by Cals. Without opening a bank account, Cals could not have opened the GDR issue. Very fact that Cals operated the account opened with Banco on the basis of resolution dated 30/10/2007 certified by Sundararajan clearly falsifies the case put up by Cals that it had not authorized any one to open an account with Banco for depositing the GDR subscription amount.*

(g) Similarly, argument that Cals had never authorized any person to sign any Account Charge Agreement is also without any merit, because, the Account Charge Agreement was signed by Goorha promoter-director of Cals. The Account Charge Agreement provides that all communications in relation thereto should be addressed either to Goorha or Sundararajan as they were the two authorized signatories to operate the Bank account of Cals with Banco. It is relevant to note that Goorha was the founder, promoter, director of Cals, whereas, Sundararajan was the director of Cals nominated by the Spice Energy group which had taken over Cals with a view to implement its refinery project through Cals by raising funds through issuance of GDRs. Admittedly, Sundararajan was in-charge of the entire GDR process. Thus, the bank account with Banco for depositing the GDR subscription amount was opened by Sundararajan, director representing the Spice Energy group and the Account Charge Agreement was

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

20. The Company has also contended that the SCN is based on surmises and conjectures and have placed reliance on judgements passed by Hon'ble Supreme Court and SAT viz:- *Nandkishore Prasad v. State of Bihar,* ((1978) 3 SCC 366; *Sterlite Industries Ltd v. SEBI,* (2001) 34 SCL 485 to substantiate their argument that a high degree of probability is required to establish the charge of fraud and manipulation. It is further submitted by the Company that their record of regulatory compliances have been excellent, that they do not have any pending investors complaints, that the GDR issue was made after complying with all laws and that the SCN has not brought out any concrete figure of loss incurred by Indian investors. However, the Noticee Company should not overlook the fact that the SCN has clearly spelt out the allegations, the device, artifice or the scheme engaged or practiced by the Company and its directors for facilitating the financing of the subscription and allotment of its GDR issue, without disclosing the true and correct facts to the investors, which lead to an unmistakable conclusion that the Noticees have committed fraud upon investors at large. The allegations made in the SCN are further supported by adequate evidence available in the form of Board Resolution, execution of Loan and Pledge Agreement, delay in receipt of the GDR proceeds, non-disclosures of the relevant specific Board Resolutions, execution of agreements and other vital information pertaining to the issuance of GDRs to the Exchange. Hence, the assertions made by the Noticees about regulatory compliance and no loss to investors etc. cannot absolve the Noticees from the unfair trade practice adopted

by them thereby keeping the shareholder and other investors in dark about the Company's pre-meditated arrangement with Vintage and EURAM Bank. In this regard, I find it apt to refer to and rely on the views of the Hon'ble Supreme Court in the case of *SEBI v. Kishore Ajmera*, (2016) 6 SCC 368, wherein the apex court has made the following observations about the nature of evidence to be used while adjudicating a quasi-judicial proceeding:-

> *"……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...*
> *.....Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder is concerned....."*

21. Applying the above test in the instant proceedings, I am of the view that there are enough evidences available on record which sufficiently indicate the fraudulent intent on the part of the Noticees to mislead the investors by concealing material facts from them and to induce the investors to trade in the scrip and such fraudulent acts of the Noticees certainly fall within the ambit of PFUTP Regulations. I further find the observations of the Hon'ble Supreme Court in the case of *SEBI v. Rakhi Trading Pvt. Ltd., (2018) 13 SCC 753* relevant to be relied upon at this juncture, wherein it was held 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 the case of SEBI v. Shri Kanhaiyalal Baldevbhai Patel and Ors (2017) 15 SCC 1 the apex Court have 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."

22. Further with regards the contention of the Noticee that the SCN has not brought any concrete figure of loss incurred by Indian investors, I would also like to rely on the following observation made by Hon'ble Supreme Court in the case of *Rakhi Trading Pvt. Ltd. (Supra):*

"According to SAT, only if there is market impact on account of sham transactions, could there be violation of the PFUTP Regulations. We find it extremely difficult to agree with the proposition. As already noted above, SAT has missed the crucial factors affecting the market integrity, which may be direct or indirect. The stock market is not a platform for any fraudulent or unfair trade practice. The field is open to all the investors. By synchronization and rapid reverse trade, as has been carried out by the traders in the instant case, the price discovery system itself is affected. Except the parties who have pre-fixed the price nobody is in the position to participate in the trade. It also has an adverse impact on the fairness, integrity and transparency of the stock market."

23. It may be recalled here that the Company had informed BSE on June 25, 2010 that *"the Board of Directors of the Company at its meeting held on June 25, 2010 successfully concluded placement of 5,208,333 Global Depository Receipts at US$ 10.32 per Global Depository Receipt (Representing 31,249,998 Equity Shares of Rs. 10/- each) totaling to USD 53.75 mn*." However, despite being aware about the specific entity who would be subscribing to whole of its GDR issue as per its premeditated arrangement with the enity,

the crucial material facts surrounding the Loan and Pledge Agreements and also about the single subscriber were knowingly concealed from the investors. The investors were never allowed to know that the GDR proceeds would be kept as a security against the loan taken by the subscriber and in case of default by the subscriber, the proceeds would be eventually utilized by Bank to settle the loan obligations of the borrower/subscriber. It was also observed that soon after their issuance to the single subscriber, the GDRs were converted into equity shares and sold in the Indian Securities Market. The afore mentioned declaration made by the Company on June 25, 2010 on the platform of the Stock Exchange about the successful subscription of GDR issue without disclosing the behind the scene arrangement undertaken by it with the subscriber/borrower to ensure full subscription to its GDR by facilitating a loan to the subscriber, has given an ostensible impression to the investors and the market about the strong potential of the Company that investors outside India had shown overwhelming interest in subscribing to the securities issued by the Company.

24. The above acts of the Company represent a serious fraudulent and unfair trade practice, inflicted on the Shareholders and also on the innocent investors in the Securities Market at large. The investors including its own Shareholders were made to believe that the shares of the Company have a good market abroad and have been very well received by investors abroad, hence, the Company has a great value for investment in India as well. Such misleading inferences and deceptive positive expectations about the shares of the Company were caused by the Company's own acts by devising and arranging a scheme through which it ensured a successful issuance of GDR beyond the knowledge of its Shareholders. The investors were not aware about the artifice created by the Company through which it enforced the successful subscription to its GDR. Under the circumstances, identifying or

ascertaining the actual figure of loss suffered by the investors in the Securities Market is neither relevant nor can it be insisted upon as a pre-condition to issue a SCN for violation of PFUTP Regulations, as argued by the Noticees.

25. In this context, I further find it proper to refer to observation of Hon'ble Supreme Court of India dated July 6, 2015 in *SEBI v. PAN Asia Advisors Ltd & anr.*, (2015) 14 SCC 71 wherein Hon'ble Supreme Court, while dealing with issue of GDR by way of a similar arrangement of Loan and Pledge Agreement, have observed the following;

> "*the most relevant fact which is to be borne in mind is that the existence of GDRs is always dependent upon the extent of underlying ordinary shares lying with the Domestic Custodian Bank……..*
> *….that for creation of GDRs which can be traded only at the global level, the issuing company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing company in the market and the confidence built up with the investors both internally as well as at global level, the issuing company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a keen interest to invest in such GDRs. Mere desire to raise foreign investments without any scope for the issuing company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs…….*
> *To put it differently, by artificial creation of global level investment operation, either the issuing company on its own or with the aid of its lead Manager cannot attempt to make it appear as though there is scope for trading GDRs at the global level while in reality there is none…."*

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

> *"The expression 'fraud' is defined under the PFUTP Regulations……..*
> *……..from the aforesaid definition it is absolutely clear that if a person by his act either directly or indirectly causes the investors in the securities market in India to believe in something which is not true and thereby induces the investors in India to deal in securities, then that person is said to have committed fraud on the investors in India. In such a case, action can be taken under the PFUTP Regulations against the person*

committing the fraud, irrespective of the fact any investor has actually become a victim of such fraud or not……..
…….Thus, the investors in India were made to believe that in the global market the issuer companies have acquired high reputation in terms of investment potential and hence the foreign investors have fully subscribed to the GDRs, when in fact, the GDRs were subscribed by AP through Vintage which was wholly owned by AP. In other words, PAN Asia as a Lead Manager and AP as Managing Director of PAN Asia attempted to mislead the investors in India that the GDRs have been subscribed by foreign investors when in fact the GDRs were subscribed by AP through Vintage. Any attempt to mislead the investors in India constitutes fraud on the investors under the PFUTP Regulations".

27. In view of the discussions and observations made in the preceding paragraphs, I find that the entire scheme created by the Company (Resurgere) starting with passing of Board Resolution, followed by entering into the Pledge Agreement to permit use of the funds deposited in its account with EURAM Bank as a security against a loan, making an announcement on June 25, 2010 that the GDR have been successfully allotted and then not disclosing to the Public the relevant Board Resolutions, details of Pledge Agreement and its arrangement with the sole subscriber to secure the obligation of its loan liability have cumulatively resulted in misleading the investors at large. Such a scheme and arrangement has in it, all the ingredients that comprise a fraudulent activity in the Securities Market. In view of the above, I hold that by its acts of concealing and suppressing vital material facts about the arrangement of the Loan and Pledge Agreements, the Noticee Company has committed a fraudulent act upon its own existing Shareholders and also upon all the investors of the Securities Market who might have been induced to deal in the shares of the Company due to the artificially created positive outlook about the Company's performance. Under the circumstances, the acts of engaging in such practices, scheme and concealing material information from Shareholder are held to be 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.

ISSUE NO. 2: *Whether the Noticees no. 2 to 6 have violated Section 12A(a), (b), (c) of the SEBI Act read with Regulations 3 (a), (b), (c), (d) and 4(1) of PFUTP Regulations?*

28. I note from the SCN that the Directors of the Company, viz:- the Noticees no. 2 to 6 attended the Board Meeting held on May 28, 2010. Accordingly, on the basis of the authorization given by the Board by passing enabling resolutions on the said date, the Noticee no. 2 has signed the Pledge Agreement on behalf of the Company, which provided *inter alia*, for GDR proceeds to be kept as a security against the loan availed by Vintage for subscription to the GDR of Resurgere. I also note that none of these Directors has disputed his attendance in the aforesaid meeting.

29. It is noted that Noticee no. 3 has stated in its written reply that he wants to adopt the contentions and submissions advanced by the Noticee Company in its written reply. Since, the submissions and contentions raised by the Noticee Company have already been discussed by me in preceding paragraphs while dealing with the issue no. 1 pertaining to the Noticee Company, my observations and conclusions made therein are also equally applicable in the case of Noticee no. 3 to the extent they have followed and adopted the arguments and explanations of Noticee Company. Similarly, there are several common contentions raised by the Noticees in their written replies which have been already been dealt with and are not being repeated for the sake of brevity. I therefore would proceed to deal with the additional submissions made by the Noticees in their defence. Noticee no. 2 (Mr. Subhash Sharma) has submitted that he was the Chairman and Managing Director of

the Company since 2002 and he trusted the expertise of the Lead Manager hence, signed the documents in good faith. He has denied having executed the Pledge Agreement and has stated that the original documents have not been made available to him by SEBI prior to making such serious allegations against him. He has also stated that he was wrongly made a party to the Pledge Agreement.

30. Admittedly, Noticee no. 2 was the Chairman and Managing Director of the Noticee Company and was in-charge of the day to day management of the affairs of the Company. As per the Board Resolution of the Company dated May 28, 2010, the GDR proceeds were authorized/permitted to be kept as a security against the loans, if any. In conformity with the above Board Resolution, I find that an amount of USD 53.75 million, which were raised through GDR issue were pledged with the EURAM Bank and were not made available to the Company for its immediate utilisation. None of the Noticees has brought any evidence in defence to support his submissions that the intent of the aforesaid Board Resolution was something else and not to ensure subscription to the GDRs through any fraudulent scheme. Therefore, in the absence of any other contingency or business exigency shown by the Noticee, I don't see there could be any other reason to keep the GDR proceeds as a security for any loan that was proposed to be availed by the Company. Therefore, in the facts of present case, it is abundantly clear that at least as on June 16, 2010, when the Loan and Pledge Agreements were signed, (if not on May 28, 2010 when the Board Resolution was passed) the Noticee no. 2 being in charge of the day to day affairs of the Company as well as being the signatory to the Pledge Agreement, knew that the GDR subscription amount was liable to be kept as a security against the loan taken by the sole subscriber of the GDR (Vintage). I also note that the Pledge Agreement signed and executed by the Noticee no. 2

incorporates suitable provisions about the Loan Agreement and accordingly in the clauses of the Pledge Agreement suitable stipulations have been made, whereby the Noticee Company has undertaken to discharge the liability of the borrower, in the event the Borrower defaults in paying the loan received by it to subscribe to the GDR of the Company. Hence, the question of Noticee no. 2 not being aware of the Pledge or Loan Agreement with EURAM Bank does not arise.

31. It becomes clear that Noticee no. 2 was very much seized of the intent behind the Board Resolution passed on May 28, 2010 pursuant to which he has signed the Pledge Agreement to secure the loan taken by the Vintage for subscribing to the GDR of Resurgere. Undoubtedly, Noticee no. 2 was the Managing Director and was responsible for the day to day affairs of the Company hence, it was certainly his primary duty to come out completely clean before the Board with all the facts, strategy, steps to be followed and compliances to be made with respect to the proposed GDR issue, before moving a Resolution before the Board. Further, Noticee no. 2 was also part of the GDR committee. He being in the driving seat of the Company knew how to steer the proposed issuance and therefore ought to have clarified to the Board Members about his pre-arrangement with the subscriber and about the proposed Pledge Agreement that was devised to be executed with the Bank. Therefore, he can't be permitted to plead ignorance about the implications and consequence of the Board Resolution dated May 28, 2010 and cannot take shelter under the plea that he signed the documents on good faith and under influence of the Lead Managers to the issue, more so, considering the fact that neither the Company nor the Noticee Directors have taken any legal action against the Lead Manager, despite having been served with a SCN in June 2017. Noticee no. 2 being in complete command and control of the Company, is answerable

to the Board for not sharing or disclosing the true implications behind moving the aforesaid Board Resolution and the intention behind signing the Pledge Agreement which he executed without disclosing the same to the Board Members or to the Public. His denial of executing the Pledge Agreement also appears to be a feeble after thought defence to evade accountability for his own actions while the facts in the case clearly indicate that the Noticee no. 2 was actively involved in the fraudulent arrangement for the GDR issue of the Company.

32. As regards the contention of the Noticee that he has not been provided with originals documents, I find that copies of all the relevant documents relied upon in the SCN have been duly provided to the Noticees. I further note that all the documents referred to and relied upon in the SCN were collected by SEBI during the course of investigation. The originals of the two agreements i.e Loan Agreement and Pledge Agreement have to be either in the possession of the Noticee Company or of the EURAM Bank and SEBI has received only copies of these agreements during investigation, through the good offices of overseas regulatory authorities. Accordingly, copies of the documents as collected by SEBI in the course of investigation, have been duly provided to the Noticees. Under the circumstances the Noticee's claim for original documents is frivolous and without any basis and he is demanding something which cannot be in the possession of SEBI. The contentions of the Noticee has no force as the Noticee has not disputed the contents, and clauses of the agreement, especially when he is the one who has executed one of the most crucial documents, viz:- Pledge Agreement. The Noticee could have cross-checked the copies of the agreement furnished to it with the original version which has to be in the custody of

EURAM Bank or in his own custody or with the Company. In view of the above, I do not find that the Noticee has been prejudiced in any manner.

33. In so far as Noticee no. 3 (Mr. Amit Sharma) is concerned, he has argued in his defense that he was the Whole Time Director of the Company from 2004 onwards and has not made any gains or derived unfair advantage or caused any loss to investors. It is highly inconceivable to think that deriving of profit to himself or loss to investor should be an essential criteria to hold someone guilty of fraud under the PFUTP Regulations. Persons or entities who are associated with the securities market especially persons like Noticee no. 2 and 3 who are at the helm of business affairs of a listed company are not only required to be diligent and to act in adherence to the rules and regulations but also have to desist from adopting any unfair means, which would be detrimental to the interest of the securities market even though their action does not lead to any unjust profit to them or any quantifiable loss to the investors. The Noticee ought to realise that the securities market is not a platform for adopting any fraudulent or unfair trade practice in whatsoever manner that obstructs dissemination of true and fair disclosures to the Public. Therefore, the argument of not deriving any benefit or causing any loss to investors becomes infructuous and redundant once it is found that the act of the Noticee in itself is fraudulent and not fair. I find it appropriate to rely of the observations made by Hon'ble SAT in their order dated July 14, 2006 in the matter of *Ketan parekh Vs. SEBI*, wherein it was observed that *" .....We are therefore of the view that inducement to any person to buy or sell securities is the necessary consequence of manipulation and flows therefrom. In other words, if the factum of manipulation is established it will necessarily follow that the investors in the market had been induced to buy or sell and that no further proof in this regard is required. The market,*

as already observed, is so wide spread that it may not be humanly possible for the Board to track the persons who were actually induced to buy or sell securities as a result of manipulation and law can never impose on the Board a burden which is impossible to be discharged……."

34. In addition to the above, I also find it appropriate to refer to the observations made by the Hon'ble Supreme Court of India in the matter of *N. Narayanan v. Adjudicating Officer, SEBI*, (2013) 12 SCC 152 wherein, while considering the liability of a Whole Time Director of a Listed Company, the Hon'ble Supreme Court has observed the following;

> *"Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. …….*
> *…….The facts in this case clearly reveal that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person…….*
> *……the subsequent conduct of pledging their shares at artificially created prices, based on inflated financial results and raising loan on them would indicate* ***that they had deliberately and with full knowledge committed the illegality****……."*

35. Noticee no. 3 was the Whole Time Executive Director of the Company during the relevant period of GDR issue, and was also part of the GDR committee. Being actively involved in running the day to day affairs of the Company and being associated with the GDR related matters, there can't be a different opinion that he had full knowledge of the pre-determined arrangement with EURAM Bank and Vintage, pertaining to the GDR issue. The Noticee has also not produced any evidence to prove that he had no knowledge of the said fraudulent scheme or to forcefully argue his case that he had exercised due diligence in the

implementation of GDR issue. It is not even his case that he has been duped by the Company or the Managing Director. It is noted from the submissions made by the Company that Noticee no. 3 was the Executive Director of the Company and Head of Finance during the year, 2010.It has also been submitted that Noticee no. 2 had fully trusted the Noticee no. 3 and carried out the GDR issue related processes as per the instructions given by him. Noticee no. 3 has not denied the aforesaid submissions made by the Company about his role. From the above, I find that Noticee no. 3 was actively involved in managing the affairs of the Company including the GDR issue. Considering that Noticee no. 3 was the Whole Time Director during the relevant time of GDR issue including when the Company made those misleading disclosures pertaining to the GDR issue, his subsequent resignation in August 2011 would not have any relevance to his liability as charged under the SCN served on him. In view of the above, as held by me in the case of Noticee no. 2, in the absence any evidence to the contrary, I am constrained to hold Noticee no. 3 equally involved in the fraud perpetrated on the shareholders and investors of the Company in the matter of GDR issuance by the Company for the same reasons and on the same grounds on which I have held that Noticee no. 2, by his acts and conduct, has violated the provisions of PFUTP Regulations, as alleged in the SCN.

36. Moving on to the Non-Executive Independent Director Noticees, I find that Noticees no. 4 and 5 have made similar submissions and have offered similar explanations before me. Both the Noticees have submitted that they were functioning as Non-Executive Independent Directors from August 14, 2007 and have resigned on August 10, 2010. They were not involved in the day to day operations of the Company and have discharged their duties in good faith and with due diligence. They were also not part of the GDR committee

which was constituted to look after the matters related to GDR issue, comprising Noticees no. 2, 3 and 6. It has been further submitted that as diligent directors, they have resigned immediately after coming to know the nefarious design of the Company. In this regard, when confronted during their Personal hearing regarding the fraudulent scheme allegedly designed by the Company to ensure successful subscription to the GDR issue and also about the onward transfer of GDR proceeds to the Company's UAE subsidiary, the Noticees have submitted that they offered their resignation in a Board meeting held on August 5, 2010, after coming to know that a wholly owned subsidiary was already incorporated by the Company in Dubai in June 2010 without there being any approval of the Board of Directors. The Noticees have stated that they were shocked to know that such a material issue involving creation of an overseas subsidiary was brought to the Board for discussion only after the incorporation of the subsidiary and after the GDR issue was over. Therefore, they raised concerns about how it could be done without prior discussion and approval by the Board. It is further submitted that the Noticee no. 3, (Mr. Amit Sharma) informed the Board that the subsidiary has been incorporated pursuant to an old Board Resolution dated January 20, 2006 which was passed long before the Company got listed. The Noticees no. 4 and 5 have further claimed to have no knowledge about the Loan or Pledge Agreement, hence, are not in violation of provisions of PFUTP Regulations as alleged in the SCN. They have contended that the Board Resolution dated May 28, 2010 authorising the GDR proceeds to be kept as security against loan was meant for the loan to be taken by the Company and not by any third party, hence the Pledge Agreement was executed by Noticee no. 2 without the authorisation of the Board who has played mischief upon them by concealing the material facts. Noticee no. 5 has also additionally relied upon different cases decided by Hon'ble Supreme Court and SAT to buttress his contentions that as an Independent Director, he had

limited role to play as he was not involved in the day to day functioning or managing the affairs of the Company, hence, was not aware of the alleged wrongdoings by the Company. Further, he has exercised diligence immediately after becoming aware of the facts and has tendered his resignation from the Company's Board hence, can't be held liable, for the wrongdoings of the Company.

37. On his part, Noticee no. 6 has contended that he was the Non-Executive Independent Director of the Company from June 17, 2009 to January 5, 2012 and was not involved in the day to day management of the Company. He has no material/pecuniary relationship with the Company or promoters or senior management and has enjoyed the reputation of being an honest professional with utmost integrity. He has contended that the allegations in the SCN pertain to concealing of material facts about the fraudulent arrangement in respect of the Pledge Agreement, etc. which fall in the domain of day to day activities performed by Whole Time Directors and other officials and the SCN does not allege that the said activities were approved by the Board of the Company. As regards the opening of a Bank account in EURAM Bank, the Noticee has submitted that the same was part of the proposal relating to issue of GDRs and there was nothing on record to appear suspicious about it. It has also been contended by the Noticee that the Board had given authority to Noticee no. 2 to create a security, *if and when so required*, and it was Noticee no. 2's decision to execute the Pledge Agreement in which Noticee no. 6 was also not involved. Further, the matter of GDR proceeds utilisation was solely being looked after by the CMD and Whole Time Directors, and as an Independent Director, he was not involved in utilisation of GDR funds.

38. I have perused the judgement of Hon'ble Supreme Court in the case of *Chintalapati Srinivasa Raju and ors. v. SEBI,* (2018) 7 SCC 443 relied upon by Noticee no. 5, wherein Court has held that **"***Non-executive directors are, therefore, persons who are not involved in the day to day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company."* I have also taken note of the reliance placed by the Noticee on Regulation 25 (5) of (Listing Obligations and Disclosure Requirements) Regulations, 2015 to state that an Independent Director should only be made liable in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. I note that the allegation against these Directors in the present proceedings is that they have authorised the management of the Company for execution of a Pledge Agreement by passing a suitable resolution in the Board meeting held on May 28, 2010, followed by allegedly indulging in a fraudulent arrangement with EURAM Bank and Vintage to facilitate financing of subscription to the GDR issue of the Company. In addition to the above, these Noticee Directors were allegedly involved in filing those false and misleading disclosures to the Stock Exchange about the GDR issuance, allotment and subscriptions, thereby becoming parties to the fraud committed by the Company on the Shareholders and investors of Securities Market. I note that these Directors have claimed to have neither any knowledge of nor have they authorised the execution of any Pledge Agreement but have not been able to substantiate successfully as to why at all, they have passed such a resolution in the first place and what other reasonable purpose was intended to be served by the said Resolution which authorised the Company to hold the GDR proceeds as security against loan. Accordingly, it has to be seen as to whether they have actually had no knowledge of the fraudulent arrangement and whether

they have displayed any due diligence that is expected of an Independent Director while participating in a Board meeting that dealt with such a crucial matter like issue of GDR by the Company. In this regard I am persuaded by the submissions of the Noticee no. 4 and 5 explaining with substance to rely upon, that they have tried to demonstrate considerable due diligence in the matters of the Company by raising pertinent questions in the Board Meetings. It has been pointed out to me that after coming to know that the Company was not being transparent, the Noticees no. 4 and 5 have immediately taken a decision to step down from the position of directorship. The two Noticees have shown their limited liability as an Independent Director and have further highlighted before me as to how they were diligent in performing their duties in the capacity of Independent Directors. I can observed from their explanations that they have endeavoured to act with diligence and to bring transparency in the working of the Company. I further note that none of these two Noticees i.e Noticee no 4 & 5 was part of the GDR Committee and both of them have resigned from the Board within months after the GDR issue was completed on August 10, 2010. Considering the submissions made by the Noticees and the manner these two Noticees have carried themselves as Independent Directors with due vigil and alertness and have raised objections to the management whenever needed, I find that the charges made on Noticees no. 4 and 5 would not sustain in the facts of the matter and accordingly, the proceedings against them deserve to be dropped without any direction being issued.

39. However, with respect to Noticee no. 6, I find that he was part of the GDR Committee and continued to be a director of the Company till January 5, 2012. There is nothing in his submissions to explain as to why he was continuing even after coming to know the facts that were discussed and disclosed in the board meeting held on August 05, 2010. He has

not not been categorical in his submissions to show to me as to what due diligence he has exercised as part of the GDR Committee and as an Independent Director to protect the interest of the Company and its shareholders. Therefore, in the absence of any evidence produced by the Noticee no. 6, I am constrained to find him guilty of the charges made in the SCN. Needless to state that issuance of GDRs in overseas market was a very crucial decision of the Company and it is expected from the Board Members to be careful and cautious while deliberating and deciding on the course of action on such a matter of vital importance to the Company. Undoubtedly, Noticee no. 2 (Mr. Subhash Sharma), CMD of the Company along with the Whole Time Director (Noticee no. 3) were in charge of the day to day affairs of the Company and it was certainly their primary duty to come clean before the Board with all the facts, strategy, steps to be followed and compliances to be made with respect to the proposed GDR issue, before moving a Resolution before the Board. Even assuming for a moment that the Chairman/Managing Director have acted fraudulently by keeping the Board Members in dark about the proposed Pledge Agreement and their prior arrangement with the Vintage, on his part Noticee no. 6 has not adduced any evidence to show that he had acted diligently and performed his role as Non-Executive Independent Director in the interest of the shareholders of the Company. He was part of the GDR Committee set up to monitor and implement the GDR issue. Even subsequent to the issue and allotment of GDR, the Noticees no. 6, does not appear to have taken any steps or done anything to show that he had acted diligently to protect the interest of the Company or its shareholders. Further, by not raising any concern over non receipt of the GDR proceeds for Company's utilisation immediately after the issue, the Noticee no. 6 has not exhibited any good conduct to rise above the strong suspicion about his collusions with the Company and other Directors. Being casual and thereby omitting to act diligently at times

may be ignored but turning a blind eye and allowing something to be done in disregard of the duties of a Director can't be considered as a mere omission, but would amount to a collusive misconduct. In my considered view, Noticee no. 6 being a part of the GDR committee cannot absolve himself from the onerous duty to look after the best interests of the Company and cannot escape from his fiduciary duties by taking the plea that he has been kept in dark by the Executive Directors of the Company. Therefore, apart from the Managing Director and Whole Time Director who certainly acted fraudulently, Noticee no. 6 has also not acted in the interest of Shareholders of Noticee no. 1 Company and investors of Securities Market, and rather has apparently conducted himself in collusion, albeit passively, with other Noticees in conceiving and implementing the GDR issue in a fraudulent and non-transparent manner, to the detriment of the interest of the investors in the Securities Market.

40. As held by me, the Company has used the GDR mechanism to mislead and induce the Indian investors. The Company has not divulged its fraudulent arrangement of the Loan and Pledge Agreement in its disclosure made in the Indian securities market and by merely informing that the GDRs were successfully placed, has presented a misleading appearance and a false promise of great value and potential about the stock of the Company in the domestic markets. Such a misleading disclosure tantamount to fraud on the investors with a motive to further its interest as opposed to the interests of investors of Securities Market who may easily fall prey to the artificially created successful GDR issue and get induced to invest in its shares expecting better returns. The Noticees no. 6 being a Non-Executive Director of the Company, ought to either have taken due precautions and diligence before agreeing on the Resolutions of the Board that sowed the seeds of the Pledge Agreement to

secure a loan taken by an unrelated third party as part of a collusive scheme, to mislead and defraud the investors and should have acted diligently even subsequently, by questioning the management of the Company and expressing his concerns about the said arrangement through which, GDRs were issued in a deceptive manner, in order to establish his bonafide as being victim of the fraud and not part of the fraud that was committed by the Company. I note that the Noticees no. 6 has not shown any diligence on his part as a Non-Executive Independent Director in the entire GDR issue or even otherwise, in the functioning of the Company.

41. The Hon'ble Supreme Court, in the matter of *Rakhi Trading (supra)* above case have 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. The Hon'ble Apex Court have further 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."*

42. To sum up the preceding discussions, I find that the Loan Agreement was inseparably linked to the Pledge Agreement and vice versa, and both were executed consecutively. The Pledge Agreement was signed by Mr. Subhash Sharma (Noticee No. 2) on behalf of the Pledgor i.e., Resurgere. The Noticee Directors facilitated the execution of the Pledge Agreement by passing a conveniently enabling Board Resolution. The Loan Agreement and Pledge Agreement enabled Vintage to avail loan from EURAM Bank for subscription of GDR of Resurgere. This was made possible by the Company by offering its GDR proceeds as security for the loan extended by EURAM Bank to Vintage. The GDR issue would not have been subscribed, if the Company had not given such a security against the

loan taken by Vintage. By entering into such an arrangement, the Noticees no. 2, 3 and 6 have led the investors in India to believe that the issuer Company i.e. Resurgere has got a good reputation in terms of investment potential because of which, foreign investors have enthusiastically subscribed to its GDR, whereas in reality, the GDRs were subscribed by Vintage with the help of the Company itself. Therefore, in effect on the basis of authorisation given by the Board of Directors, the Company has facilitated the subscription of GDR by Vintage on the strength of a loan obtained by it from EURAM Bank against which, the GDR proceeds of the Company were kept as security. All the aforesaid transactions and activities were undertaken behind the back of the Shareholders and other investors of the Securities Market. It is only when Vintage repaid the loan, presumably by liquidating the underlying shares of the GDRs in the Securities Market, that the Company could get back its GDR proceeds from EURAM Bank for its utilisation. In my view, apart from the Issuer Company (Resurgere) i.e. Noticee no. 1 and Chairman and Managing Director (Noticee no. 2), its Whole Time Director (Noticee no. 3) who have undoubtedly concealed the above information from the Shareholders, Non-Executive Independent Director (Noticees no. 6) who was also a part of the Committee overseeing the GDR issuance, has also failed to advance any credible explanation supported by any evidence to prove his innocence, hence, it constrains me to hold that he too has acted fraudulently along with Noticees no. 1, 2 and 3, in breach of the provisions of Sections 12A (a) to (c) of the SEBI Act read with Regulations 3 (a) to (d) and 4 (1) of the PFUTP Regulations.

DIRECTIONS:

43. In view of the above discussions and my concluding observations with respect to the two issues that were considered by me in the matter, in exercise of powers conferred upon me

under Sections 11, 11(4), 11B (1) 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 and to meet the ends of justice, I hereby issue the following directions:

a) Noticee no. 1, the Company is restrained from accessing the Securities Market including by issuing prospectus, offer document or advertisement soliciting money from the public and is further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, for a period of five (5) years from the date of this order.

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

S. No.	Names of the Noticee	PAN	Period (years)
1.	Mr. Subhash Sharma	AXCPS8189D	Three (3)
2.	Mr. Amit Sharma	AVRPS2826C	Two (2)
3.	Mr. Nitin Sethi	ADUPS1603C	One (1)

c) It is clarified that during the period of restraint, the existing holding of securities of the Noticees including units of mutual funds, shall remain frozen.

d) The Order shall come into force with the immediate effect.

e) 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 20, 2020 **S. K. MOHANTY**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA