WTM/MPB/EFD-1-DRA-1/116 /2020

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In Re: **Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003**

In the matter of M/s Aptech Limited

In respect of:

S.No.	Name of the Entity	PAN
1	Aptech Limited	AADCA0602L
2	Mr. Pramod Khera	AADPK2859G

Background:

1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") investigated the issuance of Global Depository Receipts (hereinafter referred to as **"GDR"**) by **M/s Aptech Limited** (hereinafter referred to as **"Aptech/ Company"**) for the Period October 01, 2003 to November 30, 2003, which revealed that Aptech

had issued 38,40,000 GDRs (amounting to approx. US$14.40 million) on November 06, 2003 on the Luxembourg Stock Exchange, equivalent to 1,53,60,000 underlying equity shares of the Face Value Rs. 10 each. Summary of the GDR issue as provided by the Company during the time of investigation is tabulated as below:

GDR issue date	**No. of GDRs Issued**	**Capital raised (US$ mn.)**	**Price per GDR (US $)**	**Underlying shares per GDR**	**Local custodian**	**No. of equity shares underlying GDRs**	**Global Depository Bank**	**Lead Manager**	**Bank where GDR proceeds deposited**	**GDRs listed on**
06-Nov-2003	38,40,000	14.40	3.75	4	ICICI Bank Ltd., Mumbai	1,53,60,000 (At approx. ` 45.4 per share)	Deutsche Bank Trust Company Americas	Reliance Corporate Finance Limited, UK	Banco Efisa	Luxembourg Stock Exchange

2. During the investigation, it was noted that Banco Efisa, S.F.E., S.A (hereinafter referred to as **"Banco Bank"**) had granted loan of upto US$20,000,000 to Willow Brooks S.A (hereinafter referred to as **"Willow"**) by way of a Credit Agreement dated October 20, 2003 (hereinafter referred to as the **"Credit Agreement"**) for enabling them to subscribe to the GDR issued by Aptech Ltd and it was observed that the entire 38,40,000 GDRs were subscribed by only one entity, i.e. Willow.

3. Investigation further found that the Company pledged its entire GDR proceeds with Banco Bank as a security against the loan availed by Willow from Banco Bank for subscribing to GDR of Aptech. For this purpose, the Company entered into an Account Charge agreement refer to as Loan Agreement dated October 20, 2003 (hereinafter referred to as the **"Account Charge Agreement"**) with Banco Bank and the said agreement was signed by Mr. Pramod Khera, Managing Director of Aptech (hereinafter referred to as **"Pramod")** on behalf of Aptech). Pramod signed a Board Resolution dated July 31, 2003 on the letterhead of Aptech and on the strength of this Board Resolution submitted to Banco Bank, Pramod on October 20, 2003, signed the account charge agreement on behalf of Aptech which provided security to Banco Bank to allow avail of loan by Willow from Banco Bank for subscription of GDRs of Aptech. As per Account Charge Agreement, Aptech shall deposit in its designated account with Banco Bank an amount not exceeding loan availed by Willow for subscription of GDRs of Aptech as security for all the obligations of Willow under the Credited Agreement (*which was signed between Banco Bank and Willow by which Banco Bank agreed to lend Willow for subscription of GDRs of Aptech).* The aforesaid Account Charge Agreement was an integral part of Credit Agreement entered into between Willow and Banco Bank and vice versa and both were executed concurrently and on the same date i.e October 20, 2003. Aptech could withdraw an equivalent amount from the bank account with Banco Bank only upon payment of all or part of the amounts due under the Credit Agreement. Aptech had pledged GDR proceeds to secure the rights of Banco against the loan given to Willow for subscription to GDR and corresponding GDR proceeds was utilized by Aptech only on repayment of loan by Willow. Later, on, the loan against which the GDR proceeds of the company were used as security, turned out to be the loan taken by Willow to subscribe the entire quantity of GDR issued by the company. It was further observed that the GDR issued by the company to Willow were subsequently converted into equity shares and sold in the Indian Securities Market. During the course of investigation, it was found that the Company had not disclosed to the stock exchange and the Company reported misleading news to the stock exchange which contained information in a distorted

manner and might have influenced the decision of investors thereby, the scheme of issuance of GDRs by Aptech was fraudulent. Hence, Pramod, Managing Director of Aptech who was party to the fraud by signing the Account Charge Agreement had violated the provisions of Section 12A(a), (b), (c) of SEBI Act 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as "PFUTP Regulations") and Aptech which perpetuated the above mentioned scheme had violated the provisions of Section 12A(a), (b), (c) of SEBI Act 1992 read with Regulations 3(a), (b), (c), (d) and 4(1), 4(2) (f), (k) and (r) of PFUTP Regulations.

Show Cause Notice, Inspection of Documents, Reply and Personal Hearing:

A. Show Cause Notice;

4. Based on the above noted findings made in the investigation, a common Show Cause Notice (hereinafter referred to as **"SCN")** dated December 19, 2017 was issued to Aptech and Pramod **(hereinafter referred to their respective names or collectively as "Noticees"**), wherein, Aptech was charged with the violations of Section 12A (a) (b) and (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1), 4(2) (f), (k) and (r) of PFUTP Regulations and Pramod was charged with the violations of Section 12A (a) (b) and (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations. The SCN called upon them to show cause as to why suitable directions shall not be issued against them under Sections 11, 11B and 11(4) of the SEBI Act.

B. Inspection of Documents:

5. Pursuant to the SCN, Aptech vide letter dated January 09, 2018 and January 24, 2018 requested to provide copies of all the relevant documents/or information collected or recorded by SEBI during its investigation. Pramod vide letter dated

December 26, 2017, through his Advocate & Solicitor, sought for inspection of documents. Aptech and Pramod availed the opportunity of inspection of relied upon documents in the SCN on the date provided by SEBI.

- Pursuant to Inspection of documents, Aptech vide March 08, 2018 requested for additional documents. SEBI vide letter dated April 03, 2018, provided two additional documents i.e copy of Aptech letter dated July 30, 2003 addressed to BSE and copies of bank statements and various instructions issued by Aptech to Banco Bank and informed that all the relied upon documents in the SCN have already been provided. Pramod vide March 05, 2018 requested for additional documents. SEBI vide letter dated April 03, 2018, informed that all relied upon documents in the SCN have already been provided.

- Aptech vide letter dated April 05, 2018 and May 07, 2018, again reiterated to their submission seeking additional documents by citing if the decision to not provide the relevant documents is a quasi-judicial decision. SEBI vide letter dated April 24, 2018, informed that all relied upon documents in the SCN have already been provided and vide letter dated June 12, 2018, SEBI cited SAT Appeal Judgment Order dated May 12, 2017, *B Ramalinga Raju Vs SEBI* and also advised to reply to the SCN. Aptech vide letter dated June 19, 2018, again reiterated to their submissions of seeking additional documents.

C. **Application for Settlement:**

6. Aptech vide e-mail dated June 30, 2018 and Pramod vide e-mail dated June 06, 2018, informed that they have filed application of Settlement with SEBI under SEBI (Settlement of Administrative and Civil Proceedings), Regulations, 2014. Though Aptech and Pramod had filed application for Settlement with SEBI, the proceedings continued but the final order was to be kept under abeyance till the disposal of the Settlement application.

D. Personal Hearing and Reply:

7. In view of the above and in the interest of Principal of Natural Justice, Noticees vide hearing notice dated July 25, 2018, were provided an opportunity of personal hearing on September 27, 2018. The said hearing was postponed to October 23, 2018. On October 23, 2018, Authorised Representative (hereinafter referred to as "AR") of Pramod attended the personal hearing. On the date of hearing, authorised representative of Aptech appeared and requested for adjournment of the personal hearing and Aptech did not appear on the date of the personal hearing. Another opportunity of personal hearing was granted on January 16, 2019, to Noticees. Vide letter dated November 27, 2018, Aptech informed that since it has filed application for settlement, the matter may be kept in abeyance till the disposal of application. Authorised Representative of Pramod vide e-mail dated December 03, 2018, confirmed to be present at the said hearing date. Vide e-mail dated January 15, 2019, Pramod, requested for adjournment of personal hearing citing that the relied documents upon in the SCN have not been provided by SEBI. Vide e-mail dated February 22, 2019, it was informed to Pramod that the opportunity of inspection has already been provided on March 05, 2018 on all the relied upon documents in the SCN. Another opportunity of personal hearing was granted on March 05, 2019 to Noticees.

8. Meanwhile, Aptech submitted its reply vide letter dated February 27, 2019, which is summarized below:

- The existing shareholders including the existing promoters were not involved in the alleged acts set out in the SCN;
- the existing promoters have taken the control and management of Aptech in October 2005 and as per SCN the alleged acts were carried out in the year 2003 i.e. during the period of erstwhile promoters;
- The current promoters, directors and top management of Aptech do not have any information about the dealings during the period prior to October 2005, as the

erstwhile promoters and directors have exited the company after the current promoters had taken over the company on October 2005.

- No board meeting took place on July 31, 2003 and therefore the said board resolution was not on records of the company.
- Mr. Pramod Khera and Mr. Kalpathi S. Aghoram were not authorised to sign, execute any charge over the account and the Bank was not authorized to use the funds as security for the charge.
- The members of the Board of Directors were not made aware of any charge creation over the account nor were any documents in relation to the charge creation placed before them.
- As per the information obtained from BSE and the annual report of Aptech, the board meeting was not held on 31st July, 2003. The foregoing observations in the SCN itself clearly establish that the said board resolution dated 31st July, 2003 purportedly signed by Mr. Pramod Khera, the then Managing Director, appears to be fabricated and therefore, such act or knowledge of the Managing Director cannot be attributed to Aptech the acts of the earlier management cannot be a ground for penalizing Aptech, which in effect nothing but penalizing the existing shareholders including the public shareholders for no fault of them.
- There has been a change in the promoter group of Aptech on account of a change in control of Aptech through acquisition of shares followed by an open offer by Aptech Investments, a partnership firm, constituted in July 2005, comprising of Marganta Textiles Private Limited, Damani Investment Private Limited and Ask Investment and Financials Consultants Private Limited. These alleged violations in the matter of GDR could not be detected during the due diligence conducted for acquisition.
- Further, the Board Resolution dated 30th July, 2003 varies with contents of Board Resolution dated July 31, 2003. A certified true copy of the minutes of the Board meeting dated July 30, 2003 is annexed. It is apparent on the authority to Pramod or to Mr. T.K. Ravishankar to provide any security to Banco for the loan availed by Willow for subscribing the issue of GDR. Further, in the place of Mr.

T.K. Ravishankar, the name of Mr. Kalpathi S Aghoram, Vice Chairman was mentioned. It appears from the foregoing, the Board Resolution dated July 31, 2003 was fabricated without the knowledge of the other Board of Directors of Aptech.

- Aptech was not aware of the borrowing by Willow to subscribe to the GDRs of Aptech nor of any other collateral provided in relation to such borrowing. It is evident from the extract of the bank account of Aptech provided by SEBI to Aptech vide its letter dated April 03, 2018 that that the GDR proceeds were credited to bank account of Aptech with the Banco on 7th November, 2003. An amount of about USD 14.40 million was transferred by Banco on the instruction of Aptech by November 17, 2003. None of the documents provided by SEBI specify that the said GDR proceeds were transferred from the account of Aptech on repayment of the loan amount by Willow. The transfer of proceeds was contrary to the alleged Account Charge Agreement. It is unbelievable that Banco has transferred the GDR proceeds within few days of the credit of such proceeds notwithstanding the alleged execution of the Account Charge Agreement. Therefore, no knowledge of Account Charge Agreement could be attributed to Aptech more particularly when the instructions of Aptech were complied by Banco without any objection and without communicating to Aptech about its charge over such proceeds. In the light of the foregoing, coupled with the fact that the Board Resolution dated 31st July, 2003 certified by Mr. Pramod Khera does not match with the Board Resolution dated 30th July, 2003 as per the records of the Company and confirmed by BSE, the act and knowledge of Mr. Pramod Khera should not be attributed to Aptech and Aptech ought not be construed as a part of the alleged fraudulent scheme.
- Aptech is constrained in making submissions as some of the documents sought by Aptech from SEBI were not provided causing prejudice to Aptech in defending the matter. However, based upon the documents now available with Aptech, there are sufficient grounds for the current management to believe that Aptech's management (other than the authorised signatories in the Board Resolution dated 31st July, 2003) were not aware of any such Board Resolution

dated 31st July, 2003 and the execution of Account Charge Agreement and therefore could not have made disclosure with regard to the same to the Stock Exchange.

- Without prejudice to the foregoing, there were no unlawful gains to Aptech. The use of GDR proceeds was confirmed in the audit report of Delloitte in the annual accounts for the financial years 2003 and 2004.
- It is submitted that no such credit agreement entered between Willow and Banco for the subscription of GDR was available on the records of the Company and only came to know when SEBI provided a copy of the credit agreement as an annexure to the SCN.
- SCN may kindly be withdrawn and if any action is taken against it, it will cause a grave miscarriage of justice by punishing the victim i.e the company and its shareholders including Promoters for no fault of them and such punishment if imposed is also prejudicial to the interest of the securities market. The existing shareholders should not be subjected to penalty even indirectly for any alleged acts of omission or commission of the erstwhile Promoters and management.

9. The Company Secretary and AR of Aptech appeared on the date of personal hearing i.e March 05, 2019 and reiterated to its submission vide its reply dated February 27, 2019.

- During the course of hearing ARs were advised to submit the following information:

  (a) At the time takeover, what was the actual Due Diligence done by the current promoter on physical availability of assets.

  (b) In resolution dated July 30, 2003, as submitted by Aptech, board of directors of Aptech has resolved to open a bank account with Banco, in this regard, Aptech is advised to clarify the following:

(i) Why Aptech has chosen only Banco to open a bank account for the purpose of receiving GDR proceeds.

(ii) Why Aptech has opened escrow account with Banco.

(iii) Why did Aptech allowed to transfer GDR fund/proceeds to other Banco Accounts.

(c) In resolution dated July 30, 2003, the board of directors of Aptech had resolved and authorized Mr. Pramod Khera and Mr. T.K. Ravishankar to sign and execute "other documents". Aptech is advised to make their submission on this point.

(d) In respect of submission of Aptech that Board Resolution dated July 31, 2003 is fabricated, Aptech is advised to make their submission on doctrine of indoor management.

(e) Subsequent to takeover, Mr. Pramod Khera continued with Aptech till March 2009. Aptech is advised to make their submission on this point.

- ARs of Aptech requested 3 weeks' time to submit the aforesaid information and additional written submission in the matter. Acceding to the request, ARs was advised to submit the aforesaid information and additional written submission, if any, by March 21, 2019. If ARs fail to submit the said information and additional written submission within the time limit, then the matter would be proceeded further on the basis of documents available on record.

10. Pursuant to personal hearing, Aptech vide letter dated March 26, 2019 reiterated its earlier submission and made additional submissions, relevant portions are summarized below:

- The current promoters had carried out a limited due diligence based upon publicly available documents as there was doubt with regard to the conduct of extensive due diligence prior to acquisition under the insider Regulations.

Therefore, the current promoters had relied upon the Annual Reports for the year 2003 in which the then Statutory Auditors M/s Deloitte Haskins & Sells, Chartered Accountants.

- Due to non-availability of co-operation from the erstwhile promoters and directors, the Company is not able to comment how and why the purported/fabricated board resolution dated July 31, 2003 was brought into existence though there was no board meeting held on that date.
- With regard to the board meeting resolution dated 30th July, 2003, it is submitted that the said resolution is generic and cannot be the basis for creation of charge as no such authority was conferred under the said resolution. The reference to escrow agreements and other agreements should be construed to be generic in nature only to provide for the escrow of the proceeds of GDR till the GDRs are listed as a part of stipulations.
- The Company in its correspondence including vide its letter dated 22nd June 2015 and email dated 4th November, 2016 has informed that during the deluge of July 2005, many of its records and documents were destroyed as a result of massive flooding in its premises.
- Without prejudice to the above submission, it is submitted no copy of Willow account with Banco Bank was provided by SEBI to show that the amounts in the Aptech account with Banco Bank were allowed to be withdrawn only on repayment of the loan by Willow to Banco Bank. Further, as per the copy of the statement of accounts in Banco Bank, it is observed that Banco has allowed withdrawal of entire amount credited on 7th November, 2003 by 17th November,2003. It is surprising that Banco Bank has allowed such withdrawal even though the alleged account charge agreement was in existence. The foregoing facts establish a possibility that other than the signatory to the alleged account charge agreement, the other persons in the Company were not aware of the above charge arrangement in the light of the withdrawals permitted by Banco Bank of the entire amount within a period of 10 days from the date of credit.

Pramod:

11. AR of Pramod appeared on the date of personal hearing and requested for adjournment of personal hearing and further requested for 10 days' time to submit reply. AR was advised to submit the reply by March 15, 2019. Another opportunity of personal hearing was granted to Pramod on May 29, 2019. AR requested for adjournment of the personal hearing which was not granted.

Reply of Pramod:

12. Vide letter dated March 15, 2019, Pramod made detailed submission, which are summarized below:

- The SCN has been issued after a gross delay. The GDR issue was completed by Aptech Limited in the year 2003 and the first time that I was called for an investigation was on July 28, 2017 to answer questions on events which had transpired almost 13 years ago. Thereafter, SCN was issued on December 19, 2017 i.e. after a period of almost 6 months after the said investigation and 14 years after the alleged events had transpired. It is pertinent to note that I resigned from Aptech Limited.
- He requested that all the documents collected by SEBI during its investigation in the matter of the GDRs by Aptech in 2003 be provided to me forthwith. SEBI not to pass any direction or order against him without providing both the relevant documents. Denial of inspection and documents is contrary to settled principles of law and various judgments including of the Hon'ble SAT and the Hon'ble Supreme Court of India in case of Price Waterhouse Vs SEBI and Hon'ble SAT in case of Smitaben N Shah Vs SEBI.
- An opportunity should also be provided to me to undertake cross examination of all the concerned people associated with the purported issue of GDR which is the cause of the present SCN.

- First time heard of the alleged Credit Facility Agreement, Account Charge Agreement, purported Aptech Board Resolution dated July 31, 2003 purportedly signed by him, the alleged loan taken by Willow and the alleged charge over the GDR proceeds etc., only when SEBI informed him of the same and when he attended the offices of SEBI on July 28, 2017. As the signature on the copies of the purported resolution and signature page of the Account Charge Agreement shown to me prima facie appeared similar to my signature, I requested SEBI for (amongst other things) inspection of the originals in order to be able to properly verify the genuineness of the purported signatures.
- Whilst denying that the aforementioned documents inter alia the Account Charge Agreement and the certified true copy of the Board resolution purportedly dated July 31, 2003 were in fact signed by me. In order to order to establish the charges of fraud in a case, it is required by SEBI to establish that any harm was induced by the materialisation of a risk that was not disclosed because of the alleged fraudulent practice.
- In the present case, in order to levy the allegation of fraud under the PFUTP Regulations, the SCN has failed to demonstrate the following essential· elements beyond reasonable doubt:
- Any personal gains made by him from dealing in the securities of Aptech basis the purported information.
  i. Any inducement made by him to any agent or any third party to deal in the securities of Aptech
  ii. mens rea on his part to undertake the purported fraudulent arrangement;
  iii. that he was aware of the purported execution of the Account Charge Agreement and creation of the charge of the proceeds of the GDR and knowingly did not disclose such an information to the stock exchanges.
- He first joined Aptech in 1987 as Systems Executive. After spending about seven years with Aptech, I re- joined Aptech in 1996 as Education Franchise Head and continued until 2001. In 2001, I was appointed as Chief Executive

Officer & Managing Director of Aptech, a position I continued to occupy until I resigned in March 2009.

- It is pertinent to note that when I joined Aptech, the promoters of the company were the Nishar family wherein the promoter shareholding was held principally by (a) Advent Tele-Net Private Limited and (b) Norfolk Infotech Private Limited, being entities promoted by the Nishar family.
- On or about March 10, 2003, SSI acquired control of, and became the new promoter of Aptech. Consequently, on 10th March 2003, the Board of Directors of Aptech was reconstituted with certain directors including the representatives of the Nishar family resigning, and SSI, the New Promoter, appointing new directors on the Aptech Board. The directors inducted on the Aptech Board at the of SSI included Kalpathi Suresh, K S Aghoram, K S Ganesh, D V Narasingarao, R Nagruajan, N Seshadri Kumar and T K . Bhaskar.
- Mr. Kalpathi Suresh was appointed the Chairman of Aptech, and Mr. K S Aghoram was appointed as the Vice-Chairman of Aptech.
- On the same date, i.e. March 10, 2003, the New Promoters, through the Aptech Board which was then controlled by it, constituted a Capital Issues Committee which passed a resolution for raising of funds by issuance of GDR. The Capital Issues Committee was formed only from the new directors who had been appointed on the Aptech Board at the instance of the New Promoters (viz. R Nagarajan, N Seshadri Kumar and T K. Bhaskar). It is pertinent to note that he was not a member of the Capital Issues Committee.
- The Open Offer made by the New Promoters closed in May 2003. The New Promoters, having decided that Aptech should acquire the training division of SSI (i.e. of the New Promoter), known as "SSI Education", that for funding this acquisition (the proceeds of which would go directly or indirectly to the New Promoters themselves) and also some other fund requirements of Aptech, new equity shares would be required to be issued by Aptech byway of GDRs, ADRs etc., on May 28, 2003, the Aptech Board passed resolutions to acquire the SSI Education Business from the New Promoters for a consideration of Rs.28.65

crores with effect from April 1, 2003; and approve, subject to the required shareholders' approval, the GDR issue.

- The CIC and the New Promoters, who were extremely hands-on and active on the financial functions of Aptech, initiated and took charge of the process to raise funds through a GDR issue by Aptech. As seen from the above, SSI and its promoters had taken the key decisions and process were managed entirely by them.
- It is pertinent to note that I was not involved in the decisions relating to the GDR issue. All discussions with lead managers, banks, investors, etc. were conducted by the New Promoters. He and the management team in Murnbai only met the lead managers in Mumbai in relation to the input required by them relating to the operational aspects of the Company. All discussions with Banco Bank were handled by the SSI team in Chennai as more particularly mentioned below. They went abroad for, and were involved in and all roadshows for the GDR issue. He did not meet Willow at any occasion. He was not involved in these matters and they were handled directly by the SSI and its team. His role was limited to signing documents as per the directions of the Board of Directors relating to the GDR issue (including signing certain documents in London as mentioned at paragraph _ below) and doing various ministerial or routine matters relating to the GDR issue in his capacity as the Chief Executive Office & Managing Director of Aptech. However, he does not recall having heard of or signed any documents relating to any charge or pledge on the GDR proceeds. Attached as Annexure an email exchange between the Chennai office of SSI and him evidencing the above including where Mr. K. Suresh and Mr. K.S. Aghoram asked for Aptech visiting cards and a blank letterhead pad of Aptech.
- SEBI has, in the SCN, acknowledged that the Board of Directors of Aptech had approved the issuance of GDRs and had appointed him as the authorised signatory for inter alia opening the bank account with Banco Bank and execute all documents as maybe necessary to complete the transaction. Accordingly, it is undisputed that he was merely acting on the instructions of the Board of

Directors of Aptech at the relevant time and any documents signed by him were on the direction of the Board of Directors. It is common knowledge that during the course of opening and operating any account a number of forms and documents are signed by the account holder's authorised signatory and such numerous documents and formalities are not necessarily perused by each of such authorised signatories at the moment of signing and a senior executive like the CEO & MD typically relies on the Company's management team, instructions of the Chairman's office, documents prepared by the lawyers, etc.

- It is pertinent to note that he was not entitled to any share of profits made by Aptech and had nothing to personally gain from the GDR issue.
- As regards the statement that "Investigation established that Willow was the only entity to have subscribed to the entire 38,40,000 GDRs", The statement appears to be inconsistent with the information provided by Aptech to SEBI vide its letter date 22nd June 2015 (para 5) wherein, .. against "Name of the initial allottees" Aptech has listed eight allotees, a number of who appear to be institutions, as mentioned below (and Willow is not one of them). The resolution submitted by Aptech to SEBI vide letter dated June 22, 2015. These resolutions also give the names of 8 initial allottees; which do not include Willow. The above also seems to accord with the information provided by Aptech to the stock exchange vide its announcement dated November 06, 2003. SEBI has not provided a copy of the investigation report or its basis for the finding that Willow was the sole initial allottee of all the GDRs.
- He has denied of any knowledge of the board having authorised the creation of any charge over the GDR proceeds or having signed the alleged Account Charge Agreement. He denied having signed such resolution as is mentioned unless, in circumstances as mentioned above or in some other manner, his signature was taken unknowingly, surreptitiously and fraudulently. He will deal with the same accordingly once he has been provided inspection of the originals. He stated that he appears to be the victim of a fraud and conspiracy which was hatched behind my back and unknown to him.

- He has no knowledge of such alleged Account Charge Agreement and therefore no question arose of disclosure of the same. No such agreement had been discussed or approved or authorised by Aptech at any board meeting. He does not recollect signing any such agreement nor had anyone informed him that any such agreement had been signed.
- Since the allegation in the SCN has occurred more than 15 years ago and having left his employment at Aptech in 2009, he has no records of the same. However, what is stated herein appears to accord with the information provided by Aptech to SEBI and he presently have no reason to doubt the correctness of the same. In this regard, on the basis of what is stated in this paragraph, it is pertinent to note that US$ 5.5 million appears to have been remitted from the Banco Bank account to Aptech on November 7, 2003 itself and a further US$ 1.5 (aggregating to nearly 50% of the issue proceeds) appear to have been remitted just a week later on November 14, 2003. This does not seem to be consistent with the proceeds being under charge/ pledge. In fact, as per this table, within a fortnight of receipt of the GDR proceeds, nearly US $ 10 million out of the total US $14.4 Million of the GDR proceeds seem to have been transferred out of the Banco Bank account.
- Cancellation/conversion of GDRs the underlying equity shares are transferred to the name of the GDR holder (Beneficiary). It is seen from the table in the SCN that the names of the Beneficiaries in a number of cases conform to the initial GDR allottees mentioned by Aptech in its letter and in the Capital Issues Committee and Board resolutions of Aptech mentioned above and that Willow's name does not appear in this table. It is also seen that these conversions happened only in 2004 while around US$ 7,620,000 (approx. 52.91%) of the GDR proceeds had been transferred out of the Banco Bank account before then.
- Assuming there was a fraudulent scheme, he was not a part of, or aware of, any such Scheme, and SEBI should hold responsible those persons who were involved in such Scheme and who would gain from and have a motive to formulate and implement such a Scheme. Has denied that he did anything

fraudulent or acted knowingly acted as a party to any fraudulent scheme. Assuming there was fraudulent scheme, the same was not known to him and assuming (whilst denying) that his signature was obtained on the alleged resolution or the signature page attached to the alleged Account Charge Agreement, the same was not signed knowingly by him and his signature would have been obtained fraudulently.

- He has stated that the SCN which is incomplete has been issued against him under the erroneous belief that he had signed knowingly signed the Account Charge Agreement and was aware of the alleged Credit Agreement and the alleged charge over the GDR proceeds to secure the alleged loan to Willow. He has denied the same on oath to SEBI when recorded his statement with SEBI and once again deny it through this reply.

13. Pramod and ARs appeared on May 29, 2019 for personal hearing and made following oral submissions:

a. That ARs reiterated the earlier reply / submission dated March 15, 2019 made by Pramod.

b. That upon perusal of copy of account charge agreement, at the bottom left corner of each page of copy of account charge agreement the word 'Draft' is written, thus it appears that the said copy of account charge agreement was a draft copy and not the final copy. Further, only last page of copy of account charge agreement contain his signature.

c. He had signed stack of documents.

d. That the definition of Fraud under SEBI (PFUTP) Regulations does not apply to him.

e. That if there is any malafide intention on the part of him, then he would have left Aptech Limited in 2005 only, however he left Aptech Limited in 2009.

f. That there was no Board meeting held on July 31, 2003. The Board meeting was held on July 30, 2003. The Copy of Board Meeting Minutes of July 30, 2003 is submitted. Or if there is any board meeting held on July 31, 2003, he

was not aware and also was not provided with the board meeting minutes held on July 31, 2003.

g. That the total no. of shares held by Mr. Pramod Khera was 4,547 shares which were bought much before the GDR issue and under old management. Till 2005 Mr. Pramod Khera have not dealt in the shares of Aptech either directly or indirectly.

h. ARs submitted the copy of following case laws:

i. HB Stock Holdings Limited vs. SEBI (Hon'ble SAT Appeal no. 114 of 2012)

ii. SEBI vs. Price Waterhouse (Hon'ble SC in Civil Appeal No. 6001 -6001 / 2012)

iii. Smitaben N. Shah Vs. SEBI (Hon'ble SAT Appeal No. 37 of 2010)

iv. SEBI vs. Shri Kanaiyalal Baldevbhai Patel (Hon'ble SC in civil Appeal no. 2595 of 2013)

- Pramod / ARs were advised to submit the following documents / information:
- An affidavit of Pramod stating the following:
  i. Whether Pramod had read the documents which he had signed at the time of GDR issue with Banco.
  ii. Whether Account Charge agreement document was placed before Pramod or not for signature and whether he signed the account charge agreement or not.
  iii. The Deloitte report.

- Pramod had requested the evidence / documents which shows that Willow was the initial / first subscriber to the GDRs and the evidence / documents of conversion of GDRs into shares as stated in the SCN.
- AR/Pramod was advised to provide any additional written submission and queries raised above within 15 days from the date of receipt of documents / evidence provided by SEBI to ARs/ Pramod.

- Hearing was concluded in respect of Pramod.

14. Vide letter dated January 27, 2020, with respect to Willow being the initial/first subscriber to the GDRs, SEBI submitted that observation was made based on the Credit Agreement dated October 20, 2003 executed between Willow and Banco Bank and the account charge agreement on the same date, which was already provided to Pramod at the time of issuance of SCN and the same was again provided to Pramod. With respect to the evidence/documents of conversion of GDRs into shares details as provided by the custodian (ICICI Bank) in the matter was provided.

15. Vide letter dated February 13, 2020, Pramod has submitted Original Affidavit cum Declaration declaring that :

- he has acted solely and only on instructions of the Board of Directors of Aptech and he has not signed or executed any documents, deeds, writings or the like other than what has been authorized to me by the Board of Directors of Aptech or the documents, deeds, writings and the like which were approved by Board of Directors.
- He has followed the instructions of the Board of Directors in terms of the resolution passed by the Board of Directors at its meeting held on July 31, 2003 and have not acted outside the authority granted to him by the Board of Directors of Aptech.
- He does not remember to have signed the Account charge agreement dated October 20, 2003 on behalf of Aptech which provided security to Banco for loan availed by Willow from Banco for subscription of GDR of Aptech. In fact, he came to know of this account charge agreement, only when SEBI showed the same to him on July 28, 2017, when he appeared before the investigating authority.

16. Settlement Application filed by Aptech and Pramod were rejected and the same were communicated to the Company and Pramod on November 14, 2019 and December 17, 2019 respectively.

17. Pursuant to rejection of application of Settlement, Aptech vide letter dated November 26, 2019, sought to grant a personal hearing to make additional submission in the matter. An opportunity of personal hearing was granted to Aptech on January 20, 2020. Aptech with its authorized representative appeared for the personal hearing on the said date and made following oral submissions:

(a) ARs reiterated the earlier submissions made by Aptech.
(b) Aptech vide letter dated January 20, 2020 submitted the list of documents (which was also attached with their letter dated January 31, 2020).
(c) The allegation is that account charge agreement is not disclosed to the exchange.
(d) The records of the company were destroyed during the Mumbai floods in 2005.
(e) There is a change in management control / promoter of the Company. The alleged violations / transactions were happened during the tenure of erstwhile management.
(f) On November 06, 2003, Aptech issued 38.4 lakhs GDRs amounting to approximately USD 14.4 million to 8 allottees. The list of allottees are attached as Exhibit 9 of the aforesaid list. Further, lead manager vide email dated December 15, 2003 submitted the list of 8 allottees. The said email is attached as exhibit 10. Therefore, 38.4 Lakhs GDR was issued to 8 allottees and not to 1 allottee.
(g) Further, as per the minutes of board meeting resolution dated November 06, 2003 there were 8 allottes to the GDRs. The said board resolution is attached as Exhibit – 6 to the aforesaid list. The minutes of the board resolution is approved in the board meeting held in January 2004.

(h) With regard to the conversion of GDRs into equity shares, NSE vide letter dated December 10, 2003 requested the company to submit the certificate from statutory auditor stating that the company has received the entire consideration payable prior to the allotment of shares. In this regard, Aptech submitted the Deloitte auditor certificate, certifying that Aptech had received the consideration toward allotment of GDRs aggregating to US $ 14,400,000 on November 06, 2003. The NSE letter and Auditor certificate is attached as Exhibit 8A and 8B to the aforesaid list.

(i) It is submitted that as per the law, the board resolution / board meeting minutes was not required to file / disclose anywhere.

(j) There is no green shoe option. GDR return were filed with RBI.

(k) Account charge agreement states about US $ 20 million whereas actual GDR issue was for US $ 14.4.

(l) On page 4 of credit agreement, obligor means borrower and sterling biotech.

(m) It is submitted that July 31, 2003 board resolution does not exist in Company record and was created by Pramod. In this regard, Aptech is advised to submit its reply on doctrine of indoor management. Aptech submitted that Company is not responsible on indoor management. Detail reply in respect of doctrine of indoor management will be submitted along with written submission.

(n) It is submitted that Pramod had perpetrated the fraud. But company had neither filed any FIR against Pramod nor had taken any action against him.

(o) Any adverse direction against the company after 15 years is like punishing the investors/ current shareholders. Since 2003, 98% shareholding has been changed. This will result as absolute miscarriage of justice as company had not done anything.

(p) On Due diligence, it is submitted that current promoter had relied on Deloitte report.

(q) There has been no allegation in the SCN that Funds has been diverted.

(r) Not informing about the account charge agreement to the exchange was a technical charge.

(s) With regard to the utilization of Funds, Aptech had file GDR return with RBI. The copy of the same is attached as exhibit 15D to the aforesaid list.

(t) One of the reason of the object of the GDR issue is that Aptech is in education business and they need the money for acquisition to setup offices in India. There was no object in the issue for acquisition in abroad. Further, it is submitted that money actually came back to India.

(u) Aptech submitted that account charge agreement and credit agreement is not equal to the evidence. Investigation Authority does not have the power to call the information. The information collected by SEBI from Portugal is an information and not evidence.

- ARs had made certain oral legal submission. ARs of Aptech stated that they will submit their said oral legal submission in detail in writing along with their written submission.

- During the course of hearing ARs were advised to submit the following information:

(a) Aptech have not submitted any reply to queries / information asked during the course previous hearing held on March 05, 2019. Hence, Aptech / ARs are once again advised to submit the reply to the same queries.

(b) Re-submit the bank statement highlighting the return of funds.

(c) Aptech submitted that July 31, 2003 board resolution does not exist in Company record and is created by Pramod. In this regard, Aptech is advised to submit its reply on doctrine of indoor management.

(d) What action (if any) Aptech has taken against Pramod.

(e) Why Aptech has chosen Banco over other banks available in the world. Submit the reason for opening an escrow account with Banco.

(f) What was the object of the issue? If there was no object in the issue for acquisitions abroad, then why the full money has not came back in India.

- ARs of Aptech requested time till January 31, 2020 to submit the aforesaid information and additional written submission in the matter. Acceding to the request, ARs were advised to submit the aforesaid information and additional written submission, if any, by *January 31, 2020*. If ARs failed to submit the said information and additional written submission within the time limit, then the matter would be proceeded further on the basis of documents available on record.

18. Pursuant to Personal Hearing Aptech made submission vide letter dated January 31, 2020, the additional submissions made are summarized below:

- It was submitted that based upon the records available provided to the earlier management by the Lead Manager, the names of the initial allottees were provided to SEBI vide letter dated 22nd June, 2015. The name of the initial allottees were:
  i. Citi Group Global Markets Limited;
  ii. Praveen Jain;
  iii. Ehinger & Armand Von Ernst AG;
  iv. Matterhorn Ventures Singapore;
  v. BNP Paribas Private Bank;
  vi. ContiFina SA;
  vii. Investec Bank (Switzerland) AG;and
  viii. Taib Bank EC.

- It appears from the alleged Account Charge Agreement that the loan agreement signed between Willow and the Banco Bank provides that the Banco will lend to Willow an amount of upto US $20,000,000. However, the subscription amount of the GDRs even as per SCN was only US$ 14.40 million. If at all the Banco was willing to lend upto US$ 20,000,000,it is unexplainable as to why an odd amount of US$ 14.40 million was paid as subscription amount towards 38,40,000 GDRs.
- Paragraph 2 of the alleged Account Charge Agreement inter alia mentioned that Aptech deposited in the bank's account number 6134766 the amount of US $20,000,000. Strangely, the date of the alleged Account Charge Agreement is October 20, 2003. If at all the alleged Account Charge Agreement was acted upon on October 20, 2003, the Banco Bank would have shown US $20,000,000 in the Aptech account with Banco and Willow would have subscribed the entire amount of US $20,000,000 towards GDRs. However, even the SCN mentioned US$ 14.40 million as subscription amount. Therefore, it is apparent that the alleged Account Charge Agreement which records the deposit of US$ 20,000.000 in the bank's account number 6134766 on October 20. 2003, itself is unreliable and not admissible as evidence in any proceeding.
- We submit that the Paragraph 11of the SCN that Willow had also given a drawdown notice (Annexure 7 to the SCN) which would be required to avail the loan facility and is unsubstantiated. The copy of Annexure 7 provided to Aptech indicates that it is only a schedule to the alleged credit agreement and it was unsigned. If at all, such drawdown notice was signed by Willow for availing the alleged loan under the alleged credit agreement, Banco Bank would have provided such copy to the SEBI and SEBI would have furnished such copy to Aptech. In the absence of such drawdown notice, the said allegations of SEBI are baseless and made mechanically based upon surmises.
- We submit that SEBI has not provided any bank statement of Willow with Banco Bank to demonstrate that Willow had availed US$ 14.40 million from Banco for subscribing to the GDRs and to establish that the GDR proceeds in Aptech account with Banco were released only on repayment of the alleged loan by

Willow. Even the bank statement of Aptech with Banco Bank also indicate withdrawals of substantial amount from the said account in a matter of three days from November 2003 which is very unlikely in the event if such proceeds are purported to be charged for the loan availed by Willow for the purpose of subscribing to GDRs.

- It appears from the bank statement of Banco Bank, an amount of US $5,500,000 and US $210,000 were allowed to be withdrawn on 7th November, 2003 i.e. on the date of deposit itself. On 10th November, 2003 amounts aggregating to US $ 6,11,580 were allowed to be withdrawn.
- Further, on 12th November, 2003 an amount of US $3,30,000 was allowed to be withdrawn and on 17th November,2003 an amount of US $1,500,000 was allowed to be withdrawn. It is evident from the bank statement, an amount aggregating to US $8,15,1580 was allowed to be withdrawn within a span of 10 days which contradicts the allegation of SEBI that the account of the Company with Banco Bank was under the charge and the withdrawals were permissible under the alleged Account Charge Agreement.
- Further we have not been provided with any investigation report of SEBI that establishes the availment of loan by Willow for the purpose of subscribing to GDRs despite our repeated requests for the same. We were also not been provided with the communications between SEBI and Willow despite our requests. In the absence of such bank statement reflecting the alleged loan availed by Willow from Banco Bank, the allegations in SCN that Willow was the sole subscriber to the GDRs and the said subscription amount of US$ 14.40 million was paid by availing loan from Banco Bank on the basis of alleged credit agreement and alleged Account Charge agreement are mere surmises without any reliable documentary corroboration whatsoever.
- The allegation that Aptech has not disclosed about pledging the GDR proceeds as security for the loan to Willow to facilitate subscription to its GDR is not substantiated by any evidence on the basis of the documents furnished by SEBI to Aptech.

- The then Statutory Auditors M/s Deloitte Haskins & Sells, Chartered Accountants had made the following statements in their Auditors Report for the year 2003 that:
  - The management has disclosed the end use of money raised by public issue (Global Depository Receipts} during the current year and the same has been verified by us.
  - To the best of our knowledge and belief and according to the information and explanations given to us, no fraud on or by the company was noticed or reported during the year.
- Based upon the above Annual Reports, Auditor Reports and the GDR return, it is evident that the GDR proceeds were utilised for the end use as set out in prospectus.
- The loan account of Willow or the signed drawdown notice of Willow were not provided by SEBI to substantiate its charge that Willow has subscribed to the GDRs of the Company availing the loan from Banco on the strength of the alleged Account Charge Agreement. Further, in the absence of signed drawdown notice of Willow, such loan account, there cannot be any presumption that Willow has availed any loan amount or any amounts from the account of the Company with Banco Bank were adjusted towards the loan of Willow.
- Assuming, for an argument sake, there is a diversion of funds out of GDR proceeds, the same constitutes a fraud perpetrated on Aptech to the extent of such diversion for which Aptech should not be made liable. Further, there was no cooperation from Banco Bank to the present management of the Company to ascertain whether there is any basis for any such assumption. The Company is bereft of any investigative powers to cull out any information in relation to the same, however, the Company has received some queries from Enforcement Directorate. The Company has provided the necessary information and co-operating with the said agency in the investigation. If at all there is any diversion of funds, the Enforcement Directorate would be able to identify and proceed against the culprits involved in it and in the process may restore the Company, the amount, if any, diverted.

- We submit that in the absence of any documentary proof to show that there was a diversion of funds especially when the matter involves cross border transaction, there is no purpose served by filing a first information report with local police. The Enforcement Directorate is more equipped to deal with foreign exchange related transactions and is seized of the matter. The Company would proceed, against the persons involved in the alleged fraud, for recovery of funds diverted, if any, if the Enforcement Directorate concludes such diversion and quantum of amount diverted, if any.
- We further submit that the acts of the erstwhile managing director were unauthorized, and therefore, not in the knowledge of the Company acting through its Board of Directors. The Company itself came to know regarding such alleged irregularities committed by Pramod only in March 2017 when SEBI provided vide its letter dated 10th March 2017 the scan copy of the fabricated board resolution dated 31st. July, 2003.
- It is apparent from the portion in SCN referred to paragraph 14 above, the allegation of SEBI is that the misleading news reported to BSE might have influenced the decision of investors and was therefore fraudulent in nature. Such announcement was primarily meant to mislead Indian retail investors that GDRs were fully subscribed. We submit that the alleged account charge agreement was executed unauthorisedly without the knowledge of the Company and therefore, such alleged act shall not be attributed to the Company for alleging as misleading news reported to BSE by the Company. Assuming that charge is true as alleged by SEBI, the then promoters and the then Managing Director, Pramod alone ought to be held responsible for the same. However, while Pramod has been rightly show caused. The erstwhile Promoters have been left scot free without even issuing notices for such alleged acts, and instead the Company which is the victim of the alleged irregularities has been wrongly show caused.
- We submit that the delay of about 14 years in the issuance of SCN has caused serious prejudice to the Company and the existing shareholders who are the investors as the erstwhile promoters and the management has changed immediately after the alleged GDR and the refusal of Banco to cooperate with

the Company. As submitted that the records of the Company were lost during the deluge in 2005. Therefore, the proceedings under the SCN are to be withdrawn against the Company.

- We submit that passing any directions under 11B at this stage against the Company would be defeating the intended purpose of Section 11B as more particularly, the erstwhile promoters and the Managing Director who were there at the time of the alleged acts under the SCN are no more associated with the Company. We submit that no purpose would be served by issuing such directions under section 11B against the Company when the erstwhile promoters and the Managing Director are no more in control of the Company. And, any such directions would not be remedial or preventive but would only be penal which, is not the objective of Section 11B.

Doctrine of Indoor Management

- The doctrine of indoor management is not applicable where the circumstances surrounding the contract are suspicious and therefore, invite inquiry. We also submit that while there was no board meeting held on 31st July, 2003, a fabricated Board resolution showing the date of board meeting of 31st July, 2003 was created and allegedly signed by Pramod wherein the execution of account charge agreement was brought in with ulterior motive. Further, apart from Pramod, authority was given to Mr. Aghoram in the said fabricated resolution who was not authorised by the Board in the meeting of 30th July, 2003. It is evident from the foregoing, that the Board Resolution dated 31st July, 2003 was fabricated as Banco might have refused to accept the Board Resolution dated 30th July, 2003 as that resolution has not authorised for creation of account charge and was not in the format as required by Banco Bank. Therefore, it could be safely construed that Banco Bank was fully aware of the irregularity in the Board Resolution dated 31st July, 2003 and that it was fabricated. Therefore, the doctrine of Indoor management is not applicable. It is also evident from the recent orders passed by the SEBI in the GDR matters that Banco was involved in such type of issues. And, because of the irregularities committed by Banco Bank,

we understand, that Banco Bank was Nationalised in 2008 by the Portugal government.

- Cited the Judgement: M/s M.R.F. Limited Vs Manohar Parikar (2010 AIR SCW 5742).
- The alleged account charge agreement executed was ultra vires the constitutional documents of the Company as there was no authorisation of the then shareholders and it was beyond the scope of authority of even the Board of Directors and therefore the Managing Director was acting beyond the scope of authority. Hence, SEBI shall not apply doctrine of indoor management in the circumstances set out above more particularly when such alleged acts were alleged to be committed were ultra vires being in clear violation of section 372A of Companies Act, 1956 and the provisions of Articles of Association due to application of Doctrine of constructive notice. It is evident from the above, when natural persons are to be treated in law as being the company for the purpose of acts done in the course of business, it is necessary to Identify whether those persons were authorised under Memorandum and Articles of Association or as a result of action taken by the directors, or by the company in general meeting pursuant to the Articles, are entrusted with the exercise of the powers of the company. In the present case, as submitted earlier, the Articles of Association (Article) 123 stipulates that the Managing Director has to act subject to the superintendence, control and directions of the Board of Directors. However, the Managing Director has acted in violation of the Board Resolution and section 372A of the Companies Act. Further under Article 143, it is necessary to obtain the approval of the shareholders for creating any security to a third party in excess of 60% of the share capital and free reserves, which the Managing Director being fully aware has acted beyond the scope of his authority assuming that he has provided a certified copy of the fabricated Board Resolution dated 31st July 2003 and also signed the alleged account charge agreement.
- Pramod, as a Managing Director was required to act in accordance with the provisions of the Companies Act, 1956, Articles of Association and superintendence and control of the Board of the Company. The alleged acts of

Pramod were beyond the scope of his authority and in blatant violation of Section 372A of the Companies Act, Article 123 and Article 143 of the Articles of Association, Board Resolution dated 30th July 2003 and with requisite approval of the then Shareholders. Therefore, the said alleged acts cannot be attributed to the Company to fasten any liability.

- Further, Aptech has submitted as a Legal issues the following:
  i. The issuing authority has not disclosed under which provision the Annexures enclosed in the SCN were received.
  ii. That Section 11(2) (ib) does not empower an Authority to collect 'evidence'
  iii. That the issuing authority is not empowered under Section 11(2)(ib) to collect information as per the General Order of Delegation of Powers
  iv. That only the Board is empowered to collect any information u/s 11(2)(ib)
  v. That the issuing authority lacks jurisdiction to send SCN u/s 11B.
  vi. That the annexures enclosed with SCN are not evidence.
  vii. That the annexures enclosed with SCN do not pass the test of Standards of Evidence as they are unauthenticated by the authority who sent it.
  viii. That the quasi-judicial proceedings are also bound by principles of natural justice and evidence
  ix. That the Section 65 of Indian Evidence Act has no application in the present case.
  x. That there is no evidence to prove "fraud" under PFUTP.
  xi. That the alleged act of Pramod was unauthorized and committed outside the scope of employment and hence does not bind the company herein.
  xii. That SCN issued after unexplained delay of 14 years.
  xiii. That SCN issued without proper application of mind and vague and omnibus in nature.

19. Aptech made further additional submission vide letter dated February 05, 2020, summarized below:

- Allegations and observations presented during the personal hearing and the queried raised for the first time during the personal hearings and the queries

raised for the first time during the personal hearing are not only incorrect, but the same travel beyond the scope of the SCN.

- SCN also records a finding that Pramod signed a Board Resolution dated July 31, 2003 on the letterhead of Aptech and on the strength of such resolution, Pramod signed the account charge agreement on behalf of Aptech. It is submitted that there are no records available with Aptech which records such a resolution. Further, any such resolution would have to be approved by the Board of Directors and informed to the stock exchanges which is missing in the present case. Despite this, SEBI chose to refer to the said resolution and the non- existent meeting on July 31, 2003 to draw an inference that Aptech was party to a fraudulent arrangement.
- While Aptech has provided justifications to not impose any direction against Aptech, Aptech would be dealing with all such specific direction upon SEBI intimating the same to Aptech. This becomes more relevant given the scheme of the proceedings under Section 11 and 11 B where SEBI is empowered to issue direction and penalty only in the interest of securities market and only against such persons who are responsible and not against the company. Therefore it would be relevant for SEBI to provide the exact direction under Section 11 and 11 B which SEBI proposes to issue should SEBI not agree with the submissions of Aptech. This would enable Aptech to further demonstrate how even such actions cannot be passed against the Aptech.

ISSUES FOR CONSIDERATION AND FINDINGS:

20. I have perused the SCN dated December 19, 2017 including the annexures therewith, the replies filed by the Aptech and Pramod, submissions made during the course of personal hearing and written submissions filed after availing the opportunity of hearing. After considering all the material available on record, the following questions now arise for consideration

1. ***Whether Aptech has authorised Pramod to enter into account charge agreement with Banco and Pramod has signed the said account charge agreement for pledging the proceeds of GDR to Banco to secure the loan of Willow?***
2. ***Whether there exists a credit agreement between Banco and Willow and the same was known to Aptech and Pramod?***
3. ***Whether Aptech is bound by the execution of account charge by Pramod even if there is no authority from the Board in view of the principle of indoor management, and whether Aptech is deemed to know the credit agreement?***
4. ***Whether the fact that the credit agreement and Account charge agreement was entered into was disclosed to the stock exchange?***
5. ***Based on the determinations of the above issues whether the authorizing of pledge of its own proceeds of GDR to secure the loan of Willow and the failure to disclose the credit agreement and account charge agreement amounts to Fraud under the PFUTP regulations?***
6. ***Based on the determination of the above issues, whether the Noticees are responsible for the violations? What directions are required to be issued against the Noticees?***

21. Before proceeding in the matter, I would like to address the common preliminary objections raised by the Noticees with respect to

- Delay in the proceedings;
- Not providing full inspection of documents;
- Cross Examination.

22. Delay in the proceedings:

- Noticees have contended that the allegations in the SCN pertain to the year 2003 and there is no justification for initiating the present proceedings against them after a delay of more than 14 years. They have relied on various

judgements of Hon'ble SAT to support their contention that unexplained delay in initiating the show cause proceedings ought to result in quashing of the proceedings. In this regard, I note that SEBI conducted investigation into a number of cases of GDRs issues which revealed that one Mr. Arun Panchariya, in connivance with different issuer companies and their promoters/directors, had conceived such fraudulent schemes to help those companies to issue GDRs in overseas market. During the course of investigation similar modus operandi was also observed in respect of several other GDR issuances, which prompted SEBI to widen the investigations so as to encompass in its fold, scrip wise investigation into a large number of GDR issue cases. In view of the fact that a large number of scrips and issues were taken up for investigation simultaneously and collectively for which substantial amount of information had to be collected from different entities including from the authorities situated outside India through regulatory coordination with overseas Regulators, it required considerable time for completion of the investigation after which, SCNs have been issued to a number of such GDR issuer-companies. I note that major relevant information in this regard was received from CMVM, Portugal (Portuguese Securities Market Regulator) vide their letter dated March 18, 2016. I further note that SEBI order dated June 16, 2016 has recorded that investigation was initiated in respect of 59 GDR issues made by 51 Indian Companies during the period 2002 to 2014 and Aptech was also one such scrip in respect of which the investigation was completed in March, 2017. Further, after completion of the investigation, the SCN was issued to Noticees dated December 19, 2017. Therefore, the time taken for completion of investigation into a large number of cases of similar nature and for issuing SCNs to large number of entities connected with those cases, is understandable. Without prejudice to the above factual observation, I find that no provision under SEBI Act prescribes any time limit for taking cognizance of the alleged breach of provisions of SEBI Act, and Rules and Regulations made there under. Therefore, the aforesaid argument of Noticees is misconceived. In the case of Ravi Mohan & Ors. v. SEBI(SAT Appeal No. 97 of 2014 decided

on 16.12.2015), Hon'ble SAT while referring to its own decision in HB Stockholdings case (supra) and decision of Hon'ble Supreme Court in Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India)reported in 2003 (158) ELT 129 (S.C.) have held as under:

".....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no.114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice....."

23. Not providing full inspection of Documents:

- With respect to their grievances about providing inspection of documents, I find that copies of all the relevant documents relied upon in the SCN have been duly given to the Noticees. I further note that major documents annexed to the SCN pertain to the Company. Documents referred to and relied upon in the SCN were collected by SEBI during the course of investigation. In addition, SEBI had provided copy of letter dated July 30, 2003 by Aptech addressed to BSE that the Board Meeting of the Company was held on July 30, 2003 and also vide letter dated April 03, 2018, provided copies of the bank statements and various instructions issued by Aptech to Banco Bank. In this regard, vide letter dated June 12, 2018, it was informed to Aptech bringing to their notice SAT Order dated May 12, 2017 (Appeal No. 286 of 2014) B.Ramalinga Raju Vs SEBI *"_____Apex Court in case of Price*

Waterhouse has specifically recorded that the directions given in that case are general directions given as and by way of clarifications without going into the merits of the case. Therefore, directions given in the facts of Price Waterhouse cannot be said to be the ration laid down by the Apex Court applicable to all other cases. In these circumstances, appellants are not justified in contending that the directions given by the Apex Court in case of Price Waterhouse may be applied to the case of the appellants."

- Further, the Noticees had requested for statement of recording with various entities and also copy of the statement recorded, it was informed to the Noticees vide letter dated April 03, 2018, that none of such statements have been relied upon by SEBI in the SCN and copies of all the documents relied upon in the SCN have already been provided. Pramod had sought evidence/documents of conversion of GDRs into shares which was provided vide letter dated January 27, 2020. Accordingly, copies of the documents relied upon by SEBI in the course of investigation, have been duly provided to the Noticees. It is observed that demanding various documents which are not relied upon in the SCN and therefore, the contentions raised in this regard is not tenable.

- I further note that Pramod had not disputed nor denied the signing and execution of the Account Charge Agreement. He has stated that he does not recollect signing the Account Charge Agreement. He has however, admitted to signing a bunch of papers, further, he has admitted that he signed documents as per the directions of the Board of Directors relating to GDR issue when he was on a business visit to London. Pramod has contended that the original document has not been produced during the inspection to verify the signature. I note that the original of the account charge agreement is not available with SEBI and the Evidence Act is not applicable to the quasi-judicial proceedings under SEBI. Thus, the contention raised by Pramod that he was not shown original documents to verify his signature is untenable.

- The contention of Noticees that a copy of investigation report and other connected documents have not been provided to the Noticees. I note that the allegations against the Noticees are clearly articulated in the SCN and all the relevant documents relied upon in the SCN have been provided to the Noticees. In view thereof, I do not find that the Noticees have been prejudiced in any manner. A copy of the major relied upon documents provided by Banco Bank i.e Account Charge Agreement and Credit Agreement have already been provided to the Noticees. Further, I find that SEBI has relied upon the documents furnished by Aptech vide their letter dated June 22, 2015 during the time of the investigation. SEBI is having copy of the documents forwarded by Banco Bank and Aptech, therefore, showing of original documents which are with Aptech and Banco Bank does not arise. Copies of all these documents relied upon by SEBI in the SCNs were already provided to the Noticees and in response thereto Noticees have filed detailed replies. Thus, I find that no prejudice has been caused to any of the Noticees in defending their interest and contesting the allegation made against them in the SCNs. I note that the aforesaid request for inspection is roving and fishing in nature as SEBI has provided all the relied documents upon in the SCN. Further, I find that Noticees have been making roving request for inspection of documents without specifying the documents of which inspection is required. Thus, the contention raised by the Noticees that SEBI has not provided complete documents is not tenable

24. Aptech's contention that additional submission was sought during personal hearing:

- Aptech has contended that during the personal hearing dated January 20, 2020, SEBI had advised to submit additional submission not contained in SCN for which it has sought once again inspection of documents. I note the additional submissions/information were in the context of substantiating/explaining their case. For instance, it was the case of Aptech that the by the resolution dated July 30, 2003, the board of directors of Aptech

had resolved and authorized Mr. Pramod Khera and Mr. T.K. Ravishankar to sign and execute “other documents”. I note that in the said hearing, Aptech was advised to make their submission on this point of “other documents”. Similarly, in response to the case of Aptech, it was asked to make submissions on the relevance of the circumstance of subsequent to the takeover of the Company, Mr. Pramod Khera continued with Aptech till March 2009. Therefore, it is incorrect to contend that information/clarification was sought travelling beyond the SCN. Further, as the relied upon documents in support of SEBI’s case have already been given to Aptech, the inspection of documents to substantiate Aptech’s own case does not arise, as the case of the Aptech needs to be substantiated by it by producing documents.

25. Cross examinations:

- The submissions of Noticees seeking cross-examination is also unfounded, considering that no statements have been relied upon in the SCN. I find all the relevant documents relied upon in the SCN have already been provided to the Noticees with the SCN.

26. Challenging SEBI powers:

- I would like to deal with the contention of Aptech that the exercise of powers by SEBI under various Sections as mentioned was unjustified and unwarranted. In this context, I note that the primary function and duty of SEBI is to protect the interests of the investors in securities and regulate the securities market. SEBI has been mandated to protect the interests of investors in securities by such measures as it thinks fit which provide a large sweep to SEBI. In terms of Section 19 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board is empowered to delegate such of its powers and functions by general or special Order in writing, to any member, officer of the Board or any other person subject to such conditions, as may be

specified in the Order. The enabling provisions of the Act must be so construed as to subserve the purpose for which it has been enacted. Further, measures are set out in Sections 11(1), 11(2) to enable SEBI to perform its duties and functions efficiently. Section 11(2)(ia) *inter-alia "calling for information from and records from any person including any bank or any other authority or board…….. shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities"* 11(2)(ib) *inter-alia " calling for information, from, or furnishing information to, other authorities, whether in India or outside India, have function similar to those of the Board, in the matter relating to the prevention or detection of violations in respect of securities laws,……".* The Board can exercise its power where it has reasonable grounds to believe that such company has been indulging in fraudulent and unfair trade practices relating to securities markets. The Board can call for information from outside India who have signed Bilateral Agreement and signatories to the IOSCO, MMOU with SEBI and the information called for can be used for preventive and remedial action. CMVM is one of the signatories to the IOSCO MMoU with whom SEBI has Memorandum of Understanding which inter-alia "*sets forth the Authorities' intent with regard to mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the respective Laws and Regulations of the jurisdictions of the Authorities……..".* To enforce the directions, the Board has powers under Section 11(4) to issue directions including restraining the persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities.

- Further, I note that the proceedings initiated under Section 11(4) and 11B of the SEBI Act, 1992 are in the nature of quasi-judicial proceedings, as held by the Hon'ble Supreme Court in NSDL Vs. SEBI (2017) 5 SCC 517. As such the provisions of Indian Evidence Act, 1872 are not strictly applicable to these proceedings. Even Section 65 (a) of the said Act, allows admissibility of a document as secondary evidence when the original is in possession of the

person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court. The wide sweep of the powers of SEBI leaves no manner of doubt that it has powers for the control and orderly development of the securities market in India. It would not be mere rhetoric to state that in this era of globalisation, the importance of the functions performed by SEBI are of paramount importance to the well-being of the economic health of the nation. Further, the powers of SEBI to pass directions under 11B has been judicially recognized. Accordingly, I do not find any merit in the argument of Aptech in respect to the Legal submission made.

Now I proceed to deal with issues framed earlier on merits

1. ***Whether Aptech has authorised Pramod to enter into account charge agreement with Banco and Pramod has signed the said account charge agreement for pledging the proceeds of GDR to Banco to secure the loan of Willow?***
2. ***Whether there exists a credit agreement between Banco and Willow and the same was known to Aptech and Pramod?***

27. The allegation in the SCN is that Company had issued 38,40,000 (amounting to approx.US$14.40 million) GDR on November 06, 2003. The underlying shares issued by the Company against the said US$ 14.40 million GDR issued were 1,53,60,000. There is no dispute on these facts. I further note that the allegation in the SCN is that Aptech passed a Board Resolution dated July 30, 2003 authorising Pramod, Managing Director of Aptech, to open an account with Banco Bank for the purpose of receiving subscription money in respect of the said GDR issue of upto US$ 20 million and also authorized Pramod for creating charge over the account of Banco which holds the GDR proceeds so deposited in the aforesaid bank account. It is also alleged that Pramod has submitted certified copy of the board resolution dated July 31, 2003 to Banco singed by him.

28. I note the relevant clauses from the copy of the certified true copy of Board Resolution dated July 31, 2003:-

"Resolved that a bank account to be opened with BPN, S.A/Banco Efisa, S.A., any branch, including the off-shore branch (the "Bank"), outside India for the purpose of receiving the subscription money in respect of GDR issue of USD 20 million to be made by this Company.

Resolved further that Mr.Kalpathi S Aghoram, Vice-Chairman and Mr. Pramod Khera, Managing Director, be and are hereby individually authorised to sign, execute any charge over the account (a charge), application, agreement, escrow agreement document, undertaking, confirmation, declaration and other documents from time to time as may be required by the Bank, and to carry and affix Common Seal of the Company thereon, if an when so required.

Resolved further that Mr. Kalpathi S Aghoram, Vice-Chairman and Mr. Pramod Khera, Managing Director, be and are hereby individually authorised to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Banco Efisa, S.A. any branch, including the off-shore branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of this company.

Resolved further that the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans for which any charge is granted as well as to enter into Escrow agreement or similar arrangements if and when so required."

29. Aptech contended that no board meeting was held on 31st July, 2003 and further contented that Pramod and Mr. Kalpathi S. Aghoram were not authorised to sign or execute any charge over the account and the Bank was not authorized to use the funds as security for the charge.

30. It stated that there was only a board resolution dated July 30, 2003. In substantiation of its stand, it submitted that the Board Resolution dated July 31, 2003 was fabricated without the knowledge of the other Board of Directors of Aptech. It was pointed out by Aptech that the Board Resolution dated 30th July, 2003 varies with contents of Board Resolution dated July 31, 2003. In the Board Resolution dated July 31, 2003 the name of Mr. Kalpathi S Aghoram, Vice Chairman was mentioned in place of Mr. T.K. Ravishankar.

31. It is contended that the said resolution dated 30th July, 2003 is generic and cannot be the basis for creation of charge as no such authority was conferred under the said resolution. It was contented that the reference to escrow agreements mentioned therein and other agreements should be construed to be generic in nature only to provide for the escrow of the proceeds of GDR till the GDRs are listed as a part of stipulations. It was also contended that the contents of Board Resolution dated 30th July, 2003, make it apparent that authority to Pramod or to Mr. T.K. Ravishankar was not conferred by Board to provide any security to Banco for the loan availed by Willow for subscribing the issue of GDR.

32. Pramod contended that he heard for the first time the alleged Credit Facility Agreement, Account Charge Agreement, purported Aptech Board Resolution dated July 31, 2003 purportedly signed by him, the alleged loan taken by Willow and the alleged charge over the GDR proceeds etc., only when SEBI informed him of the same and when he attended the offices of SEBI on July 28, 2017. The signature on the copies of the purported resolution and signature page of

the Account Charge Agreement shown to him, prima facie, appear similar to his signature.

33. He denied of any knowledge of the board having authorised the creation of any charge over the GDR proceeds or having signed the alleged Account Charge Agreement. He denied having signed such resolution as is mentioned unless, in circumstances as mentioned above or in some other manner, his signature was taken unknowingly, surreptitiously and fraudulently.

34. He further contented that he was not involved in the decisions relating to the GDR issue. All discussions with lead managers, banks, investors, etc. were conducted by the New Promoters. He and the management team in Mumbai only met the lead managers in Mumbai in relation to the input required by them relating to the operational aspects of the Company. All discussions with Banco Bank were handled by the erstwhile promoters/SSI team in Chennai.

35. He further contented that that he was merely acting on the instructions of the Board of Directors of Aptech at the relevant time and any documents signed by him were on the direction of the Board of Directors and doing various ministerial or routine matters relating to the GDR issue in his capacity as the Chief Executive Office & Managing Director of Aptech. However, he does not recall having heard of or signed any documents relating to any charge or pledge on the GDR proceeds.

36. I find that a resolution was approved by the Board on July 30, 2003 for, inter alia, opening of a bank account with Banco Bank for the purpose of receiving subscription money in respect of the GDR proposed to be issued by the company. Accordingly, Minutes of the Board Meeting held on July 30, 2003, had authorized, Mr. T. K. Ravishankar and Pramod to sign, execute *any agreement*, escrow agreement document, etc. as may be required by the Banco Bank. Therefore, it is clear that Pramod has been authorized by Aptech to open

bank account with Banco. There is no dispute on the existence of the board resolution dated July 30, 2003. There is also no dispute that name of Pramod is mentioned in the Board Resolution dated July 30, 2003. Therefore the next question that comes up for consideration is whether the said board resolution dated July 30 2003 is sufficient enough to confer authority on Pramod to enter into the account charge agreement with Banco.

37. I note both the company and Pramod denied the existence of account charge agreement dated October 20, 2003 and they denied any knowledge of the account charge agreement. In order to assess the evidence of existence of account charge agreement and the knowledge of such existence by Company and Pramod, it is essential to refer to the following clause of the account charge agreement dated October 20,2003; the same reads as follows:

2.Account Charge

Subject to the terms of this Agreement, Aptech deposited in the Bank's account number 6134766 (hereinafter the Account) the amount of US$ 20,000,000 as security for all the obligations of Willow under the Loan Agreement (hereinafter the Secured Obligations)and with full title guarantee hereby assigns to and charges by way of first fixed charge in favour of the Bank all the rights, title, interest and benefit in and to the account as well as all the moneys from time to time standing to the credit thereof and all interest from time to time payable in respect thereof. Such assignment and charge shall be a continuing security for the due and punctual payment and discharge of the Secured Obligations.

Upon payment of all or part of the amounts due under the Loan Agreement, Aptech may withdraw from the Account the equivalent amount.

Upon payment and final discharge in full of all the Secured Obligations, this Agreement and the rights and obligations of the Parties shall automatically cease and terminate and the Bank shall, at the request of Aptech, release the deposit made in the Account.

<u>Aptech</u> covenants with the Bank that it will on demand pay and discharge the Secured Obligations when due to the Bank.

At any time after the Bank shall have demanded payment of all or any of the Secured Obligations the Bank may without further notice apply all or any part of the Deposit against the Secured Obligations in such order as the Bank in its discretion determines.

Aptech hereby irrevocably appoints by way of security the Bank as the attorney of Aptech with full power in the name and on behalf of Aptech to sign, seal and deliver any deed, assurance, instrument or act in order to perfect this charge and at any time after an event of default by Aptech to sign, seal and deliver any deed assurance, instrument or act which may be required for the purpose of exercising fully and effectively all or any of the powers hereby created.

Aptech hereby warrants and declares that any and all such deeds, instruments and documents executed on its behalf by or on behalf of the Bank by virtue of this Agreement shall be as good, valid and effective, to all intents and purposes whatsoever, as if the same had been duly and properly executed by Aptech itself and Aptech hereby undertakes to ratify and confirm all such deeds, instruments and documents lawfully executed by virtue of the authority and power hereby conferred.

38. I find that in terms of the Account Charge Agreement, only upon payment of the amounts due under the Credit Agreement by Willow, Aptech could withdraw equivalent amount from its designated account and only upon payment and final discharge of all the obligations by Willow under its Credit Agreement, the rights and obligations of the parties under the Account Charge Agreement shall cease and Banco Bank shall release the amount of bank balance lying in its account to Aptech.

39. I further find that the Account Charge Agreement also mentions that Aptech has undertaken to pay and discharge the obligations of Willow under their Credit

Agreement to Banco Bank and Banco Bank will be entitled to apply all or any part of the deposit made by Aptech in the designated account against the obligations of Willow without further notice

40. Now, I find that Banco has received the entire subscription amount of US $14.40 million on November 7, 2003. Thereafter, Banco has transferred the following amount to various beneficiaries. The details are as follows:

S. No.	Date	Amount (US$)	Beneficiary
Group A			
1	7-Nov-03	5,500,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
2	14-Nov-03	1,500,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
3	09-Mar-04	750,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
4	30-Mar-04	250,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
5	28-Jun-04	300,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
6	25-Aug-04	9,00,000	Aptech Ltd. Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
7	22-Sep-04	3,89,000	Aptech Ltd.

			Union Bank of California offshore account 536101210000001 (SEEPZ, MUMBAI Branch)
Group B			
8	10-Nov-03	219,730	Gemgrove Corp
9	10-Nov-03	165,600	Gemgrove Corp
10	10-Nov-03	330,000	Gemgrove Corp
11	24-Nov-03	100,000	Gemgrove Corp
12	10-Nov-03	2,090,000	Banco A/C 6014680152
13	21-Sep-04	1,480,000	Banco A/C 6029618151
Group C			
14	10-Nov-03	31,250	Reliance Business Consultants Ltd.
	Total	**14,005,580**	

41. From the records available with SEBI, I observe that an amount of US$ 9,589,000 was transferred to Union Bank of India Account (SEEPZ, Mumbai Branch) of Aptech between November 07, 2003 to September 22, 2004. On September 22, 2004, Aptech intimated Banco Bank to close the account and hence the amount transferred from Banco account to Aptech till September 22, 2004 has been considered. An amount of US$31,250 was transferred to Lead Manager (transfer apparently fees for the service rendered to the GDR Issue). On November 10, 2003 & September 21, 2004, amount of US$ 2,090,000 and US$1,480,000 were transferred to two Banco accounts as mentioned in the table above. Similarly, amount of US$ 815,330 was transferred to Gemgrove Corp. from November 10, 2003 to November 24, 2003.

42. With respect to the transfers done to Union Bank account of Aptech as mentioned in Group A (Sr. No. 1 to 7) in the table above was seen validated from the Aptech Bank account No. 536101210000001. Further, vide email dated October 24, 2016, during investigation, SEBI had sought clarification from

Aptech regarding remaining transfers from Banco Account (Corresponding to Group B (Sr. No. 8 to 13) in above table). Aptech vide email dated November 04, 2016, expressed their inability to provide explanation for the said transfers citing that the records/documents were destroyed during the deluge of July 2005, the erstwhile promoters are not co-operating and Banco Bank are not responding to their letters. Aptech shared Audit Reports for the financial years 2002-2003 and 2003-2004 during the investigation. It was observed that Aptech had received US$9,589,000 in its bank account maintained in India. Therefore, as per the case of the Company US$9,589,000 of GDR proceeds have been received by Aptech. It is also observed from the quarterly report ended December 31, 2003, March 31, 2004, June 2004 and September 2004, submitted by Aptech during the proceedings, Aptech was receiving the amount in tranches and the entire proceeds of GDR was not received by Aptech for its utilization. Aptech could not provide any explanation about the utilization of remaining GDR proceeds Group B (Sl. No. 8 to 13) to SEBI investigation. Aptech has informed vide letter dated January 31, 2020, that it has received queries from Enforcement Directorate regarding the aspect of diversion of funds out of the GDR proceeds.

43. At this juncture, what is important from the perspective of the evidence of whether the account charge agreement exists or not and its knowledge to the company and Pramod is the receipt of the money in tranches from Banco to Aptech. This receipt in tranches when considered in the light of the clause of the account charge agreement above mentioned, indicates that the money in trances are released by Banco to Aptech in consonance with the amount of money repaid by its borrower i.e. Willow. But for the account charge agreement, the entire proceeds of whatever money received by Aptech as GDR proceeds should have been received at one go for the benefit of Aptech and not in tranches upto almost a year later. Therefore, the preponderance of probability indicates the existence of the account charge agreement dated October 20, 2003. The fact that the money was received in tranches is the case

of the Company itself and Pramod as well apart from the material available on record and they have offered no explanation of the same despite being given an opportunity to do so. Therefore, both Company and Pramod as Managing Director had the knowledge of underlying account charge agreement dated October 20, 2003. And that is why they permitted the company to receive the money in tranches from Banco. Therefore, I find that the account charge agreement dated October 20, 2003 exists and the same was known to the Company and Pramod.

44. The fact that account charge agreement dated October 20, 2003 existed and was known to the Company and Pramod, when seen in the light of the Board resolution dated July 30, 2003 which authorised Pramod to enter into any agreement, points to the fact the Board of Aptech vide resolution dated July 30, 2003 had in fact authorised Pramod to enter into any agreement including of the sort of an account charge agreement. Affidavit of Pramod further states that he signed as authorized by Board and did not deny the signing the account charge agreement. All these factors taken together, the preponderance of probability culminates into the finding that Pramod was authorized to sign any documents as required by Banco to pledge the GDR proceeds. Therefore, the contention that the said resolution dated 30th July 2003 is generic and cannot be the basis for creation of charge as no such authority was conferred under the said resolution cannot be accepted. Since Board has authorised vide its resolution dated July 30, 2003, Pramod, for entering into any agreement, which has found earlier, includes the authority for creation of the account charge agreement, and in fact the said agreement has been entered into and Apetch and Pramod was aware of the creation of such agreement, I proceed to determine who is the signatory to the account charge agreement. In this regard, Pramod has taken various contentions. He contended that he was only acting on behalf of the Board and if any documents were signed by him, it was at the instruction of the Board. He also contented that he does not recall signing of any such account charge agreement. It was also argued that the agreement

has the word “draft” indicating that it cannot be final one. However, he admitted that signature in the said account charge agreement dated October 20,2003 is prima facie his signature and prove that whether it is his signature, he sought for the inspection of the original so that he can prove whether the said signature is his own or not.

45. It is already found that Board has authorised vide its resolution dated July 30,2003 Pramod for entering into any agreement, which has found earlier, includes the authority for creation for the account charge agreement, and in fact the said agreement has been entered into. This finding belies the contention of Pramod that he was not aware of the account charge agreement dated October 20, 2003. He also admitted that signature in the said account charge agreement is prima facie his signature. I note that Pramod has not provided any evidence to show that he has lodged any complaint with the appropriate forum about the claimed misuse of his signature by the Company to execute Account Charge Agreement with Banco Bank, ever after the receipt of SCN by him. However, he made contradictory statements as stated in earlier para. Given his admission that the signature is prima facie his signature and his contradictory submissions and the findings already made and produced in this para, I find that the contention of Pramod relating to denial of knowledge of execution or execution of account charge agreement dated October 20, 2003 is only an afterthought and the same deserves to be rejected as not acceptable. I further note that the mentioning of the word “draft” does not have any significance given the fact that it does not support the fact of non-execution of the final document, in view of the finding already rendered to the effect that the GDR subscription money was received in tranches indicating the circumstance of GDR proceeds being released based on repayment made by the debtor to Banco. This further indicates that there was a final arrangement. Therefore, the mentioning of the word “draft” in the account charge agreement does not militate against the final arrangement of account charge agreement.

46. In the context of contesting the existence of the account charge agreement dated October 20, 2003 and the credit agreement the company took the plea that Willow was never a sole subscriber to the GDR. Instead it contented that the original subscribers are different from Willow. I note that the Company provided to SEBI vide letter dated June 22, 2015, the list of initial allottees of GDR during the investigation which is tabulated as under:

S.No	Name of the allottee	No. of GDRs issued
1	Citigroup Global Markets Limited	800000
2	Praveen Jain	66666
3	Ehinger & Armand Von Ernst AG	130000
4	Matterhon (India Fund)	135000
5	BNP Paribas Private Bank	135000
6	Contfina SA	2038334
7	Investec Bank (Switzerland) AG	410000
8	Taib Bank EC	125000

47. Therefore, the question arises whether these eight persons are the initial subscribers/allottees of the GDR. I note that Aptech vide its letter dated February 04, 2016 during investigation, had stated that the list of initial "eight allottees" have been provided by the Lead Manager- Reliance Corporate Finance Ltd (now known as Elara Capital PLC) (**hereinafter referred to as "Lead Manager"**) to the earlier Management in 2003. In support of its case of eight original allottees of GDR, Aptech submitted the copy of the Minutes of the Board Meeting dated November 06, 2003, where it has disclosed the names of the initial allottees. To verify these were the initial allottees, Aptech had further stated it had written various letters to Lead Manager (letter dated October 14, 2015 and January 22, 2016), wherein, it had not received any response. As per the case of Aptech the source of information on the claimed eight original allottees of GDR came from Lead Manager. On perusal of the material on

record I find that there is a copy of one e-mail dated December 15 2003 from the Lead Manager informing the names of eight allottees.

48. However, on perusal of the document submitted by Aptech during the personal hearing and subsequent letter dated January 31, 2020, I find that it has attached an e-mail dated December 15, 2003 which records that name of the initial eight allottees. As per the case of Aptech, that was the only source of information to the company on who are all the initial allottees of GDR. In this context it is important to note the dates of their e-mail which is the source of information on the original allottees and the date of resolution incorporating the names of original allottees. The date of resolution incorporating the names of the original allottees is dated November 06, 2003 and the date of the e-mail which is the source of the name of original allottees is dated December 15, 2003. It does not stand to reason how email dated December 15, 2003, can be the basis for the naming of original allottees of GDR in the board resolution dated November 06 2003. The perusal of both the Board resolution and the e-mail shows that the names of original allottees as per the e-mail and the board resolution are the same. In view of the fact that the e-mail is subsequent to the board resolution, it creates doubt on the veracity of the board resolution dated November 06 2003. It is further noted that in the disclosure by Aptech regarding the board meeting dated November 06 2003, there is no mention of the names of the original allottees of GDR. Therefore, it is difficult to accept that as on November 06 2003, the eight persons named as original allottees were known to the company. I also note that Aptech was unable to provide the bank account of statement of Escrow Account during investigation to substantiate that the subscription money was received from these eight allottees. Therefore, I am not inclined to accept the contention of Aptech that there were eight initial allottees and not a single subscriber to the GDR proceeds.

49. I also observe that these names are reflecting when GDRs were converted/cancelled into equity shares and these shares were sold in Indian

Capital Market. I observe that the Cancellation of GDRs started from January 06, 2004 and continued till June 28, 2005. I note that the name of these few entities are found as the entities who converted the GDRs, this does not mean that they are the original allottees because it is always possible for the original GDR Holders to transfer the GDRs allotted to them to other persons. The other persons who have received so, would be counted as allottees of GDRs and these persons can submit the GDRs for the cancellation. Therefore, the preponderance of probability is that Willow is the original subscriber of GDRs and subsequently these eight persons received GDRs from Willow.

50. In view the above findings, the next question that arises for consideration is whether the account charge agreement for pledging the proceeds of GDR to Banco is to secure the loan of Willow. In this context the definition clause of the account charge agreement is worth reproducing:

> *"1. Definitions*
>
> *.....*
>
> *Loan agreement means the Loan agreement signed between Willow Brook (as borrower) and the Bank dated on or approximately on the date of this Agreement by which the Bank lent to Willow Brook the maximum amount of up to US$ 20,000,000.*

51. In this context the following clause of the account charge agreement is worth re-producing which reads as follows:-

Subject to the terms of this Agreement, Aptech deposited in the Bank's account number 6134766 (hereinafter the Account) the amount of US$ 20,000,000 as security for all the obligations of Willow under the Loan Agreement (hereinafter the Secured Obligations)and with full title guarantee hereby assigns to and charges by way of first fixed charge in favour of the Bank all the rights, title, interest and benefit in and to the account as well as all the

moneys from time to time standing to the credit thereof and all interest from time to time payable in respect thereof. Such assignment and charge shall be a continuing security for the due and punctual payment and discharge of the Secured Obligations.

52. The perusal of the other portions of the account charge clause mentioned in the account charge agreement already reproduced in the previous para coupled with the above clause, makes it clear the credit agreement for pledging the proceeds of GDR to Banco is to secure the loan of Willow.

53. In view of the above discussion, I find that Aptech has authorised Pramod to enter into credit agreement with Banco and Pramod has signed the said credit agreement for pledging the proceeds of GDR to Banco to secure the loan of Willow.

54. I further note Banco has executed the credit agreement with Willow on the same date when the account charge agreement was executed with Aptech. Thus said credit agreement was executed on October 20, 2003. I further note the need for entering into the account charge agreement arises only when the company wants to provide a security to Banco for the loan extended by it. The perusal of the copy of the credit agreement especially the definition clause and the other clauses reproduced in this issue clearly stands to prove that Banco has agreed to provide a loan to Willow by stating in the definition clause "loan agreement" means Loan agreement signed between Willow Brook (as borrower) and the Bank.

55. In this regard, some of the relevant clauses of the said Credit Agreement are quoted below:

"1. Definitions and interpretations

……..

Deposit Charge *means the charge over the deposit made by Aptech Ltd with the Bank dated on or around the date of this Agreement.*

……..

Facility Limit *means a maximum principal amount of up to US$20,000,000, as reduced or cancelled in accordance with this Agreement.*

Financing Documents *means this Agreement and the Security Documents.*

Security Documents *means the Deposit Charge and any other guarantee or document creating, evidencing or acknowledging security in respect of any of the obligations and liabilities of any Obligor under any Financing Document.*

2. Facility

Subject to the terms of this Agreement, the Bank agrees to make available to the Borrower a Dollar term loan facility in the maximum principal amount of up to US $20,000,000.

3. ***Purpose***

The Borrower shall use the proceeds of the Advance to subscribe for global depository receipts to the value of up to US $20,000,000 issued by Aptech on the terms of the Listing Particulars to be delivered to the Luxembourg Stock Exchange.

4. Conditions Precedent

Notwithstanding any other term of this Agreement, the Bank shall not be under any obligation to make the Facility available to the Borrower unless it has notified the Borrower that it has received all the documents listed in Schedule 1 (in form and content satisfactory to it).

5. Drawdown period

Subject to the terms of this Agreement, the Loan shall be made to the Borrower at any time during the Drawdown Period by way of a single Advance, when requested by means of a drawdown notice in accordance with this Clause 5. At the close of the business on the last day of Drawdown Period, the undrawn

amount of the Facility shall be automatically cancelled and the Facility Limit reduced accordingly.

10. Security

The obligations and liabilities of the Borrower to the Bank under this Agreement shall be secured by the interests and rights granted in favour of the Bank under the Security Documents."

11.

(n) GDRs: *It is, and is registered on the books of the Depositary as, the sole, absolute and beneficial owner of the GDRs for which it has subscribed, that no person other than the Borrower has any right or interest in or to the GDRs and there are no agreements or arrangements (other than the Deposit Agreement) affecting the GDRS in any way or which would or might in any way fetter or otherwise prejudice the Borrower's right and interest in and to the GDRs.*

56. Aptech has pointed out that on Page No. 4 of credit agreement, it is between Borrower i.e Willow and company "Sterling Biotech", I observe from other SEBI orders passed, there are many instances wherein, Banco Bank has entered into loan agreement with other companies to pledge GDR proceeds of the company with overseas subscriber and since these are generic agreements between Banco Bank and overseas borrowers, there may have been typographical error on the side of Banco Bank and Aptech cannot take a shelter that the credit agreement entered is void. I further note that the mentioning of the word "sterling biotech" does not have any significance given the fact that it does not support the fact of non-execution of the credit agreement between Banco Bank and Willow as the fact of execution has been already established.

57. Therefore, I find Aptech was aware of the existence of credit agreement October 20, 2003 between Banco and Willow.

58. In view of the above discussion I find that Aptech has authorised Pramod to enter into account charge agreement with Banco and Pramod has signed the said account charge agreement for pledging the proceeds of GDR to Banco to secure the loan of Willow. I also find that there exists the credit agreement between Banco and Willow and the same was known to Aptech and Pramod.

3. Whether Aptech is bound by the execution of account charge by Pramod even if there is no authority from the Board in view of the principle of indoor management, and whether Aptech is deemed to know the credit agreement?

59. I have already given a finding in the earlier issues that Aptech has authorised by virtue of Board Resolution dated July 30,2003, Pramod, to enter into account charge agreement with Banco and Pramod has signed the said account charge agreement for pledging the proceeds of GDR to Banco to secure the loan of Willow.

60. In this context, the contention of the company is that Company did not pass any resolution on July 31, 2003 and the purported Board Resolution dated July 31, 2003 was in fact fabricated by Pramod. The contention of the Pramod is that he is not aware of any such Board Resolution dated July 31,2003, though he admitted that the signature on the said certified copy of the board resolution is prima facie his signature. The fact that no disclosure of the Board Resolution dated July 31, 2003, was made to the Stock Exchange does not conclusively, in the facts and circumstances of the case, establish that there was no such resolution. There can be a case where the Board Resolution dated July 31, 2003, was passed and the same was not disclosed to the Stock Exchange. This case gets further validated by the existence of a certified copy of the resolution dated July 31, 2003, certified to be true copy by Pramod in the files of Banco. The GDR funds being received by Aptech in tranches over a period of almost a year being one of the grounds to conclude the knowledge of the Company on

the existence of the account charge agreement executed by Pramod lends credence to the case that there was a Board Resolution dated July 31, 2003, passed by Aptech, especially in view of its contention that Resolution dated July 30, 2003 does not authorise Pramod to execute the account charge agreement. If July 30, 2003, board resolution does not authorise Pramod to execute account charge agreement, the fact that entire GDR proceeds did not reach Aptech at one shot should have raising issues with Banco. Aptech chose to accept the tranche receipts without any issue. The preponderance of probability is that this was because the Company was aware of its resolution dated July 31, 2003. This also explains why Aptech has not, even after the receipt of SCN by them and knowing the contents of the SCN, not filed any criminal or civil case against Pramod in respect of the alleged fabrication.

61. Without prejudice to the above, even for a moment, assuming that the Board had not authorised the signing of the account charge agreement vide its resolution dated July 31,2003, it needs to be considered whether the act of signing of account charge agreement by Pramod is the act of the company in view of doctrine of indoor management.

62. Aptech has contended that doctrine of indoor management is not applicable where the circumstances surrounding the Account Charge Agreement signed by Pramod on behalf of the company are suspicious and therefore invite inquiry. As per its contention while there was no board meeting held on July 31, 2003, a fabricated Board resolution showing the date of board meeting of July 31, 2003 was created and allegedly signed by Pramod wherein, the execution of Account Charge Agreement was brought in with ulterior motive.

63. In this context the principle of indoor management also known as Turquand rule as quoted by Hon'ble Supreme court in M/S. M.R.F. Ltd vs Manohar Parrikar & Ors on May 03, 2010 is reproduced below:

71) The doctrine of indoor management is also known as the Turquand rule after the case of Royal British Bank v. Turquand, [1856] 6 E. & B. 327. In this case, the directors of a company had issued a bond to Turquand. They had the power under the articles to issue such bond provided they were authorized by a resolution passed by the shareholders at a general meeting of the company. But no such resolution was passed by the company. It was held that Turquand could recover the amount of the bond from the company on the ground that he was entitled to assume that the resolution was passed. The doctrine of indoor management is in direct contrast to the doctrine or rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed. Therefore doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of a company or corporation against dealings with the outsiders. However suspicion of irregularity has been widely recognized as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry.

64. A perusal of above case law raises the question whether the Managing Director was otherwise empowered to enter into the account charge agreement. The definition of Managing Director under the Companies Act 1956, clearly indicates that Managing Director is a director who is vested with substantial powers of

management. Therefore, by virtue of that substantial power of management the Managing Director is legally empowered to enter into an account charge agreement. Hence executing an agreement can be considered as falling within the category of excise of substantial power of management in view of the fact that GDR proceeds are entrusted to Banco as a security to the loan extended by Banco to Willow. The conferment of the substantial power of management to the managing director brings the act of execution of the account charge agreement dated October 20, 2003 within the realm of indoor management even if necessary resolution was not passed empowering the managing director to exercise the power of execution of the account charge agreement.

65. The second aspect that requires consideration in this regard was whether there were any surrounding circumstances, given the facts and material available on record in this case, for Banco to suspect that the board resolution dated July 31, 2003 was a fabricated one. It is noted that what has been seen by Banco is the certified true copy of the board resolution dated July 31, 2003 certified by none other than the Managing Director, Pramod. The contents of the said board resolution dated July 31 2003 does not lead to any suspicious circumstances for Banco to question the existence of board resolution dated July 31, 2003. Therefore, it is incorrect to contend that there was suspicious circumstances in funder Banco regarding the board resolution dated July 31, 2003.

66. Another question that further arises is as to whether the claim of forgery taken by Aptech takes the case out of the realm of indoor management as forgery is considered as one of the exemptions on the applicability of indoor management. I note that the act for which indoor management gets attracted is not the act of certifying the board resolution dated July 31, 2003 but the act of execution of account charge agreement. As it is already found that account charge agreement was executed by Pramod. Therefore, the claim of forgery in respect of board resolution dated July 31, 2003 cannot be a ground to claim the non-applicability of indoor management. In view of this, I hold that even under this

scenario, the execution of the account charge agreement falls within the realm of indoor management and the company is bound and responsible for the act of the managing director.

67. The company while contenting that indoor management principle cannot be applied in the instant case, stated that section 372A of the Companies Act has been not complied with. In the submission made by Aptech vide letter dated January 31, 2020, at Part-B, Para 4.7, it had stated that as on December 31, 2000, the share capital and free reserves were 86.17 crores. Any security over and above Rs. 51.7 crores (60% of Rs. 86.17 crores) requires the shareholder resolution under Section 372A of Companies Act, 1956 and no such resolution was passed. However, on perusal of section 372A the companies Act, 1956, I note that the said section provides for two different types of caps, inter alia, in respect of providing security to the loan taken by any person. As per the provision, one cap can be 60% of Paid up capital and free preserves or it can be 100% of the free reserves as per the latest audited balance sheet. On perusal of the Annual Report 2002 available on the company's website, I find the company has shown Rs 67,99,72,333 as reserves and surplus, which at that time was equivalent to approx.. US$ 14.15 million (RBI reference rate @Rs. 48.03 as on December 31, 2002). Therefore, the security provided through the account charge agreement is well within the limits prescribed by the Companies Act under section 372A. Therefore, the argument based on non-compliance of section 372A also does not hold any merit.

68. As stated in the previous issue the knowledge of account charge agreement results in the knowledge of the credit agreement, as the credit agreement is referred to in the account charge agreement.

69. Therefore, I hold that even under this scenario, Aptech is bound by the execution of account charge by Pramod even if there is no authority from the

Board in view of the principle of indoor management and Aptech is also deemed to know the credit agreement.

4. Whether the fact that the Account Charge agreement and Credit agreement was entered into was disclosed to the stock exchange

70. The Company had informed BSE that "the Committee of Board of Directors (Capital Issues) of the Company at its meeting held on November 06, 2003, approved the allotment of 3,840,000 GDRs representing 15,360,000 underlying equity shares……..".

71. However, despite being aware of the existence of the credit agreement and account charge agreement, the crucial material facts surrounding the Credit and Account Charge Agreements was not disclosed to the stock exchange. It is also the case of the Noticees that they were not disclosed, though as per the Noticees the same were not in existence or not known to them, and the same as already found was not sustainable. The investors were never allowed to know that the GDR proceeds would be kept as a security towards the loan taken by the subscriber, Willow and in case of default by the subscriber, the entire proceeds were exposed to the risk of eventually being utilized by Bank to settle the loan obligations of the borrower/subscriber.

5. Based on the determination of the above issues ; Whether the authorizing of pledge of its own proceeds of GDR to secure the loan of Willow and the failure to disclose the credit agreement and account charge agreement amounts to Fraud under the PFUTP Regulations?

72. Before dealing with this issue I find it appropriate to refer the relevant provisions of SEBI Act and PFUTP Regulations.

SEBI Act, 1992

12A. No person shall directly or indirectly—

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

(b) Employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;

PFUTP Regulations, 2003

3. Prohibition of certain dealings in securities

No person shall directly or indirectly-

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

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

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

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

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

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

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely: -

(a) …….

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors

(r) planting false or misleading news which may induce sale or purchase of securities.

73. Aptech denied violation of provisions of PFUTP Regulations and have stated that the allegation of fraud being a serious charge, cannot be established on the basis of disputed facts and hearsay evidence against them. I refer to and rely on the views of the Hon'ble Supreme Court in the case of SEBI v. Kishore Ajmera,(2016)6 SCC 368, wherein the apex court has made the following observations about the nature of evidence to be used while adjudicating a quasi-judicial proceeding:

".....It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion.....Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of

the Act or the provisions of the Regulations framed thereunder is concerned....."

74. In view of the discussions and observations made in the preceding paragraphs, I find that the entire acts of commission and omission of Apetch starting with passing of Board Resolution, followed by entering into the Account Charge Agreement to permit use of the funds deposited in its account with Banco Bank as a security against a loan, making an announcement on November 06, 2003 that the GDR have been successfully allotted and then not disclosing to the Public the details of Account Charge Agreement and its arrangement with the sole subscriber to secure the obligation of its loan liability etc. has the effect of misleading the investors at large. Such a scheme and arrangement has in it, all the ingredients that comprise a fraudulent activity in the Securities Market.

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

"*the most relevant fact which is to be borne in mind is that the existence of GDRs is always dependent upon the extent of underlying ordinary shares lying with the Domestic Custodian Bank.....that for creation of GDRs which can be traded only at the global level, the issuing company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing company in the market and the confidence built up with the investors both internally as well as at global level, the issuing company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a*

keen interest to invest in such GDRs. Mere desire to raise foreign investments without any scope for the issuing company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs.....To put it differently, by artificial creation of global level investment operation, either the issuing company on its own or with the aid of its lead Manager cannot attempt to make it appear as though there is scope for trading GDRs at the global level while in reality there is none...."

76. The declaration made by the Company on November 06, 2003 on the platform of the Stock Exchange about the successful subscription of GDR issue without disclosing the advance arrangement made by it with the Willow to ensure full subscription to its GDR, has given an impression to the investors and the market about the strong potential of the Company. The above acts of the Company represent a serious fraudulent and unfair trade practice, inflicted on the Shareholders and also on the innocent investors in the Securities Market at large. The investors including its own Shareholders were made to believe that the shares of the Company have received an overwhelming response in the market abroad and have been very well received by investors abroad, hence, the Company has a great value for investment in India as well. Such misleading inferences and false positive expectations about the shares of the Company were caused by the Company's own acts by devising and arranging a scheme through which it ensured a successful issuance of GDR behind the back of its Shareholders. Even assuming that the account charge agreement was not given effect, the fact that it has entered into such an agreement for the purpose of agreeing to secure the loan of a prospective subscriber with the proceeds of the GDR, the said arrangement itself brings the act of the Company and Pramod within the definition of fraud under the PFUTP Regulations.

77. Further being the Manging director, Pramod is entrusted with the substantial powers of management and he has responsibility to ensure his conduct is not

in violation of PFUTP Regulations. He cannot escape his liability by pleading that he performed as per the directions of the Board. If such an interpretation is adopted, the directors can shelter under this argument while the requirement of law is that they also have to ensure their conduct is not prohibited under PFUTP Regulations. Even assuming that he was carrying out the acts under the instructions of board, his act is so reckless which has the ultimate effect of inducing the investors, as the investors are lead to belief that the subscription of GDR is successful while the subscription was made successful by way of securing the proceeds to the loan of the GDR subscriber. As per the definition of fraud" under Regulation 2(1) of PFUTP Regulations, it includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss. Therefore, I hold that even if his act is reckless, the same falls within the definition of fraud under PFUTP Regulations.

78. I further find the observations of the Hon'ble Supreme Court in the case of *SEBI v. Rakhi Trading Pvt. Ltd., (2018) 13 SCC 753* is relevant to be relied on, wherein it was held that Regulation 4(1) of PFUTP Regulations in clear and unmistakable terms has provided *that "no person shall indulge in a fraudulent or an unfair trade practice in securities"* and then referring to its own judgment in the case of SEBI v. Shri Kanhaiyalal Baldevbhai Patel and Ors (2017) 15 SCC 1 have held that;

"*Although unfair trade practice has not been defined under the regulation, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear cut generalized definition of the 'unfair trade practice' may not be possible to be culled out from the aforesaid definitions. Broadly trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in*

business transactions. It is to be noted that unfair trade practices are not subject to a single definition; rather it requires adjudication on case to case basis. Whether an act or practice is unfair is to be determined by all the facts and circumstances surrounding the transaction. In the context of this regulation a trade practice may be unfair, if the conduct undermines the good faith dealings involved in the transaction. Moreover the concept of 'unfairness' appears to be broader than and includes the concept of 'deception' or 'fraud'.....

.....Having regard to the fact that the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not have to labour much on the meaning of unfair trade practices in securities. Contextually and in simple words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market."

79. Aptech have also submitted that there is not allegation of any adverse impact on the market or investors as a result of the GDR issue. I note that there is no requirement of adverse market impact as per the PFUTP Regulations. Even otherwise, when material information is not disclosed to the stock exchange, it results in the adverse impact to the investors who invest on the basis of incomplete/misleading information.

80. In view of the facts and law discussed above, I hold that by its acts of concealing and suppressing vital material facts about the arrangement of the Account Charge and Credit Agreements, amounts to fraud upon its own existing Shareholders and also upon all the investors of the Securities Market who might have been induced to deal in the shares of the Company due to the artificially created positive outlook about the Company's performance. Under the circumstances, the acts of engaging in such practices, scheme and concealing material information from Shareholder are held to be in violation of provisions of Section 12A(a),(b),(c) of the SEBI Act read with Regulations 3(a),(b),(c),(d), 4(1),4(2)(f),(k),(r) of PFUTP Regulations.

6. If the above issue is decided in the affirmative, whether the Noticees are responsible for the violations? What directions are required to be issued against the Noticees?

81. Pramod has admitted that he was Chief Executive Office and Managing Director of Aptech from 2001 to March 2009. I note that Pramod who was then the Managing Director of Aptech had attended the Board Meeting held on July 30, 2003. It is Pramod who has summited a copy of board resolution dated July 31st 2003 as certified true copy of the board resolution dated July 31st 2003. Therefore, there is a primary role of Pramod in the entire scheme. In view of this context it cannot be accepted that he has acted only on the instructions of the Board of Directors on every count. I note it is Pramod who has executed the account charge agreement. By virtue of this agreement Banco was authorised to retain the proceeds of GDR for the purpose of securing its loan to Willow.

82. In the instant matter, Pramod, as the Managing Director of Aptech and on behalf of Aptech has signed the Account Charge Agreement to pledge the GDR proceeds of Aptech. Further, this act of the Managing Director of Aptech is not only known Aptech but also attributed to it.

83. Accordingly, Pramod, the Managing Director of Aptech who signed the Account Charge Agreement on behalf of Aptech and pledged the GDR proceeds and Aptech are party to the fraud which involved the signing of Account Charge Agreement and non-disclosure of the same to the stock exchanges have the provisions of PFUTP Regulations.

84. It is submitted that a Managing Director has substantial power of management. Such exercise of substantial power of management has to be exercised for the benefit of the company and its shareholders. The Managing Directors is required to act on behalf of a company in a fiduciary capacity and his acts and deeds have to be done for the benefit of the company. Being responsible for

the operations of the company, he is also expected to exercise utmost care, skill and diligence in the exercise of his power and functions on behalf of the company as is expected from men at such responsible positions. He cannot wash his hands off by saying he was following instructions implying "without application of mind". The Hon'ble Supreme Court in Official Liquidator v. P.A. Tendolkar (1973) 1 SCC 602 has observed that;

"A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially".

85. I note that Account Charge Agreement was an integral part of Credit Agreement and vice versa and both were executed concurrently. As already held, the Company is also involved and was aware of the execution of both account charge agreement and the credit agreement. Therefore, I note that by signing the Account Charge Agreement, Pramod and Aptech facilitated artificial subscription of the GDR issue. I also note that these agreements enabled Willow to avail loan from Banco Bank for subscription of GDR of Aptech by providing GDR proceeds as collateral for the loan extended by Banco Bank to Willow. The GDR issue would not have been subscribed if Aptech had not given such security towards the loan taken by Willow. Further, the corporate announcement made by Aptech was also false and misleading to the extent that its GDR issue was successfully allotted whereas, the same was subscribed by only one entity i.e Willow by obtaining loan from Banco Bank which was again secured by Aptech by pledging the GDR proceeds. The execution of credit agreement and account charge agreement which were material facts, was not disclosed to the stock exchange.

86. In view of the above, I hold that Aptech has violated the provisions of Section 12A (a), (b) (c) of the SEBI Act, 1992 read with Regulations 3 (a) (b),(c), (d) and 4 (1), 4(2) (f), (k) and (r) of the SEBI PFUTP Regulations and Pramod has violated the provisions of Section 12A (a) (b) (c) of the SEBI Act, 1992 read with Regulations 3 (a), (b), (c), (d) and 4 (1) of the SEBI PFUTP Regulations.

87. I note that Section 11 of SEBI Act casts a duty on the Board to protect the interests of investors in securities and promote the development of and to regulate the securities market. For achieving such object, it has been authorized to take such measures as it thinks fit. Thus, power to take all measures necessary to discharge its duty under the statute which is a reflection of the objective disclosed in the preamble has been conferred in widest amplitude. Pursuant to the said objective, PFUTP Regulations have been framed. The said Regulations apart from bringing transparency and fairness among other things aims to preserve and protect the market integrity in order to boost investor confidence in the securities market.

88. The SCN issued to the Noticees unequivocally states provisions under which preventive measures, if any would be issued. One such provision mentioned in the SCN is Section 11(4) of SEBI Act which states that upon completion of an inquiry, a person can be restrained from accessing the securities market and can also be prohibited from being associated with the securities market. Thus, it is incorrect to contend that SCN has not envisaged the directions that may be issued against it. Therefore, the submission of the Aptech that SCN does not put to notice about what is the specific measure intended to be adopted by SEBI against the Aptech, is not acceptable

89. I take note of the submission that the existing promoters have taken the control and management of Aptech in October 2005 and the above fraud was carried out in the year 2003 i.e. during the period of erstwhile promoters. However, the company being the legal entity, the fact of change of promoters would have no

bearing on whether the Company as a legal entity has committed a violation or not. I also note that the violations were committed in the year 2003. Further, there is considerable passage of time subsequent to the violations. However, taking into account the passage of time, and the fact of company being a legal person, appropriate directions have been incorporated in respect of the company. At the same time when it comes to the moulding of directions against the Managing Director, who was primarily responsible for the violations appropriate directions need to be passed even though there is considerable passage of time so that prospective investors at large and integrity of securities market is protected.

DIRECTIONS:

90. In view of the above, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992 read with Section 19 of the SEBI Act, 1992, hereby direct that:

i. The Company i.e Aptech Ltd, is restrained from accessing the Securities Market including by way of issuing prospectus, offer document or advertisement soliciting money from the public and is further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, for a period of six months from the date of this order.

ii. Shri Pramod Khera, is restrained from accessing the Securities Market and are further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly in any manner, from the date of this order, for a period of five years from the date of this order. Shri Pramod Khera is also hereby restrained from holding any position as Director or Key Managerial Personnel in any listed company and SEBI Registered Intermediary for five years from the date of this Order.

iii. It is clarified that during the period of restraint, the existing holding of securities of the Aptech and Shri Pramod Khera including units of mutual funds, shall remain frozen.

iv. It is made clear that if Aptech and Shri Pramod Khera have any open positions in any exchange traded derivative contracts, they can close out/ square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. It is also clarified that Aptech and Shri Pramod Khera can settle the pay-in and pay-out obligations in respect of transactions, if any, which have taken place before the close of April 01, 2020.

v. This Order shall come into force with immediate effect.

vi. A copy of this order shall be served upon all recognized Stock Exchanges, Depositories and the Registrar and Share Transfer Agents to ensure compliance with the above directions.

Sd/-

DATE: April 01, 2020 **MADHABI PURI BUCH**

PLACE: Mumbai **WHOLE TIME MEMBER**