BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
ADJUDICATION ORDER NO. Order/VV/AK/PSS/2022-23/19841

UNDER SECTION 15-I OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF THE SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

In respect of:
S.K.Bhoan
(PAN – AAKPB0324N)

In the matter of
Disclosures by Nakoda Ltd
in respect of its GDR issue.

A. BACKGROUND

1. Securities and Exchange Board of India ("**SEBI**") had conducted investigation against several Indian companies that had issued Global Depository Receipts ("**GDR**") in overseas markets. In this regard, on an enquiry with European American Investment Bank ("**Euram Bank**") about the loan taken by initial GDR subscribers, it has been informed that in respect of GDR issue of Nakoda Limited("**Nakoda**"/"**the Company**"), M/s. Vintage FZE ("**Vintage**"), also known as Alta Vista International FZE had availed loan against the GDR proceeds of Nakoda. Accordingly, SEBI had investigated the GDR issue of Nakoda during the issuance of GDR i.e, November 01, 2010 to December 31, 2010 (hereinafter referred to as Investigation Period ("IP")) to ascertain as to whether:

   1) GDRs were issued with the intention of defrauding Indian investors ;
   2) Shares underlying GDRs were issued with proper consideration ; and
   3) Appropriate disclosures with respect to Listing Agreement, if any were made.

2. During the course of investigation, it was observed that:

I. The scheme of issuance of GDRs was fraudulent as Nakoda, the Company, had entered into a Pledge Agreement with the bank, EURAM Bank for a loan that had been availed by Vintage, towards the subscription of GDRs issued by the Company. The Pledge Agreement was not disclosed to the stock exchanges, which made the investors believe that the said GDR issue was genuinely subscribed by foreign investors. Vintage was a party to this fraudulent scheme. D.B. Jain, who was the Joint Managing Director of Nakoda, signed the Pledge Agreement with EURAM Bank, whereby the account holding the GDR proceeds was given as security for the loan availed by Vintage from EURAM Bank for subscribing to the GDRs of Nakoda. D.B. Jain along with B.G. Jain and S.K. Bhoan ("***the Noticee***"), who were also Directors on the Board of Nakoda, in the board meeting dated September 23, 2010 authorized D.B. Jain and B.G. Jain to sign the Pledge Agreement allowing EURAM bank to use the GDR proceeds account as security for the loan availed by Vintage. Mukesh Chauradiya signed the Loan Agreement on behalf of Vintage for the subscription of GDRs of the Company. Arun Panchariya was director and beneficial owner of Vintage.

II. India Focus Cardinal Fund ("IFCF") was a sub-account of FII EURAM Bank. Arun Panchariya was the beneficial owner of IFCF. FII sub-account IFCF received GDRs, converted them and sold the converted equity shares of Nakoda in the Indian stock exchanges.

III. The Company came out with the issuance of 20,00,000 GDRs amounting to USD 24.25 million on November 26, 2010. A bank account was opened by Nakoda with EURAM Bank under the client number 580034 to deposit the GDR proceeds. Accordingly, a total of USD 24.25 million was credited to this account. Vintage had subscribed to the total GDR issue of Nakoda.

IV. It was observed during investigation that of the total 24.25 million USD taken as loan by Vintage, it did not repay any amount. Subsequently, it defaulted on the said loan, and the funds in the GDR proceeds account were appropriated by EURAM Bank by invoking the Pledge Agreement for satisfaction of the amount owed by Vintage. Considering that Vintage was the only subscriber of the GDR issue, and the Company had in effect paid for Vintage owing to the default by it in servicing the loan, and the same being satisfied from the GDR proceeds account of Nakoda, it was concluded that the GDRs, and the underlying equity shares in turn, to the tune of 24.25 million USD, were issued by Nakoda to Vintage without any consideration, at the cost of shareholders / investors of Nakoda. This is the fraudulent scheme that had been conceived.

V. On September 23, 2010, the Board of Directors of Nakoda (including the Noticee) passed a resolution resolving that a bank account be opened with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue of the Company. Also, at the said board meeting, EURAM Bank was authorized to use the GDR proceeds as security against loans, if any.

VI. Vintage entered into a loan agreement dated November 12, 2010 with EURAM Bank for a loan facility of USD 24.25 million, so as to "provide funding enabling Vintage FZE to take down GDR issue of 20,00,000 Luxembourg public offering and may only be transferred to EURAM account no.580034, Nakoda."

VII. On November 12, 2010, a Pledge Agreement was executed between Nakoda (as pledger) and EURAM Bank and the same was signed by D.B. Jain of Nakoda. As per the Pledge Agreement, Nakoda's designated account with EURAM Bank bearing no. 580034 would be held in pledge by EURAM Bank to secure the obligations of Vintage under the Loan Agreement.

VIII. The aforesaid Pledge Agreement was an integral part of the Loan Agreement entered between Vintage and EURAM Bank and vice versa and both were executed concurrently. The Pledge Agreement had the reference to the Loan Agreement entered between Vintage and EURAM Bank by virtue of which EURAM Bank provided the loan facility to Vintage for the purpose of subscribing to the GDRs of Nakoda. As already stated, the GDR proceeds to the tune of 24.25 million USD were deposited in the Company's bank account bearing number 580034 maintained with EURAM Bank.

IX. As Vintage had defaulted, an amount of USD 24.32 million (USD 24.25 million along with accrued interest of USD 0.07 million) was adjusted from the account of Nakoda, in conformity with the Pledge Agreement dated November 12, 2010, towards the outstanding loan amount owed by Vintage.

X. Even though consideration had not effectively passed from Vintage to Nakoda, the GDRs issued were, however, allowed to be converted into equity shares, and these shares were sold in the Indian capital market on April 04, 2011, Vintage had transferred 14,500 GDRs to FII-sub account, IFCF i.e. Noticee No. 8. On April 07, 2011, 14,500 GDRs were converted into 4,35,000 equity shares by IFCF.

XI. Further, India Focus Cardinal Fund was registered as sub account of FII, EURAM Bank. IFCF was the only sub account to be registered with EURAM Bank. Also, as an FII, EURAM Bank did not make investment in India, except for the sale of shares in the Indian capital market, pursuant to the conversion of GDRs by IFCF. The FII, namely, EURAM Bank facilitated the sale of the equity shares, received by way of fraudulent issue of GDRs.

XII. On October 25, 2012 and November 20, 2012, Nakoda wrote two letters to Bank of New York Mellon (Global Depository) (hereinafter referred to as `BNY Mellon') requesting that no shares be transferred or sold without its consent.

XIII. BNY Mellon sent a resignation letter dated December 06, 2013 to Nakoda informing it of the termination of GDR program, and asked Nakoda to appoint a successor depository bank on or before April 07, 2014, failing which it would terminate the GDR program. On April 16, 2014, BNY Mellon announced its termination notice publicly. As per the termination notice, the GDR holders had two options i.e., to take the possession of underlying shares or to receive the sale proceeds of shares once BNY Mellon sold underlying shares in Indian Stock exchanges.

XIV. Thereafter, BNY Mellon began to sell the shares underlying the GDRs held in its custody account in January 2015 and completed the sale of shares in October 2015. BNY Mellon sold the underlying shares through DBS Bank (Local custodian). DBS Bank vide email dated February 22, 2017 informed SEBI that, based on the instruction of BNY Mellon, it had sold 5,95,65,000 shares of Nakoda for Rs. 1,81,83,538.71 (including income tax).

XV. Since, the Noticee along with other directors had approved the board resolution dated September 23, 2010 and authorized D.B. Jain and B.G.Jain to sign the agreement with EURAM Bank and authorized EURAM Bank to use funds as a security in connection with loan, pursuant to which D.B.Jain signed pledge agreement with EURAM Bank, the Noticee is alleged to have violated section 12A(a) , (b) , (c) of the SEBI Act read with Regulation 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations.

B. APPOINTMENT OF ADJUDICATING OFFICER

3. Mr.Sahil Malik was appointed as the Adjudicating Officer under section 15I of the Securities and Exchange Board of India Act, 1992 read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as the 'Adjudication Rules') to inquire into and adjudge under section 15HA of the SEBI Act. Subsequent to the transfer of Mr. Sahil Malik, the Undersigned has been appointed as the Adjudicating Officer in the present matter vide order dated August 09, 2019.

C. SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice dated December 20, 2020 ("**SCN**") was duly served upon the Noticee under Rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be held and penalty be not imposed against the Noticee under the provisions of under section 15HA of SEBI Act for the alleged violation of section 12A (a) , (b), (c) of SEBI Act r/w Regulations 3(a), (b), (c) and (d) , 4(1) of PFUTP Regulations.

5. I note, from available records, that the SCN was duly delivered to the Noticee. Noticee has filed multiple replies dated April 06, 2022, April 30, 2022, August 29,

2022 and September 01, 2022. Opportunity of personal hearing in the matter was provided to the Noticee on March 22, 2022, May 04, 2022 and September 22, 2022. I note that principles of natural justice have been complied with.

6. The Noticee vide his letters dated April 06, 2022 , April 30, 2022 , August 29, 2022 and vide E-mail dated September 01, 2022 has made his submissions. The key submissions made by the Noticee are summarized as under:-

   i) Complete material/documents in support of the allegations have not been made available to the Noticee. Due to the unavailability of such documents/material on which the allegetions have been levelled qua the Noticee, it makes him handicapped in effectively answering the charges levelled against him in the SCN.

   ii) There is no specific averment, allegation or statement against the Noticee. as to the nature of fraud which has been alleged in the SCN. SCN just pointed out that the Noticee was the part of the alleged meeting, which authorized to open bank account, however, the SCN has failed to consider the role of the Noticee in the Company and GDR process. In this regard, Noticee has relied upon judgment of the Hon'ble Supreme Court ("**SC**") namely *Gorkha Security Services vs Govt of NCT of Delhi (2014 9 SCC 105).*

   iii) There has been an undue and unexplained delay in the initiation of proceedings against the Noticee. It is a fact on record that the SCN was issued in the year 2018 and the alleged acts committed in the year 2010, i.e. after a lapse of nearly more than 8 years from the date of issuance of GDRs. In this regard, Noticee has relied upon the order dated 15-04-2021 of Securities Appellate Tribunal ("**SAT**") in (1) *Morepen Laboratories Limited vs SEBI* , judgment of Hon'ble Supreme Court ("**SC**") namely (2) *Adjudicating Officer, SEBI vs Bhavesh Pabari* and order of SAT dated 15-02-2021 *in (3) G.V.Films vs SEBI.*

   iv) Noticee was independent director of the Company from April 24, 2007 to December 20, 2013, when the Noticee resigned from the post. As

Independent Directors of the Company, Noticee was not involved in day to day operations and decision making that goes on within the Company.

v) Noticee was only a party to the meeting of management committee dated September 23, 2010 in which there needed to be a resolution passed by the board of directors. Being a member of the management committee does not construe that the Noticee has the knowledge of GDR scam and was aware about day to day affairs of the Company. Noticee only authorized at the time of management committee meeting and at the time of board meeting mostly all other directors are also present.

vi) Decision of the management committee cannot make the Noticee vicariously liable since the said committee is not the statutory committee under the provisions of the Companies Act and the said decision is followed by the board's approval.

vii) Board resolution had given a general authorization to Mr.D.B.Jain and Mr.B.G. Jain and the Noticee being an independent director who is not involved in day to day workings of the Company would never get to know about any alleged fraudulent and manipulative intent of the Managing Directors behind the passing of the Board Resolution as alleged. In this regard, Noticee has relied on judgment of the SC namely (1) *K.K.Ahuja vs V.K.Vora and Ors.(2009 10 SCC 48) , (2) Pritha Bag vs SEBI (SAT order dated 14-02-2019)*

viii) The allegations under PFUTP Regulations are serious ones which require mens rea to be established. There is no intent to defraud or the like or actual fraud or the like. Very serious allegations of fraud which have been raised against the Noticee require a high level of proof. In this regard, Noticee has relied on following judgments/orders of higher courts:-

a) Union of India vs Chaturbai M.Patel (AIR 1976 SC 712)
b) Parsoli Corporation vs SEBI (SAT dated 12-08-2011)
c) Sterlite Industries vs SEBI (SAT dated 22-10-2001)
d) Paresh Parekh vs SEBI (2002 40 SCL 139)
e) Ess Ess Intermediaries vs SEBI (SAT dated 19-06-2013)

Hindustan Steel vs State of Orissa (AIR 1970 SC 253)

ix) With regard to amount of penalty, the Noticee has relied on the following judgments/orders of higher courts :-

a) Hindustan Steel vs State of Orissa (AIR 1970 SC 253)

b) Ex-Naik Sardar Singh vs Union of India (1991 3 SCC 212)

c) Ranjit Thakur vs Union of India (AIR 1987 SC 2386)

d) Adjudicating Officer vs Bhavesh Pabari (SC dated 28-02-2019)

e) PG Electroplast vs SEBI (SAT dated 02-08-2019)

f) P.F.Sundesha & Ors vs SEBI (SAT dated 27-06-2022)

g) Sybly Industries & Ors. Vs SEBI (SAT dated 14-07-2022)

D. REVELANT PROVISIONS

7. It is relevant to reproduce the provisions of laws which have been attracted and invoked in the SCN and the same are quoted here under:

SEBI Act,1992

<u>Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.</u>

"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 recognized 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 recognized stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;"

*“**Section 3.** Prohibition of certain dealings in securities*

No person shall directly or indirectly-
***(a)** buy, sell or otherwise deal insecurities 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.”*

*“**Section 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.”*

***Section 15HA of the SEBI Act, 1992**:*

“**15HA**. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty five crore rupees or three times the amount of profits made out of such failure, whichever is higher.”

E. ISSUES

8. I have carefully perused the allegations levelled against the Noticee in the SCN, the replies of the Noticee and also the documents/evidence available on record. The following issues arise in the matter :-

    i) Whether the Noticee has violated section 12A (a), (b) and (c) of SEBI Act, r/w Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations ?

    ii) If the answer to Issue No.(i) is in affirmative, do the violations, if any on the part of the Noticee would attract monetary penalty ?

    iii) If the answer to Issue No.(ii) is in affirmative, what would be quantum of the monetary penalty that should be imposed upon the Noticee ?

F. CONSIDERATION AND FINDINGS

9. I note that the Noticee has raised certain preliminary objections and it would be appropriate first to deal with preliminary objections raised by Noticee in the matter as under :-

Delay in issuance of SCN

10. The Noticee has averred that there has been considerable delay in issuance of SCN. In this regard, it is seen from the record that documents *inter-alia* in the captioned matter were obtained from the Financial Market Authority, Austria in 2016. Details were also obtained from entities like BNY Mellon across jurisdictions. Consequent to the receipt of documents as above, investigation was initiated into the GDR issue of Nakoda and the said investigation was completed in the year 2017. After the completion of investigation in the matter, a Show-Cause Notice dated January 17, 2018 was issued to the Noticee. Once the said Show-Cause Notices was served on the Noticee, opportunity of hearing was given to the Noticee on March 22, 2022. I note that vide email dated April 06, 2022, it was informed to the Undersigned that the Noticee has filed settlement application in the instant matter. Further, another opportunity of hearing was given to the Notice on May 4, 2022. Vide e-mail dated September 19, 2022, it was informed to the Undersigned that the settlement application filed by the Noticee has been rejected by SEBI. Thereafter, another opportunity of hearing was given to the Noticee on September 22, 2022.

11. In this regard, it is worth mentioning that in another GDR matter, namely **Jindal Cotex Limited and Ors Vs. SEBI** (Date of Decision: February 5, 2020, SAT Appeal No. 376 of 2019), the Hon'ble SAT held that arguments on delay in investigation and consequently affecting natural justice were devoid of any merit. In the aforesaid matter, the Hon'ble Tribunal, while dismissing the ground of delay acknowledged the complexity involved in the entire manipulative GDR issue and appreciated the time taken by SEBI to gain information relating to the various entities from multiple jurisdictions.

12. Again, in the matter of **G.V. Films Ltd. Vs. SEBI** (Date of Decision: February 15, 2021, SAT Appeal No. 168 of 2020), the Hon'ble SAT opined on the issue of delay in a similar matter pertaining to issue of GDR's as follows:

> *"Having heard the learned counsel for the parties on this issue, we find that there is no doubt that there has been a delay in the issuance of the show cause notice after 10 years from the date of the GDRs issue. However, on this ground of delay, the proceedings cannot be quashed*

for the reasons that we find that an investigation was required to be done beyond the borders of India which took time."

13. In view of the above, I do not accept that there is delay in the matter that would vitiate the proceedings.

Specificity of Violations Alleged in the SCN

14. The Noticee has also averred that there is no specific averment, allegation or statement against the Noticee as to the nature of fraud which has been alleged In this regard, it is further noted that the SCN issued to the Noticee has clearly spelt out the provisions under which the desired preventive/remedial measures, etc. if found necessary, would be issued and also clearly indicate the specific nature of violations that have been alleged against it in terms of different provisions of the PFUTP Regulations, 2003. Therefore, it is observed that specific allegations were unambiguously conveyed to the Noticee and further, opportunity was given to the Noticee for tendering his response thereto. It is, therefore, incumbent on the part of the Noticee to explain his position with support of relevant evidence in response to various allegations made against it in the SCN. The judgment of the Hon'ble SC that has been relied upon by the Noticee has been perused by me and I find that this judgment is of no help to the Noticee in the instant matter.

Investigation Report/ Documents Not Provided by SEBI:

15. The Noticee has submitted that a copy of the Investigation Report and other documents on the basis of which the SCN was issued, was not provided to them despite the request made by him. From the SCN and Annexures, I find that all the relevant and relied upon documents in support of the SCN and also the findings of the investigation captured in the SCN have been forwarded to the Noticee. Further, on a comparison of the SCN and the Investigation Report, it is observed that the SCN has largely reproduced the contents of the Investigation Report.

16. In this regard, it would be appropriate to refer to the *Order of Hon'ble SAT dated February 12, 2020 in Shruti Vora vs. SEBI (Appeal No. 28 of 2020)* wherein, it was observed that: "*The contention that the appellant is entitled for copies of all*

the documents in possession of the AO which has not been relied upon at the preliminary stage when the AO has not formed any opinion as to whether any inquiry at all is required to he held cannot be accepted. A bare reading of the provisions of the Act and the Rules as referred to above do not provide supply of documents upon which no reliance has been placed by the AO, nor even the principles of natural justice require supply of such documents which has not been relied upon by the AO. We are of the opinion that we cannot compel the AO to deviate from the prescribed procedure and supply of such documents which is not warranted in law. In our view, on a reading of the Act and the Rules we find that there is no duty cast upon the AO to disclose or provide all the documents in his possession especially when such documents are not being relied upon." In view of the aforesaid, I find that the contention of the Noticee that SEBI has not provided complete documents is untenable.

17. Accordingly, I now proceed to deal with the other issues in the matter.

Issue no. (i)

18. It has been alleged in the SCN that the Noticee along with other directors had approved the board resolution dated September 23, 2010 and authorized D.B. Jain to sign the agreement with EURAM Bank and authorized EURAM Bank to use funds as a security in connection with any loan. Pursuant to this board resolution, Joint Managing Directors D.B.Jain executed the pledge agreement in accordance with the board resolution. I note that the Noticee has not disputed the fact of approving the said board resolution dated September 23, 2010. The text of the said board resolution is reproduced as under :-

> *"……RESOLVED FURTHER THAT ANY ONE of Shri BG Jain and Shri DB Jain, Directors of the Company, be and are hereby severally and singly authorized to sign, execute, any application, agreement, escrow agreement, documents, undertaking, confirmation, declaration and other paper(s) from time to time, as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.."*
>
> *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."*

19. The Noticee has averred that being independent director of the Company, Noticee was not involved in day to day operations and decision making that goes on within the Company. However, from the Annual reports of the Company (Annexures 33 to 36 of the SCN) for the years 2010-2013, it is noted that S.K. Bhoan was the part of the Management Committee till he resigned on December 20, 2013, which was constituted to carry out the day to day activities of the Company. Further, I note that the Noticee has himself admitted in his reply that he was a party to the meeting of the management committee dated September 23, 2010 in which a resolution was required to be passed by the board of Directors.

20. Noticee has averred that he is not supposed to have knowledge of the GDR scam by merely being a member of the management committee. I do not see merit in these averments of the Noticee as it would be very naive to conclude that the Noticee was not aware of the ongoing fraud in the Company being a member of the management committee which was constituted to carry out the day to day activities of the Company.

21. The Noticee has further submitted that the decision of the management committee cannot make the Noticee vicariously liable since the said committee is not the statutory committee under the provisions of the Companies Act and the said decision is followed by the board's approval. I note that the Noticee has approved the said resolution in board meeting as well as in the management committee meeting and being member of the management committee, the Noticee had greater responsibility than other directors who approved the board resolution.

22. The Noticee has also contended that the board resolution had given a general authorization to Mr.D.B.Jain and Mr.B.G. Jain and the said resolution had no mention of granting authority for using GDR proceeds as security in relation to loans obtained by any third part, i.e. Vintage in the present case. The Noticee has further submitted that the he being an independent director who is not involved in day to day workings of the Company would never get to know about any alleged fraudulent and manipulative intent of the Managing Directors behind

the passing of the Board Resolution as alleged. I am not inclined to agree to the aforesaid averments of the Noticee. Although, the said resolution was a general authorization, the Noticee being an independent director and member of the management committee has remained a mute spectator and did make efforts to look into the matters of the Company while the fraud was being committed. I note that the Noticee has never raised any query or sought any clarification from the executive directors regarding the GDR issue which he should have done being an independent director and member of the management Committee.

23. Noticee has further submitted that the allegations of fraud require a high level of proof and establishment of mens rea. In this regard, Noticee has relied on various judgments/orders of higher courts. I have perused the judgments/orders relied upon by the aforesaid Noticees and I am of the view that the facts of the instant case are different and distinguishable from the facts of the cited judgments/orders and the same shall not be of any help to the Noticee.

24. Further, with regard to amount of penalty, the Noticee has relied on several judgments/orders of higher courts/Tribunal. I have taken note of the said judgments and orders and the same will be taken into account in calculation of penalty, if any.

25. It is pertinent to emphasize here that the role of independent directors is to work as a watchdog, help in managing risk and safeguard the interests of minority shareholders. Though the Noticee has denied being in charge of day to day affairs of the Company, it is clear from the Annual Reports that apart from D.B. Jain and B.G. Jain, it was only S.K. Bhoan, the Noticee who was part of the Management Committee, which, as noted above, was constituted to carry out the day to day activities of the Company. In view of the aforesaid, the averment of the Noticee that he was not in-charge of the day to day affairs of the Company, is not justified. In such facts and circumstances of the case, I find that the submissions of the Noticee are not acceptable and he cannot plead ignorance.

26. It is pertinent to mention here that in another GDR case, namely, *Mohandas Shenoy Adige Vs. SEBI* (Appeal No. 511 of 2020, Order dated July 28, 2021), the Hon'ble SAT noted that the Appellant was a director in the company for

several years and was the member of the audit committee which handled/reviewed the financial matters of the Company during the period when the GDR proceeds vanished from the accounts of the Company. In view of the same, the Tribunal held that *"Taking into consideration all these facts, in our view it would be naive to conclude that the appellant Mohandas was only an independent director and had innocently consented to the Board decision authorising Mr. P.V.R. Murthy to deal with the GDR including loan if any."* Similarly, in the instant matter too, I am unable to accept the contention of the Noticee S.K. Bhoan that he should be exonerated.

27. I note that the Noticee S.K. Bhoan, who approved the board resolution and authorised Mr. DB Jain and B.G.Jain to sign the agreement with EURAM Bank and authorized EURAM Bank to use funds as a security in connection with loan, pursuant to which D.B.Jain signed pledge agreement with EURAM Bank, had acted as party to the fraudulent scheme. In view of the above, I am of the view that the Noticee S.K. Bhoan has violated the provisions of Section 12A(a), (b) and (c) of the SEBI Act 1992 read with Regulations 3 (a), (b), (c), (d) and 4(1) of the SEBI (PFUTP) Regulations, 2003.

28. I also note that order dated October 14, 2021 has also been passed by the Whole Time Member, SEBI against the Noticee in the same matter whereby the Noticee was inter-alia restrained from accessing the securities market for a period of 3 years. It is pertinent to reproduce relevant paragraphs from the said order as hereunder :-

> *"5.32. Further, S.K. Bhoan (Noticee No.4) has stated that he was an Independent, Non-Executive Director. The Noticee has submitted that he was not in charge of the day to day management of the Company and that the Board Resolution authorized pledging of the GDR proceeds as security for a loan availed by Nakoda itself and not any third party. During the personal hearing granted to Noticee No.4, he was asked whether he had raised any query or sought any clarifications regarding the GDR proceeds. In his post hearing written submissions dated August 2, 2021, Noticee No.4 has stated that he was informed that the GDR proceeds would be used in projects to be implemented after 2012. The Noticee has again reiterated that he was not involved in the day to day affairs of the Company. However, from*

the Annual report of the Company for the years 2010-2013, it is noted that S.K. Bhoan was the part of the Management Committee till he resigned on December 20, 2013, which, as noted above, was constituted to carry out the day to day activities of the Company. Further, the Noticee in his own submissions has stated that he was a director in Nakoda from 2007 to 2013."

"5.33. It must be emphasized that the role of independent directors is to work as a watchdog, help in managing risk and safeguard the interests of minority shareholders. Though S.K. Bhoan has denied being in charge of day to day affairs of the Company, it is clear from the Annual Reports that apart from D.B. Jain and B.G. Jain, it was only S.K. Bhoan who was part of the Management Committee, which, as noted above, was constituted to carry out the day to day activities of the Company. Hence, S.K. Bhoan cannot contend that he was not in-charge of the day to day affairs of the Company. In such a scenario, I find that the submissions of S.K. Bhoan are not acceptable and he cannot plead ignorance. In this context, I also note that in another GDR case, namely, Mohandas Shenoy Adige Vs. SEBI (Appeal No. 511 of 2020, Order dated July 28, 2021), the Hon'ble SAT noted that the Appellant was a director in the company for several years and was the member of the audit committee which handled/reviewed the financial matters of the Company during the period when the GDR proceeds vanished from the accounts of the Company. In view of the same, the Tribunal held that "Taking into consideration all these facts, in our view it would be naive to conclude that the appellant Mohandas was only an independent director and had innocently consented to the Board decision authorising Mr. P.V.R. Murthy to deal with the GDR including loan if any." Similarly, in the instant matter too, I am unable to accept the contention of S.K. Bhoan that he should be exonerated."

Issue no.II

29. The violations committed by the Noticee as detailed in previous paras wherein a fraudulent scheme of GDR issue was carried out jointly and in close connivance with others, had acted as one part of the entire fraudulent scheme by arranging for the subscription of the GDRs through Vintage using the pledge agreement to obtain a loan from the EURAM Bank and then to dispose the shares acquired through such GDRs, thereby creating an elaborate façade of demand for the securities of Nakoda and mislead the Indian investors, which was prejudicial to the interest of the investors and the securities market, calls for imposition of

monetary penalty as contemplated under section 15HA of SEBI Act, 1992 against the Noticee.

30. Hon'ble Supreme Court of India in the matter of Chairman, SEBI Vs Shriram Mutual Fund { [2006]5 SCC 361 } held that "*In our considered opinion ,penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must made by the defaulter with guilty intention or not*.''

31. In view of the above, I conclude that the Noticee has become liable for monetary penalty under Section 15HA of the SEBI Act for violation of the provisions of Section 12A(a), (b) and (c) of the SEBI Act 1992 read with Regulations 3 (a), (b), (c), (d) and 4(1) of the SEBI (PFUTP) Regulations, 2003.

Issue no. III

32. While determining the quantum of penalty under Section 15HA of SEBI Act it is important to consider the factors stipulated in Section 15J of SEBI Act, which reads as under:

> **"15J - Factors to be taken into account by the adjudicating officer**
> *While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
> *(c) the repetitive nature of the default.*
> ***Explanation:***
> *For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E,clauses (b) and (c) of section 15F,15G,15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section."*

33. Having regard to the factors listed in section 15J of SEBI Act read with Rule 5(2) of the SEBI Adjudication Rules and in the light of Supreme Court's judgment in the matter of SEBI vs Bhavesh Pabari [(2019) 18 SCC 246], it is noted from the material available on record that any quantifiable gain or unfair advantage accrued to Noticee or the extent of loss suffered by the investors as a result of the default in this case cannot be computed. There are no investors' complaints on record arising out of such defaults. However, it would be appropriate to once again refer to the order of the Hon'ble SAT in Pan Asia Advisors Limited vs. SEBI, cited above wherein, while interpreting the expression of 'fraud' under the PFUTP Regulations, 2003, it was observed that *"…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.*"

34. With respect to repetitive nature of default, I note from the available record that there are no previous violations by the Noticee.

G. ORDER

35. After taking into consideration the nature and gravity of the violations established in the preceding paragraphs and in exercise of the powers conferred upon me under section 15-I of the SEBI Act read with rule 5 of the SEBI Adjudication Rules I hereby impose a penalty of Rs.5,00,000 (Rupees Five Lakhs) on the Noticee S.K.Bhoan for the aforementioned violations.

36. In my view, the said penalty is commensurate with the violations committed by the Noticee in this case.

37. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, or through online payment facility available on the SEBI website www.sebi.gov.in on the following path by clicking on the payment link.

ENFORCEMENT → ORDERS → ORDERS OF AO → PAY NOW

38. The Noticee shall forward the said demand draft or the details/ confirmation of penalty so paid through e-payment to the Division Chief, Enforcement Department-1, DRA-1, SEBI, in the format given in table below:

Case name	
Name of payee	
Date of payment	
Amount paid	
Transaction no	
Bank details in which payment is made	
Payment is made for	Penalty

39. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this order, consequential proceedings including, but not limited to, recovery proceedings may be initiated under Section 28A of the SEBI Act, for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties.

40. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order shall be sent to the Noticee and also to the Securities and Exchange Board of India.

Date: September 29, 2022
Place: Mumbai

VIJAYANT KUMAR VERMA
ADJUDICATING OFFICER