WTM/KV/MRD/MRD-PoD-3/30754/2024-25

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: KAMLESH C. VARSHNEY, WHOLE TIME MEMBER

ORDER

ORDER IN PURSUANCE AND IN COMPLIANCE WITH ORDERS DATED JANUARY 23, 2023, JUNE 09, 2023, DECEMBER 01, 2023, MARCH 08, 2024, MARCH 15, 2024, MAY 15, 2024 AND JUNE 24, 2024 PASSED BY HON'BLE SECURITIES APPELLATE TRIBUNAL.

In the matter of NSE and Others (Co-location)

In respect of:

Sl. No.	**NAME OF *NOTICEES***	**PAN**
1.	NATIONAL STOCK EXCHANGE OF INDIA LIMITED (NSE)	AAACN1797L
2.	RAVI NARAIN	AAYPN8382Q
3.	CHITRA RAMKRISHNA	ABVPR7353M
4.	ANAND SUBRAMANIAN	AARPA8290K
5.	RAVINDRA APTE	ADLPA5449B
6	UMESH JAIN	AANPJ7802N
7	MAHESH SOPARKAR	AAJPS7041Q
8	DEVIPRASAD SINGH	AAZPS9535R

(The entities mentioned above are individually known by their respective name or Noticee No. and collectively referred to as "Noticees")

Synopsis of the order

A. *BACKGROUND OF THIS PROCEEDING*

1. The present proceeding is emanating out of, and in due compliance of, the order dated January 23, 2023 (hereinafter referred to as ***"2023 SAT Order"***) passed by Hon'ble Securities Appellate Tribunal (hereinafter referred to as ***"SAT/Tribunal***") in Appeal No. 333 of 2019 (*National Stock Exchange of India Limited Vs. SEBI)* and connected appeals including Appeal No. 331 of 2019 (*Mr. Ravi Narain vs. SEBI*), Appeal No. 336 of 2019 (*Ms. Chitra Ramkrishna vs. SEBI* and Appeal No. 433 of 2019 (*Mr. A. Kumar vs SEBI*)**,**

filed by appellants, *inter alia*, challenging the order No. WTM/GM/EFD/03/2018-19 dated April 30, 2019 (hereinafter referred to as the **"*2019 SEBI NSE Order*"**), passed by the Securities and Exchange Board of India (hereinafter referred to as ***"SEBI"***) in the matter pertaining to the co-location facility provided by the National Stock Exchange of India Limited (hereinafter referred to as "***NSE***"). It may be clarified that the said 2023 SAT Order also dealt with appeals filed by OPG Securities Private Limited (hereinafter referred to as "***OPG***") and its three directors in Appeal number 184 of 2019 arising out of the order No. WTM/GM/EFD/02/2019–20 dated April 30, 2019 (hereinafter referred to as the **"*2019 SEBI OPG Order*"**). The relevant sub-paragraphs of the paragraph 266 of the 2023 SAT Order are reproduced herein below;

> *g. The violations committed by OPG as found by WTM is affirmed. However, the direction of the WTM directing OPG and its Directors to disgorge Rs.15.57 crores along with interest at the rate of 12% p.a. from 7th April, 2014 onwards is set aside. The matter is remitted to the WTM to decide the quantum of disgorgement afresh in the light of the observation made above within four months from today.*
>
> *h. In addition to the above, we direct the WTM to consider the charge of connivance and collusion of OPG and its Directors with any employee/officials of NSE. Further, the WTM will decide the issuance of direction/penalty concealment/destruction of vital information and will further reconsider Issue No.2 relating to crowding out other market participants.*

2. Hon'ble Tribunal, vide 2023 SAT Order, had directed to re-adjudicate aforesaid issues within a period of four months. Thereafter, vide various orders dated June 09, 2023, December 01, 2023, March 08, 2024, March 15, 2024, May 15, 2024 and June 24, 2024, Hon'ble SAT, while disposing of applications filed by parties seeking extension of the time based on reasons stated in these applications, laid down a schedule to complete the proceeding. Though, as per the order dated March 15, 2024, Hon'ble Tribunal directed that the said proceeding with respect to the remand issues in sub- paragraphs (g) and (h) of paragraph 266 of the 2023 SAT Order has to be completed by June 30, 2024, the deadline has since been modified vide the order dated June 24, 2024, when Hon'ble Tribunal while disposing of Appeal No 372 of 2024 has held as follow;

"We direct the SEBI to grant two days' time to the appellant to complete the submissions within an outer limit of two weeks from today. Appellants are granted two weeks' time after conclusion of hearing to file their written submissions. SEBI shall pass final order within 8 weeks therefrom."

Here appellant means OPG and its directors. It may be clarified that hearings in the case of OPG and its directors took place on July 5, 2024 and July 8, 2024. Subsequently, time was given to them to file written submissions by July 22, 2024. Replies were filed on July 23, 2024. This order is passed today well within the stipulated time line of 8 weeks, starting from July 23, 2024

3. Moving back to the matter, it is seen that vide 2023 SAT Order, Hon'ble Tribunal had remanded to SEBI to re-adjudicate the following four issues:

   (a) To decide the quantum of disgorgement afresh in the light of the observations made in the order with respect to the finding that OPG and its directors were guilty of unfair access and gained advantage by consistently logging into the secondary servers, and on that basis, made unlawful gains.
   (b) To re-consider the charge of connivance and collusion of OPG and its directors with any employee/officials of NSE.
   (c) To re-consider the issue no. 2 of 2019 SEBI OPG Order, relating to crowding out other market participants.
   (d) To decide the issue of direction/ penalty for concealment/destruction of vital information.

4. Out of these four issues which have been remanded for re-adjudication, the issue pertaining to charge of connivance and collusion of OPG and its directors with *any* employee/officials of NSE is the only issue which is part of this proceeding. It may also be noted that all these four issues are relevant in the case of OPG and its directors, the order in which case is also being passed simultaneously today.

B. *DETAILS OF RE-ADJUDICATION PROCEEDING*

5. It is noted that, pursuant to the 2023 SAT Order, a Show Cause Notice dated May 17, 2023 (hereinafter referred to as ***"SCN"***) was issued to *Noticees*, narrating the facts and

allegations and asking them to respond as to why, based on facts as narrated in the SCN, directions should not be issued against them, in case the following alleged violations are found established:

(i) NSE through its employees/officials have colluded/connived in facilitating OPG to crowd out other TMs by consistently establishing the 1st, 2nd, 3rd and even 4th connection to a server;

(ii) NSE through its employees/ officials have colluded/connived in letting OPG to continue to log in to the secondary server for the period stated in the SCN, despite OPG displaying disregard for the norms laid down by NSE.

6. It is noted that the issue of connivance/collusion has been confined in this order for logging in to the secondary server (as in the 2023 SAT Order it has been held to confer unfair advantage to OPG) and crowding out (as in the 2023 SAT Order the issue is required to be re-adjudicated to find out if that has conferred unfair advantage to OPG). Since in the 2023 SAT Order, it has been held that there is no unfair advantage on logging on first to the primary server, possible connivance/ collusion for first log in to primary server is not part of this order.

7. Before proceeding in the matter, it would be useful to list out various allegations made in the SCN against each of *Noticees*. These are based on the investigation already conducted in the past which also formed the basis of show cause notices issued in the years 2017 and 2018. The specific violations of the relevant provisions of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "***SCR Act, 1956***"), the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "***SEBI Act***") and provisions of different regulations, circulars, code of conduct, policy or guidelines issued thereunder as stated in the SCN are presented below-

Table No. 1

Entity Name / Designation / Tenure	**Nature of allegations/ findings in brief**	**Violations observed**
NSE (*Noticee* No. 1)	a) NSE allowed 'crowding' by OPG by assigning multiple IPs of OPG to single	Section 12A(a), (b) & (c) of SEBI Act read with

	ports, thereby enabling OPG to consistently establish the 1st, 2nd, 3rd and even 4th connection to the server and gain unfair advantage over other Trading Members (hereinafter referred to as 'TMs'). This could have been possible only through active connivance between NSE and ex-officials and OPG and its officials. b) NSE continued to permit OPG to connect to the secondary server despite OPG displaying disregard for the norms laid by NSE. The consistent reluctance on the part of NSE to prevent OPG from accessing the secondary server ahead of others on continuous basis, allowed OPG to gain undue advantage. Such regularity of success by OPG would have been possible only with active connivance with NSE and its (ex) officials with OPG and its Directors/officials. c) NSE, despite being aware that OPG was generally connecting to the secondary server without valid reasons, it did not take any steps to take any action. This indicate that there was connivance between NSE and its (ex) officials and OPG, its Directors/officials to give preferential treatment to OPG and that NSE has acted in fraudulent manner and has indulged in fraudulent	regulation 3(a), (b), (c) & (d) and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("***PFUTP Regulations"***), regulations 41 (2) and 42(2) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 ("***SECC Regulations***"), Clause 4(i) of SEBI circular CIR/MRD/DP/09/2012 dated March 30, 2012 and Clause 3 of SEBI circular CIR/MRD/DP/07/2015 dated May 13, 2015.

	and unfair trade practices in securities market.	
RAVI NARAIN (*Noticee* No. 2) (Former MD & CEO of NSE) (2000 to March 2013) **CHITRA RAMKRISHNA** (*Noticee* No. 3) (Former MD & CEO of NSE) April 2013 to December 2016, (Deputy MD: 2008-10, and Joint MD: 2010-2013) **ANAND SUBRAMANIAN** (*Noticee* No. 4) Chief Strategic Officer (April 2013 to March 2014) and Group Operating Officer (April 2014 to October 2016)	a) During the relevant period, the *Noticees* No. 2, 3 and 4 failed to perform their role in establishing adequate systems, which led to the scenario whereby certain brokers were allowed to breach the norms of fair and equitable access. b) The manner in which OPG gained preferential access day after day on select servers indicates complete laxity and dereliction of duty on the part of *Noticees* Nos. 2, 3 and 4. Therefore, by not taking preventive as well as curative measures proactively, Mr. Ravi Narain, Ms. Chitra Ramakrishna and Mr. Subramanian Anand facilitated fraud and manipulation by OPG. c) consistent unfair access to OPG despite NSE's consistent denial clearly establishes that NSE and its officials were completely oblivion of the principle of fair and equitable access. The extent of unfair access by OPG could be possible only through the active connivance between NSE and its (ex) officials with OPG and its officials.	section 12A(a), (b) & (c) of the SEBI Act read with regulation 3(a), 3(b), 3(c), 3(d) & 4(1) of the PFUTP Regulations, Part A (not applicable for Mr. Subramanian Anand) and Part B of schedule II of the SECC Regulations read with Regulation 26(1) [not applicable for Mr. Subramanian Anand] & (2) of SECC Regulations and clause 3.8.1 of SEBI Master circular dated December 31, 2010.
RAVINDRA APTE *Noticee* No. 5 (Former CTO of NSE)	a) *Noticees* Nos. 5 and 6 have shown laxity and dereliction of duty by not taking adequate steps to make the TBT architecture robust and prevent it from being manipulated. The manner in	section 12A(a),(b) & (c) of SEBI Act read with Regulation 3(a), 3(b),3(c), 3(d) & 4(1) of the PFUTP Regulations, Part B of

(2007 to September, 2012) **UMESH JAIN** *Noticee* No. 6 (Former CTO of NSE) (October 2012 to June 2015)	which OPG gained preferential access day after day on select servers indicates complete laxity and dereliction of duty on the part of the CTOs of NSE i.e., Mr. Ravindra Apte and Mr. Umesh Jain. Therefore, by not taking preventive as well as curative measures proactively, Mr. Ravindra Apte and Mr. Umesh Jain facilitated fraud and manipulation by OPG. b) consistent unfair access to OPG despite NSE's consistent denial establishes that NSE and its officials were completely oblivion of the principle of fair and equitable access. The extent of unfair access by OPG could be possible only through the active connivance between NSE and its (ex) officials with OPG and its officials.	schedule II of SECC Regulations read with Regulation 26(2) of the SECC Regulations and clause 3.8.1 of SEBI Master circular dated December 31, 2010.
MAHESH SOPARKAR *Noticee* No. 7 (Head of PSM Team) (2009-2013) **DEVIPRASAD SINGH** *Noticee* No. 8 (Head of PSM Team) (2013-2016)	As Project Support and Management Team (PSM Team) has failed to monitor the TMs who were connecting to the secondary server. This indicates that *Noticees* Nos. 7 and 8 have connived with OPG and its officials.	Section 12A(a), (b) & (c) of SEBI Act read with Regulation 3(a), 3(b), 3(c), 3(d) and 4(1) of the PFUTP Regulations.

8. Upon service of the SCN, *Noticees* have, through their authorised representatives, sought inspection of documents and further sought for additional documents including cross

examination so as to enable them to defend these allegations. Having provided with details of documents relied upon in the SCN, I note that *Noticees* have availed cross examination on December 06 2023, and have filed their respective replies before the opportunity of hearing was provided to them on February 02, 2024. During the course of the hearing on February 02, 2024, submissions have been advanced on the lines of written replies filed earlier. *Noticees* also sought time to file post hearing submission, which was granted to them. They subsequently filed post hearing written submissions. Details of replies filed, cross examination, hearing granted and post hearing submission filed are summarised in the table below:

Table No. 2

***Noticee* No.**	***Noticee* Name**	**Inspection granted on**	**Date of reply filed**	**Date of cross examination provided**	**Date of post hearing submission filed.**
1	NSE	July 13, 2023	August 03, 2023	December 06, 2023	February 09, 2023
2	RAVI NARAIN	October 06, 2023	January 05, 2024	December 06, 2023	February 21, 2024
3	CHITRA RAMKRISHNA	Inspection not sought	November 09, 2023	December 06, 2023	April 19, 2024
4	ANAND SUBRAMANIAN	Inspection not sought	July 03, 2023	December 06, 2023	February 12, 2024
5	RAVINDRA APTE	July 12, 2023	August 02, 2023	December 06, 2023	February 15, 2024
6	UMESH JAIN	July 26, 2023	August 24, 2023	December 06, 2023	February 12, 2024
7	MAHESH SOPARKAR	July 12, 2023	August 02, 2023	December 06, 2023	February 15, 2024
8	DEVIPRASAD SINGH	July 12, 2023	August 02, 2023	December 06, 2023	February 15, 2024

Note: All 8 *Noticees* were heard on February 02, 2024.However, the issue of possible connivance and collusion between OPG and its directors with NSE employees/officials, is a common issue in the proceeding against OPG and its directors and this proceeding. Hence, the submission of OPG and its directors was also required to be considered along with submissions of *Noticees* in this proceeding. This has necessitated passing the order in two proceedings simultaneously.

C: SUMMARY OF REPLIES OF NOTICEES AND OPG & ITS DIRECTORS

9. The responses of *Noticees,* submitted through different dates, as well as during hearing, are summarised hereunder.

9.1 *Noticee* No. 1 (NSE);

a*)* The *Noticee* No. 1 made following submissions, which it believes to be relevant while considering the charges against it-

i. In the event of a primary server failure, the secondary server would allow TMs to continuously receive TBT market feed without disruption. All TMs uniformly had access to the secondary server, and it was expected that TMs would only connect to the secondary server when they were unable to connect to the primary POP servers and for the reason to avoid disruption, the secondary server was kept in active mode.

ii. A 'registration enablement mail' was sent to all members who subscribed to the TBT service, which contained all the relevant operational details, including the connection details for the primary server and the secondary server (and the IPs assigned to such member).

iii. It was expected that members would act in good faith and only connect to the secondary server when the primary server was down and not otherwise and this was also set out in the Colocation Guidelines issued by the *Noticee*.

iv. The *Noticee* did not resort to measures such as disconnecting the members who were connecting to the secondary server because this could seriously disrupt the business of a member and cause large financial loss to

individuals as well as to the market, as the members might not be able to close out open positions.

v. TMs (including OPG) were using automated trading workflows to connect the TBT system in the morning.

vi. In any event, connecting to the secondary server did not guarantee any benefit to a member, as EY's simulations had demonstrated that despite the lower load, members on the secondary server did not receive all the ticks ahead of members on other servers. The 2023 SAT Oder also held that early/first connections did not guarantee first receipt of the data due to the inherent randomization within the system.

vii. During the period 2010 to 2011, the *Noticee* had experienced hardware (server) failures, due to *inter alia*, environmental factors which were causing corrosion of hardware components. Therefore, in order to avoid a market-wide TBT failure and ensure greater reliability of TBT servers, the *Noticee* decided to undertake a resiliency improvement programme that involved: (i) hosting the TBT application on Stratus Fault Tolerant hardware, and (ii) moving the entire TBT infrastructure from the primary data centre of NSE to a separate colocation data centre.

viii. This migration of TBT servers to the new data centre location was undertaken in the first six months of 2012. During this period, in order to ensure that the secondary server was free in the event that the primary server went down due to the migration activity, *Noticee's* PSM team performed some limited checks with respect to connections to the secondary server.

ix. To perform this check, the PSM team would run a script to check which would return a list of members who were connected to the secondary server. It should be noted that the list would not specify all members who had connected to the secondary server on that particular day, but only those members who were connected to the secondary server at that point in time. The PSM team would communicate this list to the colocation team which would, in turn, email the members warning them about connections to the secondary server.

x. During this period of data centre migration, the *Noticee* had sent emails to various TMs (including OPG), who had been connecting to the secondary server on a uniform basis, informing them to cease from doing so. At no point in time the *Noticee* had a mechanism to continuously or automatically monitor connections to the secondary server. These were only periodic checks which were carried out by the PSM team on 18 days only during the migration period.

xi. Warnings were issued to TMs connected to the secondary server at the time that the check was performed. It is possible that some members were connected to the secondary server during the same day but were not connected at that precise point of time, and therefore were not recipients of warnings.

xii. After June 2012, once the migration activity was complete, the PSM team ceased to perform the limited checks on connections to the secondary server.

xiii. When the *Noticee* was made aware that certain TMs were connecting to the secondary server, it promptly took disciplinary action against errant TMs, including OPG.

b) The *Noticee*, in its submissions, also submitted that the SCN was contrary to the mandate of the 2023 SAT Order and that the SCN had misread the order of the Hon'ble Tribunal. Further, the *Noticee* stated that Hon'ble SAT did not find fault with the WTM for absolving NSE of the charge of fraud and consequently held the exoneration to be rightful. Thus, there could not be a question to re-opening the matter by SEBI as far as NSE was concerned. The *Noticee* also pointed out that the issue of collusion by NSE and by NSE's employees were two distinct issues framed separately and decided separately in the WTM order.

c) The *Noticee* stated that the matter ought to have been decided on the basis of the material available on record without inclusion of any additional material. The SCN contains material extraneous to the limited issue for which the matter was remanded.

d) With respect to the allegation of collusion by the *Noticee's* employees to provide preferential access to OPG and/ or fraudulent or unfair trade practices by the

Noticee, it was submitted that the same was mere surmise and conjecture and not based on evidence.

e) The *Noticee* submitted that a serious charge of fraud and collusion/connivance on the basis of suspicion ran contrary to time-tested judicial precedents which caution against suspicion, conjecture and surmise being passed off as proof especially where fraud was alleged. The *Noticee* also submitted that the 2023 SCN disregarded the ruling of the Supreme Court in *Elizabeth Jacob v District Collector, Idukki and Ors* (2008) 15 SCC 166 which at paragraph 15 held that: "*A doubt or surmise is not proof of a fact…. a suspicion that there might have been collusion and fraud is not proof of collusion and fraud*." In support of the submission, the *Noticee* also referred to the judgements in the matter of *Nirmal Bang Securities (P) Ltd. v SEBI, [(2003) SCC OnLine SAT 37]; SEBI v. Kanaiyalal Baldevbhai Patel (2017) 15 SCC 1; Ernst Ernst v. Hochfelder 1976 SCC OnLine US SC 54;* ***SEBI v. Kishore Ajmera 2016 (6) SCC 368****;*

f) It *has* been submitted that following facts were contrary to the possibility of the existence of any connivance or collusion between NSE and OPG and therefore the SCN did not survive.

   i. The *Noticee* pointed out that OPG's first connect started increasing exactly after it implemented its automated login mechanism in February to March 2012. It was submitted by the *Noticee* that this had nothing to do with NSE or any of its employees.

   ii. The *Noticee* referred to Statement of Mr. Sanjay Gupta dated July 6, 2017, at page 5 and Statement of Mr. Aman Kokrady dated August 10 2017, at pages 4 to 5 wherein it was confirmed by OPG that: (i) it did not receive any information from the *Noticee* or its employees regarding the alleged advantages of early login or the time of server start up or regarding its login rank on a particular date; and (ii) it was not aware of its log-in rank or the order of connection.

   iii. The *Noticee* submitted that when OPG implemented its automated system for the first time, NSE in fact asked OPG to reduce the ping frequency due to the large volume of traffic, which was contrary to the allegation and support that *Noticee* or its employee had not connived with OPG or any of its employee/ officials.

iv. The *Noticee* pointed out that OPG did not even feature in the top 5 members to connect first in the Cash Market and Currency Derivatives segments, demonstrating that other members also had a fair and equitable opportunity and capability to connect first.

v. The *Noticee* submitted that in the first half of 2012, (when the limited monitoring of connections to the secondary server was undertaken) the *Noticee* had repeatedly warned TMs including OPG against connecting to the secondary server. The *Noticee* also submitted that subsequently, when the issue of unauthorized access to the secondary server was brought to the attention of the *Noticee*, it had initiated disciplinary proceedings against OPG, and suspended its membership for 6 (six) months. Further, the disciplinary proceedings were discontinued only when SEBI commenced its investigation against OPG.

vi. The *Noticee* contended that it took decisions relating to the TBT architecture in good faith and based on relevant considerations and that it had not adopted any measures with a view to benefit any particular broker. Further, the *Noticee* pointed out that there was no allegation that the *Noticee* had benefited from the alleged collusive or fraudulent acts.

g) The *Noticee* has contended that there was no evidence / conclusions by external experts to support the allegation of 'collusion' 'connivance' or 'fraud' and further relied upon the following material:

i. The *Noticee* referred to the CFT Report which states that "… *Additionally, issues such as collaboration with exchange staff to receive information about dissemination start up times etc., require further detailed examination*."

ii. Reference was made to the SEBI External Committee Report which states that "*Note that w.r.t. Objective a) it is outside the scope of this interim report to determine whether any NSE personnel were involved in helping OPG securities exploit the architecture. Similarly, for Objective b) it is the outside the scope to determine whether any NSE individuals were purposely facilitating any unauthorized activities*."

iii. Reference was also made to the 2016 Deloitte Report which examined the issue of collusion and stated that "*While there are indications of differential behavior being shown towards few members by certain employees, we are not in a position to comment, on the basis of the review performed, on whether this would amount to collusion/ connivance or just preferential behavior. Also, in the course of our review, we have not seen indications of employee involvement other than those mentioned in our report*."

iv. Further the EY Report – Cash Market and the EY Report – Currency Derivative / IRF also observed that, "*Based on our keyword-based review of emails of select employees (more than 20 current and former NSE employees) for [……] segment, we did not observe relevant communications to members and / or internal NSE employees regarding start times of the dissemination servers, advice about logging at particular time, granting privileged access to the secondary servers and performance of dissemination servers which could have indicated potential collusion*."

v. While referring to the scope of the 2018 Deloitte Report which includes, *inter alia,* "*To determine whether there was any collusion between Exchange employees, trading members and / or any other third parties with respect to preferential treatment related to TBT dissemination / non-empanelled service's provider related issues and quantification of such gains, etc*", it has been submitted that the 2018 Deloitte Report made no adverse findings or conclusions to advance the allegations of collusion with TMs including the OPG in any manner.

vi. The *Noticee* referred to the 2018 Investigation Report wherein it was noted that *"… it is difficult to draw a causal relationship between Jagdish Joshi's resignation from NSE and the reduction in the number of first connects for OPG.*" Further the 2018 Investigation Report had also noted the conclusions of EY and Deloitte that they did not come across any communications indicating that members were informed about early login or the start-up time of the dissemination servers. No material has been adduced by SEBI to controvert these findings.

vii. After considering the treatment of other members as compared to OPG, SEBI in the 2018 Investigation Report itself concluded that "From the above,

considering the above responses and observations made by the auditors, it may not be possible to draw any specific adverse inference…"

viii. Both the orders i.e. the 2019 SEBI NSE Order and the Order dated February 10, 2021 passed by the Adjudicating Officer with respect to two separate proceedings in the same matter gave findings and exonerated the *Noticee* from the allegation of "fraud" while dealing with the issue of "collusion/connivance".

ix. The new materials adduced to the SCN did not prove the existence of any collusion or connivance between NSE and OPG. Also, the 2023 Report of ISB did not concern itself with the scope of the remand.

h) The *Noticee* referred to an email dated December 05, 2023 sent by Deloitte to SEBI, wherein it was, *inter alia*, informed that they did not find any evidence in the form of financial transaction or calls to establish collusion/ connivance. Based on the contents of the said email, the *Noticee* submitted that there was no question of any collusion/ connivance as far as NSE is concerned.[1]

i) The *Noticee* submitted that the SCN charges NSE with 'laxity/ being oblivious', which could not co-exist with a charge of connivance and collusion. Obliviousness/laxity indicated ignorance or unawareness which was polar opposite of "actively" conniving with another which indicated wilful/intentional participation. In this regard, the *Noticee* relied on the observations made by Hon'ble Supreme Court in the matter of *Kishore R. Ajmera v. SEBI (supra).* Further, it was submitted that Hon'ble SAT had already penalized NSE for the "laxity/ obliviousness" related charges.

9.2 Ravi Narain (*Noticee* No. 2) -

a) The *Noticee* submitted that SEBI had completely misinterpreted the directions given by Hon'ble SAT in its order dated January 23, 2023. The *Noticee* pointed

[1] Since Deloitte in its 2016 Report did not clearly answer one of the terms of reference which relates to the issue of collusion, Deloitte was asked to inform "*whether there was any collusion between the Exchange employees, trading members and /or any other third parties with respect to preferential treatment related to TBT dissemination*." Deloitte, vide email dated December 05, 2023 replied "*basis review of the above mentioned data sets, we did not identify any financial transactions or calls between employees of the exchange and trading members*."

out that in view of the ruling in the 2019 SEBI NSE Order read with the 2023 SAT Order, *Noticees* No. 1 to 8 had been fully exonerated on the charge of "collusion" and "fraud" and there was no question of initiating the present proceeding by issuing the SCN.

b) The *Noticee* submitted that the SCN contained no new allegations, evidence and findings against the *Noticee* regarding any collusion or connivance or fraud and the same was liable to be withdrawn. Further, the *Noticee* submitted that SCN was barred by principles of *estoppel* and *res-judicata* since the evidence pertaining to the matter was scrutinized by authorities and a finding was given in favour of the *Noticee.*

c) The *Noticee* pointed out that the new ISB Report 2023 did not have any new finding/ evidence of any collusion/ connivance with OPG or anyone else.

d) The *Noticee* also stated that the matter was *sub-judice* as SEBI had filed appeal in Hon'ble Supreme Court against the 2023 SAT Order and the same was pending.

e) The *Noticee* submitted that the allegation of ignorance and active connivance were mutually destructive and the charge demonstrated complete non-application of mind.

f) The *Noticee* submitted that a show cause must set out full and complete particulars and details of what evidence being relied on in support of the allegations made under the new show cause. In the instant proceedings, SCN was not specifying the nature of evidence being relied on qua the specific acts of collusion/connivance with OPG or anyone else.

g) The *Noticee submitted* that with respect to the allegation of load balancing, the SCN referred to old reports of EY and Deloitte in addition to statements of various NSE personnel and some emails pertaining to 2011-2012, which had already been considered in the previous proceedings. Further, there was no identification or allegation as to what specifically was alleged that would amount to any collusion/ connivance with OPG and its directors. The Noticee stated that as per Hon'ble SAT, absence of load balancer might have resulted in some advantage to OPG but it was categorically held that there was no evidence of any collusion/ connivance/ fraud. Hence, no fault could be attributed to the Noticee in relation to the said issues of load balancer and /or crowding out.

h) The *Noticee* submitted that the allegation of absence of load balancer (alleged in the Deloitte's 2016 report) alleging that OPG had managed to log in 1st, 2nd, 3rd etc. on many occasions, was old allegations that were considered in previous proceedings and orders passed by SEBI had recorded that the allegation was not found the support of evidence. Thus, in the absence of any fresh evidence, said allegation was pure conjecture as having no evidence to show collusion/connivance.

i) The *Noticee* submitted that the allegations made in the SCN regarding connecting to the secondary server had already been considered in all previous proceedings and the same had been decided in the favour of the *Noticee*. Further, the *Noticee* submitted that the Colo Guidelines were sent to all TMs and that the same required all TMs to check the secondary server and move to it in case the primary was not working properly. Further, the *Noticee* pointed out that there was no monitoring mechanism with respect to the secondary server. Further, the *Noticee* pointed out that during the period 2010 to 2016, 93 TMs had connected to the secondary server, which belied the allegation that there was any collusion of the *Noticee* with OPG (or other TMs).

j) The *Noticee* submitted that he was the Managing Director (MD) and Chief Economic Officer (CEO) of NSE up-to March 31, 2013 whereas the allegations in the 2023 SCN extended beyond his tenure as the MD and CEO, which was unwarranted.

k) The *Noticee* also stated that he was not a technical expert and had no role in the alleged violations mentioned in the 2023 SCN. Further, the *Noticee* submitted that there was no evidence to show his active involvement in the implementation and maintenance of COLO facility. Further, there was no evidence to show that any of the technical aspects were escalated to him.

l) As per the *Noticee*, the allegation of 'laxity' and 'dereliction of duty' were opposite and contradictory to the allegation of collusion/connivance.

9.3 Chitra Ramakrishna (*Noticee* No.3):

a) The *Noticee* submitted that the material available on record did not support any allegation levelled against her in the SCN either in her personal capacity or in

the capacity as Joint Managing Director/ Managing Director/ Chief Executive Officer of NSE. Further, *Noticee* could not be held vicariously liable for any alleged actions or omissions by any person/s within the organization.

b) The *Noticee* referred to certain excerpts from the 2019 SEBI NSE Order and the 2023 SAT Order and stated that the question of levelling the allegation of collusion did not arise. It was further submitted that once the *Noticee* was specifically held innocent of any fraud and/or fraudulent / unfair trade practice, Article 20(2) of the Constitution provides constitutional protection from being prosecuted twice for the same set of allegations.

c) The *Noticee* submitted that the allegation of ignorance and active connivance were mutually destructive and that the charge demonstrated complete non-application of mind. Further, the *Noticee* contended that the SCN was vague.

d) The *Noticee* was not an expert in technical matters and used to rely on the advice of technology team headed by other entities. The SCN did not point out any instance where any of the alleged issues regarding colocation system were brought to her notice or she had failed to take steps for the same.

e) The *Noticee* was also the MD when the TBT system was being replaced by multi-cast and that too without any intervention by SEBI.

f) During the investigation period 2010-14 when the alleged multiple first connect took place, the *Noticee* was not the MD and CEO. In view of the findings of Hon'ble SAT, the *Noticee* could not be held responsible for the alleged unfairness and lack of transparency.

g) The *Noticee* submitted that the SCN, despite findings in the 2023 SAT Order, proceeded on a presumption of fraud even after acknowledging TBT as a viable technology that continued to be used by many primary exchanges around the world. Viability/non-viability could not be attributed to be a fraud.

h) The *Noticee* also pointed out that due to the organizational structure of NSE, the responsibility of ensuring fair and equitable access as regards the TBT infrastructure was not limited to her in the capacity as Joint MD and CEO but lay on several other personnel including but not limited to the then Chief Technology Officers (CTOs). The *Noticee* stressed on the point that no red flags were ever raised inviting her attention in her role as joint MD and/or MD of NSE.

i) The *Noticee* submitted that the SCN had unfairly proceeded against her on the basis of mere conjectures and surmises of wrongdoings when it was not established as to how the *Noticee* had voluntarily participated in the alleged wrongful activities or even had knowledge thereof.

j) The *Noticee* had resigned from NSE with effect from December 02, 2016 and any actions taken by NSE thereafter would not bind her in any manner. Further, no case was made out against the *Noticee* for breach of any provisions of the SECC Regulations and the Master Circular dated October 31, 2010.

k) The *Noticee* was not responsible for the day-to-day affairs of NSE and she had no role to play in the allocation of colocation facility or grant of preferential access to any trading member. The *Noticee* urged to withdraw the SCN and suspend all future proceedings against the *Noticee*.

l) The *Noticee* referred to Hon'ble SAT's observation that there was no breach of principles of fair and equitable access. Hence, the charge of not taking steps by the *Noticee* did not arise.

m) The *Noticee* also stated that Systems Advisory Committee would also consider all technology and systems related initiations and approve the proposals before the same was placed before NSE's Board. Further, it was stated that the responsibility of ensuring fair and equitable access with respect to TBT infrastructure was not limited to her in her capacity as Joint Managing Director and Chief Executive Officer and that no red flags were ever raised to her with respect to the same.

n) The *Noticee* submitted that she had no knowledge of alleged preferential access provided to any particular TM.

o) The *Noticee* also referred to the cross examination of the expert witness who authored the ISB Report 2023 and also the email dated December 05, 2023 sent by Deloitte in response to a query sent by SEBI and thereby submitted that there was no material to suggest any wrongdoing or collusion by the Noticee No. 3.

9.4 Anand Subramanian (*Noticee* No. 4);

a) The *Noticee* submitted that there was no mention of him in any of the documents annexed with the SCN despite of the findings made in various Reports.

b) Further there was no reference to even a single email correspondence, any other form of communication, or any statement by any relevant person to establish a channel or link between the *Noticee No. 4* and the purported irregularities at the colocation facilities in NSE.

c) The Noticee submitted that the SCN proceeded on an erroneous assumption and held the Noticee allegedly accountable for active connivance with OPG purely on the premise that the Noticee was a Chief Strategic Office.

d) It was submitted that the Noticee No. 4 was exonerated on all counts not just by the WTM but also by the AO in the previous colocation proceedings.

e) It was also submitted that the SCN did not contain any additional material or facts against the *Noticee No. 4*.

f) The Noticee No. 4 stated that nowhere in the SCN, SEBI had adduced or even alluded to any material that remotely suggested that the Noticee No. 4 had knowledge of either the working of the TBT systems or the fact that OPG was getting any purported undue advantage with regards to the same.

g) The Noticee No. 4 stated that he was not even distantly associated with the core technical functions of NSE.

h) The Noticee No. 4 referred to the table in the SCN showing various dates of introduction of TBT system and Multicast system w.r.t various segments (FO/ Cash Market/ Currency Derivatives) and submitted that all the six warning/ advisories issued by NSE for the continued login by members of OPG on the secondary server of NSE were issued till May 2012 i.e. the unwarranted login began prior to the year 2012. However, the *Noticee* No. 4 joined NSE on April 01, 2013. Thus, it was submitted that all the purported irregularities happened much prior to his joining NSE as Chief Strategic Officer. Further, much before the *Noticee* was appointed as Group Operating Officer on April 01, 2015, the switching to the Multicast system was already completed.

i) The *Noticee* also stated that the cross examination of Prof. Ramabhadran Thirumalai with respect to ISB Report dated April 2023 also showed that there was no dealing of the *Noticee No. 4* with any of the purported irregularities at the Co-location facility.

j) The *Noticee* submitted that the allegation relating to 'failure to take steps to ensure proper checks and balances to provide equitable access to all' had

already been specifically considered in the 2019 SEBI NSE Order and the 2023 SAT Order and the *Noticee* was unconditionally exonerated on all counts. It was also submitted that SEBI could not agitate the same allegations in the SCN, which had already been given quietus by both SEBI and Hon'ble SAT, as it would amount to a violation of *Noticee's* fundamental right against *double jeopardy*.

9.5 Ravindra Apte (*Noticee* No. 5):

a) The submission of the *Noticee No. 2* also was requested to be read here.

b) The *Noticee* submitted that he was involved only in the broad conceptualization of the colocation project and not the detailed particulars of the hardware. Further, there was no concept that any broker could get any advantage by using the secondary server instead of the Primary Server, and therefore there was no monitoring system as well.

c) The *Noticee* mentioned that he was only engaged as a "consultant" and his tenure of engagement lapsed in September 2012. Further, he had no role in the day to day running of the colocation facility or in monitoring access to the primary or secondary server by the brokers.

d) Further, the Noticee argued that the SCN merely repeated the very same allegations which had already been heard and decided previously. The Noticee also took the plea of applicability of res judicata on the proceeding.

e) It was also submitted that SEBI had filed an appeal in the Hon'ble Supreme Court against the 2023 SAT Order and the same was pending. Hence, there was no justification to pursue the present proceedings.

f) It was also stated that the 2023 ISB Report did not in any manner whatsoever made out or supported any allegation of any collusion/connivance between any of the *Noticees* and OPG. The *Noticee* pointed that neither new investigation was done nor any new evidence or material had been unearthed qua the *Noticee No. 5* to remotely justify issuing the said SCN against him.

9.6 *Noticee* No. 6 (Umesh Jain):

a) It has been submitted that the *Noticee* had joined NSE on September 1, 2012 as Senior Vice President and that software development and design was not part of his portfolio as the same was led by one N. Muralidharan, who reported to Ms. Chitra Ramkrishna (*Noticee No. 3)*. The *Noticee* submitted that he was designated as CTO on April 10, 2013 and that the Software Design and Development was made part of his portfolio and that he prioritized the design and development of Multicast architecture and same was delivered within 8 months.

b) The *Noticee No. 6* further submitted that he was not a Key Managerial Person ("KMP") with NSE. He was not in charge of all technology related functions and all technology employees did not report to him. Further, he stated that he was never in charge of Colocation facilities and no Colocation employee reported to him.

c) The *Noticee* referred to orders passed by SEBI in the same matter stating that the orders were disposed of on merits without passing any orders/ directions/ comments against the *Noticee*. The *Noticee* submitted that the matter cannot be reopened or directed to be reopened as the same was barred by the principle of res judicata. In support of his submissions, the *Noticee* relied on the judgement of Hon'ble Supreme Court in the matter of *Subramaniam Swamy vs. State of Tamil Nadu and Ors. (AIR 2015 SC 460),* wherein it was observed '*23. ….The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgements". "Res judicata pro veritate accipitur" is the full maxim which has over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. 24. The doctrine contains the rule of conclusiveness of the judgement which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis lithium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari pro uno et eadem causa" (no man should be vexed twice over for the same cause).'* Additionally, the *Noticee* also relied on the judgements in the matter of *Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and Anr.* (AIR 1960 SC 941); *M. Nagabhushana v. State of Karnataka &*

Others. [(2011) 3 SCC 408]; *Union of India & Ors. v. Major S. P. Sharma & Ors.* [(2014) 6 SCC 351]; *Hope Plantations Ltd. v. Taluk Land Board, Peermade and Anr.* [(1999)5 SCC 590]; *Andanur Kalamma and Ors. v. Gangamma (dead) by L.Rs.* (Civil Appeal Nos. 423-424 of 2018); *Sanjay G. Khemuka v. The State of Maharashtra and Ors.* (AIR 2004 Bom 245).

d) The *Noticee* submitted that he could not be charged for concealment/ destruction of evidence and crowding out and the same was also clarified during the personal hearing.

e) The *Noticee* also submitted that the charges in the SCN were beyond the 2023 SAT Order as he was exonerated of all charges by the 2019 SEBI NSE Order. Further, the direction of Hon'ble Tribunal was not applicable to the *Noticee* as he was not a party to any of the appeals filed before Hon'ble SAT. In support of his submissions, the *Noticee* relied on the order passed by Hon'ble High Court of Bombay in *Commissioner of C. Ex and Customs v. D.J. Malpani* [2010 (258) ELT 185 (Bom.)] wherein it was observed "*4… A lower authority cannot go against the order of remand issued by the higher Appellate Authority. In fact it is bound by the terms of the remand order and cannot go beyond the terms of the order of remand.*" The *Noticee* also relied on the orders passed in the matter of Road Lines, Partnership Firm and Ors. v. Rajkuwar Bai and Ors. [2015 (3) CGLJ 482]; *V. Srinivas v. Securities and Exchange Board of India* (SAT Order dated February 02, 2023 in Appeal No. 5 of 2019).

f) The *Noticee* referred to a statement/response of the expert witness i.e. author of ISB Report dated April 2023 provided during the cross- examination dated December 6, 2023 wherein it was mentioned that the ISB Report did not disclose any laxity or dereliction of duty by the *Noticee* No. 6 or any active connivance or conspiracy between *Noticee* No. 6 and any broker or its official.

g) The *Noticee* submitted that in the proceedings under the show cause dated July 03, 2018, the expert Deloitte was cross-examined on February 28, 2019. The *Noticee* pointed out that the expert had replied (i) there was no evidence of collusion or misconduct by the *Noticee* No. 6; (ii) there was no evidence of preferential behaviour being shown towards few members by *Noticee* No. 6. The *Noticee* also submitted that the SCN dated May 17, 2023 had not relied upon the record of cross-examination of the expert Deloitte and the same

ought to have been made part of the documents relied upon in the said SCN. According to the *Noticee*, if the record of cross examination had not been relied upon in the SCN, the reports from the expert Deloitte could not be used as evidence against the *Noticee* no. 6. In support of his submission, the *Noticee* relied on the judgement in the matter of *State of Maharashtra v. Damu and Ors.* (AIR 2000 SC 1691); *Ramesh Chandra Agarwal v. Regency Hospital Ltd. and Ors.* (AIR 2010 SC 806); *Phool Kumar v. Delhi Administration* (AIR 1975 SC 905).

9.7 *Noticee* No. 7 (Mahesh Soparkar)-

a) Submission of the *Noticee No. 2* also was requested to be read here.

b) The *Noticee* referred to the directions issued to NSE in the 2019 SEBI NSE Order to conduct an inquiry under its Employee Regulations, which were also affirmed by Hon'ble SAT. The *Noticee* pointed out that in compliance of the said order, Inquiry was conducted and as per the Inquiry Report of Hon'ble Chief Justice (Retd.) of Kerala High Court- Mr. Justice Arvind V. Savant, it was expressly concluded that there was no material to hold the *Noticee* No. 7 guilty of any misconduct.

c) The *Noticee* submitted that the allegation of connivance in the SCN pertaining to OPG's regular early login was pure conjecture devoided of any evidence and was repetition of same old allegation.

d) The *Noticee* submitted that he had no role in designing, development, technology selection i.e. TCP/IP protocol, use of randomiser, use of load balancer, primary/secondary both in active mode etc. These functions were the responsibility of the Application Development Team (ADM). The *Noticee* also submitted that the PSM team which was reporting to the *Noticee* was an operations team and only responsible to keep the TBT system up and running and monitoring the technical parameters (CPU, memory, disk space, etc.) as per the ADM's instructions.

e) The *Noticee* also pointed out that he was not involved in selecting the architecture, systems or equipment for the colocation facility and admittedly the same had no facility to continuously monitor as to which brokers were taking data from the secondary server.

f) The *Noticee's* job was to keep the colocation system working and it was not his job to monitor access to the secondary server.

g) The *Noticee submitted* that there was no concept that any broker could get any advantage by using the secondary server instead of the primary server, therefore, there was no monitoring system. Further, the *Noticee* stated that all brokers were entitled to switch whenever there was any problem with the primary server.

h) As per the submission of the *Noticee*, the SCN implied that the secondary server was not the first to connect to the primary data centre on most days. Further, TAC Report held that the data went first to primary servers and then to the secondary server, which Prof. Prof. Ramabhadran Thirumalai did not disagree with.

i) The *Noticee* submitted that he was expressly exonerated by the previous orders passed by the WTM and the AO as well as by the Enquiry Report of the Hon'ble Chief Justice (Retd.) of Kerala High Court- Mr. Justice Arvind V. Savant.

9.8 *Noticee* No. 8 (Devi prasad Singh);

a) Submission of the *Noticee No. 2* also was requested to be read here.

b) The *Noticee* submitted that he had no role in designing, development, technology selection i.e. TCP/IP protocol, use of randomiser, use of load balancer, primary/secondary both in active mode etc. These functions were the responsibility of the Application Development Team (ADM). The PSM team which was reporting to the *Noticee* was an operations team and only responsible to keep the TBT system up and running and monitoring the technical parameters (CPU, memory, disk space, etc.) as per the ADM's instructions.

c) The *Noticee* referred to the Inquiry Report dated October 23, 2019 of Hon'ble Chief Justice (Retd.) of Kerala High Court- Mr. Justice Arvind V. Savant, vide which it was expressly concluded that there was no material to hold the *Noticee* guilty of any misconduct. The *Noticee* pointed out that the said Inquiry Report was pursuant to SEBI's direction to NSE to have an inquiry under its Employee Regulations.

d) The Noticee also submitted that the allegations about collusion and connivance with OPG were also belied by the fact that proceedings were taken before NSE's disciplinary Action Committee against OPG for wilfully flouting NSE's directions and by an order dated September 04, 2017, OPG was suspended from trading for

six months. However, on an appeal filed by OPG, the said order dated September 04, 2017 of NSE was set aside by Hon'ble SAT vide its order dated May 01, 2018.

e) The *Noticee* submitted that he was not involved in selecting the architecture, systems or equipment for the Colocation facility and admittedly the same had no facility to continuously monitor as to which brokers were taking data from the secondary server.

f) Further, the *Noticee* submitted that his job was to keep the Colocation system working and it was not his job to monitor access to the secondary server.

g) The *Noticee* also stated that there was no concept of any TM to get any advantage by using the secondary server instead of the primary server, therefore, there was no monitoring system. All brokers were entitled to switch whenever there was any problem with the primary server.

h) As per the *Noticee's* submission, the SCN also implies that the secondary server was not the first to connect to the primary data centre on most days. The *Noticee* also referred to the TAC Report which observed that the data went first to the primary servers and then to the secondary server, which the expert witness (Prof. Ram), author of ISB Report 2016 did not disagree with.

i) The *Noticee* submitted that the allegation of "laxity" and "dereliction of duty" against the *Noticee* was totally inconsistent with the allegation of any collusion or connivance.

j) The *Noticee* stated that he was expressly exonerated by the previous orders passed by SEBI as well as the Inquiry Report of Hon'ble Chief Justice (Retd.) of Kerala High Court- Mr. Justice Arvind V. Savant.

k) With respect to the 2023 ISB Report, the *Noticee* submitted that the same did not in any manner whatsoever made out or supported allegation of collusion/ connivance between any of the *Noticees* and OPG.

l) The *Noticee* also submitted that the 2023 SCN referred to some emails on the issue of load balancers, but admittedly none of them were addressed to the *Noticee* and that all of them related to the time period before the *Noticee* became the Head of PSM and Colo Team in 2013.

m) The *Noticee* also mentioned that based on old evidence, the SCN narrated alleged involvement of Mr. Jagdish Joshi, who had not been made a party to the present SCN.

n) The *Noticee* submitted that he had no role in the decision of load balancer in the Colo facility and that no fault could be attributed to him in relation to the issue of load balancer and/or crowding out. Hence, no question arose of the same resulting in any assumption of any collusion or connivance of the *Noticee* with OPG or anyone else.

10. The issue of collusion/ connivance is also relevant in the case of OPG. Hence, it is useful if the reply of OPG is also considered here while adjudicating this issue. OPG in his case has made following submissions to plead that there is no collusion/ connivance:

a) In terms of para 226 and 266 (h) of the 2023 SAT Order, SEBI was required to only 'consider' the charge of collusion/connivance of OPG and its directors with the employees of NSE.

b) A necessary ingredient of a charge of collusion was existence of more than one party acting in consonance to achieve a shared objective.

c) The SCN attempted to make allegations of collusion/connivance between OPG and employees of NSE, and all such employees have been exonerated at different stages of the proceedings.

d) The charges of collusion had been time and again dismissed by the WTM, SEBI, Hon'ble SAT, as well as NSE in its internal inquiry.

e) There was no additional evidence adduced in the present proceedings on the charges of access to the secondary server and crowding out.

f) There was overwhelming evidence that directly proved the impossibility of there being any collusion between OPG and employees of NSE.

g) The assumption of existence of collusion for the secondary server was only based on the number of connections of OPG to the secondary server. However, it has been ignored that mere number of connections did not automatically indicate collusion.

h) Other TMs had even more connections (on a nearly daily basis) to the secondary server, as compared to OPG, and yet, no allegations of collusion had been made against such brokers. The details are given in the following table:

Table No. 3

Sr. No	Trading Member/Stock Broker Name	Days connected to secondary server in Currency Derivatives	Days connected to secondary server in Capital Markets	Days connected to Secondary Server in Futures & Options	Total Days of secondary server Connection
1.	SHAASTRA SECURITIES TRADING PVT. LTD.	322	443	339	**1104**
2.	PARWATI CAPITAL MARKET PVT. LTD.	432	271	191	**894**
3.	PACE STOCK BROKING SERVICES PVT. LTD.	111	372	347	**83**
4.	SMC GLOBAL SECURITIES LTD.	1	418	363	**782**
5.	OPG SECURITIES PVT. LTD.	12	125	631	**768**
6.	ADROIT FINANCIAL SERVICES PVT. LTD.	438	77	66	**581**
7.	IKM INVESTORS PVT. LTD.	407	1	95	**503**
8.	SHARE INDIA SECURITIES LTD.	1	369	45	**415**
9.	PRB SECURITIES PVT. LTD.	6	199	184	**389**
10.	ADVENT STOCK BROKING PVT. LTD.	28	238	102	**368**
11.	CPR CAPITAL SERVICES LTD.	54	55	246	**355**

i) The allocation of IPs to a TM was manually controlled by employees of NSE and there is no SOP for the manner in which such allocations could be made. It is also

an admitted position that dissemination of the tick data was made sequentially on a port, which were again sequentially connected to a server.

j) While dropping the charges of first connect/early login, the 2019 SEBI OPG Order had noted that there had been no preferential treatment in the allocation of IPs to OPG. Had there been any preferential treatment, the employees of NSE would have ensured that OPG was allotted Port 10990 on all servers, which was not the case.

k) During September-October 2011, OPG started facing disconnection issues in the servers, and any such issues even for a few seconds could have resulted in huge financial losses. Such disconnections resulting in potential loss of business was the main reason for connecting to the secondary server.

l) During December 2012 to May 2014, OPG faced a total of 35,817 disconnections from the primary server, i.e., 98 disconnections per day (357 days total).

m) OPG was firing incorrect orders based on incorrect information disseminated to it and was facing trading losses. NSE was also aware of the issues in connection with the primary server and on several occasions (like the one mentioned in email dated September 11, 2014), NSE itself had requested OPG to switch to the secondary server.

n) Other TMs were also continuously raising complaints with NSE regarding disconnections, invariable latency and receipt of incorrect data. In the email dated September 23, 2015 of NSE issued to SEBI, following was *inter alia* stated:

> "*Point 5 - 'Details of Complaints received w.r.t. colo from members: All tickets relating to TBT*
>
> *250+ (nearly every day) complaints raised by various members over 357 days period of alleged violation recorded on telephone at NSE Colo Support helpdesk related to issues with the primary infrastructure during the period of alleged violations (Dec '12- May' 14)"*

o) OPG had connected only 9% of its IPs to the secondary server, however, there were other brokers also, who had connected as many as 60% of their total IPs to the secondary server.

p) No amount of collusion could allow a TM to crowd out other TMs in the Unicast TBT.

q) In view of evidence against the existence of any collusion, and the findings recorded in the 2019 SEBI OPG Order, SEBI was of the view that there was no evidence for making charges of collusion. The internal noting dated February 28, 2023 shows that SEBI took note of the fact that the directions in the 2023 SAT Order were 'in general' and not based on any evidence not considered by 2019 SEBI OPG Order, and despite collusion being a two sided allegations, Hon'ble SAT erred in directing reconsideration of the issue only in respect of OPG and not NSE employees.

r) Despite noting these flaws, SEBI included the issue of collusion in the SCN.

s) Vide email dated December 05. 2023, Deloitte had confirmed the absence of financial transactions/calls between NSE's employees and TMs, thereby proving absence of any collusion. The said email was issued after the issuance of the SCN.

D. *FINDING OF FACTS BY HON'BLE SAT*

11. It is noted that the jurisdiction of this authority to re-adjudicate the issues remanded by Hon'ble SAT needs to be confined within the directions given by it. While the wording of the main direction of the remand by Hon'ble SAT has been produced at para 1 of this order, it is equally important to look carefully at how such a direction of remand was arrived at. It is undisputed that Hon'ble SAT is the final authority on determination of question of facts. Hence, it is equally important to look at the facts determined by Hon'ble SAT in this case, before considering the issues remanded by it. The consideration of various issues by this authority must not be at variance with facts finally determined by Hon'ble SAT. Similarly, the consideration by this authority is required to be in sync with various issues determined by Hon'ble SAT and the directions issued by it after such determination.

12. The detail of TBT architecture has been explained in details by Hon'ble SAT in the 2023 SAT Order and the same is not repeated again for the sake of brevity. The summary of issues determined by the WTM in the 2019 SEBI NSE Order and the adjudication by Hon'ble SAT on such issues in the 2023 SAT Order is as under:

12.1. On the issue of whether the TCP-IP architecture for TBT data feed provided fair and equitable access to all TMs, the WTM held the following in the 2019 SEBI NSE Order:

- There was some randomness in the sequence of the POP server connecting to the PDC. The randomness was not on the basis of a system characteristic or a built-in-design, but was a matter of chance based on unpredictable circumstances
- System conferred an advantage on early loggers in a Port compared to others. This was for the reason that there was no mechanism to shuffle the order-rankings of TMs in front of a Port (which is based on the log-in time of respective TMs). Hence, the information dissemination order from a Port would remain static throughout the day depending upon the ranks established on the strength of log-in timings.
- The absence of Load Balancer provided advantage to some TMs. Although there was a limit of 30 connections for each Port of POP server, the actual number of TBT IPs allocated by NSE exceeded 30 connections per Port of a POP server i.e. a total of 90 connections per POP server. Further there were significant variations in terms of (i) number of TBT IPs allotted to each Port within a particular POP server and (ii) total number of TBT IPs allotted to each POP Server, which clearly demonstrated that the TBT IP allocation process undertaken by NSE was not in line with the recommendation made by its Development Team. There were significant variations in terms of TBT IP connections across POP Servers with TBTCOLO27 (secondary server) being the least crowded server. This clearly indicated that the load on the Port on a particular POP server varied significantly vis–a–vis the load across Ports and across servers and in the absence of a Load Balancer, such variation of load at each Port would have resulted in a varied time lag for distribution of data under sequential data dissemination process.
- TCP-IP architecture of TBT data feed, as adopted by NSE, was inadequate as the inherent early login advantage was not sought to be addressed by introduction of randomizer, as pointed out by the various reports. Moreover, even the adoption / implementation of TBT Data feed architecture, was not in

accordance with the standards stipulated by NSE's Development Team, specifically with respect to the procedure of IP allotment and the allocation of IPs within the limit.

12.2. On the issue of whether the TCP-IP architecture for TBT data feed provided fair and equitable access to all TMs, Hon'ble SAT agreed with some of the findings in the 2019 SEBI NSE Order while overruled some others. Hon'ble SAT held the following in the 2023 SAT Order:

- Hon'ble SAT agreed with the finding in the 2019 SEBI NSE Order that the flow of data from the PDC to the POP server followed a random sequence. However, it did not agree with the finding that such randomness was not on the basis of a system characteristic or a built in design but was a matter of chance based on unpredictable circumstances.
- Hon'ble SAT agreed with the finding in the 2019 SEBI NSE Order that the dissemination of data from POP servers is sequential to the Port. But it also found that receipt of information at the sender Port is not sequential, namely that batch 1 of information may be received first by Port 1, but batch 2 may be received first by Port 2. Thus, Hon'ble SAT held that till the stage of Port, there is some randomness in the dissemination of data right from PDC level to the Port level. It further found that there was variability in the order of receipt of data at the Port level and even the Port that was disseminated data first did not necessarily receive all the data first. A TM who logged in first would receive the data first on that particular Port ahead of the TM who logged in after him. Hon'ble SAT also observed that the TM who logs in first may get a probabilistic advantage of receiving the data first ahead of other TM who logged in later on that particular Port.
- Hon'ble SAT did not agree with the finding in the 2019 SEBI Order that a TM who logged in first to the sender Port of a POP receiver, which was first on a trading day, would get the disseminated data first. This was held to be incorrect as even if a TM is connected first to a Port, it is not necessary that he would receive the data first. A TM who logs in later on another Port may receive the data first before the TM who logged in first on Port 1.

- Hon'ble SAT did not agree with the finding in the 2019 SEBI Order that the absence of randomizer created an inherited advantage in receiving TBT data who connected first and held that there was no requirement of having an additional randomizer for further randomness of dissemination of data.
- Hon'ble SAT observed that the absence of load balancer appeared to have created an advantage to certain TMs due to manual intervention and due to failure to implement the load balancer, NSE had failed to ensure fair, transparent and equal access to its TMs. Hon'ble SAT also observed that there was nothing on record to indicate what *bonafide* decision was taken by NSE for not implementing the load balancer when it was aware of the practical difficulties in manually allocating the IPs and shifting the IPs from one Port to another Port and a load balancer was suggested to it. The allocation of IPs and its shifting from one server to another server was not done as per the decision taken by NSE. There were overcrowding of IPs on one server as compared to other server. There was unequal distribution of IPs on the same server and there was no laid down SOP for allocation of IPs to a TM. It further observed that NSE should have implemented a load balancer which would have distributed the IPs equally across all servers and norms of fair access would not have been breached.

12.3. On the issue of access to the secondary server and the mechanism in NSE to monitor the secondary server, the WTM held followings in the 2019 NSE SEBI Order:

- The secondary server was less loaded in terms of IP connections, primarily due to the fact that TMs were expected to access only primary servers in compliance with NSE's colocation guidelines. In the absence of a strict monitoring system and punitive mechanism, the non-compliant and recalcitrant TMs who routinely connected to the secondary server, were able to harvest the benefits of early access to TBT feeds.
- NSE did not have defined policies and procedures around the secondary server access, except for those mentioned in the 'NSE Colocation Guidelines'. Also, NSE did not have a documented policy or procedure around

reprimanding TMs connecting to the secondary server. In the absence of defined policy and procedures, the monitoring of connections by TMs to the secondary server was assigned to the level of junior staff in the exchange and not supervised by any higher ups, paving the way for misuse of the secondary server with impunity.

- EY's stimulation test was accepted which observed that 95-96% in CM segment and 80-85% in CD segment of all batches were disseminated to members connected first to Port of the secondary server and thereby certain advantages were made by these TMs.

12.4. On the issue of access to the secondary server and the mechanism in NSE to monitor the secondary server, Hon'ble SAT while agreeing with the findings in the 2019 SEBI NSE Order, held the followings:

- NSE as a regulator did not place any mechanism to check unauthorized access to the secondary server by various TMs. Though there was no difference between the secondary server and primary servers, the secondary server was only to be used in the event of an emergency upon failure of a primary server. Information was disseminated from the PDC Center to the POP 1 Receiver, POP 2 Receiver, POP 3 Receiver and POP 4 Receiver. POP 4 Receiver was the secondary sever. Each POP receiver had three Ports and the secondary server also had three Ports. All TMs were required to login in the three primary servers and not in the secondary server. Certain mechanism was placed by NSE for balancing the load on the three Ports but no mechanism of balancing the load was placed in the secondary server.
- Any TM who logged in through the secondary server had an added advantage as there was no mechanism to monitor the load factor and since there was less load on the secondary server, it became advantageous to access the data faster ahead of other TMs.
- After knowing the misuse of the secondary server by various TMs, NSE should have set up a monitoring system immediately and ensured that no TMs accessed the secondary server without permission. There was no plausible explanation as to why during this period only some of the TMs were

reprimanded and others who had also logged in to the secondary server were not reprimanded. Thus, it concluded that certain TMs were given preferential treatment and no warning letters were issued to them.

- The secondary server was less loaded in terms of IP connection primarily due to the fact that TMs were expected to access the primary server in compliance with NSE Colocation guidelines and only in case of issue with the primary server they could connect to the secondary server. In the absence of any mechanism for monitoring, TMs who connected themselves to the secondary server were able to harvest the benefit of early access to the TBT feed in comparison to the other TMs who were not connected to the secondary server.
- NSE did not have any defined policy and procedure regarding access to the secondary server except those which were mentioned in NSE guidelines which were basic and inadequate. Further, there was no documented policy or procedure regarding monitoring of unauthorized access by TMs on the secondary server which resulted in the misuse of the secondary server with impunity by some of the TMs.

12.5. On the issue of the liability of NSE under the PFUTP Regulations and the SECC Regulations, the WTM held the following in the 2019 SEBI NSE Order:

- The allegations levelled in the SCN, pertained to violations that were arising by flouting the principles underlying the conduct of business of a stock exchange, pertaining to fair and equitable access to information. Alleging "fraud" against the Exchange, in this scenario, tantamounted to attributing "intention" or "knowledge". In the absence of facts pointing towards the collusion of employees with the TMs or proof of specific discrimination towards any specific TM or the accrual of monetary benefits/ unjust enrichment to any employee or TM, etc., it was found to be difficult to conclude that there was a violation of the provisions of PFUTP Regulations, involved in the matter.
- Failure to have '*randomizer*' or '*load balancer*' in the TCP IP dissemination protocol, could not *per se* be categorised as breach of the principle of "fairness and equity" as an act attracting the provisions of the PFUTP Regulations. Dissemination of information which was in breach of the stipulations contained

in the SECC Regulations could not automatically attract the rigors of the SEBI (PFUTP) Regulations,2003, without there being any proof to indicate fraud. In the absence of any evidence leading to the culpability of any specific employee of NSE or the collusion or connivance from the side of NSE with any specific TM, it was held that there was no possibility of existence of a "fraud".

- The exchange had failed to comply with the provisions of SECC Regulations in letter and spirit, which had given scope to the complaints in question. Stock exchange, as a first level regulator, had a fiduciary duty to the entire ecosystem. Market participants' confidence in the trading system was based on the presumption that the rules of trading were completely uniform and transparent.
- Omissions/commissions on the side of NSE, as brought out above, were in violation of sub-regulation (2) of regulations 41 and sub-regulation (2) of regulation 42 of SECC Regulations, read with sub clause (i) of Clause 4 of SEBI circular CIR/MRD/DP/09/2012 dated March 30, 2012.

12.6. On the issue of the liability of NSE under the PFUTP Regulations and SECC Regulations, Hon'ble SAT agreed with some of the conclusion in the 2019 SEBI NSE Order while disagreeing with others. Hon'ble SAT held followings in the 2023 SAT Order:

- While coming to conclusion of violation of sub-regulation (2) of regulations 41 of the SECC Regulations, the WTM had taken into consideration the circular of 13th May 2015 which had nothing to do with the present controversy in as much as the alleged violation was for the period 2010 to April 2014 as during this period NSE had used the TBT architecture for dissemination of data before introducing MTBT system.
- The finding of the WTM was that NSE had not violated any provisions of the PFUTP Regulations and had not committed fraud. The WTM observed that the charge levelled under regulations 3 and 4 of the PFUTP Regulations were not only vague but were unsubstantiated. None of the ingredients as provided under clause (c) of sub-regulation (1) of regulation 2 and sub-clause (9) of clause (c) of sub-regulation (1) of regulation 2 of the PFUTP Regulations

applied to NSE. There was no "knowing misrepresentation", "active concealment", "false promise", "representation made in a reckless and careless manner", "fraudulent act or omission", "deceptive behavior", "false statement" etc. which were all ingredients of fraud and, therefore clauses (a), (b), (c) & (d) of regulation 3 of the PFUTP Regulations were not attracted. The WTM, on the aforesaid basis**, rightly** came to the conclusion that no case of fraud or inducement was made out against NSE under regulations 3 and 4 of the PFUTP Regulations.

- The allocation of IP was to be distributed equitably by NSE team. This was a human intervention and had nothing to do with the TBT architecture. There was no requirement of a randomizer to be installed as there was randomness in the dissemination of the data. Similarly, installing a load balancer was an additional hardware/software to be installed in the architecture for better distribution of the IP allocation but the same had nothing to do with dissemination of the data by the TBT architecture. Failure to monitor frequent connection to the secondary server was a human failure and had nothing to do with the functioning of the dissemination of the data by the TBT architecture.
- The finding of the WTM that because of inequitable distribution in the allocation of IPs, absence of load balancer and non-inclusion of randomizer and failure to monitor frequent connection to the secondary server, the system did not ensure a level playing field for TMs subscribing to the TBT data feed of NSE and, consequently, NSE failed to provide equal, unrestricted and fair access, was held to be wholly erroneous.
- There was no violation of sub-regulation (2) of regulation 41 of SECC Regulations. Sub-regulation (2) of regulation 41 of the SECC Regulation could not be invoked for placing the TBT architecture which had already been placed in 2010. Provisions which came later is prospective in nature and could not have retrospective application. Sub-regulation (2) of regulation 42 relates to maintenance of books of accounts and records by the recognized clearing corporation and had nothing to do in sofar as NSE was concerned. Hence, the finding of the WTM that NSE had violated sub-regulation (2) of regulation 42 was held to be patently erroneous.

- However, the circular of 30th March 2012 was held to be applicable which stipulated that the stock exchange while promoting algorithm trading would ensure that all arrangements, procedures and system capability to manage the load on their systems in such a manner so as to achieve consistent response time to all stock brokers and should continuously study the performance of its systems and, if necessary, undertake system upgradation. In the instant case, there was inequitable distribution of IP connections which resulted in unequal load on various Ports. NSE should have provided load balancer to equalize the load on each server. There was no laid down policy or SOP was made to monitor frequent connection to the secondary server and thus there was a violation of the circular of 2012.

12.7. On the issue of liability of employees of NSE under the PFUTP Regulations, and SECC Regulations, the WTM held followings in the 2019 SEBI NSE Order:

- Since the allegation of fraudulent and unfair trade practices levelled against NSE stood disproved, the same could no longer stand against the employees.
- With respect to Mr. Ravi Narain and Ms. Chitra Ramkrishna, it was found that they held the position of MD and CEO of NSE in succession, during the relevant point of time. Having held the senior most management position in NSE and being in charge of the affairs of the conduct of the stock exchange business, they could not limit their roles to the non-technology issues of the exchange. The MD and CEO of a stock exchange could not abdicate his/ her responsibility by citing limited knowledge in certain spheres of the business activities. Undisputedly, they were vested with the general and overall responsibility of ensuring the implementation of the principle of equal, fair and transparent access, as mandated under regulation 41 of the SECC Regulations. While implementing TBT dissemination architecture at NSE, the essence of "*Fair and Equitable access*" was not attempted to be imbibed into the various stages of implementation of the technology and only "safety and reliability" was taken into account. While a stock exchange with a commercial focus could introduce technological innovations for enhancing the overall efficiency of the platform, it ought to have also reinforced the mandates laid

down in the law, with respect to equal and fair access to TMs, in the interests of the market participants and investors in the market. Mr. Ravi Narain and Ms. Chitra Ramkrishna having officiated as the Managing Directors of the Exchange during the relevant time, were held to be liable for breaches of provisions of the SECC Regulations However, no fraud was found against Mr. Ravi Narain and Ms. Chitra Ramkrishna nor were they held to be facilitating any manipulation done by OPG.

- With respect to Mr. Mahesh Soparkar and Mr. Deviprasad Singh, it was held to be the responsibility of the PSM team to inform the Colo team, which would escalate the issue further. Therefore, Mr. Mahesh Soparkar (Head of PSM team during 2009-13) and Mr. Deviprasad Singh (Head of PSM team during 2013-16) being the Head of PSM Team at NSE, were held to be responsible for monitoring unauthorized connections to the secondary server and following up with Colo team to ask evading members to stop connecting to this server. Both Mr. Mahesh Soparkar and Mr. Deviprasad Singh, were held to be guilty of failing to discharge their duties as PSM team Heads, by monitoring the access to the secondary server by TMs from time to time and administering uniform standards of discipline against various TMs. NSE was mandated to fix accountability on the employees, as deemed fit and appropriate.
- All other employees were exonerated by the WTM.

12.8. On the other miscellaneous issues, the WTM held followings in the 2019 NSE SEBI Order:

- The 2017 SCN had *inter alia* alleged that NSE had weak or inadequate electronic record retention policy. While evaluating the systems and procedures of NSE, it was found that there was no policy with respect to maintenance of records. Therefore, the allegations in the SCN to the effect that there was no Standard Operating Procedures (SoP) for IP allocation to TMs, dealing with the TM - requests for reassignment of different servers, etc. was confirmed. Likewise, the records of log-in or running of Epsilon script were not held to be maintained. Though some of the electronic data could have been voluminous in nature, it was held that NSE ought to have put in place a

documented policy, after identifying the crucial data that would be required to be stored for purposes of review of any conduct issues from the side of TMs or employees or for other investigations, etc.

- On the issue of cooperation by NSE and its officials, there was nothing noted by the WTM which apparently suggested deliberate attempt to misled the inspection or investigation.

12.9. Accordingly, the WTM passed various directions against NSE, Ravi Narain and Chitra Ramakrishna, in the 2019 SEBI NSE Order. These directions were not upheld by Hon'ble SAT. Hon'ble SAT adjudicated on various WTM directions as under:

- For the lack of human intervention in failing to monitor frequent connection to the secondary server by certain TMs, equitable direction under Sections 11 and 11B could be issued, but there was no occasion to issue a direction for disgorgement. The direction for disgorgement was patently erroneous since there was no unethical act/acts on the part of NSE. NSE had not indulged in any unethical act nor had unjustly enriched itself as a result of any wrongful act. The direction to disgorge must be in relation to any transaction or activity which was in contravention of the provisions of the SEBI Act or its Regulations. The direction to disgorge could be issued when it was found that the person had made profit through illegal or unethical acts and was not necessary that in each and every case a direction to disgorge should be passed merely because some provisions of the Act or Regulations had not been adhered to. In the instant case, the lack of due diligence was not on account of any violation of any provisions of the Act or the Regulations or circulars but was on account of human failure to comply with the circulars completely in letter and spirit.
- The WTM had exonerated NSE of the charge of violation of the PFUTP Regulations holding that no fraud was committed by NSE or its employees. Therefore, the activity of NSE was not in contravention of any provisions of the SEBI Act or the Regulations or circulars made therein and it was only a case of non-adherence of a circular to some extent. Hon'ble SAT noted that the SCR Act was framed with the object of preventing undesirable transactions in securities. The Act required all contracts in securities to be dealt only on a

recognized stock exchange. A larger responsibility was placed on the stock exchange to ensure that undesirable transactions did not take place. Hon'ble SAT noted that in the instant case, the information disseminated from the TBT architecture was accessible to everyone through a transparent mode which was equal, unrestricted and gave fair access. The lapse on the part of NSE in not ensuring equitable distribution of IPs could only invite a penalty or a direction under Section 11 and 11B but under no circumstances a direction in the nature of disgorgement could be passed on the facts and circumstance of the present case. Hence, the direction to disgorge an amount was held to be totally unwarranted.

- It was also observed that there was no finding to the fact that Mr. Ravi Narain or Ms. Chitra Ramkrishna had made profit or wrongful gain which was a prerequisite for issuance of a direction under Sections 11 and 11B for disgorgement. Accrodingly, Hon'ble SAT held that in the absence of any finding of wrongful gain being made by Mr. Ravi Narain and Ms. Chitra Ramkrishna, no direction for disgorgement could be made especially when there was no finding of fraud, unfair trade practice or collusion with any TM.

13. The summary of issues determined by the WTM in the 2019 SEBI OPG Order and its adjudication by Hon'ble SAT on such issues in the 2023 SAT Order is as under:

13.1. On the issue whether OPG consistently logged in first across POP servers on account of being aware of the weakness of the TCP/IP TBT System architecture and thereby gained an advantage and whether OPG tried to crowd out other TMs from the TCP/IP TBT System platform, the WTM in the 2019 SEBI OPG Order held the followings:

- The first connect position might not remain static throughout the day and might get diffused and diluted due to the varying load factor in each Port. Hence, the allegation that OPG consistently logged in first to gain preferential access to TBT data feed through POP servers did not stand proved.
- With respect to crowding out, data disseminated was first sent to Port 1, Port 2 and then to Port 3 of the POP Server. OPG was allocated Port 1 on only one

primary POP server (TBTColo26) and the secondary POP server (TBTColo27), which indicated that it had gained a limited advantage of early login. The allegation contained in the SCN that assigning multiple IPs to OPG to single Ports by NSE allowed *'crowding out'* by the said TM had been arrived at after considering the analysis of 1st, 2nd, 3rd, 4th connect made by OPG on any Port of a POP server. Such 1st, 2nd, 3rd, 4th connect to the Ports other than Port 1 of the POP server, while possible as per login time, will nonetheless stand relatively on a lower rank vis–a–vis the array/dissemination sequence formed on that POP server since data dissemination occurs first to Port 1 of the POP server. Similar process of allocating multiple IPs of a TM on a single Port was also followed by NSE in respect of other TMs. In view of the aforementioned, it was held that there was no merit in the allegation of *'crowding out'* as made out in the SCN against OPG.

13.2. On the issue whether OPG consistently logged in first across POP servers on account of being aware of the weakness of the TCP/IP TBT System architecture and thereby gained an advantage, Hon'ble SAT agreed with the exoneration in the 2019 SEBI OPG Order. However, on the issue of whether OPG tried to crowd out other TMs from the TCP/IP TBT System platform, Hon'ble SAT did not agree with the finding in the 2019 SEBI OPG Order and observed that the WTM fell in error in exonerating the appellant on the Issue no.2. It further observed that the aspect which require reconsideration was about OPG having multiple IPs to single Ports and establishing 1st, 2nd, 3rd and even 4th connect to the POP servers as a result gaining unfair advantage over other TMs. Whether the tick was received by other TM after it was received by OPG causing loss of those few seconds which was advantageous to OPG and disadvantageous to other TMs was also an aspect directed to be reconsidered by Hon'ble SAT.

13.3. On the issue whether OPG gained an unfair access and advantage by consistently logging into the secondary POP server for large number of days, the WTM in the 2019 SEBI OPG Order held the followings:

- By repeatedly connecting to the secondary POP server almost on a daily basis without valid reasons and ignoring NSE's warning/advisories, for the purposes

of gaining an unfair advantage over the other TMs, OPG could be stated to have indulged in *'unfair trade practice'* in securities, which is prohibited under sub-regulation (1) of regulation 4 of the SEBI (PFUTP) Regulations, 2003. Further, the aforementioned recalcitrant conduct of OPG clearly indicated that the said TM failed to abide by standards of integrity, due skill, care and diligence in the conduct of its business and ensure compliance with statutory requirements. In light of the aforementioned, it was held that the profits which accrued to OPG on account of secondary POP server connections would qualify as unlawful.

- In the context of the allegation of unfair advantage gained by OPG through its secondary POP server connections, the show cause notice had alleged collusion/connivance of NSE and OPG. However, it was held that the same was not substantiated in the absence of specific sufficient evidence.

13.4. Hon'ble SAT confirmed the finding in the 2019 SEBI OPG Order with respect to OPG gaining an unfair access and advantage by consistently logging into the secondary POP server for large number of days by observing that OPG displayed complete disregard for the norms laid down by NSE in its circular/guidelines for moving to the secondary server. Such disregard for the norms and the manner in which OPG was connected to the secondary server amounted to an unfair trade practice which, Hon'ble SAT held it to be violative of sub-regulation (1) of regulation 4 of the SEBI (PFUTP) Regulations, 2003.

13.5. On the issue of allegation of collusion/connivance of NSE with OPG, Hon'ble SAT did not agree with the exoneration given in the 2019 SEBI OPG Order and directed to re-consider the charge of connivance and collusion of OPG and its Directors with any employee/officials of NSE.

E. *CONSIDERATION*

14. Having perused carefully the SCN, replies of *Noticees* and provisions of law alleged to have been violated, I find that submissions can be broadly categorised into two. One containing preliminary issues and second on merit stating that no case is made out to

hold them guilty of the contraventions alleged in the SCN. Therefore, before proceeding further to examine the matter on merit, the preliminary issues are dealt with at the initial stage itself.

E.1 PRELIMINARY ISSUES

E.1.1. Whether Principles of Natural Justice with respect to the inspection of documents, cross examination and personal hearing have been followed?

15. Subsequent to the issuance of the SCN, *Noticees* Nos. 1 to 8 sought inspection of various documents and cross-examination of witnesses. It is observed that all *Noticees*, except *Noticees* Nos. 3 and 4, vide various letters, requested inspection of records/ documents referred to and relied upon in the SCN. The inspection was granted by SEBI to said *Noticees* and the same was availed by them on the dates mentioned at Table No. 2. I note that the opportunity of inspection was neither sought nor availed by *Noticees* Nos. 3 and 4. Further, adequate opportunity of personal hearing was granted to all *Noticees* and sufficient time was provided to file written submissions, which have been filed by all of them. There has been no objection by any of *Noticees (*during hearing or in the written submission) that there has been violation of principle of natural justice. Thus, it is held that there is no violation of principle of natural justice while conducting this proceeding.

E.1.2. Whether the principle of *Res Judicata* apply on the present SCN?

16. I note that *Noticees*, in their replies, *inter alia*, have submitted that the present SCN was barred by *res judicata* and continuation of the proceeding amounts to *double jeopardy.* It has been pleaded that the evidence pertaining to the matter was scrutinized by authorities and a final finding was given in favour of *Noticees*. In this regard, some of the *Noticees* have referred to the judgements passed in the matter of *Hope Plantations Ltd. vs. Taluk Land Board Peermade & Anr* (1999) 5 SCC 590; *Sulochana Amma vs Narayanan Nair* 1994 SCC (2) 14; *Nirmal N. Kotecha v. SEBI* 2021 SCC On Line SAT 1613; *S. K. Chowdhary v. SEBI* (SAT order dated April 12, 2023) to contend that issues raised in the present proceedings is hit by the principles of '*Estopple'* and '*res judicata'*.

17. The issue of *res judicata* has come up for consideration in several matters, wherein it was considered as to what amounts to *res judicata* and in which case the principle of *res judicata* is applicable. In this regard, Hon'ble Supreme Court, in the matter of ***The Jamia Masjid vs. Sri K V Rudrappa (Since dead) by Lrs. & Ors.***[2] (judgement dated September 23, 2021), observed that in order to attract the principle of *res judicata*, the following ingredients must be fulfilled:

(i) The matter must have been directly and substantially in issue in the former suit;

(ii) The matter must be heard and finally decided by the Court in the former suit;

(iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and

(iv) The Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

18. Having gone through the above postulates of *res judicata* and submissions advanced by *Noticees* assailing the initiation and continuation of the instant proceeding contending that the same was barred and prohibited by the principle of *res judicata*, I find that judicial decisions relied upon by *Noticees* are factually distinguishable and not applicable squarely to the instant proceeding. There is no dispute that certain issues viz; crowding out and connivance/ collusion were decided in favour of *Noticees* in the earlier proceeding and continuation of the same would be barred in normal circumstances. However, in the extant matter, I note that Hon'ble SAT, vide its order dated January 23, 2023, has remanded findings on those issues back to SEBI for re-adjudication. Accordingly, SEBI has issued the fresh SCN dated May 17, 2023 to *Noticees Nos*. 1 to 8, in compliance with Hon'ble SAT Order. I note that one of the ingredients to attract the principle of *res judicata* is that the issue in the matter must be heard and **finally** decided by the Court in the former suit, has not been fulfilled as the findings having been set aside/remanded by Hon'ble Tribunal. Hence, they cannot not be said to be "finally decided".

19. Once, a finding is set aside/remanded by any court/tribunal having competent jurisdiction, this authority is under obligation to examine the matter afresh. In the instant matter, Hon'ble SAT has remanded the matter with respect to a few issues and they are

[2] [2021 sec Online SC 792]

required to be re-adjudicated by this authority. The previous findings in the 2019 SEBI NSE Order or 2019 SEBI OPG Order, to the extent of remand, have become non-est. In this regard, attention is drawn to the findings of the Hon'ble Tribunal made in the matter of ***Gurbaksh Singh vs. SEBI and Others (order dated March 28, 2022),*** wherein while relying on the law laid down by Hon'ble Supreme Court, Hon'ble SAT has held as under:

> "*Once an order of the WTM is set aside by this Tribunal the said order is no longer in existence and cannot be utilized in any manner…..Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed as held in Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Assn. (1992) 3 SCC 1."*

20. Therefore, the instant proceeding is not the institution of a fresh proceedings but continuation of the previous proceeding in pursuance of the order of Hon'ble SAT. Considering the same, I do not find any merit in the objections of the *Noticees* that the instant proceeding can't be initiated and hit by the principle of *res judicata* and *double jeopardy.*

E.1.3. Whether NSE could be party to this proceeding?

21. It has also been contended by NSE that issuance of the SCN in pursuance of the 2023 SAT Order was an abuse of the process. It has been contended that Hon'ble Tribunal, while remanding the issue of connivance/ collusion, had remanded only against the officials/employees of NSE and not against NSE, the Stock Exchange. I have gone through the record and perused the order of Hon'ble Tribunal. The contention of NSE (*Noticee* No. 1) appears to be not tenable. It is observed that in the 2019 SEBI NSE Order, a specific allegation of connivance/ collusion has been made against NSE and its officials/employees, which for the reasons recoded in the said Order was dropped. Since, identical allegation was also made against the stock broker OPG, Hon'ble Tribunal while disposing of appeals has categorically set aside the findings and remanded the matter of connivance/ collusion for re-adjudication. Relying on earlier cited decision of Hon'ble SAT in the case of ***Gurbaksh Singh vs SEBI*** *(supra, para 19 of this order)*; after set aside/remand the original position of earlier SCN is resorted on that issue. It is further observed that *Noticees* Nos. 2 to 8 have been issued show cause notice in their capacity

of holding different position in NSE during the relevant period and it is the act or omission on their part (*Noticees* Nos. 2 to 8) that has been attributed as act or omission on the part of the *Noticee* No.1.

22. It is a trite law that a company is a separate juristic entity but having no independent eyes and mind. It has no separate mind to think and no separate hand to execute. It performs all its function through its employees/officers and therefore, for the act or omission on the part of its employees/officials, the company can be held liable and therefore, it is not right to contend that the issue remanded is not applicable to NSE. In support of the above findings, I further rely upon the law held by Hon'ble Supreme Court in the matter ***N. Narayanan vs Adjudicating Officer, SEBI (2013) 12, SCC, 152*** holding that "A company though a legal entity cannot act by itself, it can act only through its directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence."

23. I further rely on the principle laid down by Hon'ble Supreme Court in ***Sunil Bharati Mittal Vs. CBI (2015) 4 SCC 609*** wherein Hon'ble Court while amswered to the question whether doctrine of *alter ego* can be applied to hold directors/officials liable for criminal prosecution for the acts of the company. The Hon'ble Court has held that in normal circumstance, the doctrine of *alter ego* can be applied to hold the company liable for the acts of its directors, however, the same is not applicable vice versa. Thus, if the charge of connivance/collusion against the employees of NSE, in their capacity as employees, is established, it would also make NSE liable for action for such violation. Hence, it is held that the SCN has correctly been issued to NSE.

E.1.4. Whether the fact of appeal filed by SEBI in Hon'ble SC against 2023 SAT Order would prevent continuation of this proceeding?

24. I note that *Noticees* Nos. 2, 5, 7 and 8, in their replies, *inter alia,* have contended that SEBI had filed an appeal before Hon'ble Supreme Court against the 2023 SAT Order and the same was pending. It has also been contended that since the matter was *sub-judice*, initiation of the present proceedings lacked justification. The contentions of *Noticees* have been carefully considered. It is reiterated that the scope of the present proceedings is

limited to the issue of "collusion/connivance" of NSE through its officials with OPG and its directors. In this regard, it is pertinent to note that the issue of this remand does not form part of the question of law arising out of the impugned 2023 SAT Order that has been agitated before Hon'ble Supreme Court by SEBI. Further, it is seen that Civil Appeal No. 1961/ 2023 titled as *Om Prakash Gupta & Ors vs. SEBI*, was filed by OPG and Ors. before Hon'ble Supreme Court against the 2023 SAT Order. The said Civil Appeal of OPG and Ors. was tagged with Civil Appeal No. 1692-1694/2023 titled as SEBI vs. NSE, which was filed by SEBI against the 2023 SAT Order. In the aforesaid Civil Appeal filed by OPG and Ors., which came up for hearing on April 05, 2023, Hon'ble Supreme Court, vide its order dated April 05, 2023, while declining to grant stay has categorically held that

> "*We clarify that the issue of notice would not come in the way of the proceedings on the direction of remand issued by the appellate tribunal.*"

I note that the direction of remand issued by Hon'ble Tribunal also includes the issue of connivance/ collusion of OPG and its Directors with employee/ officials of NSE. As Hon'ble Supreme Court has allowed the proceeding to continue on the remand issues, I do not find any merit in the said submission of the *Noticees* that approaching the Hon'ble Supreme Court would prevent the continuation of the instant proceeding.

E.1.5. Whether the SCN is contrary to the remand order as certain *Noticees* were exonerated in the 2019 SEBI NSE Order and not a party before Hon'ble Tribunal?

25. I note that *Noticees* Nos. 4 to 8 have raised contention that issues remanded by Hon'ble Tribunal were not applicable on them as they were not a party before Hon'ble Tribunal for the reason of having exonerated in the 2019 SEBI NSE Order. In this regard, I note that at paragraph 226 of the 2023 SAT Order, the Hon'ble Tribunal while making its observation on the charge of disregarding the norms of NSE and failure on the part of NSE to prevent OPG from accessing the securities market through the secondary server have noted that there is no finding or discussion relating to any connivance of OPG and its directors with any employee/officials of NSE. Further, at para 259 of the said order it has observed that there was laxity at the hands of the employees of NSE in the distribution of IPs which resulted in unequal distribution of IPs on the servers. Finally, at sub para (h)

of para 267 of the said Order, Hon'ble Tribunal has categorically directed to consider the charge of connivance and collusion of OPG and its directors with any employee/officials of NSE. Thus it is evident that the role of employees/officials were clearly directed to be reconsidered on the issue of collusion/ connivance. This proceeding is as a result of and in consequence of the directions contained in the said 2023 SAT Order. Hon'ble SAT is legally empowered to issue directions on any issue before it and such directions may affect the rights of persons who are not in appeal before it. It may also be noted that the powers of Hon'ble SAT are unique in the sense that unlike some other tribunals, Hon'ble SAT, under Rule 21[3] of the Securities Appellate Tribunal (Procedure) Rule, 2000, has power to give directions as may be necessary to secure the ends of justice. In any event, against any grievance arising out of an order passed by Hon'ble Tribunal, remedy lies only before the Hon'ble Supreme Court of India Thus, there is no substance in the pleading that just because some of the *Noticees* were not party to proceedings before Hon'ble SAT, they could not be impleaded in this proceeding as a result of the direction of Hon'ble SAT in an order.

E.1.6. Whether the SCN contains materials extraneous to the issues for which the matter has been remanded?

26. It has been submitted on behalf of *Noticees* that even though the SCN was required to be limited to the issue of considering any connivance or collusion of OPG and its directors with employees/officials of NSE, the SCN issued by SEBI included within it, various paragraphs pertaining to the TCP/IP TBT architecture, allegations relating to which were already disposed of by SEBI itself in the 2019 SEBI NSE Order and the Adjudication Order dated February 10, 2021 which was a separate proceeding in relation to the same subject matter. In this respect, on careful perusal of the SCN, it is observed that abovementioned facts have been stated to give a perspective to the allegations of connivance/collusion. It is further noticed that the SCN in respect of connivance/ collusion pertaining to assigning of multiple TBT IPs to OPG to single Ports of certain POP servers noted that it enabled OPG to consistently be 1st, 2nd, 3rd and even 4th connection to the POP servers thereby it tried to crowd out other TMs from the TBT platform (para 85 of

[3] 21. **Orders and directions in certain cases:** The Appellate Tribunal may make, such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

the SCN). Similarly, the connivance/ collusion of employees/officials of NSE with OPG and its directors in not preventing OPG from continuous connection to the secondary server has been alleged in para 117 and 118 of SCN. Further, para 126 to 140 summarise the above two allegations, attributing further role of each of the *Noticees* for the said two alleged violations. In view of the above, there is no merit in the above contentions of *Noticees*. In any event, I am cognisant of the order of Hon'ble SAT dated January 23, 2023 whereby certain issues have been remanded for re-adjudication and will confine my adjudication to only those issues. Hence, this objection is also disposed of as without merit.

E.1.7. Whether all TMs have been treated with parity?

27. *It has* also been argued that the charge of allegation was confined to OPG only and no such allegation pertaining to collusion had been attributed to other TMs availing Colo Facility. In this regard, I note from the material available on record that other TMs are not a party before me, hence, I am not aware of the status of their cases. As regards the submission of either exoneration of other TMs from certain charges or not proceeding under the same provisions of law, I would like to remind myself that the purpose of the present proceeding is to only adjudge the allegations brought before me against *Noticees*. Non-impleading or not initiation qua other TMs, even if true, cannot be taken as a shelter to secure a suo moto exoneration from the allegations made in the present proceeding. It is once again reminded that the present is the proceeding initiated in due compliance of the order of Hon'ble Tribunal where possible action or no action against TMs cannot be taken as a defence.

28. Apart from the above, I further seek reliance on the findings made by Hon'ble SAT in the matter of **Systematix Shares & Stocks (India) Limited Vs. SEBI** (date of decision: April 23, 2012), wherein in response to the argument seeking parity with other persons who were not impleaded in that proceeding was agitated. Hon'ble SAT had while rejecting the argument advance held as:

> "…*It is true that the Board has taken action selectively against a few entities involved in the alleged wrong doing. According to the appellant the Board should have*

proceeded against all wrong doers and the action against the appellant and a few entities alone is also discriminatory. We cannot subscribe to this view since the Board has set its own benchmark in selecting cases for action and, in any case, the appellant cannot plead himself innocent or his trades as lawful."

In view of the aforesaid discussion, such an argument advanced by Noticees is devoid of any merit, hence is rejected.

E.2 EXAMINATION ON MERIT

29. After dealing with preliminary issues, I now proceed to discuss the issues on merit. The question for re-adjudication (as per the direction of Hon'ble SAT) before me is to examine if there is any connivance or collusion of OPG and its directors with any employee/officials of NSE.

30. While examining charge of collusion/connivance, it is necessary to note that as per the findings recorded in the orders of the WTM and affirmation of which by Hon'ble SAT, there is no advantage of logging in first to primary servers. The charge of "crowding out" was required to be re-adjudicated separately while adjudicating the proceeding *qua* OPG. In that proceeding of OPG (whose order is passed simultaneously by me today), after examining the matter holistically, it has been held that there is no unfair advantage on account of "crowding out". Under the circumstances, the charge of collusion/connivance is required to be examined only in the context of unfair advantage due to consistently logging in to the secondary server. In this context it is relevant to note that Hon'ble SAT has confirmed the findings of the WTM recoded under the 2019 SEBI OPG Order that OPG has gained an unfair access and advantage by consistently log in to the secondary server and has derived unlawful gains through such unfair practice.

31. Accordingly, at this stage, it has to be adjudicated whether this unlawful gain derived by OPG was on account of any collusion/connivance with *Noticees* or not?

E.2.1. Examination of Legal Issues.

32. To start with, it is required to examine violation of specific provision of securities laws/regulations that alleged collusion or connivance could lead to. The SCN has pointed out clauses (a), (b) and (c) of section 12A of the SEBI Act read with clauses (a), (b), (c) and (d) of regulation 3 as well as sub-regulation (1) of regulation 4 of the PFUTP Regulations.

33. Clauses (a), (b) and (c) of section12A of the SEBI Act read as under:

12A. No person shall directly or indirectly—

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

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

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

34. Relevant provisions of PFUTP Regulations read as under:-

The PFUTP Regulations

3. Prohibition of certain dealings in securities

(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 manipulative, fraudulent or an unfair trade practice in securities markets.

35. From the above reading it is clear that if it is established that there was collusion/connivance of OPG and its directors with *Noticees* in order to get access to the secondary server, it could turn out to be an act of "fraud" in connection with or related to dealing in securities. This, if proven, would be violative of the provision of section 12A of the SEBI Act read with clauses (a), (b), (c) and (d) of regulation 3 of PFUTP Regulations. Further such a determination would also make it a fraudulent practice, and in addition an unfair trade practice vis a vis other TMs, so as to attract the provisions of sub-regulation (1) of regulation 4 of the PFUTP Regulations.

36. I note that *Noticees*, *inter alia,* have submitted that the charge of alleged violation of the PFUTP regulations, had already been considered by Hon'ble SAT and that NSE and other *Noticees* had been exonerated from such allegations. The question arises that whether the earlier determination has effect on this proceeding and whether provisions of PFUTP Regulations can now be examined against *Noticees* once again? It is a fact that NSE and other *Noticees* have been exonerated from violation of PFUTP regulations in the previous proceeding before Hon'ble SAT. In the same 2023 SAT Order there is a clear finding that the act of OPG (i.e. repeatedly connecting to the secondary server almost on a daily basis without any valid reason and ignoring the warning and advice given by NSE for the purposes of gaining unfair advantage over other TMs) is an unfair trade practice which is prohibited under sub-regulation (1) of regulation 4 of the PFUTP Regulations. That order

has also directed this authority to reconsider the charge of connivance/ collusion of OPG and directors with *Noticees* on account of such unfair trade practice. Hence, the determination that is required to be made in this case is in addition to what has been considered and decided in the earlier proceeding. If in this proceeding (based on additional evidences or material or objective facts) it is established that there is connivance or collusion of OPG and its directors with *Noticees*, it could be examined afresh as to whether provisions of section 12A of the SEBI Act read with regulations 3 and 4 of PFUTP Regulations could still be attracted in the case of *Noticees*, notwithstanding what has already been determined in earlier proceeding. Any other interpretation would render the direction of Hon'ble SAT as *otiose*. Such an interpretation would be fatal to judicial process and therefore be not correct.

37. In the case of OPG it is already confirmed by Hon'ble SAT that there is violation of sub-regulation (1) of regulation 4 of the PFUTP Regulations. Direction issued under section 11B of the SEBI Act has also been confirmed (Except re-determination of disgorgement amount). If in this proceeding it is established (based on additional evidences or material or objective facts) that there is connivance or collusion of OPG and its directors with *Noticees*, it could be examined afresh as to whether provisions of section 12A of the SEBI Act read with regulations 3 and 4 of PFUTP Regulations could again be invoked qua OPG and its directors. If yes, that would lead to violation of same provision but on different count. Such multiple counts of the violation of the same provision of the law/regulations could result in another set of direction under section 11B of the SEBI Act *qua* OPG and its directors.

38. The term "collusion" or "connivance" is not defined in securities laws. The term "connivance" forms part of the definition of "fraud" as per clause (c) of sub-section (1) of section 2 of the PFUTP Regulations which is as follows-

> *"2(1)(c) "fraud" 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 to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—*

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent,

(7) deceptive behavior by a person depriving another of informed consent or full participation

(8) a false statement made without reasonable ground for believing it to be true.

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

And "fraudulent" shall be construed accordingly;"

39. It is noted that this definition of "fraud" is quite wide as it uses words "and shall also include". Thus, the definition is inclusive and as an inclusion it has nine clauses which make the definition broader than what we normally understand "fraud" under other laws. Infact, one of these nine clauses is clause (6) which states that

"(*6) any such act or omission as any other law specifically declares to be fraudulent."*

Hence, where an act or omission is fraud/fraudulent under any other law, then it is also fraud/ fraudulent under the PFUTP Regulations. Such clause is in addition to various other clauses which constitute "fraud". The above definition makes it clear that to make

an act as fraudulent act, there may not necessarily be a wrongful gain or avoidance of loss, as one of the essential ingredients. Further the act may not be carried out in deceitful manner. Hence, it can be inferred that what is not seen as a fraud in any other act/ law can still be seen as fraud under securities laws.

40. In this regard, reference is also made to the matter of ***SEBI Vs. Kanaiyalal Baldevbhai Patel & Ors*****. [(2017) 15 SCC 1]** wherein the Hon'ble Supreme Court has observed that

> "*the definition of fraud which is an inclusive definition and therefore has to be understood to be broad and expansive, contemplates even an action or omission, as may be committed, even without any deceit if such act or omission has the effect of inducing another person to deal in securities. Certainly the definition expands beyond what can be normally understood to be a fraudulent act or a conduct amounting to fraud."*

41. Thus, the definition includes even a mere expression or omission to act without having any intention to deceit or collude, if such act or omission or expression or concealment leads to inducement of another person to deal in securities irrespective of whether there is any wrongful gain or avoidance of loss in dealing with such securities. Thus, when we examine whether the act of OPG to log in to the secondary server regularly is a fraudulent act, we are not required under the law to examine whether it has resulted into any wrongful gain or avoidance of loss to OPG/NSE employees. Further whether the act of logging into the secondary server was carried out in a deceitful manner is also not required to be established. However, when we are required to examine whether a particular act is an act of collusion/connivance so as to make it a fraudulent act, we are still required to examine whether such an act falls within the definition of collusion/connivance. Since these terms are not defined in securities law/regulations, it is required to be seen how are they naturally defined/understood in common parlance.

42. In this respect, as per Black's Law Dictionary, "Collusion" is an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. The dictionary also refers to a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.

Similarly, the Law Lexicon – the Encyclopaedic Law Dictionary, define "collusion" as being synonymous with conspiracy. Thus, to call an act as act of collusion, there must be an agreement between two or more persons to defraud. Conspiracy is also an important ingredient of collusion.

43. To be classified as fraudulent activity under the SEBI Act or PFUTP Regulations, in general, there may not be a requirement to prove conspiracy. However, if we want to invoke the provisions relating to fraudulent activity on account of collusion, it would be necessary to establish conspiracy too. Further, it needs to be established that there is an agreement between two or more persons to defraud. For example, in this case Hon'ble SAT has already confirmed violation of PFUTP Regulations by OPG on account of unfair practice of logging on to the secondary server. For that there was no requirement to see whether this unfair activity was carried out by OPG in agreement with NSE or its employees. But if we wish to invoke PFUTP Regulations again on account of collusion, we need to prove that aspect as well.

44. As per Black's Law Dictionary, "Connivance" means the secret or indirect consent or permission of one person to the commission of an unlawful or criminal act by another. Similarly, the Law Lexicon – the Encyclopaedic Law Dictionary, defines "connivance" to mean voluntary blindness to some present act or conduct or an agreement or consent, directly or indirectly given that something unlawful shall be done by another. Thus, if we compare collusion and connivance, it is seen that there is no requirement of conspiracy for an act to become connivance. While this appears to be a major difference between the two, the other part (relating to direct or indirect agreement between two parties) appears to be more or less similar. From the above, where one party is doing unlawful activity and the other person has given secret or indirect consent to that activity by acting blind to carrying out of that activity, it would constitute connivance. Applying the above, in the context of the present case, connivance would be established if it is proved that NSE or its employees have given secret or indirect consent or permission to OPG to log on to the secondary server in an illegal manner.

45. After understanding the meaning of the two terms, “collusion” and “connivance”, it would be useful to examine what standard of proof is needed to come to a finding that a particular act is an act of collusion or connivance.

46. In this context it is important to note that the extant matter is a civil proceeding and standard of proof is preponderance of probability and not of beyond reasonable doubt. In this *regard*, reference is made to the case of ***SEBI v. Kishore Ajmera*** **(supra)**, wherein Hon’ble Supreme Court, while dealing with allegations that a TM breached the Code of Conduct and the PFUTP Regulations, laid down the following as the applicable standard for determining violation of securities laws (including PFUTP Regulations):

> *“26. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled.* ***While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. 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.***
>
> *……*
>
> *30. …**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**.” (Emphasis supplied)*

47. Further, reference is made to the matter of ***SEBI Vs. Kanaiyalal Baldevbhai Patel & Ors*****. (supra)**, wherein Hon’ble Supreme Court observed as under:

> *“14. To attract the rigor of Regulations 3 and 4 of the 2003 Regulations, mens rea is not an indispensable requirement and the correct test is one*

of preponderance of probabilities. Merely because the operation of the aforesaid two provisions of the 2003 Regulations invite penal consequences on the defaulters, proof beyond reasonable doubt as held by this Court in Securities and Exchange Board of India Vs. Kishore R. Ajmera (supra) is not an indispensable requirement. The inferential conclusion from the proved and admitted facts, so long the same are reasonable and can be legitimately arrived at on a consideration of the totality of the materials, would be permissible and legally justified."

48. Attention is also drawn to the matter of **Maya Gopinathan Vs. Anoop S.B. & Anr. [2024 INSC 334],** wherein Hon'ble Supreme Court observed that

"…20. Law is well-settled that inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. Since the mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole, there must be evidence - direct or circumstantial - to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial, from which to infer the other fact which it is sought to establish. In some cases, the other facts can be inferred, as much as is practical, as if they had been actually observed. In other cases, the inferences do not go beyond reasonable probability. If there are no positive proved facts - oral, documentary, or circumstantial - from which the inferences can be drawn, the method of inference would fail and what would remain is mere speculation or conjecture. Therefore, when drawing an inference of proof that a fact in dispute is held to be established, there must be some material facts or circumstances on record from which such an inference could be drawn. In civil cases including matrimonial disputes of a civil nature, the standard of proof is not proof beyond reasonable doubt 'but' the preponderance of probabilities tending to draw an inference that the fact must be more probable."

49. From the above judgements, it is clear that the normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by preponderance

of probability. Unlike criminal law, it is not necessary to look for hard evidence to establish violation in civil proceedings. The matter can be proceeded on the basis of preponderance of probability. However, the conclusion should not be based on conjectures or speculations and it should be based on reasonable inference from objective facts (direct or circumstantial). The inference would be what a normal prudent person faced with a similar situation would believe to be of having higher probability of existence of a proposition than its non-existence.

50. At the outset, it may be pointed out that there is no direct evidence in the SCN pointing or indicating that NSE or its employees were having any conspiracy or agreement with OPG/its directors, or indicating any secret or indirect consent or permission, to allow OPG to log on to the secondary server illegally/unlawfully. Thus, there is no direct evidence of any collusion/connivance between OPG or its directors with *Noticees* and therefore, the allegation is required to be tested on the basis of preponderance of probability based on evidence/material/objective facts on record. This test of preponderance of probability has to be applied on the charges made out in the SCN against *Noticees*. It needs to be seen whether based on analysis of all evidence/material/objective facts, an ordinary person under similar circumstances would conclude that there is high probability of collusion/ connivance.

51. The SCN contains charges based on which *Noticees* were required to show cause why direction should not be issued on account of collusion/connivance between OPG and its directors with *Noticees*. Replies have been filed by OPG and *Noticees*. These charges and replies have been realigned into a few important points whose examination would help us in arriving at the appropriate decision. These are examined in subsequent paragraphs.

E.2.2. ISB Report 2023.

52. One of the arguments advanced by *Noticees* is that there is nothing in the ISB report to point towards existence of collusion/ connivance.

52.1. I note that the ISB Report 2023, which was an additional document relied upon in the 2023 SCN, is not relevant to the charge of “collusion” “connivance” or “fraud”

since it does not give any finding regarding the same. The mandate of the ISB Report 2023 was to compute the profit unearned unlawfully. Further, from the terms of engagement finalized on July 07, 2021, it is noted that the issue of collusion/ connivance was not within the scope of the said Report. Hence, the said Report is not relevant to decide the extant issue.

E.2.3. <u>Introductory email.</u>

53. Defence is taken by NSE is that NSE would uniformly send a 'registration enablement mail' to all members who subscribed to the TBT service, which contained all the relevant operational details, including the connection details for the primary server and secondary server (and the IPs assigned to such member). As per NSE, it was expected that members would act in good faith and only connect to the Secondary Server when the primary server was down, and not otherwise. In my views the emails detailing when to connect to the secondary server and the expectation of TMs acting in good faith will not rule out the possibility of collusion/connivance. Hence, this defence is not relevant for considering the issue in hand.

E.2.4. <u>No action, no documented policy for connection to the secondary server.</u>

54. One of the charges made out in the SCN is that no action was taken by NSE, despite being aware that OPG was generally connecting to the secondary server (during the first half of the year 2012) without valid reasons and that there was no documented policy. It has also been alleged that not all TMs were warned. It is also alleged that the same could not have been possible without connivance.

54.1. It is a fact that OPG was connecting to the secondary server on a continuous basis despite the warnings/ advisories given by NSE in the first half of 2012. Details of these warnings issued by NSE to OPG over the period for its trades under different segments are as under:

Table No. 4

Date of Warning / Advisory	Segment for which advisory issued	Observation
10/02/2012	FO	OPG continued to connect

14/02/2012	FO	OPG continuously connected till February 29, 2012
21/02/2012	FO	OPG continuously connected till February 29, 2012
15/03/2012	FO	OPG continuously connected till March 30, 2012
04/05/2012	CM	OPG continuously connected till June 07, 2012
18/05/2012	FO & CM	OPG continuously connected till June 07, 2012
07/06/2012	CM	

54.2. It was reported by EY, in its report dated May 18, 2018, in Currency Derivatives and Interest Rate Futures Segment, that "*NSE performed limited monitoring of connections by members on secondary server in 2012 and reprimanded select members for making connections to secondary server*." Further, the said report recorded as under-

> "*Not all members who accessed secondary servers were reprimanded by NSE.*
>
> *21 members connected to secondary server at least once in the period 2 February 2012 (operationalization of secondary server) to 8 June 2012 (last day NSE sent out reprimanding emails for CD/IRF segment with respect to secondary server connections). Of these 21 members, there were 7 members who connected to secondary server on the four days when NSE sent reprimanding emails and all of them were warned at least once.*
>
> *There were 12 members who accessed NSE TCP/IP TBT secondary server post 8 June 2012 (i.e. the last day when NSE sent reprimanding emails in this segment) at least once. These 12 members were never reprimanded by NSE for their connections made to secondary server.*
>
> *Out of the total 33 members that accessed secondary server at least once (since operationalization of secondary server i.e. 2 February 2012 to 31 December 2015), NSE reprimanded only 7 members for their connections made to secondary server."*

54.3. Further, it was reported by EY, in its report dated May 18, 2018, in Cash Market, that "*NSE performed limited monitoring of connections by members on secondary*

server in 2012 and reprimanded select members for making connections to secondary server." Further, the said report recorded as under-

> *"Not all members who accessed secondary servers were reprimanded by NSE.*
>
> *53 members connected to secondary server at least once in the period 2 February 2012 (operationalization of secondary server) to 13 June 2012 (last day NSE sent out reprimanding emails for CM segment with respect to secondary server connections). Of these 53 members, there were 20 members who connected to secondary server on the five days when NSE sent reprimanding emails. Of these 20 members, 16 members were warned at least once and the balance 4 members were not warned.*
>
> *There were 14 members who accessed NSE TCP/IP TBT secondary server post 13 June 2012 (i.e. the last day when NSE sent reprimanding emails in this segment) at least once. These 14 members were never reprimanded by NSE for their connections made to secondary server.*
>
> *Out of the total 67 members that accessed secondary server at least once (since operationalization of secondary server i.e. 2 February 2012 to 31 December 2015), NSE reprimanded only 16 members for their connections made to secondary server."*

54.4. Similarly, Deloitte in Project Regler of July 2018 has recorded issuance of email dated February 10, 2012, February 21, 2012, March 15, 2012, May 18, 2018 and June 07, 2012 to OPG asking not to connect to the secondary server.

54.5. Thus, it is alleged that that selective warnings were given to certain TMs but not all TMs. Further, it is alleged that OPG was also allowed by NSE to connect to the secondary server and no action was taken against it. This is evident from the Project Borse Report, wherein Deloitte had noted that –

> *"We were given to understand that the secondary POP server was also an active server, and there was no system whereby the secondary POP server would start up only when the primary server failed, or to ensure that TMs*

connected to secondary POP servers only when the primary server failed or was down. By February 16, 2012, OPG Securities was still connected to the secondary POP servers despite the reminders there were multiple e–mails indicating that OPG Securities did not move off the fallback server even by the end of the month. We came across various e–mails from COLO Support to OPG Securities requesting them to move to the primary server, however OPG Securities kept stalling, requesting for another day and then stating that they were conducting some testing and needed to stay connected for a few additional days. It is pertinent to note that Jagdish Joshi, Avadhut Gharat and Mahesh Soparkar were all marked on these e–mails, however none of them intervened or requested the TM to move to the primary server. Bhavya separately escalated the issue to Jagdish Joshi at least twice, but we did not see a response from him in this regard. We observed another e–mail from Bhavya Gandhi to the Colo Support team with PSM IICS team, Avadhut, Jagdish, Balakrishnan, Swaminathan and Smrati Kaushik on copy on 15 March 2012 listing out TMs who were still connecting to fallback servers again, and reiterating that TMs are not supposed to connect to fallback servers unless intimated by the Exchange. He also stated "They need to justify why they are again connecting to fallback servers, since there is no problem with any of the primary servers and no intimation from Exchange regarding the same". He sent a follow up to this e–mail on the same date. OPG Securities was identified as repeat offender.

54.6. With respect to selective warnings given during the first half of 2012, NSE has submitted that they monitored the secondary server during this period since migration of TBT server to new data centre necessitated that the secondary server was free for any unforeseen event of primary server going down due to the migration. It was also submitted that the PSM team used to run a script to check and this would return the name of TMs connected to the secondary server. NSE further submitted that all the TMs whose names came on this list were warned. There would be some members who would not be connected to the secondary server at the time of running of script and hence their names did not come up in the list. Thus, it was explained that there was no malafide in selective warning.

54.7. With respect to not taking action against TMs who logged onto the secondary server, NSE has submitted that it did not resort to measures such as disconnecting the members who were connected to the secondary server because this could seriously disrupt the business of a member and cause large financial loss to individuals as well to the market, as the members might not be able to close out open positions.

54.8. In my view, the above discussion pertaining to the first half of 2012 in itself do not led to any definite finding on collusion or connivance. This is for the reason that there appears to be two possibilities. One possibility is that it could be a *bonafide* lapse on the part of NSE to not take action against OPG when it noted that OPG was logging on to the secondary server during the first half of the year 2012. This by itself does not prove the allegation of connivance (i.e. secret or indirect consent or permission to OPG). Further, when one also observes that there were other TMs also which were logging to the secondary server and some were warned (including OPG) while others were not, the probability of having collusion/connivance with OPG reduces. In this respect, from the facts and data pertaining to issuance of warning to TMs as narrated above, it is evident that OPG was issued warning 5 times for its connection to the secondary server in FO segment and 3 times for its connection in Cash segment. Further, since, there was no trade of OPG in the currency derivate segment, no warning was required to be issued to OPG in that segment. It is also seen that in the email dated February 10, 2012 sent by Universal Stock Brokers Private Limited to Colo_Support, it was mentioned that

> '*From our experience we have observed that main server (IP 24) is slower than the secondary server (IP 27) therefore we have been connecting to secondary server. Hope that you will keep on allowing us to connect to the secondary/primary server as per our need and wish*.'
>
> This mail indicate that Universal Stock Brokers Private Limited was also logging on to the secondary server during this time and the TM on its own informed NSE about it. This indicates the possibility of no collusion/connivance between Universal Stock Brokers Private Limited and NSE employees. With

this possibility in mind, the probability of collusion/connivance between OPG and *Noticees* for the same action of logging on to the secondary server, reduces.

54.9. Though analysis of other facts (which I shall do in following paragraphs) could increase probability of OPG having a secret or indirect consent or permission from *Noticees,* at this stage it would be too speculative to conclude collusion/connivance on the basis of non-action on the part of NSE in the first half of 2012.

E.2.5. <u>Continued connection of OPG to the secondary server for many years thereafter.</u>

55. Another charge levelled against NSE is that it continued to permit OPG to connect to the secondary server after June 2012, even after noticing and issuing warning in the first half of the year 2012.

55.1. It is observed in the SCN that even after warning/advisory by NSE, OPG still continued to login to the secondary server on subsequent days till 2015. The details of OPG logging to the secondary server are given below:

<u>Year wise analysis of secondary server connections of OPG in FO segment</u>

Table No. 5

Calendar Year	Trading days	No of days connected	Count of numbers of IPs connected	%of days connected to trading days
2012	251	79	163	31%
2013	250	248	523	99%
2014	244	233	585	95%
2015	248	94	132	38%

Year wise analysis of secondary server connections of OPG in CM segment

Table No. 6

Calendar Year	Trading days	No of days connected	Count of numbers of IPs connected	%of days connected to trading days
2012	252	25	39	10%
2013	250	1	1	0%
2014	244	128	348	52%
2015	248	0	0	0%

55.2. From the above, it is seen that even after the issuance of warnings in the first half of the year 2012, OPG continued to connect to the secondary server for a very long period of time. Infact in FY 2013 and FY 2014, it is noticed that OPG remained connected to the secondary server in FO segments for 99% and 95% of trading days. This percentage declined in 2015 possibly after the complaint made in this case in January 2015. While connection in CM segment is lower in comparison to FO segment, it is still quite high in the year 2014. It is only after the complaint of January 2015 that the email dated May 18, 2015 was apparently sent by Varun from NSE COLO data centre to Sanjay Gupta, Aman Kokrady and Vikas Goenka with Jagdish Joshi, Avadhut Gharat and Mahesh Soparkar in CC. The said email asked OPG to connect to the primary server and not to connect to the secondary server without intimation.

55.3. Further Project Borse Report of Deloitte has, *inter alia,* observed certain TMs including OPG as a "repeat offender" and has further observed as under –

> *"We observed an e–mail dated 8 August 2012, whereby OPG wrote to Jagdish Joshi requesting to connect to the secondary TBT server for a few days for some analysis. The COLO Support team provided a confirmation to the member on 10 August 2012 that the member was enabled on the*

secondary server for one week. This e–mail trail indicates that there was a period when NSE had implemented some controls whereby the member could not connect to the secondary server without being enabled on the server by the NSE team. However, this information was not provided to us by the NSE team."

55.4. Subsequent to this, there was no mentioning or warning and OPG continued to log in to the secondary server for considerably long period of time as discussed in the immediate preceding paragraphs.

55.5. The fact of taking no action against OPG for continuously logging in to the secondary server for such a long time does give rise to possibility of OPG or its directors having a secret or indirect consent or permission from NSE or its employees to log on to the secondary server. The fact of warning of 18th May 2015 being three years after the last warning (8 May 2012), and that too after the receipt of the complaint, indicates inaction by NSE for a very long time suggesting possibility of indirect consent or permission. Practically speaking, it is not difficult to find out who all are logging on to the secondary server. There are enough checks that are required in routine operation of monitoring servers that would indicate load on the secondary server. The probability is low that even after noticing such load on the secondary server for so long, the employees would just ignore it without there being any connivance. Thus, on the basis of preponderance of probability it can be said that a normal ordinary person would not allow such connection to the secondary server for such a long period even after noticing such violation in 2012. In such a scenario, possible inference drawn by an ordinary person would be of likely connivance between OPG/its directors with *Noticees*. However, this inference based on preponderance of probability is also required to be tested on other objective facts to see if the scale of preponderance of probability shifts on examination of those facts. This is being done in subsequent paragraphs.

E.2.6. <u>Many TMs were logging to the secondary server during this period</u>.

56. One of the defences taken by *Noticees* is that during the period 2010 to 2016, 93 TMs had connected to the secondary server, which defeated the allegation that there was any collusion of the *Noticee* with OPG (or other TMs).

56.1. The SCN refers to details provided by NSE, vide mail dated May 24, 2018, and observes that in the F&O segment, during the period 2010-16, altogether 93 TMs had connected to the secondary server, with 25 TMs having connection to the secondary server for more than 100 days. It is also stated in the SCN that OPG during this period had the highest number of connections, which were 670[4] days out of 1531 trading days.

56.2. From the above it is clear that there were 93 TMs who had logged on to the secondary server and OPG had highest connections during the period 2010-16.

56.3. The fact of so many other TMs also wrongly logging onto the secondary server, at the same time as OPG, does give rise to possibility that there is a case of negligence on the part of NSE instead of being a case of connivance. Although one can argue the possibility of *Noticees* giving indirect consent or permission to all those who are logging on to the secondary server, however when one sees that 93TMs had logged on to the secondary server during this period, the probability of *Noticees* being in connivance with 93 TMs reduces. At this stage, it can't be ignored that allegation under examination in the instant proceeding is related to collusion/connivance of *Noticees* with OPG and its directors. The undisputed data as mentioned above indicate that warning were issued to TMs including OPG. And even after warning, 93 TMs were logging onto the secondary server for a long period of time. This certainly reduces the probability of connivance with OPG.

56.4. A counter argument to above could be that *Noticees* have given indirect consent to only a few TMs who have logged on to the secondary server most of the times, while others who have logged on for lesser number of days have enjoyed the

[4] It may be noted that the no. of secondary days considered in the order of OPG is 631. The difference in the secondary days is due to the reason that Deloitte has considered secondary days as 670. However, in the case of OPG, the ISB Report, 2023 has been considered for the purpose of calculation of unlawful gains. The said ISB Report, 2023 has considered total secondary days as 631.

benefit without being in connivance with *Noticees*. In view of the possibility of this counter argument, the fact of 93 TMs logging to the secondary server during the time under examination reduces the probability of NSE or its employees being in connivance with OPG to some extent, but not to a very large extent.

E.2.7. <u>No direct/indirect evidence in spite of multiple reports.</u>

57. Another point raised by *Noticees* is that there was no evidence provided by Deloitte and EY to substantiate the charge of collusion/ connivance.

57.1. I note that *Noticees*, *inter alia,* have emphasized on the point that there was no evidence / conclusions by external experts to support a finding of 'collusion' 'connivance' or 'fraud'. In respect of this submission, the following material on record were referred to-

i. The CFT Report states that "… *Additionally, issues such as collaboration with exchange staff to receive information about dissemination start up times etc., require further detailed examination*."

ii. The SEBI External Committee Report states that "*Note that w.r.t. Objective a) it is outside the scope of this interim report to determine whether any NSE personnel were involved in helping OPG securities exploit the architecture. Similarly, for Objective b) it is the outside the scope to determine whether any NSE individuals were purposely facilitating any unauthorized activities*."

iii. The 2016 Deloitte Report examines the issue of collusion and records that "*While there are indications of differential behavior being shown towards few members by certain employees, we are not in a position to comment, on the basis of the review performed, on whether this would amount to collusion/ connivance or just preferential behavior. Also, in the course of our review, we have not seen indications of employee involvement other than those mentioned in our report*."

iv. The EY Report – Cash Market and the EY Report – Currency Derivative / IRF both state the, "*Based on our keyword-based review of emails of select*

employees (more than 20 current and former NSE employees) for […] segment, we did not observe relevant communications to members and / or internal NSE employees regarding start times of the dissemination servers, advice about logging at particular time, granting privileged access to secondary servers and performance of dissemination servers which could have indicated potential collusion."

v. The 2018 Deloitte Report states that its scope includes, *inter alia* "*To determine whether there was any collusion between Exchange employees, trading members and / or any other third parties with respect to preferential treatment related to TBT dissemination / non-empanelled services provider related issues and quantification of such gains, etc*.". However, the 2018 Deloitte Report makes no adverse findings or conclusions in this regard.

vi. The 2018 Investigation Report itself notes that *"… it is difficult to draw a causal relationship between Jagdish Joshi's resignation from NSE and the reduction in the number of first connects for OPG."* Further the 2018 Investigation Report has also noted that conclusions of EY and Deloitte that they did not come across any communications indicating that members were informed about early login or the start-up times of the dissemination servers. *Noticee*, submitted that no material has been adduced by SEBI to controvert these findings.

vii. After considering the treatment of other members as compared to OPG, SEBI in the 2018 Investigation Report concluded that "*From the above, considering the above responses and observations made by the auditors, it may not be possible to draw any specific adverse inference*…"

viii. Both the orders i.e. the SEBI NSE Order and the Order dated February 10, 2021 passed by the Adjudicating Officer with respect to two separate proceedings in the same matter, gave findings on absence of the "fraud" in the case of NSE while dealing with the issue of "collusion", "connivance" or "fraud".

ix. The new materials adduced to the SCN does not bring any additional evidence or fact which can strengthen the possibility of existence of any collusion or connivance between *Noticees* and OPG. Also, the 2023 Report of ISB does not concern itself with the scope of the remand.

57.2. I note that a communication dated December 05, 2023 was sent by SEBI to Deloitte (Author of the forensic Reports dated December 2016 and July 2018), enquiring "*whether there was any collusion between the Exchange employees, trading members and /or any other third parties with respect to preferential treatment related to TBT dissemination*". The above communication was sent as it was not clear from Project Regler Report what was the findings on the term of reference about whether there was any collusion between the Exchange employees, trading members and/or any other third parties with respect to preferential treatment related to TBT dissemination. In response to the said query, Deloitte, vide an email dated December 05, 2023, replied that it had reviewed the data and basis review of the abovementioned data sets, it did not identify any financial transactions or calls between employees of the exchange and trading members.

57.3. In view of the above facts and observations, it does become a strong possibility that there is no connivance/ collusion on the part of the *Noticees* with OPG and its Directors and that the charge of collusion/ connivance/fraud made out in the 2023 SCN lacks justification. Though, one can argue that if there is secret understanding it would not be documented, so as to be caught during audit exercise or other examination. Further, it can be argued that if there is monetary exchange it would not be through banking channels. To that extent all the studies/reports cited above have limitations. Nevertheless, if there is secret understanding or conversation or money exchange for a long period of time (as it could be a possibility based on allegation in the case here) it would get reflected in some documented communication directly or indirectly at some point of time. When so many external experts have examined email dumps, communication, records for a reasonably long period of time and still have not found a single piece which could directly or indirectly suggest collusion/connivance, an ordinary man would infer that the probability of collusion/connivance is quite less. Any other

inference would amount to speculation or conjecture which as per Hon'ble SC judgment in the case of *Maya Gopinathan Vs. Anoop S.B. & anr.[supra]* must be avoided. Thus, this factor reduces the probability of collusion or connivance to a great extent.

57.4. It is clarified that the above conclusion is drawn without relying on the email dated May 30, 2015 from 'aman.kokrady@acceletrade.com' to Nagendra Kumar from NSE having 'sanjay@opgsecurities.com' and 'vikas@opgsecurities.com' in CC, which states that "*Early Login – We have at certain times seen benefit by logging in early – need to understand if early login is indeed important*". One can argue that if OPG was in connivance with NSE or its officials, this email would not have been sent in 2015. However, no reliance is placed on this email since, it is noted that this email was issued after the first complaint dated January 08, 2015 was received from Mr. Ken Fong. So this could be a genuine email or could also be an afterthought to get over the allegation made by the complainant. Further, this email talks about early log in and not secondary server log in. As regard, advantage of early login, it has been already stated earlier that Hon'ble SAT has given a ruling confirming the finding in 2019 WTM NSE as well as 2019 WTM OPG Orders that there is no advantage of early log in to primary servers.

E.2.8. <u>No new evidence from the earlier show cause notice.</u>

58. *Noticees* have also contended that the issue of connivance/ collusion has already been examined by the WTM. Further, there is a finding by Hon'ble SAT agreeing with the findings of WTM that there is no case of invocation of PFUTP Regulation against *Noticees* indicating that there is no Fraud. There is no new evidence in the latest SCN which was not there in the earlier show cause notice.

58.1. I note that the Hon'ble SAT, in the 2023 SAT Order, has already recorded certain findings regarding the conduct of NSE in relation to TBT architecture and supervision. The relevant findings made in the 2023 SAT Order is reproduced below-

"120. We find it strange that NSE as a regulator did not place any mechanism to check unauthorized access to the secondary server by the TMs. The reason why we are saying this is that there is no difference between the secondary server and the three primary servers. As we have observed earlier, information is disseminated from the PDC Center to the POP 1 Receiver, POP 2 Receiver, POP 3 Receiver and POP 4 Receiver. POP 4 Receiver is the secondary sever. Each POP receiver has three Ports and the secondary server also has three Ports. All TMs were required to login in the three servers and not in the secondary server. Certain mechanism was placed by NSE for balancing the load on the three Ports but no mechanism of balancing the load was placed in the secondary server and the reason is not far to see, namely, that TMs were not allowed to access the data from the secondary server and that the secondary server was only to be used in the event of an emergency upon failure of the primary server.

121. It was, thus, found that any TMs who logged in through the secondary server had an added advantage as there was no mechanism to monitor the load factor and since there was less load on the secondary server it became advantageous to access the data faster ahead of other TMs.

122. The guidelines issued by NSE were clear that the secondary server could only be used by a TM for accessing data only in the event of failure of the primary server. A TM could only use the secondary server upon a prior intimation and permission given by NSE Colocation team.

123. Thus, it was imperative for NSE to have a defined policy for use of secondary server and a mechanism ought to have been placed for monitoring connection by TMs on the secondary server and reprimanding or taking penal action against such TMs who violated and used the secondary server to access the data. By not doing so NSE has failed to carry out its duties as the first regulator.

124. Further, we find that the secondary server was also an active server meaning thereby that data could be accessed at any moment of time if a TM is connected. Thus, in our opinion, a system ought to have been placed whereby the secondary server could only start when the primary server failed or a mechanism should have come into existence to ensure that members could connect to secondary server only when the primary server failed.

125. It was not sufficient for NSE to hold that the TM was made aware of the use of the secondary server through their welcome email which, in our opinion, was insufficient. We find that when the load on the three Ports were being monitored it became essential for NSE to ensure that no TM had access to the secondary server for accessing the data.

126. A plausible explanation has been given that the monitoring on the secondary server was made only for a limited period during the period of data center migration. We however find that when NSE came to know about the misuse of the secondary server by the TMs, it should have set up a monitoring system immediately and ensured that no TMs accessed the secondary server without permission. We also find that there is no plausible explanation as to why during this period only some of the TMs were reprimanded and others who had also logged in to the secondary server were not reprimanded. Thus, an irresistible conclusion can be drawn that certain TMs were given preferential treatment and no warning letters were issued to them.

127. We also observe that admittedly the secondary server was less loaded in terms of IP connection primarily due to the fact that TMs were expected to access only the primary server in compliance with NSE Colocation guidelines. In the absence of any mechanism for monitoring, TMs who connected themselves to the secondary server were able to harvest the benefit of early access to the TBT feed in comparison to the other TMs who were not connected to the secondary server.

128. In this regard, we find that the EY in its report has given details supported by evidence indicating certain TMs who continuously logged in to the secondary server for a considerable period of time and were also connected to the first, second and third Port of secondary server for majority of the trading days thus, getting information prior and faster to other TMs. In this regard, detailed discussion will be made in the latter part of the judgment.

129. In view of the aforesaid, we are of the opinion, that NSE did not have any defined policy and procedure regarding access to the secondary server except those which were mentioned in NSE guidelines which were basic and inadequate. Further, there was no documented policy or procedure regarding monitoring of unauthorized access by TMs on the secondary server which resulted in the misuse of the secondary server with impunity by some of the TMs."

58.2. The above reproduction from 2023 SAT Order clearly indicate that Hon'ble SAT was cognizant of all the facts which have formed the basis of allegations, in the SCN, of there being connivance/ collusion of *Noticees* with OPG/its directors. For example, it noted that that there was lack of supervision on the part of NSE, there was no defined policy or procedure regarding access to the secondary server, there was no mechanism to prevent unauthorized access to the secondary server and that OPG and other TMs were logging on to the secondary server continuously for a long period of time without there being any action against them.

58.3. After appreciation of all these facts, Hon'ble SAT upheld the determination by the WTM that NSE has not violated any provisions of the PFUTP Regulations and has not committed fraud as under:

"143. Admittedly, the WTM found that NSE has not violated any provisions of the PFUTP Regulations and has not committed fraud. In this regard, the WTM observed that the charge leveled under Regulations 3 and 4 of the PFUTP Regulations were not only vague but were unsubstantiated. None of the ingredients as provided under Regulation 2(c)(1) and 2(c)(9) of the PFUTP

Regulations applied to NSE. There was no "knowing misrepresentation", "active concealment", "false promise", "representation made in a reckless and careless manner", "fraudulent act or omission", "deceptive behavior", "false statement" etc. which are all ingredients of fraud and, therefore, Regulation 3(a), 3(b), 3(c) and 3(d) were not attracted. The WTM, on the aforesaid basis, ***rightly*** *came to the conclusion that no case of fraud or inducement was made out against NSE under Regulations 3 and 4 of the PFUTP Regulations."* (Emphasis supplied)

58.4. Infact based on these facts, Hon'ble SAT held that there is not even violation of sub-regulation (2) of regulation 41 of SECC Regulations as under:

"148. Thus, the finding of the WTM that because of inequitable distribution in the allocation of IPs, absence of load balancer and non-inclusion of randomizer and failure to monitor frequent connection to the secondary server did not ensure a level playing field for TMs subscribing to the TBT data feed of NSE and, consequently, NSE failed to provide equal, unrestricted and fair access is wholly erroneous.

149. The choice of architecture chosen by NSE was never doubted. There is no charge against NSE with regard to the choice of the TBT architecture. In fact, it has come on record that many countries were using the TBT architecture. Considering the evidence that has come on record and, upon an analysis of the evidence made by us, we are of the view that there was a randomness in the dissemination of the data/information/tick in the TBT architecture starting from the PDC stage till the Ports and there was clear, unrestricted, transparent and fair access to all the TMs who received the data in their Colo rack from their respective Ports. We, thus, hold that there was no violation of Regulation 41(2) of SECC Regulations."

58.5. The final determination by Hon'ble SAT against NSE on the issue of invocation of SECC Regulations is as under

"156. Considering the aforesaid, we are of the view that the TBT architecture provided equal, unrestricted, transparent and fair access of data disseminating from its TBT architecture to the TMs. There was no violation of Regulation 41(2) and 42(2) of the SECC Regulations. Further, the circular of 2015 is not applicable but there is a violation of the 2012 circular. However, there was a human failure while allocating IPs to TMs of various Ports and that there was inequitable distribution of IPs. In this regard, a load balancer should have been placed in the system to ensure equitable distribution of the IPs. We also find that there was a human lapse in putting the system in place to monitor frequent connection to the secondary server by certain TMs whereby these TMs bypassed the load in the primary servers."

58.6. Similarly, Hon'ble SAT confirmed that there is no violation of PFUTP Regulations by any of the employees of NSE.

58.7. Hon'ble SAT based its decision on the basis of facts/evidences available at that point of time. After analysing those facts/evidences it held that there is no violation of PFUTP Regulations or SECC Regulations but there is human failure. Now this human failure could be by way of oversight or dereliction of duty or it could be on account of collusion/connivance. It is for this reason that this issue of possibility of collusion/connivance was remanded by Hon'ble SAT for re-adjudication.

58.8. Thus, it can be inferred that Hon'ble SAT was satisfied that based on facts and evidences, at that point of time, there was not sufficient reasons to invoke the provisions of PFUTP Regulations on NSE or its employees. It is noticed that, in this proceeding, no new facts or evidence has been brought out in the SCN or otherwise that was not available in the earlier show cause notice which formed the basis of the 2023 SAT Order. The only new evidences in the current proceeding are:(i) ISB report of 2023 which does not deal with collusion/connivance; and (ii) Email of Deloitte dated December 5, 2023 discussed at para 57.2, which actually reduces the possibility of

collusion/connivance. Thus, in my views, in the absence of no new facts or evidence it would be wrong to conclude violation of PFUTP Regulations by *Noticees* when on similar facts and evidences Hon'ble SAT has already held that there was no such violation.

58.9. Though PFUTP violation was upheld in the case of OPG by Hon'ble SAT on these facts but for collusion/connivance there needs to be collusion/connivance involving two parties. The PFUTP violation upheld in the case of OPG was on account of unfair practice of logging on to the secondary server unilaterally by OPG and thereby deriving unlawful gains. Thus, the fact of upholding of PFUTP violation by OPG in itself is not enough for deciding the issue of collusion/connivance.

F*. CONCLUSION*

59. As narrated above, there is no dispute to the fact that NSE did not have a detailed defined policy for the use of Colo facility. It even failed to monitor the use of the secondary server by TMs without having sufficient reason. The defence put forward by NSE about the issuance of welcome email in the form of 'registration enablement mail' at the time of providing Colo facility to TMs, can't be said to be justifying its role as a first level regulator. Issuance of guidelines without its monitoring showed lack of due diligence. These finding are also contained in the 2023 SAT Order *qua* NSE. However, this fact on its own does not help in deciding the issue of collusion/connivance of OPG and its directors with *Noticees*. The fact that OPG was logging on to the secondary server till May 2015, even after the warning in the first half of June 2012 does indicate indirect consent by NSE to OPG. However, the fact that 93 TMs were logging to the secondary server during this period reduces the probability of collusion/connivance. Further, it is seen that in spite of multiple reports of Deloitte, EY, SEBI External Committee where external experts have examined email dumps, communication record for a reasonable period of time, still, no direct or indirect evidences/material/objective facts of collusion/connivance have been reported. This has further reduced the probability of collusion/connivance between OPG and its directors with *Noticees.*

60. The above possible determination of no collusion/connivance gets strengthened by the fact that there are no new evidences in the current proceeding from the earlier proceeding other than ISB Report 2023, which is not relevant to the issue at hand and finding of Deloitte which further reduces the possibility of collusion/connivance. All the evidences/material/objective facts which have formed the basis of current SCN were also part of the earlier show cause notice and were examined by Hon'ble SAT and based on such examination, it was held that there was no evidence to suggest violation of PFUTP Regulations or SECC Regulations by NSE and its employees. When these evidences/material/objective facts did not lead to violation of PFUTP Regulations or SECC Regulations, they cannot lead to determination of collusion/connivance where the establishment of violation would additionally require presence of "conspiracy" or "secret or indirect consent or permission" making such establishment of violation more difficult.

61. Based on the above discussion, it is held that due to the absence of sufficient material/evidence/objective facts on record in this case, the test of 'preponderance of probability' fails to produce enough justification for establishment of collusion/connivance between OPG and its directors with *Noticees*.

G. *DIRECTIONS*

62. Accordingly, having considered holistically the matter remanded for reconsideration, in pursuance and in compliance with the Orders passed by Hon'ble Securities Appellate Tribunal dated January 23, 2023, June 09, 2023, December 01, 2023, March 08, 2024, March 15, 2024, May 15, 2024 and June 24, 2024 and in exercise of the powers conferred upon me under section 19 of the SEBI Act, 1992 read with sections 11, sub-section (4) of section 11 and section 11B of the SEBI Act, 1992 and section 12A of Securities Contracts (Regulation) Act, 1956 read with Regulation 49 of the SECC Regulations, I hereby dispose of the instant proceedings against *Noticees* without any direction.

63. A copy of this Order shall be served upon *Noticees*.

64. The discussion in this order relating to the charge of collusion and connivance is also relevant to the case of OPG and its directors, whose order is also being passed today,

simultaneously, and the discussion made in this order on the said charge of collusion and connivance has been made part of that order. Since, the Hon'ble Supreme Court has vide its order dated April 05, 2023 passed in the C.A. no. 1961 of 2023, Om Prakash Gupta and others Vs. SEBI, has directed to place the order passed against the Appellants therein, the present order may also be placed before the Hon'ble Supreme Court.

-Sd-

DATE: September 13 , 2024 **KAMLESH C. VARSHNEY**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA