SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTIONS 11 AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 IN THE MATTER OF TRANSGENE BIOTEK LIMITED

In respect of:

Sr. No.	Name of the Noticees	PAN
1.	Mr. K. Koteswara Rao (Promoter and Chairman cum Managing Director)	AHOPK5487E
2.	Mr. Prashant Kumar Ghosh (Director)	AAEPG2319Q
3.	Mr. Soma Sekhar Marthi (Director)	ACAPM9616N
4.	Mr. Narayana Murthy Pentyala (Director)	ANBPP4186A
5.	Ms. K. Nirmala Rao (Promoter)	ALCPK1645A
6.	Mr. K. Srinivas (Promoter)	AMDPK2242F
7.	Transgene Biotek Ltd	AABCT3840P

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1. Securities and Exchange Board of India (SEBI), vide an *ad interim ex-parte* order dated November 20, 2014 (hereinafter referred to as "*interim order*") directed Transgene Biotek Limited (hereinafter referred to as "*Transgene* / the company") to not to issue equity shares or any other instrument convertible into equity shares or any other security till further orders and six promoters / directors of Transgene Biotek Limited, namely Mr. K. Koteswara Rao (Promoter and Chairman cum Managing Director), Mr. Prashant Kumar Ghosh (Director), Mr. Soma Sekhar Marthi (Director), Mr. Narayana Murthy Pentyala (Director), Smt. K Nirmala Rao (Promoter) and Mr. K Srinivas (Promoter) (hereinafter collectively referred to as "the noticees") were restrained from accessing the securities market and further prohibited them from buying, selling or dealing in securities in any manner whatsoever, till further directions.

2. The *interim order* was passed taking into account facts and circumstances more particularly described therein and summarised *inter alia* as under:-
   a) On February 22, 2011, *Transgene* had issued 25,00,000 GDRs @ US$9.2 per GDR (herein after referred to as "first issue") and again on October 03, 2011 it had issued 25,00,000 GDRs @ US$7 per GDR (hereinafter referred to as "second issue"). Thus, total 50,00,000 GDRs were issued in the said GDR issues of *Transgene*.
   b) *Transgene* had raised US$23 million through first issue and US$17.5 million through second issue of GDRs. Thus, total US$40.5 million were raised by *Transgene* through aforesaid GDR issues and were deposited in the bank account of *Transgene* (account number - 020078) held in Investec Bank, Switzerland.
   c) These GDR issues were purportedly to raise capital from overseas market, *inter alia*, for

expansion of its present business activities.

d) There was a price rise from ₹ 44.65 per share to ₹ 52.25 per share during the period February 17, 2011 to February 22, 2011 (i.e., the period post announcement of first GDR issue). Similarly, there was a sharp price rise from ₹ 30.30 per share to ₹ 57.65 per share during the period September 30, 2011 to November 15, 2011 (i.e., the period post announcement of second GDR issue).

e) It was observed that from the GDR proceeds of first issue (i.e. US$23 million), US$17 million were transferred to Asia First Technologies Ltd., Hong Kong (hereinafter referred to as 'AFTL') and US$4.5 million were transferred to SyMetric Sciences Inc., Canada (hereinafter referred to as 'SyMetric'). Further, from the GDR proceeds of second issue (i.e. US$17.5 million), US$12.92 million were transferred to AFTL and US$4 million were transferred to entity named Sristek.

f) It was *prima facie* observed that the GDR proceeds as described above were transferred by *Transgene*, directly or indirectly, through subsidiary for purposes other than informed to the shareholders. Also, *Transgene* and its directors had deliberately shown a rosy picture to the investors in Indian securities market by making GDR issues and then making false and misleading disclosures about the utilization of the GDR proceeds. Further, *prima facie*, they actively concealed the fact that the *Transgene* had never received the technology and other purportedly agreed services from the entities to whom the GDR proceeds were transferred. Had the technology been received, it would have added value to *Transgene* and in turn to its shareholders. Further, the false and misleading disclosures and active concealment of material information as *prima facie* found in this case had potential to influence the investment decisions of the investors in shares of *Transgene* and to induce them to buy or sell its shares.

g) It was noted that, though the GDR proceeds were transferred by *Transgene* without there being technology transfer to it, the price of the scrip remained at a commensurate level and it had fallen sharply after April 2012 i.e. much after the transfer of GDR proceeds, when FIIs / Sub Accounts started selling shares (cancelled GDRs) and finally reached to ₹ 5.00 per share on November 16, 2012. Had the information about non-receipt of technology in spite of transfer of GDR proceeds been disclosed, being price sensitive information, it would have had immediate negative impact on the price and volume of the scrip. This information would have helped the investors in taking informed decision regarding entry or exit. Considering these facts and circumstances, it appears that *Transgene* and its Promoters / Directors tried to maintain / manipulate the share price of *Transgene* by concealing the aforesaid material information from its shareholders.

h) It is also *prima facie* observed that *Transgene* had, apart from concealing the material information about transfer of GDR proceeds for undisclosed / ulterior purposes and making false and misleading disclosures as discussed hereinabove, time and again gave inaccurate and misleading information to the market.

i) It was *prima facie* found that *Transgene* and its promoters/director had violated provision of

regulations 3(a), (c) and (d) read with 4(1) and 4(2)(f) of the SEBI (Fraudulent and Unfair Trade Practices) Regulations, 2003 (hereinafter referred to as "PFUTP Regulations") as well as section 12A (b) and (c) of SEBI Act, 1992

3. Pursuant to the *interim order*, Mr. L. S. Shetty, Advocate on behalf of the noticees filed the replies on April 21, 2015, August 12, 2015, August 21, 2015 and December 23, 2015. Considering the requests for adjournment made by the noticees from time to time, several opportunity of personal hearing was granted to the noticees. In the mean while the noticees had moved the Hon'ble High Court of Judicature at Hyderabad seeking directions to stay the proceedings before the SEBI till the investigations were completed by the Directorate of Enforcement. However, the Hon'ble High Court vide its order dated December 15, 2015 had disposed of the said petition and *inter alia* issued directions that SEBI may hear the noticees and pass appropriate orders. Last opportunity was granted to the noticees on December 28, 2015. When, Mr. Udayshankar Ram Naik, Advocate and Mr. K. Koteshwara Rao appeared and once again sought adjournment, which was rejected. Thereafter, learned Advocate made submissions on the line of reply on record. Liberty was granted to file written submission in the matter on or before January 01, 2016. The noticees vide its letter dated December 31, 2015 filed written submissions in the matter.

4. In their submissions, the noticees took plea that the company and its CMD, Dr. Koteswara Rao himself was defrauded by Mr. Nirmal Kotecha and his associates. Dr. Koteswara Rao was not aware of the correct factual position and proceeded to answer the queries raised as per his understanding of the subject and with a cautious approach so as not to commit any thing of which he himself was not sure. It was the CMD, Dr. Koteswara Rao himself who had written to SEBI on 15th July, 2012 notifying it about the unusual movement in the scrip of the company and requesting SEBI to take prompt action in this regard. It is further submitted that the CMD, Dr. Koteswara Rao had not indulged in any fraudulent or unfair trade practice and the fraud played upon the company by Mr. Nirmal Kotecha cannot be tagged on the noticees. They further submitted that the noticees have lodged a police complaint against Nirmal Kotecha and have filed a complaint with the Judicial First Class Magistrate's Court. Further, the noticees had wrote a letter to the Directorate of Enforcement requesting them to take action against Mr. Nirmal Kotecha and his associates for the involvement in the said GDR fraud. The noticees also requested that SEBI should collect the information regarding investigations done by the Directorate of Enforcement in the matter and consider the same while passing the order. Further the noticees have wrote a letters to Fundabilis GMBH(Merchant Banker) for demanding refund of the excess payments transferred and to Investec Bank demanding the refund of the GDR funds transferred illegally to different entities.

5. The replies/submission of the noticees with regard to allegation and charges in the *interim*

order are *inter alia* as under:

a) Regulation 10 of the PFUTP Regulations specifically provides for granting a reasonable opportunity of being heard before issuing necessary directions or taking appropriate action in accordance with the regulations. In the instant case, the above due procedure established in the PFUTP Regulations has been blatantly violated as no reasonable opportunity of hearing was given to the company and its Director/Promoters, in consonance with the principles of natural justice before passing the *interim order*.

b) Placing a restraint on the company and its Promoter/Directors on an immediate basis when the alleged violations had in fact taken place in the year 2010-12 and such a penal order does not serve any public purpose. Reliance is placed on the decision of the Hon'ble Bombay High Court in the case of *Ramrakh R. Bora & Ors. V. SEBI 1998 SCC Bom 684*. Section 11B order should be passed only in emergent scenario or impending dangers to the market conditions or security to the market.

c) *Transgene* being a public limited listed company with about 11,000 shareholders, it has a constant need to access the capital market in order to carry on its business operations. By the impugned *interim order* harshest and most disproportionate punishment that could have been imposed under section 11(4)(b) of the SEBI Act has been levied and that too for an indefinite period until further orders.

d) Debarment order is not in the interest of the investors which can be seen from the fact that on the day subsequent to the day when the *interim order* came to the knowledge of general public, the market capitalization of the *Transgene* was reduced by about 60 crores (consequent to steep fall of 90% in the share price of *Transgene*). The *interim order* does not justify as to how the said ban on *Transgene* and its Promoter/Directors can either be in the interest of investors or securities market.

e) The instant order being primarily punitive in nature, has been passed in excess of SEBI's jurisdiction as the Promoter/Directors of the company are not an intermediary registered with SEBI and also not associated with the securities market, it is pertinent to note that the CMD, K Koteswara Rao has neither purchased nor sold his shares in the company post the main occurrence, i.e., drastic fall in the price of the concerned scrip from ₹ 57.65 per share on November 15, 2011 to ₹ 5 per share on November 16, 2012. Thus, the *interim order* is purely based on speculative inferences without being substantiated by any reasonable cogent evidence.

f) The noticees denied that they have either directly or indirectly engaged 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. It is respectfully submitted that the

charge of violation of provisions of section 12A(b) and (c) of the SEBI Act read with regulation 3(a),(c) and 4(1) and 4(2)(f) of SEBI PFUTP Regulations cannot be sustained as there is no allegation in the *interim order* that the board of directors/promoters of the company have acted *mala fide* or against the interest of the company or that they gained unlawfully or that they caused loss. It is pertinent to note that the Promoter/Directors have not bought/sold/dealt with any 'securities' of the company during the investigation period, much less in a fraudulent manner. It is further submitted that the noticees have not made any disproportionate gain or gained unfair advantage. Further, they have not caused any loss to investors or group of investors. Moreover, the promoters/directors of the company have continued to maintain their shareholdings in the company and there has been absolutely no change during the relevant period.

g) The commission/omissions alleged in the *interim order* do not attract the definition of fraud under regulation 2(1)(c) of PFTUP Regulations, since the entire edifice of the regulations stands on the footing *'while dealing in securities*'. As per the definition of fraudulent practice given under the regulations, one should deal in security. It is a factual position that the Promoters/Directors have neither sold nor purchased shares of the company since 2009 and therefore, there can be no question of `dealing in securities' for charging the Promoters/Directors for manipulating the share price of the company as the fall in share prices of the company cannot be attributed to the Promoter/directors' actions or inactions which did not have the potential to induce sale or purchase of or dealing in securities or to influence the investment decision of the investors so as to be covered in the prohibitions of section 12A(b) and (c) of the SEBI Act and regulations3(c) and (d) of the PFUTP Regulations. In the instant case, it cannot be said that any act, omission or concealment was caused by the company or its Promoter/Directors ' *while dealing in securities'* which would satisfy the definition of *"fraud"* for the purposes of PFUTP Regulations.

h) Section 12A of the SEBI Act and regulations 3(c) and (d) of the PFUTP Regulations cannot be invoked in the present proceedings for the reason that there was no allegation/charge in the *interim order* that the Promoter/Directors of the company have dealt in securities of the company have employed any artifice or scheme to defraud in connection with *"dealing in"* or *"issue of securities which are listed or proposed to be listed on any recognized stock exchange'*. The intention of section 12A of the SEBI Act is that the concerned device, scheme or artifice to defraud must be in connection with and in regard to dealing in the securities that are listed or proposed to be listed.

i) The *interim order* does not mention about the manner in which the violation of PFUTP Regulations is sought to be dealt with and proved. The manner in which the legal provisions stand violated has been left completely unexplained, except for some bald and abrupt conclusions of the alleged violations of the PFUTP Regulations appearing at the

fag end of the order, the *interim order* is absolutely ambiguous in applying facts as to which specific act of the company/its Promoter or Directors allegedly fit into the parameters of fraud prescribed by the particular sub-regulation or regulation of the PFUTP Regulations.

j) The *interim order* deals with the allegation of contravention of PFUTP Regulations in a circulatory manner. It merely notes the definition of *'fraud'* and then holds that the company was concealing the material information about transfer of GDR proceeds for undisclosed ulterior purposes and making false and misleading disclosures. On the above basis, the order 'jumps' to the conclusion that other entities involved in the transfer and receipt of funds are in complicity with *Transgene* and its Promoters/Directors in the design to defraud the investors' and the same would be covered within the scope of section 12A of SEBI Act and regulations 3 and 4 of PFUTP Regulations. Hence the finding that *Transgene* has violated PFUTP Regulations cannot be sustained.

k) It is further submitted that the allegation that "the other entities involved in the transfer and receipt of funds are in complicity with *Transgene* and its Promoters/Directors in the design to defraud the investors is completely contrary to factual position on record and is based on presumptions, surmises and conjectures. It is further submitted that there is nothing on record to demonstrate that the noticees were acting in complicity with the entities to whom fund transfers were made or there was any meeting of minds between the noticees and the entities leading to a shared common objective of defrauding the investors of the company.

l) The *interim order* incorrectly records that the Promoter/Directors of the company were indulging in fraudulent or unfair trade practices in securities and that the company had published false information in its Annual Financial Statements F.Y. 2011-12, by failing to disclose that technology transfer from AFTL to *Transgene* never took place. In this case, there were no device, scheme, artifice, etc. with intent to defraud any person which can be established with cogent evidence. There was nothing in the Annual Statements for the F.Y. 2011-12 which was not true or which the Promoter/Directors did not believe to be true. The provisions of regulation 4(1)(f) of the PFUTP Regulations are attracted only when information has been published "which is not true" or which the person causing to publish "does not believe to be true". The company's annual accounts in F.Y. 2011-12 reflected the position as understood by the board of directors, with reference to the bank statements produced by Mr. Kishore Tapadia which was subsequently discovered to be forged in October, 2013. Therefore, the allegations in the *interim order* dated November 20, 2014 do not meet the requirements of the provisions of law mentioned therein.

m) The commission/omissions alleged in the *interim order* do not attract definition of fraud under regulation 2(1)(c) of PFTUP Regulations, company and/or its Promoter/Directors

as a person can be held guilty of fraud only if he has done an act or omission with a view to induce another person to deal in securities. The ad-*interim order* does not attribute any such conduct to the company and/or its Promoter/Directors anywhere in the *ex parte ad interim order*. It is settled law that for imposing punishment under the PFUTP Regulations, the ground of commission of fraud requires clear and unambiguous evidence and a high degree of probability, which is lacking in the present case. Similarly, no false statement has been made by the Promoter/Directors of the company in the Annual Financial Statement F.Y, 2011-12. The noticees further submit that the offer documents of GDRs contained a fair assessment of the intended operations of the company and reflected a fair judgment with regard to the prospects and the same cannot be said as a 'rosy picture falsely presented by the company', it is also submitted that the remark made in the Financial Accounts F.Y. 2011-12 in respect of transfer of US$16,952,000 was made under the reasonable belief that the company would be receiving the promised technologies from AFTL and SyMetric as per their agreements. It is also submitted that the fund transfers out of the GDR proceeds were unauthorized and one Allshore Fiduciary Services (an entity appointed by *Transgene* to provide certain administrative and management services to the subsidiary of *Transgene* namely *Transgene* Biotek HK Ltd) was involved in effecting those fund transfers.

n) Even though the *interim order* records that facts relating to non-receipt of technology were suppressed in the Annual Financial statements F.Y. 2011-12, the order does not disclose any *mens rea*. In the absence of *mens rea*, sections 11, 11A, 11(4) and 11B of the SEBI Act could not be invoked which are discretionary, remedial and not punitive in nature. It is well settled law that punishment must fit the crime, otherwise it will be hit by Wednesbury principle of unreasonableness and rule of proportionality. It is well settled law that no penalty ought to be imposed for a technical and venial breach of statutory obligations.

o) It is further submitted that there is nothing in the *interim order* to establish that by means of the alleged suppression of non-receipt of technology the directors/promoters have gained in any manner. The fact that directors/promoters gained absolutely no benefit or advantage as a result of the alleged "fraudulent practice" also operates as a strong presumption against the tenability of the aforesaid charges against the directors/promoters of the company. It is incorrect to state that the Company and its Promoters/Directors tried to manipulate/maintain share price of the company by concealing the said material information from the shareholders. It is submitted that there is no cogent convincing evidence to prove the charge of fraud against the company and a high burden of proof is cast upon the Board in cases of violation of PFUTP Regulations.

p) It is submitted that, the CMD, Mr, Koteswara Rao has never 'tried to mislead the inquiry and gave cryptic and vague reply when explanation was sought' and that the CMD, Dr.

Koteswara Rao, at all times, promptly responded to the queries raised by the board. It is submitted that the board of directors of the company had acted *bona fide* and were under the genuine belief that the payments made by the company's power of attorney were in furtherance of the agreements they had entered into with AFTL and SyMetric, by way of advance towards the technologies to be supplied to them and hence they had declared the same in the annual financial statements F.Y. 2011-12. Hence, the finding that non-receipt of technologies was concealed from the investors and that the Promoter/Directors had made false and misleading disclosures regarding utilization of GDR proceeds in the annual financial statements F.Y. 2011-12 is incorrect. A mere suspicion cannot be accepted as proof of fraud as the party alleging fraud is bound to establish it by cogent evidence, consequently the finding that the noticees have tried to manipulate/maintain share price of the company is incorrect as there is no evidence on record to establish the same.

q) All the allegations are devoid of any merit and the charge against the noticees cannot be sustained. The foreign firms have committed breach of contract by not transferring the technology to the company as agreed upon in the agreement.

r) It is further submitted that the disclosure of the transfer of funds to the Bombay Stock Exchange as per the declared agreements was not necessary as the information regarding such agreements were declared in the offer documents of GDRs.

s) The noticees have denied that the company has violated Clause 36 of the Listing Agreement and regulations 12 (1) and 12(2) read with Schedule II of the SEBI Insider Trading Regulations. Moreover it is submitted that the charges levelled against the company in respect of the SEBI Insider Trading Regulations are vague and evasive as the *interim order* does not record the relevant clauses of the code of corporate disclosure practices alleged to have been violated by the noticees. It is respectfully submitted that the company has complied with the requirements of Clause 36 of the Listing Agreement and the Code of Corporate Disclosure Practices for Prevention of insider Trading, by regularly informing the exchange of all the events, which have bearing on the performance/operations of the company as well as price sensitive information. The noticees state that the disclosure of the inordinate delay in technology transfer from AFTL and Symetric was not perceived by the Compliance Officer as price sensitive information, in respect of which the company was mandated to make a public announcement/disclosure in terms of Clause 2 of the Code of Corporate Disclosure Practices. Moreover, in terms of Clause 3.2 of the Code of Corporate Disclosure Practices, the Compliance officer is entailed with the responsibility of ensuring that the company complies with continuous disclosure requirements. Even assuming without admitting, that the delay in technology transfer from AFTL and SyMetric was required to be disclosed, the same was the responsibility of the Compliance Officer, for whose actions/inactions the other Promoter/Directors cannot be made liable, moreover, when the inaction of the

Compliance Officer came to the knowledge of the management they took immediate steps to remedy the situation to ensure compliance with the Code of Corporate Disclosure Practices and this is apparent from the BSE announcement dated 15th December, 2014. Therefore, there was no default on part of the company in making disclosures.

t) It is further submitted that Schedule II of the said SEBI Insider Trading Regulations which attempts to place all shareholders on the same footing with reference to the possession of price sensitive Information, by requiring the disclosure of price sensitive information to the stock exchanges where the shares are listed, seeks to ensure that an unfair advantage is not gained by those who are in possession of it as compared to those who are not in possession of the same. This unfair advantage materialises only when a disproportionate gain is made when the insiders in possession of price sensitive information make a profit by indulging in trading by making use of the price sensitive information. Even assuming, without admitting that the information about 'non receipt of technology' was available to the CMD and other Board of Directors of the company, they have not made any disproportionate gain or gained unfair advantage by dealing in the securities of the company on the basis of such alleged price sensitive information. Therefore, there is no loss caused to the investors on account of the Compliance Officer having failed to disclose the alleged price sensitive information as the promoters/directors of the company have continued to maintain their shareholdings in the company and there has been absolutely no change whatsoever, during the relevant period from 01-12-2008 other than converting unsecured loans into equity shares and thereafter till date.

u) It is further submitted that the obligation of the directors is to sign the Annual Reports and once that obligation is discharged bona fide, directors cannot be held liable for any technical violation, if any in the Annual Reports. In the instant case, merely because the Annual Report of the company for the F.Y. 2011-12 was signed by Dr. K. Koteswara Rao, CMD and Mr. Narayana Murthy Pentyala, Director of *Transgene*, they cannot be held liable for any technical violation, if any in the Annual Report. Furthermore, allegations in the *interim order* have been made against other Promoter/Directors solely in the capacity as a director of the company without any complicity of theirs in the alleged violations. Moreover, it is submitted that the liability for offending acts of a company can be foisted on its directors only when the applicable statute specifically provides for vicarious liability and there must be a specific act attributable to a director so as to hold such director responsible for the offending acts committed by or on behalf of the company. In the absence of any such provision under the SEBI Act making the Directors/Promoters vicariously liable for the offences allegedly committed by the company, there is no justification for passing the *interim order* against the Directors/Promoters of the company.

v) It is submitted that the noticees are totally innocent and have not violated the aforesaid

provisions of the SEBI Act and/or the Rules/Regulations made thereunder, as recorded in the *interim order*. Moreover, the facts and circumstances of this case do not warrant any intervention by the *interim order* and therefore, though the investigations may continue, there is no justification for the continuation of the *interim order* during pendency of the investigations and that the said order already been in force for more than a year and further continuation thereof, would be totally unjustified hence the *interim order* may be vacated and/or revoked, as the same is totally discriminatory and violative of their fundamental rights, as guaranteed under the Articles 14 and 19 of the Constitution of India.

6. I have carefully considered the allegations and the submissions of the noticees and have perused the relevant documents and material available on record. I note that in the instant case, the directions issued against the noticees are *interim* in nature and have been issued on the basis of *prima facie* findings. SEBI had issued directions vide the *interim order* in the matter in order to protect the interests of investors in the securities market. Detailed investigation in the matter is still in progress. Thus, the limited issue to be considered, in view of submissions made by the noticees and in the facts and circumstances so far brought on record in the instant case is, whether the directions in the *interim order* qua the noticees need to be continued, revoked or modified in any manner.

7. It is relevant to mention that the interim order has been passed based on *prima facie* findings in the nature of show cause notice cum directions pending investigation in the matter. The instant proceedings have to be completed based upon the replies on merits of law and facts and relevant material but not upon extraneous material. I note that the acts of the noticees in lodging the complaints with various authorities or writing letters to the various entities including bankers and intermediaries *prima facie* can not absolve the noticees, if they are *prima facie* found to have been involved in activities as alleged in the *interim order*. Further, the present proceedings cannot be used by the noticees to expect SEBI to collect evidences by them. The burden of prove for establishing their innocence on the basis of preponderance of probability lies upon the noticees. They cannot, expect SEBI to find out their innocence due to a fraud by Nirmal Kotecha which is under investigation by Directorate of Enforcement. Involvement of Nirmal Kotecha, if any, or of any other person can be looked into by concerned authorities at relevant time. At this stage the limited issue is whether the noticees *prim facie* indulged in the activities as alleged in the *interim order* and as to whether they have given any plausible explanation to the charges and allegations or not.

8. As regards charges and allegations in the *interim order* the noticees have made twofold submissions. First, in the nature of preliminary objections on procedures of passing of *interim order* and ambit and scope of power of SEBI to pass such orders and second, on merits of allegations. With regard to first set of contentions, the noticees have contended that the *interim*

order has been passed without granting reasonable opportunity of being heard and the due process established under regulation 10 of PFUTP Regulations has been disregard. I note that regulation 10 PFUTP Regulations reads as under :

> *Regulation 10: The Board may, after consideration of the report referred to in regulation 9, if satisfied that there is a violation of these regulations and after giving a reasonable opportunity of hearing to the persons concerned, issue such directions or take such action as mentioned in regulation 11and regulation 12.*
>
> *Provided further that the Board may, in the interest of investors and securities market, dispense with the opportunity of pre-decisional hearing by recording reasons in writing and shall give an opportunity of post-decisional hearing to the persons concerned as expeditiously as possible.*

9. From the plain reading of regulation 10 of PFUTP Regulations, it is clear that the provisions thereof come into play on receipt of investigation report. In the instant case, the *interim order* has been passed under provisions of section 11 and 11B of the SEBI on the basis of *prima facie* findings observed during the preliminary examination/inquiry undertaken by SEBI and the investigation is still going on and report is yet to be received. The *interim order* has also been issued in the nature of a show cause notice affording the noticees a post-decisional opportunity of hearing. I note that the power of SEBI to pass *interim orders* flows from sections 11 and 11B of the SEBI Act which empower SEBI to pass appropriate directions in the interests of investors or securities market, pending investigation or inquiry or on completion of such investigation or inquiry. It is settled position that while passing such *interim orders*, it is not always necessary for SEBI to provide the entity with an opportunity of pre-decisional hearing. In this regard, the following findings of the Hon'ble Supreme Court of India in the matter of *Liberty Oil Mills & Others Vs Union Of India & Other* (1984) 3 SCC 465 are noteworthy:-

> *"It may not even be necessary in some situations to issue such notices but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirements of procedural fairness and natural justice. There can be no tape-measure of the extent of natural justice. It may and indeed it must vary from statute to statute, situation to situation and case to case. Again, it is necessary to say that pre-decisional natural justice is not usually contemplated when the decisions taken are of an interim nature pending investigation or enquiry. Ad-interim orders may always be made ex-parte and such orders may themselves provide for an opportunity to the aggrieved party to be heard at a later stage. Even if the interim orders do not make provision for such an opportunity, an aggrieved party has, nevertheless, always the right to make appropriate representation seeking a review of the order and asking the authority to rescind or modify the order. The principles of natural justice would be satisfied if the aggrieved party is given an opportunity at the request. "*

10. It is pertinent to note that the *interim order* in the present case was passed under the provisions of sections 11(1), 11(4) and 11B of the SEBI Act. The second proviso to section 11(4) clearly provides that *"Provided further that the Board shall, either before or after passing such orders, give an*

opportunity of hearing to such intermediaries or persons concerned". Further, various Courts, while considering the aforesaid sections of the SEBI Act have also held that principles of natural justice will not be violated if an *interim order* is passed and a post-decisional hearing is provided to the affected entity. In this regard, the Hon'ble Bombay High Court in the matter of *Anand Rathi & Others Vs. SEBI* (2002) 2 Bom CR 403, has held as under:

> *"It is thus clearly seen that pre decisional natural justice is not always necessary when ad-interim orders are made pending investigation or enquiry, unless so provided by the statute and rules of natural justice would be satisfied if the affected party is given post decisional hearing. It is not that natural justice is not attracted when the orders of suspension or like orders of interim nature are made. The distinction is that it is not always necessary to grant prior opportunity of hearing when ad-interim orders are made and principles of natural justice will be satisfied if post decisional hearing is given if demanded. Thus, it is a settled position that while ex parte interim orders may always be made without a pre decisional opportunity or without the order itself providing for a post decisional opportunity, the principles of natural justice which are never excluded will be satisfied if a post decisional opportunity is given, if demanded."*

11. Further, the Hon'ble High Court of Judicature of Rajasthan at Jaipur in the matter of *M/s. Avon Realcon Pvt. Ltd. & Ors Vs. Union of India & Ors* (D.B. Civil WP No. 5135/2010 Raj HC) has held that:

> *"…Perusal of the provisions of Sections 11(4) & 11(B) shows that the Board is given powers to take few measures either pending investigation or enquiry or on its completion. The Second Proviso to Section 11, however, makes it clear that either before or after passing of the orders, intermediaries or persons concerned would be given opportunity of hearing. In the light of aforesaid, it cannot be said that there is absolute elimination of the principles of natural justice. Even if, the facts of this case are looked into, after passing the impugned order, petitioners were called upon to submit their objections within a period of 21 days. This is to provide opportunity of hearing to the petitioners before final decision is taken. Hence, in this case itself absolute elimination of principles of natural justice does not exist. The fact, however, remains as to whether post-decisional hearing can be a substitute for pre-decisional hearing. It is a settled law that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, the requirement of giving reasonable opportunity exists before an order is made. The case herein is that by statutory provision, principles of natural justice are adhered to after orders are passed. This is to achieve the object of SEBI Act. Interim orders are passed by the Court, Tribunal and Quasi Judicial Authority in given facts and circumstances of the case showing urgency or emergent situation. This cannot be said to be elimination of the principles of natural justice or if ex-parte orders are passed, then to say that objections thereupon would amount to post-decisional hearing. Second Proviso to Section 11 of the SEBI Act provides adequate safeguards for adhering to the principles of natural justice, which otherwise is a case herein also…"*

12. Since, reasons for passing the *interim order* have been clearly stated in the *interim order* and, in accordance with the settled law, the noticees was afforded a post-decisional opportunity to file

their reply and avail the opportunity of personal hearing, I, reject the contention of the noticees in this regard.

13. The noticees have, further, contended that *ex-parte ad- interim order* was passed on November 20, 2014, whereas the alleged violation had taken place in the year 2010-12, therefore, such order does not serve any public purpose. In this regard, I note that the time taken to issue appropriate order is dependent on the complexity of the matter, its scale and *modus operandi* involved and other attendant circumstances. The power under section 11 and 11B of the SEBI Act can be invoked at any stage, i.e., either pending examination / investigation or on completion thereof. The *interim order* clearly brings out that there is a need for a detailed investigation in the entire GDR issues of *Transgene* till the end utilization of the funds, including the role, if any, of allottees of the GDRs, role, if any, of FIIs / Sub Accounts in cancellation of GDRs and subsequent selling thereof along with the role of AFTL, SyMetric, Sristek and Allshore Fiduciary Services. Pending investigations it was found necessary to intervene in this matter to safeguard the interest of the retail shareholders of *Transgene* and protect the integrity of the securities market and a need was felt that pending investigation, effective and expeditious action was required to be taken to prevent any further harm to investors and to thwart any further device, scheme or artifice, of *Transgene* and its promoters/ directors. I note that detailed reasons and circumstances have been for stated in *ex-parte ad-interim* for the issuance of appropriate directions. I, therefore, do not find any merit in the contention of the noticees in this regard.

14. Another preliminary contention of the noticees the *ex-parte ad- interim order* has been passed in excess of SEBI's jurisdiction as the Promoter / Director of the company are not an intermediary registered with SEBI and also not *'persons associated with the securities market'*. From the provisions of section 11B of the SEBI Act, it is clear that the provisions thereof extend to *'any person associated with securities market'* and not only to the intermediaries as contended by the noticees. The Company in question is a listed company and is thus clearly *" a person associated with securities market "*. The Promoters and Directors of the listed public company who are responsible for its acts and omissions are also covered in the said expression. In this regard it is settled position that the expression *"persons associated with the securities market"* are of very wide import and the Promoters / Directors of a listed company definitely fall under it and hence , I reject the contention of the noticees in this regard also. In this respect, it is relevent to refer the Hon'ble Gujarat High Court order in the matter of *Karnavati Fincap Ltd. and Alka vs SEBI (1996 87 CompCas 186 Guj),* where in the Hon'ble High Court held that :

> *The question then arises whether "persons associated with the securities market" takes its colour from persons enumerated in clause (ba)? If one has to go by the literal meaning, the interpretation which restricts the meaning of "persons associated with the securities market" to the persons enumerated in clause (ba) is not acceptable. In ordinary meaning, the persons associated with the securities market would include all and sundry who have something to do with the securities market. It is to be noted*

that the securities market in the sense is not confined to stock exchanges only. The words "persons associated with the securities market" are of much wider import than intermediaries."

15. Further, it has also been contended that the Promoters / Directors have not bought / sold / dealt with the any *'securities'* of the company, much less in a fraudulent manner, during the period under examination. In this regard, I note that the definition of "*fraud*" in regulation 2(1)(c) is an inclusive one. It is inclusive with respect to act, expression, omission or concealment committed by any person whether in deceitful manner or not, while dealing in securities in order to induce another person. The definition is also inclusive with respect to knowing misrepresentation, concealment of material fact, suggestion to an untrue fact, active concealment of fact with knowledge, promise without intention to perform, reckless and careless representations, deceptive behaviour, false statement, etc. as listed in points (1) to (8) of regulation 2(1)(c). The activities listed in regulation 2(1)(c) (1) to (8) are not connected or related with dealing in securities by a person to induce another person to deal in securities as contended by the noticees. In my view, the acts or omissions to divert funds of the listed company, wilful concealment of material facts, false and misleading disclosures, misrepresentation of material facts, etc. as has been observed in the *interim order* would be covered in the definition and such act, omissions could be construed as fraudulent if *prima facie* found so on merits. Regulation 3 of the PFUTP Regulations prohibit employment of any *'device'*, *'scheme'* or '*artifice'* to defraud *in connection with dealing in securities"* ; and engaging in any act, practice , course of business which operates or would operate as fraud or deceit upon any person *"in connection with dealing in securities"*. The words 'device', 'scheme' or 'artifice' have not been defined in the SEBI Act or in the PFUTP Regulations. According to the Black's Law Dictionary,-

"device" means (a) an invention or contrivance; any result of design; (b) a scheme to trick or deceive; a stratagem or artifice, as in the law relating to fraud.
"scheme" means(a) a systemic plan; a connected or orderly arrangement, especially of related concepts; (b) an artful plot or plan, usually to deceive others or a scheme to defraud creditors.
"artifice" means a clever plan or idea, especially one intended to deceive.

16. In my view, the acts or omissions to divert funds of the listed company, wilful concealment of material facts, false and misleading disclosures, misrepresentation of material facts, etc. as has been observed in the *interim order*, would be covered in the definition and such act, omissions could be construed as fraudulent would be covered within the scope of the expressions '*device*' or '*artifice*' or '*scheme*'. The words "*in connection with dealing in securities"* in regulation 3 of the PFUTP Regulations do not signify that the person employing the device and engaging in act, practice, etc. should actually buy or sell securities. In my view, any fraudulent or deceptive device, scheme, act, practice which has the potential to induce sale or purchase of securities of

the listed company or to influence the investment decisions of the investors in such securities would be covered in the prohibitions of regulation 3 of the PFUTP Regulations. I note that indulging in any fraudulent or unfair trade practice in securities is prohibited in regulation 4(1). In terms of regulation 4(2) dealing in securities shall be deemed to be fraudulent or unfair trade practice if it involves fraud. Regulation 4(2) further provides inclusive list of certain acts which do not necessarily require buying, selling or dealing in securities so as to be covered in the prohibited activities in regulation 4. I, therefore, do not agree with the contentions of the noticees in this regard.

17. The noticees have submitted that even though the *interim order* does not disclose any *mens rea* and in the absence of *mens rea*, sections 11, 11A, 11(4) and 11B of the SEBI Act could not be invoked which are discretionary, remedial and not punitive in nature. In this regard I am of the view that the present proceedings are civil in nature and *mens rea* is not an essential ingredient for contravention as has been alleged in the present proceedings.

18. Coming to the contentions of the noticees on merits, I note that it is admitted position that one Ms. Lokteng Teng Dorothy from Singapore was appointed as Limited Power of Attorney Holder (representative of the company) to handle the Investec Bank account of *Transgene*, the same Ms. Lokteng Teng Dorothy was appointed as Director of Transgene Biotek HK Ltd. and she also had signed the agreement with *Transgene* as a representative of Allshore Fiduciary Services. Further, the same Ms. Lokteng Teng Dorothy was signatory to the agreement with *Transgene* representing AFTL. It is also admitted position that, *Transgene* had raised $40 million through two GDR issues, thereafter it had transferred the proceeds of said GDR issues to AFTL, SyMetric and Sristek for technology transfer and for other reasons. *Transgene* has submitted copies of the service agreements entered into by *Transgene* with AFTL and SyMetric. I note from the service agreement dated March 07, 2011 with AFTL that the full cost stipulated in the agreement could have been paid only on technology transfer and completion of training. Thus, in this case the amount paid to AFTL i.e. US$29.92 million should have been paid by *Transgene* only after receiving the purported technology and services of training before or on the date of payment. However, it is also admitted position that, full amount as stipulated in the agreement was transferred to AFTL without receiving the purported technology and other services agreed for in the service agreement. Considering these facts and on the basis of preponderance of probability, I am of *prima facie* view that such huge amount of money of more than $40 million cannot go out of company without knowledge and active connivance of the noticees in a manner has been observed in the present case. Further, possible connection between Ms. Lokteng Teng Dorothy, Transgene, AFTL and Allshore Fiduciary Services though has not been yet brought on record, it must be a subject matter of ongoing investigation in the matter.

19. I am of the *prima facie* view that payment of full consideration amount under service agreement

before receiving any service in return cannot be termed as 'advance given towards the technologies' as mentioned in the annual report. I am of the view that the fact that the full amount has been paid to AFTL and the technology had not been received (as per the terms of the Agreement) should have been reported in the annual report. I, therefore, find that the contention made by the noticees that they have never made false and misleading disclosures cannot be accepted. Accordingly, I *prima facie* find that, the Promoters/Directors of the company had actively concealed the fact that *Transgene* had never received the technology and other purportedly agreed services from the entities to whom the GDR proceeds were transferred.

20. I note that, the noticees have submitted the fact regarding non-receipt of technology or other services only after SEBI examined the matter and questioned *Transgene*. Further, the noticees submitted that, by virtue of the Power of Attorney, Ms. Lokteng Teng Dorothy was "not authorized to withdraw or cause to be paid out or delivered to any other party (including the Company and herself), monies, securities or other assets held in the said Account". If the above fact is true, while as per submissions of the noticees, the funds from the first GDR issue being transferred by Ms. Dorothy without the knowledge of the noticees, the noticees instead of taking stringent action against Ms. Dorothy at the first given chance, continued Ms. Dorothy as Power of Attorney to handle the bank account and also allowed Ms. Dorothy to remain director of *Transgene* Biotech HK Ltd. On the basis of the above facts, I *prima facie* find that the noticees have hand in glove with the entities involved in fund transfers, which needs further investigation.

21. I note that, *Transgene*, vide its letter dated April 18, 2014 has submitted that payments were made from the GDR proceeds partly to SyMetric for undertaking and carrying in-vivo studies on various drugs of *Transgene* and to AFTL in relation to acquisition of a technology platform to generate auto immune disease drugs. On being advised to give details regarding the technology and other services received against the funds transferred from GDR proceeds, vide letter dated June 24, 2014 *Transgene* revealed for the first time that it had never received any technology or services from the entities to whom the funds had been transferred. The noticees have further submitted that Dr. K Koteswara Rao had discovered that Ms. Dorothy had issued account closure instructions to Investec bank AG, on the basis of forged letter purportedly issued by *Transgene* dated February 16, 2011 bearing the forged signature of its Chairmen Dr. K Koteswara Rao, directing the bank to close the company's bank account No. 020078. I note that the copy of the aforementioned alleged letter is also provided in annexure to the submissions by the noticees, wherein the letter is dated February 16, 2011 while proceeds of first GDR issue were transferred in this account only on February 22, 2011 and proceeds of second GDR issue were transferred on October 03, 2011. From the aforementioned letter it may be inferred that the bank account closure request had been issued even before the receipt and transfer of the first GDR proceeds, which *prima facie* appears to be

not true. I further observe that in submission dated December 31, 2015 the noticees have also annexed the copy of the letter dated August 17, 2015 allegedly written by *Transgene* to Investec bank, wherein it has been mentioned by *Transgene* that no invoices were ever raised by the entities to whom the funds being transferred to *Transgene* or its subsidiary for issuance of alleged letters of instructions for effecting transfer of funds. I note that, as per aforementioned letter *Transgene* had never received any invoices from the entities to whom the funds being transferred, however vide its letter dated June 24, 2014 to SEBI, *Transgene* had provided all the copies of the invoices received from AFTL and SyMetric to whom the funds being transferred. Therefore it *prima facie* appears that, the noticees have tried to mislead the examination of SEBI by making self contradictory submissions in addition to the observations as mentioned in the *interim order* and hence raises serious doubt on veracity of the submissions made by the noticees. I further note that the contention of the noticees that 'the fraud played upon by Mr. Nirmal Kotecha cannot be tagged on the noticees' could not stand as the noticees have not provided any documentary proof which can substantiate their claim in this regard.

22. I note that, the fact that, GDR funds to the tune of $40 million were transferred to AFTL, SyMetric and Sristek and in return *Transgene* had never received any technology or services from these entities was price sensitive information considering the involvement of substantial amount of money gone out of accounts of *Transgene*, hence the same should have been disclosed timely to the stock exchanges. I further note that the noticees in their reply did not mention the clause of the listing agreement, under which the noticees have claimed the immunity from the disclosure of such price sensitive information to the stock exchanges. The noticees have also used loose statements like "the disclosure of the inordinate delay in technology transfer from AFTL and SyMetric was not perceived by the Compliance Officer as price sensitive information," and that "the disclosure of delay in technology transfer from AFTL and SyMetric was the responsibility of the Compliance Officer, for whose actions/inactions the other Promoter/Directors cannot be made liable". I note that it is fiduciary duty of the directors to ensure the disclosure of such price sensitive information and the contention of the directors wherein the directors have passed entire blame on Compliance Officer does not hold good as the directors are responsible for all the day to day activities of the company.

23. According to the noticees, the fall in the prices of shares of *Transgene* cannot be attributed to their actions or inactions. As discussed hereinabove, the information *viz.* that in derogation of the service agreement, the company had paid the full amount of consideration to AFTL even without receiving the technology and other services was price sensitive information and had bearing on the affairs of *Transgene* and its share price. Had the information about non-receipt of technology in spite of transfer of GDR proceeds been disclosed, being a price sensitive information, it would have had immediate negative impact on the price and volume of the scrip. This information would have helped the investors in taking informed decision regarding

entry or exit. I do not find the contention of the noticees acceptable and do not find any reason to change the *prima facie* findings that *Transgene* and its Promoters / Directors tried to maintain / manipulate the share price of *Transgene* by concealing the aforesaid material information from its shareholders. The noticees have not submitted any plausible and cogent defence against the *prima facie* findings regarding erosion in shareholders' value on account of misconduct of promoters/directors of *Transgene*.

24. I note that, the concealment of material facts and providing misleading information cannot be termed as violations of technical nature, but this constitutes the material information and hence the same ought to have been disclosed, therefore, the Directors have failed to perform their fiduciary duties by not disclosing such material information.

25. Considering the foregoing facts and circumstances of the matter, I, *prima facie*, find that *Transgene* and its Promoters/Directors were in complicity with the other entities involved in the transfer and receipt of funds in the design to defraud the investors, the noticees had deliberately not disclosed price sensitive information on the stock exchange viz. that full amount as stipulated in the service agreement was transferred to AFTL without receiving the purported technology and other services agreed for.

26. In view of the above, I find that the noticees have not been able to make out a *prima facie* case for revocation or modification of the *interim order* and the material available on record justifies the continuation of the directions passed against them under the *ad interim ex-parte order* dated November 20, 2014.

27. I further note that the aforesaid acts and omissions on the part of the Promoters/Directors and the consequences thereof also raise the concerns about the non-observance of the principles of corporate governance as *prima facie* found in the *interim order*. I note that the directors are entrusted with the responsibility to take decisions for the company which is for the welfare of the company and its shareholders. I further note that true, fair, adequate and timely disclosures by the company form one of the basic tenets of governance in the listed companies and are essential for maintaining the integrity of the securities market. In this case, the promoters/directors have not only actively concealed the actual fact, made false, misleading and distorted disclosures as a device to defraud them as *prima* facie found in the *interim order* but also *Transgene* and its promoters/directors in complicity with the other entities had fraudulently transferred the funds out of the company. In the facts and circumstances of this case, I am of the view that the *prima facie* findings and directions in the *interim order* are in proportion to the alleged violations. In this regard, the observations of the Hon'ble Supreme Court, as a word of caution, in the matter of *N. Narayanan vs. Adjudicating Officer*, *SEBI,* in Civil Appeal Nos. 4112-4113 of 2013, (order dated April 26, 2013) is worth mentioning:

"A word of caution:

43. SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "Rule of Law". Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity."

28. In the light of above facts and circumstances, I, therefore, am of the considered view that no intervention is called for, at this stage, in either vacating the *interim* directions or modifying it, with respect to the noticees. I, therefore, in exercise of the powers conferred upon me under section 19 read with sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992, hereby continue the directions issued vide the *ad interim ex-parte order* dated November 20, 2014 against the noticees.

29. This order shall continue to be in force till further directions.

30. A copy of this order shall be served on all recognized stock exchanges and depositories to ensure compliance with above directions.

Sd/-

DATE: March 09th, 2016 **RAJEEV KUMAR AGARWAL**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA