WTM/KV/MRD/MRD-PoD-3/30755/2024-25

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: KAMLESH C. VARSHNEY, WHOLE TIME MEMBER

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 OPG SECURITIES PRIVATE LIMITED AND OTHERS

In respect of:

Sr. No.	NOTICEES	PAN
1.	OPG SECURITIES PRIVATE LIMITED	AAACO1081C
2.	SANJAY GUPTA	AAHPG3047Q
3.	SANGEETA GUPTA	AAHPG6984C
4.	OM PRAKASH GUPTA	AAHPG3048B

(The entities mentioned above are individually known by their respective names 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 the ***"2023 SAT Order"***) passed by Hon'ble Securities Appellate Tribunal (hereinafter referred to as ***"SAT/Tribunal***") in Appeal no. 184 of 2019, filed by *Noticees nos. 1* to *4* herein, challenging the order no. WTM/GM/EFD/02/2019-20 dated April 30, 2019 (hereinafter referred to as the ***"2019 SEBI OPG 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 is noted that the said 2023 SAT Order also dealt with appeals filed by NSE and its employees in Appeal no. 333 of 2019 titled as *National Stock Exchange of India Limited Vs. SEBI* and connected appeals, challenging the SEBI's order no. WTM/GM/EFD/03/2018-19 dated April 30, 2019 (hereinafter referred to as the **"2019 SEBI NSE Order"**).

2. The relevant part of the 2023 SAT Order is reproduced herein below:

> "*266.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 alongwith 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.*
>
> *266. 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.

266.i. All other directions issued against OPG and its Directors are affirmed. The appeal is partly allowed."

3. Hon'ble SAT, vide its above mentioned order of 2023, had *inter alia* directed SEBI to reconsider the 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/Appeals filed by parties, *inter alia* extended the time to complete the proceeding. As per the order dated June 24, 2024, passed in Appeal no. 372 of 2024, titled as *OPG Securities Private Limited and others Vs. SEBI,* Hon'ble Tribunal has *inter alia* directed as:

> "*6. We direct the SEBI to grant two day's 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."*

4. It is noted that after receipt of the aforesaid order, the hearing in the present matter took place on July 05, 2024 and July 08, 2024. Subsequently, the time was given to *Noticees* to file written submissions by July 22, 2024 and the written submission has been filed by *Noticees* on July 23, 2024. Though the written submission is late by a day, the delay is condoned and the written submission dated July 23, 2024 is taken on record. This order is passed today well within the stipulated time line of 8 weeks starting from July 23, 2024. I also note that while this order was under preparation as per the directions of Hon'ble SAT. Vide email dated September 10, 2024, *Noticees* have forwarded a report obtained from Grant

Thornton Bharat ("**GT Report"). ***Noticees*** have requested that the same may be taken on record while passing the final order. I have already noted in para 3 of this order that the time to file written submissions in terms of the directions of Hon'ble SAT was till July 22, 2024, subsequent to that 8 weeks time was given for passing of this order. As the GT Report has been filed 7 weeks after the said deadline, the said delay cannot be condoned for the reason that the order needs to be passed within 8 weeks from the filing of the written submissions. Hence, the GT Report is not taken on record for consideration being way beyond the time for filing the written submission. It has also been brought to my notice that a Miscellaneous Application was filed before Hon'ble SAT by *Noticees* in the Appeal no. 372 of 2024. In the said MA, a prayer was inter alia made seeking direction to this authority to consider the GT Report as being supportive of the contentions already taken by the *Noticees* (Applicants therein) in the present proceedings. The matter was mentioned on September 11, 2024 seeking its urgent listing. However, Hon'ble SAT after hearing the arguments of both sides, rejected the request for early listing of the said MA.

5. Directions of Hon'ble SAT in the 2023 SAT Order, as recorded in paragraph no. 2, mandates re-adjudication of the following four issues by SEBI:

i. To decide the quantum of disgorgement of amount, OPG Securities Private Limited (hereinafter referred to as "**OPG**") and its directors are liable out of trades executed in violation of sub-regulation (1) of regulation 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as "**PFUTP Regulations**").

ii. To re-consider the charge of connivance and collusion of OPG and its directors with any employee/officials of NSE.

iii. To re-consider the Issue no. 2 of 2019 SEBI OPG Order, relating to crowding out other market participants.

iv. To decide the issue of direction/ penalty (for) concealment/destruction of vital information.

6. The direction to reconsider the charge of connivance and collusion pertaining to OPG and its directors with any employee/officials of NSE, also led to the issuance of a show cause notice no. SEBI/MRD/19852/1/2023 dated May 17, 2023 to NSE and its few employees/ex-employees, for which a separate order is being passed simultaneously today in culmination of the proceedings arising out of the said show cause notice.

7. Further, emanating from the directions of Hon'ble SAT, a Show Cause Notice no. SEBI/MRD/19860/1/2023 dated May 17, 2023 (hereinafter referred to as the "**SCN**") was issued to four *Noticees* herein as well as to Mr. Aman Kokrady (*Noticee no. 5* in the SCN).

8. Mr. Aman Kokrady filed a Writ Petition, W.P. no. 2461 of 2024, *Aman Kokrady Vs. Securities and Exchange Board of India,* before Hon'ble Bombay High Court. The said Writ Petition was disposed of by the order dated March 19, 2024, wherein Hon'ble Bombay High Court directed SEBI to decide first the issue of jurisdiction raised by Mr. Aman Kokrady. In compliance with the said directions, a separate order pertaining to Mr. Aman Kokrady, is being passed simultaneously today, and accordingly, the present order would be limited to *Noticees nos. 1, 2, 3* and *4.*

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

9. It is noted that the jurisdiction of this authority to re-adjuidcate the issues remanded by Hon'ble SAT needs to be confined within the directions given by it. While the main direction of the remand by Hon'ble SAT has been produced above, 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. In view of the above, 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. Accordingly, this authority is prevented to re-adjudicate facts which are already decided by Hon'ble SAT. Hence, it is important to summarise the findings of 2019 SEBI OPG Order and 2023 SAT Order.

10. 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:

I. 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 Trading Members (**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 may 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 is 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 Port by NSE allowed *'crowding out'* by the said TM has 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.

II. 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 finding 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 is about OPG having multiple IPs to single Port 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 TMs 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 by Hon'ble SAT to be reconsidered WTM.

III. 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 the 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 SCN 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

IV. Accordingly, in the 2019 SEBI OPG Order, various directions were passed against *Noticees*. In the said order, *Noticees* were prohibited from accessing

the securities market, and from buying, selling or otherwise dealing in securities for a period of five years. The *Noticee no. 1* was restrained from taking any new client for a period of 1 year. *Noticees* were directed to disgorge an amount of INR 15.57 Crore (along with 12% interest) jointly and severally.

V. Hon'ble SAT confirmed the finding in 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.

VI. 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.

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

I. 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 is 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.

II. On the issue of whether the TCP-IP architecture for TBT data feed provided fair and equitable access to all the 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 the 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 logged 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 logged 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 appears to have created an advantage to certain TMs due to the lack of manual intervention. Due to the failure to implement the load balancer, NSE has failed to ensure fair, transparent and equal access to its TMs. Hon'ble SAT also observed that there is 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 servers. 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.

III. 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 the primary server 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.

IV. 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 is 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 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 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 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, 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.

V. 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.

VI. 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 regulation 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 has not violated any provisions of the PFUTP Regulations and has 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 are 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 cooperation and had nothing to do insofar 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.

VII. On the issue of liability of employees of NSE under 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 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.

VIII. 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.

IX. Accordingly, the WTM passed various directions against NSE, Mr. Ravi Narain and Ms. 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 has 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 have 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.
- 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. 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.

12. 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. Before moving further, it is useful to quote some extracts of the 2023 SAT Order which would guide this authority in adjudicating various issues:

Para 80 (a) (vii); (d); (i), & (j), 83, 84 and 226

"80 (a) (vii): Further, there were three POP servers (including secondary) with three Ports each and consequently nine independent dissemination queues. A member would need to be first on all the nine Ports (across three POPs) to be disseminated all the batches first on that trading day."

d. EY in its report further found that TM Mr. A even if he logs in at 8:45 a.m. and TM Mr. B logs in at 8:50 a.m. respectively on Port 10980 and TM Mr. C and Mr. D logs in at 7:30 a.m. and 7:40 a.m. on Port 10981, each one of them will be ranked first and second in their respective Ports. If Port 10980 disseminates the first tick then member Mr. A and Mr. B who have logged in later than member Mr. C and Mr. D will receive the tick first. The EY report further analysed that there were three POP Servers. Each POP Server had three Ports. Therefore, there were nine Ports from which ticks were disseminated. The report found that a TM would need to be first to log in all the nine Ports in order to receive the first batch of information on a trading day."

i. A TM logging in first on a particular Port may not receive the information first. EY in its report finds that if TM Mr. A and Mr. B logs in at 8:45 a.m. and 8:50 a.m. respectively on Port 10980 and TM Mr. C and Mr. D logs in at 7:30 a.m. and 7:40 a.m. respectively on Port 10981, each of them will be ranked 1 and 2 on that respective Ports. However, if the information/tick is disseminated first on Port 10980, then TM Mr. A and Mr. B who have logged in later than TM Mr. C and Mr. D will receive the information first.
j. Once a TM Mr. A receives the information first as he was ranked first in that Port will always receive the batch of information first before other TMs on that Port for that trading day. Thus, TM Mr. A would receive the information first and TM Mr. B would receive the information thereafter. ***The time difference appears to be a fraction of a microsecond to a nano second****. Thus, a TM who is ranked last on a particular Port would always be disseminated a batch of information last on that Port for that trading day." (emphasis supplied)*

83. As we have concluded earlier that the flow of data from the PDC to the POP Server is in a random sequence. The dissemination of data from POP Server to the Port is sequential but the receipt of the 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 by Port 2. Thus, we find that till the stage of Port there is some randomness in the dissemination of data already from PDC level to Port level. We further found that there was variability in the order of receipt of data on the Port and even the Port that disseminated the data first did not necessarily receive all the data first…

84…A TM who logs in later on another Port may receive the data first before the TM who logged in first on Port 1.

226…. Admittedly, the OPG had multiple IPs to single Ports and established 1st, 2nd, 3rd and even 4th connect to the POP Servers as a result it gained unfair advantage over other TMs. The tick received by other TM was after it was received by OPG ***causing loss of those few seconds*** *which was advantageous to OPG and disadvantageous to other TMs.* ***This aspect has not been considered***." (emphasis supplied)

Para 234-236

"234. We find from the evidence that OPG was connected to the secondary server in the Futures and Options Segment on 31% of the number of trading

days in the calendar year 2012; ***99% of the number of trading days in the calendar year 2013; 95% of the number of trading days in the calendar year 2014*** *and 38% of the number of trading days in the calendar year 2015. Further, the Deloitte report analysed and submitted that OPG was only connected to the secondary POP server on 63 trading days in 2012, 248 trading days in 2013, 232 trading days in 2014 and 92 trading days in 2015.* ***This data clearly indicates that OPG was trading only through secondary server as on these many days OPG was not even connected to the primary POP server.***

235. ***We find that OPG was connected 99% of the number of trading days in 2013 and 95% of trading days in 2014****. Admittedly, the evidence recorded in the Deloitte and TAC reports shows that the load on the secondary server was low and less crowded amongst all the POP servers.* ***The contention of OPG is that business transacted from the secondary server was minimal is not supported by any evidence and, in any case, we refuse to believe this contention when we find that OPG was connected to secondary server 99% of the trading days in 2013 and 95% of the trading days in 2014 and 248 days in 2013 and 232 days in 2014 when OPG was only connected to the secondary server and was not connected to the primary servers on these days*****. It is therefore hard to believe that business conducted through secondary server was low.*** *It was urged vehemently that OPG was facing disconnection issues from 2012 and there was a total of 35,817 disconnections from primary server on 357 days between 2012-2014 which led OPG to connect and use the secondary server.* ***Such allegation has not been proved and some complaints made in this regard cannot be taken to be the gospel truth regarding disconnection on all these days as from the logs furnished by OPG itself one finds that OPG was connecting to the secondary POP server consistently from 7 a.m. to 7.05 a.m. which disproves the theory of OPG being disconnected at odd times of the day during the trading days****. The logging on the secondary server from morning itself prior to the start of the trading clearly indicated that OPG was continuously logging in to the secondary POP server irrespective of disconnection issues relating to the primary POP server. The contention raised by the appellant in this regard is clearly an afterthought and against the material evidence.*

236. In this regard, the WTM has analysed the complaints referred by OPG and found that complaints were only made in the Futures and Options Segment on five days. Further, OPG itself stated that disconnection in the primary server was less frequent in 2013. ***These facts have not been disputed before us and in view of the admission that disconnection to the primary POP server was less frequent in 2013 yet the evidence indicates that OPG was connected to the secondary server on 248 days without being connected to the primary server in 2013 and that OPG was connected to the secondary***

server on 99% of the number of trading days in 2013. *In this regard, the contention that OPG was connected to the secondary server on account of disconnection issues cannot be accepted as it is unimaginable that OPG faced disconnections on 95% to 99% in 2013-2014." (emphasis supplied)"*

Para 238:

"238. Since the secondary server was always in active mode and running without any time lag and in view of the finding that there was less load on the secondary server as it was less crowded OPG by consistently logging on the secondary server had advantage over TMs logged in normal POP servers. Because of the low load since it as less crowded on the secondary server OPG gained advantage in accessing the data faster than other TMs. The variance in time in terms of millisecond and microsecond in respect of data was immensely significant which was to the advantage of OPG when it accessed data from the secondary server. Since the delivery of the data can be done only to one recipient at a time OPG connections has to be looked from this aspect and in this background."

Para 254

"254. Upon a perusal of the Pasumarthy Report, we find that it deals with several allegations which has been dealt in the impugned order and has been dropped as highlighted in paragraph no.8.13 and 8.15 of the impugned order. Further, the Pasumarthy Report does not dwell into the unauthorized connection by OPG to the secondary server. Further, in our view, the Pasumarthy Report does not submit its own finding. It only relies on the findings of earlier expert committee 's report. The Pasumarthy Report has not based its findings on independent research and, therefore, ***in our opinion the WTM rightly rejected the Pasumarthy Report****." (emphasis supplied)*

14. The findings contained in para no. 80 (a) (vii); (d); (i), & (j), 83, 84 and 226 of the 2023 SAT Order, as quoted above, would guide us on the issue of crowding out.

15. The findings contained in para no. 234 to 236 of the 2023 SAT Order, as quoted above, would guide us on the issues of consistently logging into the secondary server; disconnections; complaints made by OPG etc.

16. The findings contained in para no. 238 of the 2023 SAT Order, as quoted above, would guide us on the issue of unlawful gains that accrued by logging in to the secondary server.

17. The findings contained in para no. 254 of the 2023 SAT Order, as quoted above, would guide us on the issue of Pasumarthy Report.

C. DETAILS OF RE-ADJUDICATION PROCEEDING

18. In pursuance of directions passed vide 2023 SAT Order, the SCN was issued to *Noticees,* detailing facts of the case, and calling upon *Noticees* to show cause as to why directions should not be issued against them, for various allegations in the said SCN, consequent to the remand of four issues (listed at para no. 2 of this order) by Hon'ble SAT.

19. It is noted that the issue of connivance/collusion has been confined to logging to the secondary server (as in the 2023 SAT Order, such practice has been held to confer unfair advantage to OPG) and crowding out (as in the 2023 SAT Order the issue is required to be reconsidered 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 in logging on first to the primary server, the issue of possible connivance/collusion for first log in on the primary server is not mandated to be a part of the present proceeding.

20. Before proceeding further in the matter, it is deemed fit to list out the allegations. In the SCN, it is noted that *Noticees nos. 1, 2, 3* and *4* have been alleged to have violated:

i. clauses (a), (b) and (c) of section 12A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act, 1992**");

ii. clauses (a), (b), (c), (d) of regulation 3 and sub-regulation (1) of regulation 4 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations 2003 (hereinafter referred to as "**PFUTP Regulations**").

21. Additionally, the *Noticee no. 1* has been alleged to have violated sub-clauses (1), (2), (3), (4) and (5) of clause A of the Code of Conduct as specified in Schedule II of regulation 9 of SEBI (Stock Brokers and Sub Brokers) Regulations, 1992 {now SEBI (Stock Broker Regulations), 1992} (hereinafter referred to as "**Stock-broker Regulations**"). Further, the *Noticee no. 2* has been alleged to have violated sub-section (2) of section 11C of the SEBI Act, 1992.

22. It is noted that pursuant to the issuance of the SCN, multiple communications were exchanged between SEBI and *Noticees*, majorly on the issue of inspection of documents. For the sake of brevity, the details of such exchange of communication is captured in the following table:

Table no. 1

Sr .No.	Details of event	Date of event
1.	Letter from *Noticees* seeking inspection of documents	June 08, 2023

2.	SEBI's letter to *Noticees* granting inspection on August 28, 2023	August 23, 2023
3.	Email from *Noticees* requesting for rescheduling the inspection to September 04, 2023	August 25, 2023
4.	SEBI's email intimating rescheduling of inspection to September 04, 2023	August 28, 2023
5.	Email from *Noticees* confirming attendance for inspection on September 04, 2023	September 01, 2023
6.	Email from *Noticees* seeking additional documents for inspection	September 04, 2023
7.	Inspection of documents conducted by *Noticees*	September 04, 2023
8.	Hard drive containing data provided to *Noticees*	September 06, 2023
9.	SEBI's email to *Noticees* sharing the Minutes of Inspection, and response to *Noticees* letter dated September 04, 2023 seeking additional documents.	September 07, 2023
10.	Email from *Noticees* informing that the data provided in hard drive on September 06, 2023 is not accessible	September 12,2023
11.	Letter from *Noticees* to the WTM for considering the submissions made in the letter	September 21, 2023
12.	SEBI's email to *Noticees* informing that the data in the hard drive can be accessible by splitting the excel files. Further, *Noticees* were asked to provide a hard drive if they wish to obtain the same from SEBI.	September 22, 2023
13.	Email from *Noticees* seeking if hard drive can be submitted on September 25, 2023	September 22, 2023
14.	SEBI's email informing *Noticees* to submit hard drive on September 25 ,2023	September 25, 2023
15.	SEBI's letter to *Noticees* confirming that the hard drive with split up files has been provided	September 25, 2023

23. Also, a demand of cross-examination was made on behalf of *Noticees*. As the report of ISB (submitted to SEBI in April, 2023) is a document used for the first time in the present proceeding, it was deemed fit to extend the opportunity of cross-examination of the author of the said report. Accordingly, vide communication dated October 26, 2023, *Noticees* were informed that the cross-

examination in the matter was fixed for November 10, 2023 and further, the personal hearing was also scheduled for November 15, 2023. In response to said communication of SEBI, an email dated November 05, 2023 was received from the AR of the *Noticees nos. 1* to *4*. In the said email, apart from certain preliminary issues, it was also requested that the cross-examination and hearing may be deferred to be conducted after November 20, 2023. Further, the *Noticee no. 5* (Mr. Aman Kokrady) vide his email dated November 06, 2023, requested that the matter should not be proceeded in any adverse manner, until he was provided with all the documents sought by him. In view of the request for adjournments, the cross-examination in the matter was rescheduled to December 06, 2023 and the personal hearing was fixed for December 19, 2023, and the said information was intimated to *Noticees* vide email dated November 24, 2023.

24. It is noted that while the above communication was being exchanged with *Noticees*, an email dated November 01, 2023 was issued to ISB, seeking certain data with respect to crowding out by OPG. ISB, responded to the said request vide its email dated November 17, 2023, and stated *inter alia* that the results showed that the average daily profit of OPG on crowding out days was lower than the average daily profit on non-crowding out days. In compliance with the principles of natural justice, the said response of ISB was furnished to *Noticees* vide email dated November 23, 2023.

25. In the meanwhile, an application was filed by SEBI before Hon'ble SAT seeking extension of time to pass order in the matter and vide its order dated December 01, 2023, Hon'ble SAT granted another four months to complete the proceeding.

26. The communication that was subsequently exchanged with *Noticees* is captured in tabular form for the sake of brevity:

Table no. 2

Sr. No.	Details of event	Date of event
1.	SEBI's email to the *Noticees* forwarding server log data and secondary server connections data as obtained from ISB	December 04, 2023
2.	Letter from *Noticees* to the WTM to look in to the requests made earlier and to pass necessary direction in order. *Noticees* requested that the cross-examination and personal hearing granted be deferred until such time	December 04, 2023
3.	SEBI's email providing response to certain issues raised by *Noticees* and advising the *Noticees* to attend the cross examination as per the schedule	December 05, 2023
4.	Letter from *Noticees* to the WTM requesting to look into the issues raised vide their letter dated September 21, 2023, on a urgent basis and re schedule cross-examination to an appropriate stage of the proceedings.	December 05, 2023

27. The cross-examination of the author of the ISB Report was scheduled for December 06, 2023. However, *Noticees* nos. 1 to 4, vide their email dated December 05, 2023, reiterated their requests made earlier and further requested to reschedule the cross-examination proceeding at an appropriate stage after deciding on their requests first. Subsequently, vide email dated December 19, 2023, *Noticees* nos. 1 to *4* were provided with a list of documents already furnished to them, and also provided with the details of additional data asking *Noticees* to collect/receive in a hard drive, as the data being bulky. In the said communication, it was specifically clarified that all documents relied upon in the

present proceeding had been furnished to them, and it was also clarified that no document/evidence, which had not been furnished to *Noticees*, would not be relied upon. It was further intimated that the cross-examination was re-scheduled on January 09, 2024 and the personal hearing was re-scheduled on January 17, 2024.

28. Data in the hard drive was collected by *Noticees* on December 22, 2023. Vide email dated January 02, 2024, a reminder about the cross-examination was sent to *Noticees*, and further, vide email dated January 04, 2024, it was intimated to *Noticees* that the opportunity of cross-examination scheduled on January 09, 2024 was the last opportunity and after that the right to cross-examination would be closed. Vide an email of even date, *Noticees nos. 1* to *4*, submitted that a hard disk containing 6 TB data had been received from SEBI on December 22, 2023 and the same was being reviewed by them. It was further stated that all records, as requested earlier, were still not provided. It was submitted that necessary directions be passed on their requests made in earlier communication dated September 21, 2023 and further requested to reschedule the cross-examination. In response to the said request, it was informed vide email dated January 05, 2024 to *Noticees* nos. 1 to 4 that there was no evidence/document which is being relied upon and which had not been furnished to *Noticees* and further advised that *Noticees* should avail the opportunity of cross-examination. A day before the date of scheduled cross-examination, i.e., on January 08, 2024, an email was received from *Noticees* nos. *1* to *4* informing that the said *Noticees* were severely aggrieved by the manner in which the proceeding in the matter was being conducted. It was also informed that *Noticees* had approached Hon'ble High Court of Delhi as the

email mentioned about “Writ Petition bearing Diary no. 28157/2024”. The said email further requested that the proceeding should be continued only after Hon’ble Delhi High Court decided the fundamental issues raised in the petition thereof.

29. On January 09, 2024, Prof. Ramabhadran S. Thirumalai (author of the ISB Report dated April, 2023) made himself available before me for cross-examination by *Noticees*. However, *Noticees* did not attend the said opportunity. As the personal hearing was scheduled for January 17, 2024, an email dated January 15, 2024 was issued to *Noticees* asking them to ensure their presence in the hearing. In response, vide email dated January 16, 2024, it was stated on behalf of *Noticees* that the *Noticees* would not be attending the said hearing as grave prejudice was being caused due to non-availability of complete inspection and further due to the fact that there was no satisfactory response on requests made by them. It was further stated in the said email that *Noticees* were approaching Hon’ble Supreme Court of India in the pending appeal (Civil Appeal no. 1961 of 2023- filed by *Noticees* challenging the 2023 SAT Order), with an interim application seeking grant of urgent reliefs in terms of the representations made during the present proceeding. *Noticees* requested that the proceeding may be kept in abeyance and hearing be rescheduled after decision of Hon’ble Supreme Court on their application.

30. Vide email dated January 18, 2024, it was informed to *Noticees* under my instructions, that it had already been stated in the emails of SEBI dated December 19, 2023, January 04, 2024 and January 05, 2024 that all the documents intended to be relied upon had already been furnished to them and it was also further clarified that no reliance shall be placed on any document that had not been

furnished. It was also stated in the said email that the opportunity of cross-examination had been closed as despite Prof. Ramabhadran S. Thirumalai (hereinafter referred to as "**Prof. Ram"),** who was not a local resident had travelled to Mumbai to make himself physically available for cross- examination, the opportunity of cross-examination was not availed by *Noticees*. It was also stated that there was no order by Hon'ble Supreme Court/Hon'ble Delhi High Court staying the continuation of the proceeding initiated in compliance with the 2023 SAT Order. By the said email, *Noticees* were also intimated that as a last opportunity, personal hearing was being fixed for February 01, 2024.

31. Vide an email dated January 31, 2024, once again *Noticees* informed that the preliminary submissions/objections raised by them needed to be decided before proceeding further in the matter. The submissions made in the said email are summarised hereunder:

I. The Expert Reports relied upon by SEBI itself points out the similarity in behaviour of all TMs registered with Colocation centre of NSE, especially while accessing the secondary servers. However, SEBI had initiated stringent action only against the *Noticee no. 1.*

II. Adjudicating Officers had passed 16 orders in respect of other TMs who were also accessing the secondary server on equal or more number of occasions than the *Noticee no. 1.* However, it had been *inter alia* held in such orders that those TMs made no unfair or illicit gains out of the secondary server connections. The said orders had not been proceeded further by SEBI under sub-section (3) of section 15-I of the SEBI Act, 1992, therefore, the said orders had attained finality.

III. The 2023 SAT Order failed to deal with the findings recorded in the AO orders mentioned above.

IV. The SCN had relied upon on the same set of evidence that had already been held to be insufficient to prove charges in the 2019 SEBI OPG Order.

V. The only additional material in the present SCN was the ISB Report dated April 2023 (hereinafter referred to as "**ISB Report 2023**"). The list of dates indicates that 2 years prior to the issuance of the SCN, SEBI had already engaged ISB. However, during the proceeding before Hon'ble SAT, SEBI was making contrary submissions, showing that the 2023 SAT Order was passed based on misleading and misguiding submissions made by SEBI.

VI. As the ISB Report 2023 was not prepared in furtherance of the 2023 SAT Order, the same could not be taken into consideration.

VII. WTM had become *functus officio* on the issues which had already been determined in the 2019 SEBI OPG Order and the said issues could not be reopened in the present proceedings.

VIII. Though the 2023 SAT Order had remanded the matter to SEBI, however, the same required consideration of the original show cause notice and the evidence forming part of it. It was not open to issue a fresh show cause notice incorporating new charges based on new evidence. Reliance was placed on the order passed by Hon'ble SAT in the matter of *Devendra Suresh Gupta vs. SEBI [Appeal No. 176 of 2020]* wherein it has been *inter alia* held as:

> *"…When the matter was remanded by this Tribunal a specific direction was issued that the matter is restored to the file of the AO and the AO was required to decide the matter afresh on merits. It means that the AO was required to decide the matter afresh pursuant*

to the show cause notice dated October 8, 2013. The AO was required to deal with the charges levelled against the appellant under the said show cause notice dated October 8, 2013. It was not open to the AO to issue a fresh show cause notice incorporating a new charge. Consequently, on this short ground the impugned orders cannot be sustained and are quashed…."

IX. In terms of principles of *res judicata* and *estoppel*, the allegations made in the SCN was liable to be rejected as findings had already been passed in the 2019 SEBI OPG Order.

X. The charge of collusion was unsustainable considering that the other entities who were alleged to have colluded with *Noticee no. 1, i.e.,* Ravi Narain, Chitra Ramakrishna, Subramanian Anand, Ravi Apte, Mahesh Soparkar and Deviprasad Singh, were exonerated in the 2019 SEBI NSE Order.

XI. Further, as findings on the charges of collusion and crowding out had already been decided in the 2019 SEBI OPG Order, these issues could not be opened again under the garb of the directions of Hon'ble SAT, as it did not direct SEBI to issue a fresh show cause notice.

XII. Assuming that Hon'ble SAT had granted SEBI the authority to re-institute the proceedings pertaining to charges that had already been dropped, the SCN had been issued prematurely without taking into consideration key findings of the re-investigation.

XIII. It was only on persistent requests of *Noticees* that SEBI addressed emails to ISB and Deloitte, seeking clarifications in terms of the queries raised by *Noticees.* A perusal of the emails of ISB and Deloitte indicated that:

a. No gains accrued to *Noticee no. 1* by crowding out as it made lesser profits on 'crowding out days' as compared with its 'non crowding out days' (Ref: email dated November 17, 2023 from ISB to SEBI); and

b. There was no possibility of collusion between OPG and NSE employees, as it had been clarified by Deloitte in its email dated December 05, 2023 that: *"we did not identify any financial transactions or call between employees of the Exchange and trading Members"*

XIV. SEBI ought to have obtained these clarifications/details prior to issuance of the SCN as these clarifications directly answered the issues of collusion and crowding out.

XV. The aforesaid clarifications had been received by SEBI after representing to *Noticees* that the inspection was completed, and after SEBI was asking *Noticees* to file the reply and conduct cross-examination.

32. Having considered the request of the *Noticees* seeking inspection and deferment of the proceeding, on February 01, 2024, a personal hearing was scheduled, wherein Mr. Ravichandra Hegde and Ms. Mitravinda Chunduru, Advocates appeared before me on behalf of *Noticees nos. 1* to *4* and, on specific request, the *Noticee no. 5* was permitted to join the hearing through Video Conferencing mode. The Advocates appearing for *Noticees nos. 1* to *4* reiterated the submissions made in their letter dated January 31, 2024 and further requested that one more opportunity of cross-examination of Prof. Ram may be granted through Video Conferencing and an opportunity of personal hearing may be granted thereafter. In the interest of justice, last and final opportunity to cross

examine Prof. Ram was granted and cross-examination was scheduled for February 08, 2024, through Video Conferencing mode, and intimation of the same was given to *Noticees* vide email dated February 02, 2024.

33. I have noted in paragraph no. 28 that *Noticees* had informed that they were approaching Hon'ble High Court of Delhi, and I have also noted in paragraph no. 29 that vide email dated January 16, 2024, it was intimated on behalf of *Noticees* that they were approaching Hon'ble Supreme Court in the pending Civil Appeal no. 1961 of 2023. However, it was learned that instead of filing a Writ Petition before Hon'ble Delhi High Court or filing an application in the pending appeal before Hon'ble Supreme Court of India, a fresh Writ Petition bearing no. [WP (C) 76/2024], titled as OPG Securities Private Limited and others Vs. Union of India and others was filed before Hon'ble Supreme Court by *Noticees*. The said petition came up for hearing on February 05, 2024, however, the said petition was withdrawn by the *Noticees*. An order dated February 05, 2024 passed by Hon'ble Supreme Court disposing of the aforementioned Writ Petition is reproduced hereunder for reference:

> *"Learned Senior Advocate appearing for the petitioners seeks permission to withdraw the present writ petition under Article 32 of the Constitution of India.*
>
> *In view of the statement made, the writ petition is dismissed as withdrawn.*
>
> *We clarify that we have not made any comments on the merits of the case. All issues and contentions are left open.*
>
> *At this stage, learned Senior Advocate submits that the petitioners may avail of other remedies, as may be available in law. We make no comments in this regard.*"

34. Subsequently, vide email dated February 06, 2024, *Noticees* were informed that apart from the cross-examination scheduled on February 08, 2024, the personal hearing in the matter had been scheduled on February 16, 2024.

35. The cross-examination of Prof. Ram was scheduled at 02:30 pm on February 08, 2024. However, before the proceedings could commence, two emails were received from *Noticees nos. 1* to *4.* In the first email received at 12:35 PM, *Noticees* informed that an application had been filed before Hon'ble SAT and the same was listed for hearing on February 14, 2024. It was further stated that the *Noticee no. 5* had informed about filing of Writ Petition before Hon'ble Bombay High Court and it was submitted that the decision of Hon'ble High Court would have a bearing on the objections raised by *Noticees nos. 1* to *4.* It was requested that the schedule of filing reply and personal hearing may be decided after the decision of Hon'ble Tribunal and Hon'ble High Court. Subsequently, another email was received at 01:30 PM, which stated that Mr. Aman Kokrady (Noticee no. 5 in the SCN) had informed that Hon'ble Bombay High Court had given liberty to him to seek adjournment for the hearing already scheduled before SEBI. Based on the said facts, *Noticees nos. 1* to *4* requested that the cross-examination and hearing be postponed to a date subsequent to the disposal of the petition by Hon'ble Bombay High Court.

36. It was made clear to *Noticees* that sufficient opportunities had been granted and considering the fact that instant was a proceeding initiated in due compliance of the order of Hon'ble SAT and further the same was required to be completed in a time bound manner. *Noticees* were required to co-operate in disposal of the proceeding. In the cross-examination, Mr. Debopriyo Moulik, Counsel, appeared

on behalf of *Noticees nos. 1* to *4* and referred to the application pending (M.A. no. 140 of 2024 in Appeal no. 184 of 2019) before Hon'ble SAT. However, it was again informed to the Counsel that another opportunity of cross-examination was granted on their specific request. Even the time and date convenient to them was considered before scheduling the cross examination and accordingly, Prof. Ram was requested to spare time from his busy schedule to make himself present for his cross-examination. Accordingly, the Ld. Counsel was advised to avail the said opportunity. The Ld. Counsel agreed for the same, however, it was submitted that the proceedings were being conducted without prejudice to their rights, contentions etc., raised before any forum, including the challenge to the very issuance of the SCN.

37. The cross-examination on February 08, 2024 was conducted and in the process, Prof. Ram was asked a total of 50 questions. In the course of the cross-examination held on February 08, 2024, the Ld. Counsel sought certain documents/emails from Prof. Ram. The said documents/emails etc., were received by SEBI on February 09, 2024 from Prof. Ram, and on the same day they were forwarded to *Noticees*.

38. The cross-examination was recorded in part on February 08, 2024 and it was directed to conduct the further cross-examination on February 09, 2024, and on the said date, 75 questions were posed to Prof. Ram. The remaining cross-examination proceedings were deferred for February 14, 2024 and Ld. Counsel was asked to conclude the same within a period of two hours. However, on February 13, 2024, an email was received wherein a request was made to grant additional time (more than 2 hours) to complete the cross-examination. On

February 14, 2024, another set of 35 questions were asked to Prof. Ram. In totality, 160 questions were asked to Prof. Ram over a span of three days, which also included a few questions posed by me in order to seek clarity on answers provided by Prof. Ram.

39. I further note that during the course of cross-examination on February 14, 2024, many questions were being put to Prof. Ram pertaining to alleged discrepancies in the draft Reports of June and November, 2022 and the ISB Report, 2023. However, in view of the time constraint to pass final order in the matter, and in view of the fact that the cross-examination proceedings have already been conducted for more than 9 hours, it was informed to the Ld. Counsel that he may provide a list of discrepancies between the aforesaid Reports, which he intended to confront to Prof. Ram and the witness would respond to the discrepancies. It was noted that to understand the reasons for any change in the final report from the draft report, Prof. Ram was also required to consult some documents to refresh his memory to provide the explanation, as it would be unreasonable to assume that the changes made in the draft Reports, 1-2 years back would be remembered by him off hand.

40. The Ld. Counsel objected on the aforesaid process of seeking response of Prof. Ram in question answer form and he further objected to the questions raised by me to Prof. Ram. It was observed during the proceeding that the arrangement of seeking clarification in question answer form over email was being made to ensure that justice was done to *Noticees* within the constraint of time, and without compromising the fairness of the proceeding. Further, on the technical objection of questions being asked by me, it was replied to the Ld. Counsel that the said

objection was not sustainable as such questions were asked in the interest of justice wherever clarity was required on the answers provided by Prof. Ram to arrive at a proper conclusion. Lastly, the Ld. Counsel requested that desired document that were sought from Prof. Ram may be directed to be provided in a time bound manner, and the said request was accepted.

41. Vide email dated February 15, 2024, it was submitted on behalf of *Noticees* that prejudice was being caused not only by denying inspection, even by denying the cross-examination in the matter and further requested to allow them to continue cross-examination of Prof. Ram. By referring to the said request as well as the request of providing inspection of documents, *Noticees* requested to adjourn the hearing scheduled on February 16, 2024. It was advised to the *Noticees* that they may make their submissions including those mentioned above, during the hearing fixed on February 16, 2024.

42. During the hearing held on February 16, 2024, (through Webex), the Ld. Counsel appearing for *Noticees nos. 1* to *4* submitted that they are yet to receive the documents which were to be provided by Prof. Ram, in terms of the cross-examination proceeding held on February 14, 2024. Meanwhile, since the desired documents was furnished to *Noticees* on February 21, 2024, *Noticees* were asked to submit/share the questionnaire with Prof. Ram by February 26, 2024, which the *Noticees* agreed to subject to orders, if any passed by Hon'ble SAT in the pending application no. 140 of 2024.

43. The documents received by SEBI from Prof. Ram vide an email dated February 20, 2024 were shared with *Noticees* on February 21, 2024 (via email). On February 26, 2024, an email was sent to the Ld. Counsels seeking the

questionnaire for Prof. Ram, as was directed in the personal hearing held on February 16, 2024. In response thereto, it was submitted vide an email of even date that the Application no. 140 of 2024 filed before Hon'ble Tribunal was listed for hearing on March 05, 2024, and therefore, the proceeding may be deferred till such date. Further, the said email also requested that certain documents (in addition to those sought during cross-examination) may be additionally provided after obtaining the same from Prof. Ram.

44. The said email of *Noticees* was responded by SEBI vide an email dated February 27, 2024. It was informed that no directions have been passed by Hon'ble SAT with respect to the ongoing proceedings, and *Noticees* have failed to furnish the questionnaire, thereby the right to seek further clarification from Prof. Ram was being closed and they were told to file the questionnaire, if they wish by February 28, 2024. Further, they were also intimated about the personal hearing schedule for March 06, 2024. However, no such questionnaire was filed and on the said date, no one appeared for the personal hearing.

45. As no one appeared for the hearing nor any communication was received, an email was issued (on March 06, 2024 itself) to *Noticees* intimating that no further opportunity of personal hearing could be granted as the order in the present matter was required to be passed on or before March 31, 2024. *Noticees* were advised to file their written submissions on or before March 13, 2024 and it was also informed that submissions filed after the said deadline shall not be considered.

46. *Noticees* once again replied over email on the same day (March 06, 2024) *inter alia* stating that during the hearing held before Hon'ble SAT, the Counsel appearing for SEBI had requested for directions from Hon'ble Tribunal to direct

Noticees to attend the hearing before me, however, no such directions were passed by Hon'ble Tribunal. *Noticees* have further requested that the opportunities for inspection, cross examination and personal hearing may be considered, based on the outcome of the hearing scheduled to be held on March 08, 2024 before Hon'ble SAT.

47. On March 08, 2024, Hon'ble SAT *inter alia* passed the following order:

> "*6. Considering the joint request of both the parties and the fact that less than a month remains for passing of the final order in this case as per the present timeline while personal hearing of the Appellants is yet to take place, I am of the opinion that in the interest of justice the timeline needs to be extended. The Respondent is directed to give a final opportunity of inspection of documents and cross-examination of witnesses to the Appellants. The Appellants are directed to appear before the WTM on March 15, 2024 on which date the Appellants will be provided final opportunity of cross-examination and inspection. If need be, the cross-examination may be conducted on day to day basis for five working days upto March 21, 2024. Opportunity of personal hearing before the WTM will be given to the Appellants on April 1, 2024. The Respondent is given time upto May 31, 2024 to complete the proceedings initiated pursuant to direction of this Tribunal in paragraph 266 (g) to (i) of order dated January 23, 2023 in Appeal No. 184 of 2019."*

48. In terms of the aforesaid order, *Noticees* were required to be provided with inspection of documents and cross-examination of Prof. Ram for five days, on a day-to-day basis upto March 21, 2024. Accordingly, an email dated March 12, 2024 was issued to Prof. Ram, however, he expressed that due to engagements already fixed, he would not be available till April 08, 2024.

49. *Noticees* vide email dated March 14, 2024, while referring to the aforesaid order of Hon'ble Tribunal, made request to provide inspection of certain documents. In response to the said email, it was informed vide an email of even date that Prof. Ram was not available for the cross-examination on the dates fixed by Hon'ble

SAT. It was also informed that due to non-availability of Prof. Ram as well as certain other constraining factors in conducting the proceeding within the prescribed timeline, SEBI had moved an application seeking clarification/flexibility from Hon'ble SAT. Meanwhile, *Noticees* were advised to avail the inspection of documents on March 15, 2024, in compliance with the directions passed by Hon'ble SAT. Also, on the same day, a reminder was issued to Prof. Ram seeking the documents which were additionally sought by *Noticees* and it was informed by Prof. Ram that such documents would be furnished by March 18, 2024.

50. The inspection of documents was conducted on March 15, 2024, and certain documents were provided during the inspection. Further, with respect to emails and attachments that were yet to be received from Prof. Ram, it was informed that the said documents would be provided upon receipt of the same from Prof. Ram. Furthermore, certain other documents were also sought by *Noticees* and the reasons for not providing those documents were informed during the inspection proceeding.

51. As stated earlier, an application was filed by SEBI before Hon'ble SAT seeking clarifications/flexibility in the schedule prescribed under its order dated March 08, 2024. The said application was listed for hearing before Hon'ble Tribunal on March 15, 2024, wherein the following order *inter alia* came to be passed:

> *"2. The prayer made by the Applicant is accepted and the schedule laid down is modified as under:-*
>
> *(i) The cross-examination of the Original Appellants / OPG Securities Private Limited may take place for three hours each day upto 7 days on any days between April 9 to 22, 2024.*
>
> *(ii) Final hearing before the WTM may take place between May 1 to 10, 2024.*

(iii) SEBI is given time upto June 30, 2024 to complete the proceedings initiated pursuant to the direction of this Tribunal in paragraph 266(g) to (i) of order dated January 23, 2023 in Appeal No. 184 of 20219."

52. In compliance with the aforesaid directions and after consulting Prof. Ram, vide an email dated March 22, 2024, 11 dates were provided to *Noticees* with a request to select any 7 days for conducting the cross-examination. In the meanwhile, vide an email dated March 18, 2024, the documents were received from Prof. Ram and same were shared with *Noticees*.

53. The records indicate that while SEBI started acting on the directions passed by Hon'ble SAT vide its order dated March 08, 2024 and March 15, 2024, *Noticees* preferred an appeal {Appeal (L) no. 138 of 2014; later registered as Appeal no. 299 of 2024} before Hon'ble SAT taking up the issue of inspection of documents etc.

54. As *Noticees* did not intimate the preferred dates of cross-examination, a reminder was issued vide email dated April 01, 2024. In response, two separate emails were received from *Noticees* on April 02, 2024, which are being discussed herein below:

I. In the first email, *Noticees* referred to the proceeding of cross-examination of Prof. Ram held in February, 2024 and submitted that he had relied on the inputs of the Author of Report prepared by Deloitte Touche Tohmatsu India LLP (hereinafter referred to as "**Deloitte**") in the year 2016. *Noticees* further submitted that the SCN had also placed reliance on the Deloitte Report, 2016 and 2018 and Report prepared by Ernst Young LLP (hereinafter referred to as "**EY**") in the year 2018, and further that SEBI

had sought inputs from the author of the Deloitte Reports even after issuance of the SCN. It was further submitted that after considering the reports prepared by Deloitte and EY as well the cross-examination of their respective authors in earlier proceedings, the 2019 SEBI OPG Order had exonerated *Noticees* from the charges of "collusion" and "crowding out". Further, the 2023 SAT Order also did not find any fallacies with the findings of the Reports of Deloitte and EY. It was further submitted that no response/clarification had been provided during the inspection proceedings when it was asked by *Noticees* if SEBI had relied upon any additional material for reopening the charges of collusion and crowding out, despite the fact that the email dated December 05, 2023 showed that SEBI communicated with the author of Deloitte Report. *Noticees* also submitted that the Report submitted by ISB to SEBI in June, 2022 and again in November, 2022, were altered on the basis of instructions issued by certain SEBI officials. Further, the Investigating Authority had taken certain views which were not supported by any reasoning or rationale. Based on aforesaid submissions, *Noticees* requested that cross-examination of the Authors of Deloitte Reports and EY Report, as well as the officials of SEBI be provided.

II. In the second email, 7 dates (09/04/2024; 10/04/2024; 17/04/2024; 18/04/2024; 19/04/2024; 20/04/2024 and 22/04/2024) were indicated for conducting the cross-examination of Prof. Ram and it was further requested to consider granting cross-examination of other witnesses also.

55. Cross-examination of Prof. Ram was scheduled (via Video Conferencing mode) on the aforesaid 7 dates selected by *Noticees* and mentioned in the previous paragraph.

56. *Noticees* vide email dated April 09, 2024, referred to the order dated March 19, 2024 passed by Hon'ble Bombay High Court in the Writ Petition no. 2461 of 2024, Aman Kokrady Vs. SEBI, and requested that they (*Noticees nos. 1* to *4)* may also be allowed to participate in the hearing to be granted to Mr. Aman Kokrady in compliance with the aforesaid order of Hon'ble Bombay High Court. This request was rejected as the order of Hon'ble Bombay High Court was qua Mr. Aman Kokrady only.

57. The cross-examination of Prof. Ram resumed on April 09, 2024, wherein at the outset, the Ld. Counsel for the *Noticees* submitted that the aforesaid order dated March 19, 2024 passed by Hon'ble Bombay High Court in the case of Mr. Aman Kokrady bars the recording of evidence in the proceedings emanating from the SCN. The relevant part of the said order in support is reproduced hereunder for ready reference:

> *"11. We clarify that till the issue of jurisdiction is decided, the concerned officer of the Respondent shall not adjudicate the showcause notice on merits including recording of any evidence of the same. In the event is any order adverse to the Petitioner is passed, remedy of the Petitioner to assail the same in appropriate proceedings as the law would permit, is expressly kept open.*
>
> *…*
>
> *13. We may observe that the present order is passed only in the context of the petitioner before us and same shall not prejudice or affect the proceedings of any other show-cause notice."*

58. After going through the said order, it was observed that para 11 of the order of Hon'ble Bombay High Court (quoted above) made it clear that the said order was *qua* Mr. Aman Kokrady, the petitioner therein, as it allowed remedy to him in case of any order adverse to him was passed. It was further observed that the above observation was evident from para 13 of the said order (also quoted above) that the relief/relaxation made in said order was in the context of the entity before Hon'ble High Court only. Hence, it was observed that as *Noticees* were not the petitioner before Hon'ble high Court in the said petition, the said order did not bar recording of evidence insofar as *Noticees nos. 1* to *4* were concerned. Further, the order of Hon'ble SAT dated March 15, 2024 was prior to the order dated March 19, 2024 of Hon'ble High Court, however, nothing had been mentioned in the order of Hon'ble High Court about scheduling the hearing by Hon'ble SAT vide its above mentioned order. Hence, in the absence of anything specific to the *Noticees*, it was not found to be appropriate to read the intent of Hon'ble High Court to stay the proceeding even in respect of parties not before it. Therefore, as noted, that the cross-examination was scheduled in compliance with the directions passed by Hon'ble SAT in its orders dated March 08, 2024 and March 15, 2024, *Noticees* were asked to conduct the cross-examination, which they agreed to by submitting that the cross-examination would be without prejudice to their rights being raised before Hon'ble SAT.

59. During the cross-examination held on April 09, 2024, 42 questions were posed to Prof. Ram. Again on April 10, 2024, the cross-examination proceedings were conducted and 30 questions were put up to Prof. Ram. Ld. During the course of cross-examination, the Ld. Counsel requested Prof. Ram to provide certain

information and accordingly, necessary directions to this effect were issued by me. Further, at the request of the Ld. Counsel to cross-examine the authors of Deloitte Reports and EY Report, it was directed that the cross-examination of the said persons may be carried out within the time period of 7 days (maximum 3 hours on each day), as permitted by Hon'ble SAT vide its order dated March 15, 2024. It was also clarified that the said persons had already been cross-examined in the earlier proceeding, however, in the light of the fresh finding from Deloitte in the form of an email, there was a case for fresh cross-examination. Based on the said reasoning and in consultation with the said official of Deloitte, the cross-examination was directed to be scheduled on April 19, 2024. Further, with respect to the author of EY Report, it was observed that though there was no fresh evidence in EY Report which was not available at the time of cross-examination conducted in the earlier proceeding; if the said author was available for fresh cross-examination within the time frame provided by Hon'ble SAT, the opportunity to cross-examine him would also be provided. It was however, clarified that the cross-examination of both the authors would be restricted to only the issues which had been remanded by Hon'ble SAT in the 2023 SAT Order.

60. Further, the request of the Ld. Counsel to cross-examine SEBI officials was denied on following grounds:

I. There was nothing on the record or in the deposition of Prof. Ram which would support the contention that the ISB Report, 2023 was altered on the basis of instructions received from such SEBI officials;

II. In the cross-examination, Prof. Ram had categorically stated that the changes from the draft reports to final report were not influenced by any

person from SEBI or any external person (Answer to Question no. 151)[1]. Prof. Ram has also stated during the cross-examination that SEBI team only facilitated the meeting held on March 21, 2023 (Answer to Question no. 201)[2];

III. The present proceedings were civil in nature and Hon'ble Supreme Court held in many judgments that there is no automatic right of cross-examination in all cases, and it depends on facts of each case. Nothing had been brought on record which would warrant cross-examination of SEBI officials.

61. The cross-examination of Mr. Amit Rahane, the author of EY Report was conducted (through Video Conferencing mode) on April 17, 2024. In the said proceedings, 31 questions were raised to Mr. Rahane by the Ld. Counsel.

62. After concluding the cross-examination, Ld. Counsel submitted that during the cross-examination of Prof. Ram conducted on April 10, 2024, Prof. Ram was requested to provide certain data and the said data had been received from SEBI (after receiving the same from Prof. Ram), only on April 17, 2024. It was further submitted that the said data was bulky and some time was sought to study the same and therefore, Ld. Counsel expressed his inability to conduct the cross-examination on the scheduled day i.e. April 18, 2024. On such a request, the Ld.

[1] *Q151Question of WTM: Were any changes carried out by you from the draft reports to the final report influenced by any person from SEBI or any external person?*
A151 No
[2] *Q201 What was the requirement of the presence of officials/members of SEBI, specifically Debashis Bandyopadhyay, Sandeep Kriplani, Pradip Bhowmick, Amarjeet Singh and Subhash K Sinduria?*
A201 I do not know what the requirement was but the SEBI team facilitated the meeting.

Counsel was informed that there are three days remaining for cross-examination of Prof. Ram, i.e., April 18, 20 and 22, 2024, and Counsel could cross-examine Prof. Ram on other issues (other than those arising out of the documents provided on April 17, 2024) on April 18, 2024; and the issues arising out of receipt of such documents could be put to Prof. Ram on other available days. However, the Ld. Counsel expressed his inability to conduct the cross-examination on April 18, 2024, and accordingly, the cross-examination of Prof. Ram was next conducted on April 20, 2024. On the said day, 28 question were asked from Prof. Ram.

63. The remaining proceedings of cross-examination were conducted on April 22, 2024 and 39 questions were asked from Prof. Ram on the said day.

64. I may note here that the information/documents as sought from Prof. Ram were received by SEBI and provided as such to *Noticees* vide emails dated April 17, 2024 and April 18, 2024. Pursuant to the same, certain clarifications were sought by *Noticees* from Prof. Ram (through SEBI) vide email dated April 19, 2024 and upon receipt of the clarifications, the same were shared with *Noticees* on the same date.

65. I may note here that Hon'ble SAT vide its order dated March 15, 2024 had directed that cross-examination be conducted for **upto** 7 days. As can be noted from Table no. 8 (in para no.139 of this order), the cross-examination of Prof. Ram and other witnesses (subsequent to order dated March 15, 2024) was conducted for 6 days out of these 7 days selected by *Noticees*, in compliance with the directions of Hon'ble SAT. It is also noted that the cross-examination did not happen on one of the days (April 18, 2024) selected by *Noticees* as the Ld. Counsel voluntary gave up the cross-examination on that day. Nevertheless, at the end of the cross-

examination, the Ld. Counsel for the *Noticees* did not have any further questions to be asked from Prof. Ram, meaning thereby that the cross-examination of Prof. Ram was conducted to the complete satisfaction of the Ld. Counsel of *Noticees.*

66. In terms of the directions passed by Hon'ble SAT vide its order dated March 15, 2024 (quoted in para 46 above), the personal hearing in the matter was fixed for May 08, 2024. However, vide email dated May 07, 2024, it was submitted on behalf of *Noticees* that the Appeal no. 299 of 2024 filed by them before Hon'ble SAT was listed on May 07, 2024 and the same stood adjourned to May 08, 2024 on the requests made by *Noticees* due to difficulty of Senior Counsel. It was further requested that the outcome of the Appeal would have a direct bearing on the ongoing proceeding, therefore, the hearing may be adjourned to some other date. In response to the said request, it was informed to *Noticees* vide email dated May 08, 2024, that Hon'ble SAT in its order dated March 15, 2024 had directed to provide hearing between May 01, 2024 to May 10, 2024, and the hearing was fixed on May 08, 2024 on the specific request of the Ld. Counsel to the effect that hearing be scheduled after May 07, 2024. However, as per the request the hearing was adjourned to May 09, 2024. On May 09, 2024, no one appeared to avail the opportunity of hearing. In the meanwhile, Hon'ble SAT adjourned hearing in the Appeal no. 299 of 2024 to May 13, 2024, which again got adjourned to May 15, 2024.

67. After completion of cross-examination in a judicious manner in compliance with the directions of Hon'ble SAT, the only issue that was left was whether complete inspection of documents has been provided. On May 15, 2024, Hon'ble SAT disposed of the Appeal no. 299 of 2024, by observing as:

"We have heard this appeal on three different dates. After substantial arguments on both sides, today Shri Sancheti, learned senior counsel for respondent SEBI submits that after due deliberation, the SEBI has decided to grant inspection and provide following the documents mentioned at paragraph 8(6),(8),(9) and (10) of the impugned order.

6.	*Approval by SEBI Market Regulation Department for obtaining ISB Report, 2023*
8.	*Internal notes, and final order of SEBI appointing investigating authority under Section 11(C) of the SEBI Act, 1992 resulting into issuance of the present Show Cause Notice.*
9.	*Internal notes, and final approval by appropriate authority of SEBI for initiation of proceedings under section 11(1), 11(2)(b), 11(4) and 11B(1) of the SEBI Act, 1992 resulting into issuance of the present Show Cause Notice.*
10.	*Approval of the Whole Time Member, Chief General Manager, and other appropriate authority of SEBI for issuance of the Show Cause Notice.*

2. In the redacted form as per the judgement of the Apex Court in T. Takano vs SEBI. He prayed that after the inspection the appellant may be directed to appear before the WTM on May 27, 2024 and file their written submissions, if within one week after conclusion of the oral submissions and the WTM may be permitted to pass orders by July 30, 2024.

3. Shri Gaurav Joshi, learned senior counsel for the appellants consents to the above proposition. Submissions of both counsels are placed on record. Ordered accordingly. Nothing further survive as the prayers pressed by the appellant are only for the above mentioned documents. Accordingly, appeal is disposed of. Pending interlocutory application/s if any stand disposed of."

68. In compliance with the aforesaid directions passed by Hon'ble SAT, vide email dated May 16, 2024, *Noticees* were intimated that the inspection of documents, as directed by Hon'ble SAT, is scheduled on May 21, 2024 and further, a personal hearing was also intimated to be scheduled on May 27, 2024.

69. In compliance with the directions of Hon'ble SAT, the inspection of documents was conducted by *Noticees* on May 21, 2024. The inspection of documents discussed in the order of Hon'ble SAT was duly provided, with redaction of identity of SEBI officials, and further few documents which contained strategic and third-party related information were redacted/not provided. Further, vide email of even date, it was informed to *Noticees* that after passing of the 2023 SAT Order, SEBI had sent two emails to ISB dated February 03, 2023 and February 23, 2023, and copy of the said emails had already been furnished to *Noticees* vide email dated February 09, 2024.

70. As noted earlier, the cross-examination of Mr. Jayant Saran (author of Deloitte Reports) was conducted on April 19, 2024. During the course of cross-examination, the said witness was requested by the Ld. Counsel to provide certain information/documents. The said documents were forwarded to SEBI by Mr. Saran vide his email dated May 03, 2024, which in turn was forwarded by SEBI to *Noticees* on the same day. *Noticees,* vide email dated May 20, 2024, stated that the response required from the witness had not been provided and the documents/emails provided vide his email dated May 03, 2024 were already on record. It was requested that *Notices* need to know whether the TBT to TAP Mapping data of *Noticee no. 1* was provided to Deloitte/Mr. Jayant Saran?

71. The said email of *Noticees* was forwarded to Mr. Jayant Saran, who replied vide his email dated May 24, 2024 as under:

> "*OPG Securities did provide some data to us. We attempted to understand the nature and content of the data provided. Attempts were made to gain an understanding of this data. The emails provided evidence that we continued to seek clarifications on the data that was provided. In the absence of such clarification, I cannot conclusively comment on the nature of data provided, or its accuracy or completeness*."

72. It is further noted that vide email dated May 24, 2024, *Noticees* raised following issues:

I. *Noticees* would not be able to respond effectively to the SCN unless all communication and documents referred in the documents (as provided to them during inspection) were also provided.

II. Designation of SEBI officials had been redacted from the internal notings. The same needed to be provided.

III. The documents indicated that Prof. J R Varma was engaged to offer his views/comments on the methodology adopted by ISB to calculate the gain made by the stock brokers. Therefore, it needed to be informed in what capacity Prof. Varma was engaged by SEBI. In case he was engaged as an independent expert, opportunity to cross-examine him was requested to be provided.

IV. Legible scanned copy of the documents provided during the inspection meeting was requested to be provided.

V. The request made vide email dated May 20, 2024 pertaining to clarification sought from Mr. Jayant Saran (Deloitte) was requested to be provided.

VI. Until proper inspection of documents was provided, the hearing fixed for May 27, 2024 needed to be rescheduled.

73. The aforesaid email of *Noticees* was responded vide email dated May 25, 2024, wherein the following was *inter alia* informed:

I. The documents sought (communication etc.) were neither relied upon nor were relevant to the issue pertaining to the documents sought in pursuance of the order dated May 15, 2024 of Hon'ble SAT.

II. The designation of officials who had proposed and approved the internal noting had already been provided. However, due to operational difficulty, at few places the designations got redacted while redacting the identity of the officers. It was further clarified that while making such redactions, no material or views/opinions of any nature had been redacted.

III. No report authored by Prof. J R Varma has been relied upon in the present proceedings, and the ISB Report, 2017 was shared with him on recommendation of SEBI Technical Advisory Committee (TAC), as Prof. Varma was the Chairman, Secondary Market Advisory Committee of SEBI. It was also informed that the cross-examination had been duly provided in compliance with the directions of Hon'ble SAT, and the request for cross-examination of Prof. Varma had been made for the first time just before the personal hearing.

IV. Legible scanned copies of documents provided during inspection had been shared vide email of even date.

V. The query pertaining to Deloitte had also been answered by Mr. Jayant and communicated to them vide a separate email.

74. After addressing all the issues raised by *Noticees,* it was also informed that the date of hearing (May 27, 2024) has been fixed by Hon'ble SAT, therefore, the request for adjournment cannot be entertained and any modification can be made by Hon'ble SAT only. *Noticees* were advised to attend the hearing and make their submissions, failing which the matter would be proceeded based on the material available on record.

75. On the date of hearing, i.e., May 27, 2024, *Noticees* addressed an email, *inter alia* stating therein as:

I. The request to provide documents, as made in the email dated May 24, 2024 was reiterated. Upon receipt of such documents, additional time would be required to analyse those documents, so as to effectively respond to the SCN.

II. *Noticees* vide their email dated May 14, 2024, had requested to provide inspection of numerous documents. However, only 2 documents were provided during inspection and all other documents were denied from inspection, which was in defiance of the directions passed by Hon'ble SAT vide its order dated March 08, 2024. Aggrieved by the said act, the Appeal no. 299 of 2024 was filed before Hon'ble SAT, wherein Hon'ble SAT had passed certain directions (as quoted in para no. 62 above) with respect to providing complete inspection of documents. However, all such documents had not been provided and vide email dated May 25, 2024, the refusal was intimated.

III. The role of Prof. Varma came to the knowledge of *Noticees* only for the first time after perusal of the internal note dated January 24, 2019 provided

during inspection on May 21, 2024. However, the request to provide cross-examination of Prof. Varma was rejected by SEBI, which was in violation of principles of natural justice.

IV. The SCN issued was without jurisdiction and was beyond the ambit of 2023 SAT Order. The ISB Report, 2023 was without jurisdiction as the same was commissioned before the said 2023 SAT Order. Further, with regard to other allegations, the WTM had reviewed his own order, which was not permitted in the statute.

V. The inspection minutes dated May 15, 2024 revealed that SEBI's Investigation Authority continued to engage with ISB on one hand, and on the other hand, defended the ISB Report, 2017 before Hon'ble SAT in the Appeal no. 184 of 2019. SEBI never informed Hon'ble Tribunal that a decision had been taken to engage ISB basis a new and different methodology vide Terms of Reference dated June 07, 2021, while the appeal was pending before Hon'ble SAT since May 01, 2019.

VI. The internal note dated May 16, 2023 (provided during inspection) showed that the decision to issue the SCN was not that of WTM, as it ought to be, but was of the Chief General Manager and Deputy General Manager. Hon'ble SAT had remanded the matter to the WTM, however, the SCN was not approved by WTM.

VII. The SCN under section 11 of the SEBI Act, 1992 could only be issued upon completion of investigation/enquiry and issuing directions/show cause notice under section 11B also required completed investigation/inquiry.

VIII. In the inspection minutes, SEBI had admitted that the decision to engage ISB was made vide internal note dated January 24, 2019, and ISB was

engaged vide letter dated June 07, 2021. SEBI's Investigating Authority was appointed vide appointment letter dated May 22, 2017, and post filing of investigation report dated June 21, 2018, the said investigating authority became *functus officio*. The proceedings emanating from the said report culminated into passing of the 2019 SEBI OPG Order, after which the WTM also became *functus officio.*

IX. Reliance was placed on the order dated March 19, 2024 passed by Hon'ble Bombay High Court in the matter of Aman Kokrady Vs. SEBI (CWP no. 2461 of 2024), directing the WTM to decide the issue of jurisdiction as a preliminary issue.

76. On the basis of aforesaid submissions, *Noticees* requested to adjourn the hearing until proper inspection of documents was given. It was further submitted that the very jurisdiction and validity of proceedings was disputed and therefore the said issue of jurisdiction needed to be decided first before proceeding to hear the matter on merits. It was informed that *Noticees* had challenged the issuance of the SCN by filing a Writ Petition (bearing e-Filing No. EC-HCBM01-05593-2024) before Hon'ble Bombay High Court. It was further submitted that *Noticees* were willing to appear for the personal hearing, to make submissions on preliminary issues, since the inspection of documents was not complete. It was also submitted that it would be logical to defer the hearing since the Writ Petition had already been filed before Hon'ble Bombay High Court, or in the alternative, the preliminary issues be decided first by passing an order. *Noticees* submitted that they were willing to appear in the hearing on May 27, 2024 to make arguments on the limited

issues stated above, and another hearing be granted after inspection and cross-examination of Prof. J R Varma.

77. As scheduled, the personal hearing was conducted on May 27, 2024 via video conferencing, wherein Mr. Paras Parekh and Mr. Debopriyo Moulik, Counsels appeared for *Noticees nos. 1* to *4* and made submissions on the lines of those made in the aforesaid email. Additionally, it was submitted that the SCN had cast vicarious liabilities against *Noticees nos. 2* to *4,* and the allegations had been made only on the basis of their directorship with OPG, which was not as per the law.

78. It was informed by me to Ld. Counsels during the hearing that there were no directions passed by Hon'ble Bombay High Court with respect to deciding the issue of jurisdiction first *qua Noticees*, and further the hearing was scheduled in compliance with the directions passed by Hon'ble SAT vide its order dated May 15, 2024. It was also observed by me that the issue of jurisdiction would be decided in the final order, and in case no jurisdiction was found to be vested, the issues remanded by Hon'ble SAT would be dealt accordingly. Further, the request to provide cross-examination of Prof. Varma was also rejected due to the reasons that Prof. Ram had mentioned during his cross-examination about the discussions he had with Prof. Varma. However, the request to cross-examine Prof. Varma was not made by *Noticees* at that time, and was made for the first time when the time provided by Hon'ble SAT to conduct the cross-examination was over.

79. Additionally it was informed by me to the Ld. Counsel that during the cross-examination, Prof. Ram had admitted that he had only discussed the

methodologies with Prof. Varma (Answer to Question no. 189[3]). However, the discussion pertained to some of the ideas of Prof. Ram himself on the methodologies that he proposed to use in the ISB Report, 2023 (Answer to Question no. 190[4]). Therefore, merely because of discussion of the author of the ISB Report, 2023 with Prof. Varma, no right of cross-examination of Prof. Varma was vested on the *Noticees* and it could not be claimed that Prof. Varma became the author of the ISB Report, 2023. Furthermore, with respect to the issue of inspection, it was informed that SEBI had replied to all objections raised vide email dated May 25, 2024 that have been captured in para no. 73 above, which I found to be in order.

80. In addition to the said grounds, it was observed by me during the hearing that the designation of SEBI employees (which have been redacted due to operational difficulties) can be provided to *Noticees* by mentioning the same in a separate document for the satisfaction of *Noticees*, though it had no material bearing on the issues under consideration. This was provided accordingly. Apart from above, it was also observed by me during the hearing that the documents had been provided for inspection in redacted form in compliance with the judgment of Hon'ble Supreme Court in the matter of *T. Takano Vs. SEBI [2022 SCC OnLine SC 210]*, in sufficient compliance of principle of nature justice. In the absence of any justifiable reason seeking inspection of documents which were referred to in

[3] *Q189 What was the involvement of Professor J R Varma, IIM Ahmedabad in the formulation and finalization of the Report, 2023?*
A189 We discussed methodologies to be used for the analysis in the Report, 2023.

[4] *Q190 Is it correct that credit for formulating methodologies used in Report, 2023 has not been given to Professor J R Varma?*
A190 He was a person with whom I discussed some of my ideas on the methodologies that I proposed to use in the Report, 2023. I did not feel the need to give him credit for those discussions.

the main documents, the situation could turn into never ending process and could not be held to be in compliance with the spirit of the law laid down by Hon'ble Supreme Court in the above matter. Careful perusal of the above mentioned judgment reveals that while acknowledging the limitation, Hon'ble Supreme Court held that documents that were made available to the authority at the time of taking decision while approving enforcement action should be made available to the entity, against which enforcement action has been initiated and accordingly, Hon'ble Court had directed to furnish copy of the Investigation Report. Keeping above legal position in mind and in order to put the controversy at rest and to conclude the proceeding well within the timeline accorded by Hon'ble Tribunal, I thought it appropriate to evaluate the request of *Noticees* afresh to consider if some more disclosure of documents could be made in terms of the judgment in the matter of *T. Takano (supra)* or such disclosure could be refused, in terms of the guidelines provided in the above judgement of Hon'ble Supreme Court. Thus, it was also observed by me during the hearing that these hearings were fixed in terms of directions of Hon'ble SAT passed vide its order dated May 15, 2024 and the final order was required to be passed in the matter by July 30, 2024. Despite such categorical directions from Hon'ble SAT, *Noticees* preferred to advance submissions on preliminary issues only.

81. As noted in the aforesaid hearing, based on a detailed evaluation, few of the additional documents were approved to be provided for inspection, and reasons were assigned for not providing inspection of the rest of the documents. Accordingly, vide email dated June 05, 2024, it was communicated that inspection of documents is scheduled on June 07, 2024 which was carried out on the said date on behalf of *Noticees.*

82. It is noted that certain documents as sought by *Noticees* were not provided for inspection due to various reasons and such reasons were duly communicated to *Noticees.* The said reasons were on account of documents being not relevant for the case in hand; or pertaining to third parties; or were having strategic information. The said denial has been found to be in line with the judgment of Hon'ble Supreme Court passed in the matter of *T. Takano (supra).*

83. It is noted that after completion of the inspection proceedings, an email dated June 07, 2024 was received from *Noticees.* In the said email, *Noticees* stated that it needed to be confirmed whether the decision to provide inspection of documents had been taken with approval of the competent authority. It was also requested to provide legible copies of certain documents mentioned in the said email. The said email was responded by SEBI vide email dated June 11, 2024. In the said response, *Noticees* were informed that that the inspection of documents was provided with my approval. *Noticees* were also furnished with copy of the internal note containing reasons and evidence of according inspection after due process. It was also informed that the scanned legible copies of the documents had already been provided in a pen drive. Further, the said email also provided response to *Noticees'* claim of non-inspection of certain documents sought by it, and highlighting the details as to how these documents had already been provided to *Noticees.* The said email also informed *Noticees* that a personal hearing has been fixed in the matter on June 19, 2024.

84. I have noted in para no. 71 that *Noticees* had informed about filing of a Writ Petition before Hon'ble Bombay High Court. It is further noted that except providing information about filing of such Writ Petition, in the email dated May 27,

2024 and during the personal hearing held on same day, no further information was received relating to such Writ Petition till date. However, *Noticees* in the meanwhile informed to have filed an Appeal before Hon'ble SAT {Appeal (L) no. 347 of 2024; OPG Securities Private Limited and others Vs. SEBI}. The said appeal was mentioned on June 18, 2024 seeking its urgent listing. On the said date, Hon'ble SAT passed the following order:

> *"… 2. By consent, call on Monday i.e. on June 24, 2024.*
>
> *3. Shri Gaurav Joshi submits that hearing at SEBI is tomorrow, i.e. on June 19, 2024.*
>
> *4. Hearing may go on, however, final order shall not be passed till the date of next hearing i.e. June 24, 2024."*

85. Accordingly, the hearing was conducted before me on June 19, 2024 through Video Conferencing mode, wherein Mr. Debopriyo Moulik, Counsel appeared for *Noticee no. 1* and Mr. Saurabh Pakale, Counsel appeared for *Noticees nos. 2, 3* and *4*. Mr. Moulik referring to the aforesaid order dated June 18, 2024 passed by Hon'ble SAT, submitted that the personal hearing may be rescheduled to any date after June 24, 2024. It was informed to the Ld. Counsel that Hon'ble SAT has categorically directed that the present hearing may go on and only direction to SEBI was to not pass final order before June 24, 2024.

86. Mr. Moulik made certain other arguments viz; WTM had become *functus officio*, issue of res judicata etc. As the said arguments have already been recorded in the present order, I deem it fit to only record only those submissions which have not been recorded so far and which are as under:

i. It was pleaded that the *Noticee no. 1* was similarly placed to the *Noticee no. 5* (Aman Kokrady) and as SEBI had given a hearing to the *Noticee no.*

5 on the issue of jurisdiction, a separate hearing needed to be given to the *Noticee no. 1* also on the same issue of jurisdiction.

ii. By referring to the Minutes of Meeting dated March 21, 2023, cross-examination of Prof. Ram, and email of SEBI dated May 25, 2024, it was submitted that the cross-examination of Prof. J R Varma ought to be provided. It was further submitted that role of Prof. Varma in preparation of the ISB Report, 2023, came to his knowledge recently during the inspection of internal file noting (held on May 21, 2024), therefore such request was not made earlier. It was further submitted that as per the office note dated January 24, 2019, Prof. Varma had questioned the approach of ISB in its earlier report. It was also submitted that the said file noting indicated that ISB report was being controlled and modulated by Prof. Varma. It was also recorded in the said noting that Prof. Varma was approached by SEBI for further analysis of data, however, he expressed his inability to take up the said assignment, and his broad guidance would be taken. It was submitted that Prof. Varma became the creator of the ISB Report, 2023 as the said report had been prepared by Prof. Ram under the aegis of Prof. Varma.

iii. By making reference to the cross-examination of Prof. Ram, it was submitted that the Terms of Reference of engagement of Prof. Ram/ISB were fixed by Prof. Varma. Further, the email dated March 15, 2023 issued by SEBI to Prof. Ram also made a reference to Prof. Varma. It was also submitted that Prof. Ram in his cross-examination stated that he changed the methodology due to Terms of Engagement, however, the facts of the case point out that the changes were brought at the instance of Prof. Varma. The cross-examination of Prof. Varma was required to know as to

why and what changes were suggested by him and whether such changes were carried out in the ISB Report, 2023.

iv. It was further submitted that Prof. Ram had not considered factors like capital deployment, no. of persons working etc., for calculation of profits.

v. It was also submitted that SEBI ought to have provided the inspection of documents in compliance with the judgment of Hon'ble Supreme Court in the matter of *T. Takano (supra),* and refusal to provide any such document also needed to be in terms of the said judgment. It was submitted that the refusal to provide some documents had been made under reasons, different from those permitted under the judgment of *T. Takano.*

vi. The possible errors in the ISB Report had not been rectified and only figures have been changed. No data was sought from OPG.

vii. The disgorgement was an equitable remedy and restitution of only gains, after deduction of taxes, expenses etc., could be directed.

87. Insofar as the submission of parity with the *Noticee no. 5* is concerned, it was observed by me during the hearing that the *Noticee no. 1* was not similarly placed as that to *Noticee no. 5.* As the *Noticee no. 5* was exonerated in the 2019 SEBI OPG Order and consequently, he was not a party before Hon'ble SAT. Hence, it was not right to plead parity by *Noticees* herein with the *Noticee no. 5*. With respect to the issue of inspection of documents, it was informed to the Ld. Counsel during the hearing that on the same issues, the Appeal of *Noticees* was pending adjudication before Hon'ble SAT. It was also observed by me during the hearing that the documents being pointed out did not seem to have any connection with the ISB Report, 2023 and had no bearing for the purposes of calculation of

unlawful gains. It was also observed that for the purposes of calculation of disgorgement amount, ISB Report, 2023 was the relevant document, which had already been furnished and extensive cross-examination of its author had also been provided. Lastly, it was once again clarified by me that no document would be relied upon in the present proceeding, copy of which had not been provided to *Noticees.* However, further arguments were made by Mr. Moulik referring to certain documents, and upon enquiring during the hearing, it emerged that these documents like draft reports etc., had already been provided to *Noticees*. As there appeared some gap in understanding with respect to inspection of documents, *Noticees* were allowed to get their confusion/doubt clarified with the concerned officials.

88. On the other hand, Mr. Pakale, Ld. Counsel for *Noticee nos. 2, 3,* and *4,* submitted that the said *Noticees* had been made vicariously liable for the acts of the *Noticee no. 1,* however, no material had been adduced to make such allegations nor details of any specific role played by said *Noticees* had been brought out. It was further submitted that in catena of judgments (*National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another; Sunil Bharti Mittal Vs. CBI; Sayanti Sen Vs. SEBI etc.*), it had been held that in order to make director of a company vicariously liable, specific involvement needed to be demonstrated. It was also submitted that the 2023 SAT Order was also silent on the roles played by the said *Noticees.* It was further submitted that no aspect of collusion or connivance had been attributed to the said *Noticees.* It was also submitted that in similar cases of 27 other brokers, the directors had not been charged.

89. Mr. Pakale concluded his arguments with respect to *Noticees nos. 2, 3,* and *4.* After that Mr. Moulik submitted that he wanted to further refer to certain judgments, and another hearing may be granted for the same. Acceding to the said request, the matter was listed for further hearing on June 20, 2024.

90. As noted in para 87 above that there appeared to be some gap in understanding/confusion and *Noticees* were asked to get the same clarified, which was duly carried out through a conference call held with SEBI officials on June 20, 2024 itself, before resumption of hearing on that day.

91. During the hearing conducted through Video Conferencing on June 20, 2024, Mr. Moulik thanked for the clarification on inspection reconciliation and submitted that a large portion of documents had been reconciled, however, certain documents were yet to be furnished by SEBI. It was clarified to the Ld. Counsel that all relevant and relied upon documents had been provided, and for those documents which were denied for inspection, reasons had been communicated. It was also informed that the Conference call was held on the day of hearing to inform the *Noticees* about the details of all documents furnished to *Noticees.* It was further informed that there was no change in the stand of SEBI with respect to the non-supply of the certain documents, and the details of such documents as well as reasons for non-supply had already been communicated to *Noticees.*

92. The other submissions made by Mr. Moulik during the hearing on June 20, 2024 are recorded herein below:

I. It was submitted that findings in the SCN had been arrived at without any fresh evidences and certain issues had been re-agitated. It was also

submitted that remit of a remand direction was confined and limited to the directions passed in such order. Issuance of a fresh show cause notice was an act beyond the scope of remand and issuance of such SCN amounted to making fresh charges. It was further argued that making charges of crowding out was an act of making fresh allegations. Reliance was placed on the order passed by Hon'ble SAT passed in the matter of *Devendra Gupta Vs. SEBI*, wherein Hon'ble SAT had quashed the order pursuant to a fresh show cause notice issued after the matter was remanded back by Hon'ble SAT.

II. It was also submitted that the present proceedings were barred by *res judicata* as findings arrived in 2019 SEBI OPG Order weere affirmed by 2023 SAT Order. Reliance was placed on the judgments of Hon'ble Supreme Court passed in the matter of *Mohan Lal Vs. Anandibai and Ors.* and *The Paper Products Ltd vs Commissioner of Central Excise.*

III. It was also submitted that jurisdiction needed to be decided in the first instance as a preliminary issue and judgment of Hon'ble Supreme Court passed in the matter of *The Management of Express Newspapers Vs. Workers & Staff Employed under It (1963 AIR 569)* was relied on. It was also submitted that jurisdictional facts must exist before an authority assumed jurisdiction over the issue. Reliance was placed on the judgment passed in the matter of *Arun Kumar Vs. Union of India (AIR ONLINE 2006 SC 636)*, order of Hon'ble SAT passed in the matter of *Bhourka Financial Services Ltd. Vs. SEBI*.

IV. It was also submitted that Prof. Ram had stated in his cross-examination that only the Terms of Reference and Letter of Engagement were referred

to, for preparation of the ISB Report, 2023, therefore, the said report did not have any bearing with the 2023 SAT Order.

V. It was submitted that doctrine of merger had given a complete go by and reliance in this connection was placed on the order dated June 12, 2015 passed by SEBI in the matter of *Jayesh P. Khandwala-HUF*.

VI. Reliance was placed on the judgments passed in the matters of: *Bidya Devi Vs. Commissioner of Income Tax and others (AIR 2004 CAL 63);* and *Vasudev Ramchandra Kamat vs. SEBI (SAT Appeal No. 287 of 2020 decided on 19.01.2021)*

VII. It was further submitted that making charges of crowding out in the SCN was an act of making fresh allegations.

93. After conclusion of the hearing, Ld. Counsel requested for time till July 02, 2024 to file Written Submissions.

94. As noted earlier, Hon'ble SAT had directed the listing of the Appeal filed by *Noticees* on June 24, 2024. Hon'ble SAT vide its order dated June 24, 2024 dismissed the Appeal [titled as OPG Securities Private Limited and others Vs. SEBI {Appeal (L) no. 347 of 2024}; later registered as Appeal no. 372 of 2024] and *inter alia* passed the following order:

> "*5. In the peculiar facts and circumstances of the case, namely, that there has been an earlier remand order and a subsequent order of May 15, 2023 to provide inspection of the documents which has been complied with; and appellant has presented substantial arguments and on instruction Mr. Joshi needs one or two days to complete the argument. In our opinion, it is just and appropriate for WTM to pass a comprehensive order on all issues including the jurisdictional issue. In the result, this appeal fails and is accordingly dismissed.*

6. We direct the SEBI to grant two day's 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."

95. In compliance with the directions passed by Hon'ble SAT, personal hearing was fixed for July 01, and July 04, 2024, which got rescheduled to July 05, and July 08, 2024 on the specific request of *Noticees.* On July 05, 2024, Mr. Moulik, Ld. Counsel appeared through video conferencing and made arguments on behalf of *Noticees nos. 1* to *4.* As the arguments remained part heard on the said date, the matter was again taken up for hearing on July 08, 2024, through video conferencing. On the said date, Mr. Ravichandra Hegde, Advocate appeared for *Noticees nos. 1* to *4* and presented his arguments. Mr. Hegde was briefly followed by Mr. Moulik, who concluded the arguments. As directed by Hon'ble SAT in its order dated June 24, 2024, the Ld. Counsels were given liberty to file written submissions on or before July 22, 2024. (Submissions made during the two hearings are captured in written submissions as discussed later in the order).

96. It is noted that after conclusion of the personal hearing, *Noticees* sought certain clarifications with respect to the information/data used by ISB in the ISB Report, 2023. The said queries of *Noticees* were addressed after obtaining necessary inputs from NSE/ISB, and the details of all such communication are being captured in the following table:

Table no. 3

Email date of *Noticees*	Brief context	Reply date of SEBI	Reply of SEBI in brief
11/07/2024	Certain data in the ISB Report, 2023 is masked. NSE may be directed to provide clarifications so as to enable the Auditors engaged by *Noticees* to verify the data	12/07/2024	In terms of information provided by NSE, all the 20 fields highlighted in the email dated 11/07/2024 are unmasked in the Report.
15/07/2024	In response to the email dated 12/07/2024, *Noticees* again highlighted that two fields namely, *"buy_clnt_cd"* and *"sell_clnt_cd"* are kept masked and requested that NSE may be asked to provide the unmasked data under these headers.	15/07/2024	The relevant Client ID and Broker ID for Proprietary trades of OPG were furnished vide email dated 17/04/2024 (copy of email was also attached). The said fields were used in ISB Report, 2023 for identifying profits of Proprietary trades of OPG. Client IDs of other entities are 'third party information' and not relevant in screen based trading, thus exempted in view of the judgment of T. *Takano.*
17/07/2024	In response to the email dated	23/07/2024	In terms of updated information provided

	15/07/2024, it was stated that "buy_dlr_usr_id" and "sell_dlr_usr_id" are kept masked.		by NSE, the segment wise mapping of unmasked and masked fields namely buy_dlr_usr_id" and "sell_dlr_usr_id" were provided.
17/07/2024	Certain issues pertaining to coding used by ISB in analysing the data were raised.	24/07/2024	The documents as provided by ISB were furnished.
18/07/2024	Certain additional issues with respect to benchmark broker connections to secondary server were raised.	19/07/2024	Connection data of secondary server for benchmark brokers in the format sought by the *Noticees* was provided. It was also informed that the said data can be obtained from the server log files of benchmark brokers, which has already been shared on 22/12/2023.

D. SUMMARY OF WRITTEN SUBMISSION

97. It is noted that vide email dated July 23, 2024, the written submissions have been filed (first filed at 00:00 and again at 22:38 pm, revised version of WS rectifying typographical errors have been filed) and the summary of said submissions is captured in the following paragraphs:

D.1 Executive Summary

I. The manner of investigation of SEBI over a period of 8 years (since filing of the complaint by the whistleblower in the year 2015) is disruptive of very essence of fair, equitable and empirical investigation, while keeping in view the duties envisaged under the Constitution of India. SEBI has sought to re-agitate the settled issues even after the investigation was officially closed, and has also made false depositions on affidavits before Hon'ble SAT.

II. When the matter was remanded back to SEBI, it took upon a chance to introduce vague findings of its roving enquiry under the purview of the remand instructions.

III. The conduct of SEBI is writ large from the decision taken to expand the scope of remand beyond the order of Hon'ble SAT. Reference is made to an internal file noting reading *inter alia* as:
"*VI therefore, the remand by the SAT to consider the disgorgement amount afresh, although for different reasons, maybe considered as an opportunity to revise the methodology for calculation of the unlawful gains made by the [Sic] OPG during the relevant period*".

IV. The data being relied upon by SEBI for its regulatory functions is prepared by amateur persons who are not even qualified to handle the exercise. The cross-examination will show that entire coding for arriving at the computation in the ISB Report, 2023 has been conducted by research assistants who are freshers and they even stated that this is their first official python code.

V. The Author of the ISB Report, 2023 has admitted that he is not a technology expert and has not reviewed the coding at least on same basis.

VI. The methodologies and assumptions adopted by the ISB Report, 2023 are baffling to be used for a disgorgement proceedings.

VII. The data used in the ISB Report, 2023 is replete with errors and has not been correctly obtained from NSE.

VIII. The figure of INR 132.28 Crore as abnormal profits is beyond prudence and objectivity, therefore, deserves to be disregarded outright.

D.2 Background of the proceedings and the order of Hon'ble SAT dated January 23, 2023

IX. NSE vide its Circular no. 693 introduced the co-location facility on August 31, 2009, for enabling the TMs to get faster access to price feed and market movement. It allowed the TMs to place their servers in the premises (data centre) of NSE.

X. OPG made its application dated October 22, 2009 to NSE for rack allocation in the co-location facility, and thereafter, OPG continued to increase its IPs, which were allocated in various rack spaces. For each subscription, OPG was

provided an allotment letter wherein log-in details for the primary servers as well as to the secondary/fallback server were provided for ensuring continuous flow of information.

XI. The co-location facility did not have specific rules, regulations etc., regarding its usage. The letter issued after making application for a new rack was a generic letter, which was in the nature of a welcome letter.

XII. Even the usage of the secondary server was never regulated by any provision of law.

XIII. Only the following Circulars were issued by NSE:

Table no. 4

Sr. No.	Circular	Remarks
1.	Circular No. 693 bearing reference no. NSE/MEM/12985 dated August 31, 2009	Introduction of the co-location services. Information as to the facilities that will be available. It did not contain restriction on the usage of secondary server.
2.	NSE Colocation Guidelines Document No. NSEIL/ITSM/INT/072 dated August 8, 2011	No reference for usage of secondary server
3.	NSE Colocation Guidelines, Document No. NSEIL/ITSM/INT/072 dated August 8, 2011 (as revised on April 16, 2012)	The objective of this circular was to provide guidance to the members to follow the co-location datacenter processes. It inter alia stated as: "*Member's **should always check** the secondary TBT parameters are working fine with their application in case of non-availability of data from TBT primary source they can move to secondary source".* The only way to check is to initiate a connection to secondary server and staying connected to it.

XIV. In view of the unfettered access permitted to secondary servers coupled with the constant issues including disconnections in primary servers, large number of TMs including OPG connected to the secondary server to secure the connection. No penalties were imposed by NSE even after witnessing such connections, as such acts were permitted.

XV. Parallel proceedings before Adjudicating Officer (AO) were commenced against *Noticees* and show cause notices identical to the ones issued by enforcement department of SEBI were issued. Before passing of AO order against *Noticees,* AO orders were passed in 3 other matters and penalties of INR 3-6 Lakh were imposed. Despite *Noticees* demonstrating the no. and nature of connections to secondary server in these 3 cases, AO imposed disproportionate penalty of INR 5.20 Crore on *Noticees.*

XVI. In the appeal filed against the AO order, SEBI filed its affidavit in reply and contended that case of OPG is not comparable with other TMs.

XVII. On the similar issues, AOs have passed orders wherein minor penalties in the range of INR 3-12 Lakh have been imposed and other findings have also been rendered that such entities did not make any unfair gain by connecting to the secondary server; connecting to the secondary server was not a banned activity etc. However, against OPG, the AO had imposed a penalty of INR 5.20 Crore.

XVIII. The said orders passed against other TMs have not been reviewed under sub-section (3) of section 15-I of the SEBI Act, 1992. The same shows bias and prejudice of SEBI against *Noticees.*

D.3 Preliminary Objections to the issuance of show cause notice

D.3.1 Office of the WTM has become *functus officio*

XIX. The WTM has become *functus officio* after passing of the 2019 SEBI OPG Order, which got merged with the 2023 SAT Order. Further, the IA was also appointed vide order dated May 22, 2017, and such appointment terminated with the submission of the investigation report in June, 2018. In the present proceedings also, the same appointment order of IA has been used and same investigation report has been used. Reliance has been placed on the judgment of *Kunhayammed & Ors. Vs State of Kerala & Anr. (2000 AIR SCW 2608)* wherein it was inter alia held as:

> *"…Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised*

by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

D.3.2 The Show Cause Notice incorrectly applies Section 11B and 11 (4) of the SEBI Act, 1992

XX. There is no appointment of an investigating authority for engaging with ISB to re-open the issues. Further, the decision to issue the SCN was not of quasi-judicial authority but was that of Chief General Manager and Deputy General Manager.

D.3.3 Meaning, scope and limitations of a direction of 'remand'

XXI. The scope and nature of remand order must be carefully considered by SEBI. Reliance has been placed on the order passed by Hon'ble SAT in the matter of *SRSR Holdings Private Limited. Vs. SEBI (Appeal no. 1 of 2019),* wherein it was *inter alia* held that the WTM is bound by the remand order and cannot enlarge the scope of remand and was further held that a higher disgorgement order cannot be directed in comparison with the original order. Apart from the above, following judgments/orders have also been relied upon to support the contention that it is not open for the authority to re-agitate the issues already decided and not re-opened by Hon'ble SAT:

i. *Vasudev Kamat Vs. SEBI (SAT Appeal No. 8 of 2020; date of decision: February 25, 2020)*
ii. *Devendra Suresh Gupta Vs. SEBI (supra)*
iii. *Shivshankara and Another versus H.P. Vedavyasa Char, (2023 SCC OnLine SC) 358*
iv. *Smt. Bidya Devi Vs. Commissioner of Income Tax, Allahabad & Ors. (supra)*
v. *Mohanlal Vs. Anandibai (supra)*
vi. *Paper Products Ltd. Vs. CCE (supra).*

D.3.4 The remit of the 'remand' under the Final SAT Order

XXII. Based on the 2019 SEBI OPG Order and 2023 SAT Order, the scope of remand directions issued by Hon'ble SAT are restricted to the followings:

i. With respect to allegation of collusion, since the 2019 SEBI OPG Order has failed to frame a separate issue and has provided findings while dealing with the issue of advantage from the secondary server, Hon'ble SAT has directed that a separate issue needs to be framed, and reasoned findings needs to be given.

ii. Similarly, for destruction of evidence, Hon'ble SAT has directed to take a decision.

iii. With respect to crowding out, Hon'ble SAT has observed that the 2019 SEBI OPG Order has failed to consider the aspect that: "*The tick received by other TM was after it was received by OPG causing loss of those few seconds which was advantageous to OPG and disadvantageous to other TMs"*. SEBI has been directed to consider the Issue no. 2 (of 2019 SEBI OPG Order) keeping in mind the aforesaid aspect.

iv. For computation of profits from secondary server access, Hon'ble SAT finds that the computation on the basis of data analysed in respect of first/early login is erroneous, since it has been concluded that there is only probabilistic advantage out of first / early login, and therefore, only the quantum pertaining to Non First Prop on Secondary days as contained in Table 15 and A11 of ISB 2017 needs to be considered. There is no direction of re-engaging an expert or making fresh computation of profits. There are no inferences to introduce a new report arising out of a parallel illegal investigation with different methodology, for classification of secondary and first login days, enhanced scope/period of review, more segments (Cash Market and Currency Derivatives).

XXIII. Each of the aforesaid directions are to be considered on the basis of the SCNs issued earlier and issuance of fresh SCN was not required at all. There is no direction to adduce any fresh evidence.

D.3.5 Show Cause Notice travels beyond the directions of 'remand', and is not arising from the Final SAT Order (2023 SAT Order)

XXIV. The SCN travel beyond the directions of remand issued in the 2023 SAT Order, and thus the SCN suffers from issue estoppel and *res judicata*.

XXV. The WTM cannot disregard and deviate from the findings already given in the 2019 SEBI OPG Order.

XXVI. The internal noting dated March 03, 2023 of CGM/DGM of SEBI records *inter alia* as:

"(vi) Therefore, the remand by the SAT to consider the disgorgement amount afresh, although for different reasons, may be considered as an opportunity to revise the methodology for calculation of the unlawful gains made the OPG during the relevant period."

XXVII. The above indicates the intent of SEBI to give effect to findings of its parallel illegal investigation under the garb of remand directions.

D.3.6 The Show Cause Notice arises out of parallel illegal investigation conducted by SEBI during the pendency of the proceedings arising out of the

Earlier Show Cause Notices, which fact has been kept undisclosed before Hon'ble SAT

XXVIII. List of dates of events will indicate that even prior to issuance of show cause notices dated July, 2018, SEBI had decided to reconsider the findings of ISB Report, 2017, and to conduct further investigation into the secondary server connections established by TMs other than OPG. There details have been gathered from the emails and documents shared by Prof. Ram during the cross-examination.

XXIX. Since issuance of earlier show cause notices, SEBI did not believe in the case, and was attempting to make the case. SEBI misrepresented before Hon'ble SAT and made erroneous submissions against its own beliefs on affidavits.

XXX. The Terms of Reference letter dated June 07, 2021 issued by SEBI to ISB shows that SEBI had requested ISB to compute gains made by 27 other TMs. During such time, the Appeals of *Noticees* were pending before Hon'ble SAT, and submissions were made by SEBI before Hon'ble Tribunal that OPG was different from other TMs, and it had established connections in a nature which was possible only through active connivance with employees of NSE. The same shows that the 2023 SAT Order was passed on the basis of active misrepresentation of SEBI.

D.3.7 The only fresh evidence, the ISB Report 2023 has been unlawfully and illegally procured by SEBI without any mandate and the said Report was not prepared after or as per the directions of Hon'ble SAT

XXXI. In terms of internal noting dated January 24, 2019, it is clear that SEBI vide its letter dated February 28, 2017 advised NSE to undertake an exercise to estimate benefits to stock brokers from alleged unfair access at NSE Colocation. In compliance to above, NSE submitted the ISB Report, 2017 to SEBI. The said report was placed before SEBI-TAC, which recommended that the report be placed before Secondary Market Advisory Committee (SMAC).

XXXII. SEBI-TAC never intended to engage Prof. Varma as an Expert to review the ISB Report, 2017. However, SEBI tried to engage Prof. Varma to conduct a further analysis basis his observations/suggestions.

XXXIII. As Prof. Varma refused to take up the assignment, ISB was engaged through Terms of Reference finalized by Prof. Varma.

XXXIV. It was decided to obtain the Report from ISB in January, 2020 itself and the report was nearly finalized in December, 2022; i.e., prior to issuance of 2023 SAT Order. However, in the MA no. 678 of 2023 filed before Hon'ble SAT on May 16, 2023, SEBI *inter alia* stated that it had sought a revised report from ISB based on the observations of Hon'ble SAT recorded in 2023 SAT Order. The observations of 2023 SAT Order are not part of the scope of ISB Report, 2023. Therefore, the ISB Report, 2023 is inadmissible in present proceedings.

XXXV. Prof. Ram in his cross-examination has confirmed that he was engaged by SEBI on June 07, 2021; he was first approached by SEBI during

October/November, 2019; he did not rely upon the 2019 SEBI OPG Order and orders passed by Hon'ble SAT including the 2023 SAT Order.

XXXVI. *Noticees* were never asked to provide any clarification during the preparation of the ISB Report, 2023. The numbers quoted in the ISB Report, 2023 are not even near to the entire profits of *Noticees* for 10 years.

XXXVII. The data used in the ISB Report, 2017 and the ISB Report, 2023 are same, and by changing the methodologies, SEBI is altering its previous findings.

D.3.8 Without directions in that regard, the Show Cause Notice adopts the ISB Report, 2023 which heavily enlarges the scope of analysis via-a-vis the original ISB Report, 2017

XXXVIII. The ISB Report, 2023 expanded the period of 2010 to 2015, to 2009 to 2016. Further, the earlier report was limited to F&O segment, however, the ISB Report, 2023 also included Cash Market and Currency Derivative segments. The number of days classified as secondary days under F&O segment have also increased from 269 to 670. These alterations were not directed to be carried out by Hon'ble SAT.

XXXIX. Further, Hon'ble SAT did not direct that SEBI should not consider 135 complaint days nor it directed to introduce a methodology of computing abnormal gains on a comparison of its profits with a benchmark set of 30 brokers. There was no benchmark analysis in the ISB Report, 2017.

XL. The 2019 SEBI OPG Order considered only pure Unicast TBT Period from January 01, 2010 to April 05, 2014. The 2023 SAT Order did not direct for inclusion of overlap days (period after April 07, 2014).

D.3.9 ISB was re-engaged by SEBI despite its clear conflict of interest

XLI. A complaint was raised by Mr. Kirit Somaiya (Ex-M.P.), raising the conflict of interest in engagement to ISB.

XLII. Further, Prof. Varma had noticed flaws in ISB Report, 2017, however, as he refused to conduct the assessment on his own, ISB was re-engaged by SEBI.

XLIII. During the cross-examination, Prof. Ram has shared an email dated February 20, 2024 stating that he had received grants/funding from NSE for various studies conducted for NSE in 2013, 2014, 2015 and 2019. The same indicates clear conflict of interest.

D.3.10 The author of the ISB Reports lacks necessary qualifications and expertise to prepare the Report

XLIV. The fallacies in the ISB Report, 2017 demonstrated the lack of qualification and field experience of the author of the said report. Further, the nature of organization is also not suited for the exercise intended by SEBI.

XLV. Prof. Ram is not an expert in technology and does not even possess the skills to review the code written by his research assistants, who were simply fresher.

XLVI. In the email dated February 21, 2023, Prof. Ram has acknowledged the errors made by his research assistants.

D.3.11 ISB Report, 2017 never taken forward before the SMAC, SEBI, which is illegal

XLVII. Based on reference of SEBI-TAC, the ISB Report, 2017 was circulated to Prof. Varma (Chairman of SMAC), however, it was never discussed in the SMAC meetings. Such an act was beyond jurisdiction as earlier SCNs were already issued and was also beyond the scope of SMAC.

D.3.12 Existence of 'jurisdictional fact' is *sine qua non*, which is absent in the present proceedings

XLVIII. The issues in the SCN fall in two categories: (i) issues decided in 2019 SEBI OPG Order and such findings that are not denied by Hon'ble SAT; and (ii) issues arising from investigation conducted by SEBI without the knowledge of Hon'ble SAT, and put to *Noticees* under the guise of remand directions. Both these set of issues cannot be considered under remand jurisdiction.

XLIX. SEBI needs to first decide upon existence of a jurisdictional fact before deciding the matter on its merits. Reliance has been placed on the following judgments: (i) *Arun Kumar and others vs. Union of India and others (supra);* (ii) *Management of Express Newspapers (P) Ltd. v. Workers (supra);* and *Ramesh Chandra Sankla Etc vs Vikram Cement Etc, (2008) 14 SCC 58*

L. Hon'ble SAT, vide its order dated June 24, 2024, has *inter alia* directed SEBI to pass a comprehensive order on all issues including the issue of jurisdiction.

LI. Hence, the WTM has to first decide:

- Whether there exists a jurisdictional fact?
- Whether the issuance of the SCN falls within the directions of Hon'ble SAT?
- Whether SEBI was authorised under the directions of Hon'ble SAT to introduce the ISB Report, 2023 which was being prepared since two years in pursuance of the 2023 SAT Order and finalised after passing of the SAT Order?

D.4 Preliminary submissions and breach of principles of natural justice

D.4.1 Complete inspection not provided to the *Noticees*

LII. The inspection of documents has been first denied by SEBI, and subsequently, documents are provided for inspection in piece meal approach after directions of Hon'ble SAT, and *Noticees* have been compelled to participate in the proceedings without complete inspection.

LIII. The inspection proceedings were dragged for one year till June, 2024. Pursuant to order dated March 08, 2024 wherein Hon'ble SAT had directed SEBI to grant

inspection, only 2 documents were provided by SEBI in contrast to 85 documents sought by *Noticees.* After passing of order dated May 15, 2024 by Hon'ble SAT, further documents were provided by SEBI for inspection.

LIV. Inspection of various fundamental documents remains pending and denied by SEBI. By not providing inspection of documents, SEBI has acted in contravention of the following judgments:

i. T. Takano Vs. SEBI (supra);
ii. Reliance Industries Vs. SEBI (AIR 2022 SCC 3690);
iii. Smitaben N. Shah Vs. SEBI (SAT Appeal no. 37/2010; date of decision: July 30, 2010);
iv. Price Waterhouse Vs. SEBI (SAT Appeal no. 8 of 2011; date of decision: June 01, 2011);
v. Amadhi Investments Limited Vs. SEBI [(2011) SAT 97]; and
vi. Natwar Singh Vs. Director of Enforcement [(2010) 13 SCC 255].

D.4.2 Denial of cross-examination

LV. Based on inspection of documents granted on May 21, 2024, following documents were *inter alia* inspected by *Noticees*:

i. File noting dated January 24, 2019;
ii. Email dated March 15, 2023 from SEBI to ISB;
iii. Minutes of Webex meeting held on March 21, 2023.

LVI. The aforesaid documents indicate the role of Prof. Varma. The said documents came to knowledge of *Noticees* only in May, 2024. However, the request for cross-examination of Prof. Varma was denied by SEBI vide its email dated May 25, 2024 citing that the request for cross-examination has been made for the first time, before the personal hearing. The said refusal is absurd and unfair.

LVII. Prof. Varma was the director and leader under guidance of whom, ISB Report, 2023 was prepared.

LVIII. Cross-examination of Prof. Varma is crucial to seek answers to all questions for which Prof. Ram had no answers. Reference is made to questions and answers nos. 189, 190, 198, 199, 200 of the cross-examination of Prof. Ram to submit that Prof. Ram has painted a picture of having a merely friendly discussion with Prof. Varma and no clarity on his role was provided. However, while rejecting the request for cross-examination, SEBI has tried to show that *Noticees* were aware of his role and were delaying the proceedings by making request at that stage.

LIX. The request for cross-examination may not be denied merely on the account of time constraints set by Hon'ble SAT.

D. 4. 3 The sequence of proceedings leading to continued infringement of the *Noticees* rights under natural justice

LX. OPG has been singled out in the present proceedings, as all TMs were acting in the same manner. NSE has also admitted that there was no policy against actions of TMs including OPG.

LXI. Only AO orders are passed against other TMs, and the findings of Deloitte, EY and ISB are not relied upon in such proceedings.

D.4.4 Show Cause Notice fails to spell out proper allegations qua the *Noticees*

LXII. The SCN has not made specific allegations and blanket charge of PFUTP Regulations and Code of Conduct have been made.

LXIII. A show cause notice should contain precise charge so that he could reply to the same. Reliance in this regard is placed on the order of Hon'ble SAT in the matter of *M/s. Swaranganga Trading Pvt. Ltd Vs. The Adjudicating Officer, SEBI (SAT Appeal No. 74 of 2009; date of decision: September 15, 2009)*; and judgments of Hon'ble Supreme Court passed in the matters of *Canara Bank vs Debasis Das (2003) 4 SCC 557* and *Gorkha Security Services Vs. Government (NCT of Delhi), (2014) 9 Supreme Court Cases 105*.

D.5 Glaring Issues in the manner of computation of gains

D.5.1 The remand directions have been misconstrued by SEBI

LXIV. The 2019 SEBI OPG Order noted that early login to the POP servers could only help gain "probabilistic" advantage and held that first connect/early login could not result in unfair advantage. Accordingly, the computation of gains from first connect/early login were dropped and after considering Tables A11 and A15 of the ISB Report, 2017, INR 15.73 Crore was taken as the alleged profit.

LXV. The said method has been found by Hon'ble SAT as patently erroneous as it has taken into consideration the computations made in the ISB Report in respect of 'first prop' and 'non first prop' trades of OPG. The 2023 SAT Order held *inter alia* as: "*The First Prop' analysis is based on when OPG logged in first. When the WTM has given a finding that early logging in does not give any advantage and could only be given a probabilistic advantage the question of calculating profits on the basis of early login becomes wholly erroneous. The WTM could only consider probabilistic advantage, if any, which the OPG may have gained by being the first logger*"

LXVI. The directions issued by Hon'ble SAT are restricted to re-computing the profits while ignoring values arising out of 'first prop' or 'overnight' trades, considering that the same are not concerned with 'unlawful gains coming out of secondary server access'.

LXVII. The 2023 SAT Order intended SEBI to consider only the profits arising out of secondary days and not from profits arising out of 'first login' on the secondary

day, during the TCP-IP/Unicast period, if any. The said figures can be identified in the ISB Report, 2017 in Table no. XXI.

LXVIII. The 2023 SAT Order intended that correct figures corresponding with the allegations in the 2019 SEBI OPG Order ought to be considered from the ISB Report, 2017, rather than including the figures pertaining to first/early login issue on the secondary days in respect of which allegations are dropped.

LXIX. The ISB Report, 2017 provides the figures pertaining to secondary days under Table no. 15 (Page no. 33) and Table A11 (Page no. 51).

D.5.2 Numerous fallacies in the ISB Report 2023 creating a dichotomy from a direction of disgorgement

LXX. For the purpose of disgorgement, it required to identify the alleged extra profits/actual gains made from the alleged violation that OPG would not have been able to earn had it not connected to the secondary server.

LXXI. Disgorgement is an equitable relief and it requires restitution of the amounts which made the delinquent unjustly enriched. Reliance has been placed on the judgment of *Kokesh vs. Securities Exchange Commission of the Hon'ble U.S. Supreme Court [(2017) SCC Online US SC 58]*.

LXXII. In terms of cross-examination of Prof. Ram, (Answers to Questions nos. 123 to 125), during the preparation of ISB Report, 2023, he was not aware that the computation being made would be applied for issuance of directions for disgorgement.

LXXIII. ISB Report, 2023 only provides the possibility of gains in comparison with the benchmark set of brokers and provides an approximation of the profits while making several unreasonable assumptions.

LXXIV. ISB Report, 2023 does not directly answer the question of disgorgement and is an academic exercise only, as admittedly stated in the Limitations of Study.

D.5.3 The methodology applied for computation of 'abnormal' gains is academic at best and cannot justify a direction of disgorgement

LXXV. The methodology applied for computation of alleged unlawful gains (page 43 of the ISB Report, 2023) is absurd and illogical.

> "*On the same day, it may be determined if the broker logged into the secondary server, regardless of whether they were first on the secondary server or not. However, there are likely to be certain days when a broker logs in first to a POP server (either on the primary or secondary server) AND logs in to the secondary server (first or not).* ***To determine if a broker has misused the collocated facilities by either logging in first to any one of the POP servers or by logging into the secondary server (first or not),*** *a simple summation of*

profits earned on the days of first login and profits earned on days of logging into the secondary servers would double-count the profits on days on which the broker logged in first to any POP server AND logged in the secondary server, first or not. The sum of all profits, thus, need to be adjusted for this double-counting to calculate the correct profit from misusing the collocated facilities by subtracting the profits earned on days of first login AND logging into the secondary server from the sum of profits earned on days of first logins and profits earned on days of logging into the secondary profits ***Next, to determine if a SEBI sample broker earned 'abnormal' profits from misusing collocated facilities, a 'normal' level of profits is calculated as the median total profits adjusted for double-counting, as described above, for the benchmark sample brokers.*** *These were reported in Tables 2, 4 and 6****. The 'abnormal' profit earned by each SEBI sample broker is the total profit earned by them after adjusting for double-counting minus the 'normal' profit from the benchmark sample brokers***" (emphasis supplied by *Noticee)*

LXXVI. During the cross-examination, Prof. Ram has provided the following response to the questions regarding abnormal profits:

"*Q145 What is the definition of "abnormal" profits/gains in Report 2023?*
A145 The definition is as follows- It is the profits made by a Broker in the SEBI sample ***on days of logging in first into atleast one port of a primary POP server that in turn logged in first to the PDC plus profits made by a Broker in the SEBI sample on days of logging in first to atleast one port of the secondary POP server that in turn logged in first to the PDC plus profits made by a Broker in the SEBI sample on days of logging in to the secondary server minus the profits made by a broker in the SEBI sample on the days on which they logged in first on any server and logged in to the secondary server minus the median profits made by the Benchmark sample of Brokers****. The median profits made by the Benchmark sample of Brokers is calculated as* ***the profits made by a Broker in the Benchmark sample on days of logging in first into atleast one port of a primary POP server that in turn logged in first to the PDC plus profits made by a Broker in the Benchmark sample on days of logging in first to atleast one port of the secondary POP server that in turn logged in first to the***

PDC plus profits made by a Broker in the Benchmark sample on days of logging in to the secondary server minus the profits made by a broker in the Benchmark sample on the days on which they logged in first on any server and logged in to the secondary server*. This is calculated in Tables 5 and 6 of Report, 2023.*

Q146 Have you calculated/ analyzed "abnormal" profits/ gain in Report of June 2022 and November 2022?
A146 No

Q147 What was the reason to include the same in Report, 2023?

A147 This was based on a discussion with the SEBI team to better present what the exact "abnormal" profits/ gains were." (emphasis supplied by Noticees)

LXXVII. The afore-quoted definition belies the principles of disgorgement and shows that the ISB Report, 2023 is replete with errors and assumptions.

LXXVIII. In the cross-examination, Prof. Ram has admitted that ISB Report, 2023 was not a study to quantify any alleged advantage from secondary server access. Reference has been made to Answers to Questions nos. 261 to 291, with special emphasis to following questions and answers:

"*Q263 Is it correct that as per the Report, 2023, the days on which the load on the Secondary server is lesser, the profits that accrued to the Trading Member will be greater in comparison to days on which the load on the Secondary server is relatively higher?*

A263 The profit analysis comparing days of lower load on the Secondary server and days of higher load on the Secondary server was not done. Hence, I cannot comment on the ***accuracy of the question****.*

Q265 As per Answers 261, 262 and 205, is it correct that profits generated by a Trading Member would be greater on days of relatively a lower load on the Secondary server as compared to days of a relatively greater load on the Secondary server?

A265 That is the implicit assumption in the Report, 2023.

Q288 Is it correct that the behavior of the server Primary or Secondary, does not change on the basis of the kind of order being placed by the Trading Member, i.e., Proprietary or non-Proprietary?

A288 Since I have not studied the TAP IPs, I cannot answer the question.

Q289 Is it correct that as per Answer 287 and 288, you did not have any information of what was the alleged advantage gained by logging in first to a Primary server or connecting to a Secondary server, as you do not have any information as to how the Trading Members used these connections?

A289 Yes, that is correct.

Q290 Attention of the witness is drawn to Table no. 70 and Table no. 72.
Is it correct that the Total intra-day profits on Secondary days (as per Report, 2023), for Proprietary trades for OPG Securities Pvt. Ltd. , i.e. INR 8630 Lakh is the total Proprietary profits made by OPG Securities Pvt. Ltd. on all the days classified as Secondary days (as per Report, 2023)?

A290 Yes, that's correct.

Q291 In light of the Answers 271 to 286, is it correct to state that the alleged abnormal profits are not a quantification of the alleged advantage gained by a Trading Member by either logging in first to a Primary server or logging into the Secondary server, but merely the statistical measure of the deviation of the total profits of a Trading Member from the median of the total profits made by the Trading Members in the benchmark sample shared by SEBI/NSE?

A291 It may or may not be correct because causation between logging in first to the Primary server or logging in to the Secondary server and alleged advantage cannot be established. On Page 1 of the Report, 2023, under Limitations of the Study, the first bullet point states that at best, only correlation between logging in first to the Primary server or logging in to the Secondary server and profits earned by various trading

members can be established. This is the basis of the findings of the Report, 2023."

(emphasis supplied by *Noticees)*

D.5.4 The meaning of 'Secondary Server Day' continues to be misrepresented

LXXIX. The 2023 SAT Order overlooks many factors and has made certain assumptions. The said assumptions are also found in the SCN and are listed below:

- It has been assumed that only OPG made connections to the secondary server and all other TMs connected to the Primary servers.
- It has been assumed that lower load leads to faster 'dissemination' of data.
- OPG had connected only 1-2 IPs out of 45 IPs, however, it is assumed that all of the OPGs business is connected through secondary server access.
- Even if 1 IP out of 45 IPs is connected to the secondary server, it is considered as a 'secondary server day' in the ISB Report, 2023 and the entire gross profits are terms as "unlawful gains".

LXXX. During the cross-examination of Mr. Jayant Saran, author of Deloitte Reports, the assumption that OPG was connecting only to secondary server on some days, or that 'secondary server day' would mean that all business of OPG on that day was being transacted through secondary server, got clarified. The relevant extract of the cross-examination is reproduced below:

"*Q 21 Witness is provided a copy of the Show Cause Notice dated May 17, 2023 (over email).*

Attention of the witness is drawn to Para 37, 28, and 39 of the SCN and Annexure 15 of the SCN.

Is it correct that on these days referred to in the said paragraphs several other IPs of OPG Securities were connected to the Primary Server. ***It is clarified that these other IPs are different from the IPs that have only connected to the secondary server on that day, ergo not all IPs of OPG on that day were only connected to the secondary server.***

A 21 That is correct" (emphasis supplied by Noticees)

LXXXI. From the above, it comes forth that on few days, OPG had some IPs only connected to the secondary server, but that also means that all the remaining IPs were connected only to the primary server. The same contradicts the fundamental assumptions made in the SCN.

LXXXII. Mr. Saran has clarified that 'secondary server day' or 'connected just to secondary server' is a feature that only applies to 1-2 IPs of OPG that are connected to the secondary server and the rest of the IPs being the majority were connected to the primary servers.

LXXXIII. The said clarification has come out in the present proceedings and was not available to Hon'ble SAT, thus the assumptions made by Hon'ble SAT are incorrect.

LXXXIV. The said clarification is further corroborated by the responses provided by Prof. Ram during the cross-examination, which are quoted below:

> *"Q83 Would the number of TBT IPs connected to secondary POP server vis a vis primary POP server by a trading member on a day affect the conclusions arrived at in Report, 2023?*
>
> *A83 I don't believe so.*
>
> *Q84 What are the reasons for stating as above in Answer 83?*
>
> *A84 Report, 2023 focused on any one of the TBT IPs of a trading member connecting first to a Port of a POP server, either primary or secondary which in turn connected first to the PDC on a day.* ***It did not examine how many TBT IPs of a trading member connected to any POP server, either primary or secondary, on a day.***
> *Q85 Question of WTM: What about cases where a trading member connected first to a Port of a primary POP server and then connected to the secondary POP server? Were such cases examined?*
>
> *A85 Yes, they were.*
> *Q86 Is it correct that Report, 2023 does not consider the source of the TBT IP (connected to either primary or secondary POP server) for sending/placing an order through a specific TAP IP to NSE?*
>
> *A86 Yes.*
>
> *Q87* ***Is it correct that irrespective of whether the TBT IP was connected to a primary POP server, the trades executed by a trading member for the day have been classified as a trade from***

TBT IP connected to a secondary server provided that atleast one out of all the IPs of a trading member was connected to the secondary POP server on that day?

A87 ***Classification is not at a trade level, it is at a day level, whether the trading member logs onto the secondary server or not."***

(emphasis supplied by Noticee)

LXXXV. The afore-quoted answers indicate that holistic dates have been considered instead of actual connections for determining 'secondary server days'. Such an assumptions has made all trades transacted on such day amenable to being considered as unlawful trades and rendered them liable to be counted for disgorgement.

LXXXVI. The said method of calculation of disgorgement is antithetical to the principles of disgorgement as laid down in the judgment of *Kokesh (supra).*

LXXXVII. More than 90% of the trades of OPG were carried through IPs connected to the primary servers, it cannot be assumed that entire days' profits ought to be considered as emanating from secondary server access. Hon'ble SAT in the matter of *SRSR Holdings Private Limited Vs. SEBI (Appeal no. 1 of 2019; date of decision: February 02, 2023),* has *inter alia* held as: *"disgorgement is only of profits linked to illegal acts and not to other acts."*

LXXXVIII. ISB itself was aware that TMs used multiple TAP IPs to route orders and that analysis involving days on which a TM is logged in to the secondary server is not completely an accurate measure of profit made by the TM using the Port/IP through which he logged in to the secondary server. Relevant portion from the ISB Report, 2023 (page 2) is reproduced below:

"*We have identified days on which members log in first to the PDC. However****, it is not clear if they use the same IP address to route most or all of their orders given that a number of them subscribe to multiple IP addresses****. The tick-by-tick data provided to us does not identify the IP address through which an order (proprietary or client) is sent to the PDC****. To that extent, some of the analyses involving days on which a member logged in first into the PDC is not a completely accurate measure of the profits made by a member using the port through which he or she logged in first to the PDC.***" (emphasis supplied by *Noticees).*

LXXXIX. The following questions and answers from the cross-examination of Prof. Ram are also referred in support of the above submission:

"***<u>Q60 Are you aware that TBT IP is used by the trading members only for receiving market data from NSE?</u>***

<u>A60 Yes.</u>

<u>Q61 Are you aware that TAP (Trading Access Point) IP is used by trading members only for placing/sending orders to NSE?</u>

<u>A61 Yes but I was not aware that it was called TAP IP.</u>

Q62 Have you separately recorded/classified/accounted for separate IP addresses, i.e., TBT and TAP being used by trading members in Report, 2023 for preparation of your tables?

A62 No.

Q63 Are you aware that multiple TBT IPs were used by a trading member to receive market data from NSE?

A63 Yes." (emphasis supplied by Noticees)

XC. Further, in the AO order dated June 15, 2021, passed in the matter of IKM Investors Limited, it has been observed that IP days is the metric to be followed and not number of days of connections.

D.5.5 <u>'Connections only to the Secondary Server' misconstrued by Hon'ble SAT, and now even the Show Cause Notice</u>

XCI. Based on misrepresentations provided by SEBI (based on erroneous findings of Deloitte) before Hon'ble SAT, the 2023 SAT Order wrongly construes that OPG was connected only to the secondary server *"on 63 trading days in 2012, 248 trading days in 2013, 232 trading days in 2014 and 92 trading days in 2015"* .

XCII. Mr. Jayant Saran has clarified the said assumption in answer to question no. 21 asked during the cross-examination (quoted earlier).

D.5.6 'Overlap period' wrongly included into the computation of 'Secondary Server Days' by the ISB Report, 2023, even though it includes IPs connected to the Multicast TBT

XCIII. During the period of April 2014 to December 2016, the TMs had access to both Unicast and Multicast colocation architectures.

XCIV. The SCN has included the aforesaid overlap period which did not form part of the earlier SCNs, the 2019 SEBI OPG Order or the 2023 SAT Order.

XCV. Understanding the very nature of Multicast TBT trades of not having any impact over the allegations in the present matter, the overlap period was consciously

excluded in the earlier proceedings. No adverse comments were passed in the 2023 SAT Order.

XCVI. Without prejudice to the above, it may also be noted that Multicast system has never been treated to be prone to exploitation. Since April 13, 2014, there has been a significant drop in number of OPG IPs that remained in the Unicast system. Due to system stability of Multicast architecture, OPG started shifting most of its IPs to the secondary server.

XCVII. In ISB Report, 2023, an assumption has been made at pages 29-30 that a TM is likely to choose Unicast over Multicast based on another assumption that there is some alleged advantage in Unicast over Multicast.

XCVIII. During the cross-examination (Answers to Questions nos. 107 to 111), Prof. Ram stated that the said assumption was based on the Deloitte Borse Report, 2016 (Page 9). However, Prof. Ram never consulted the author of the said Report to validate such an assumption.

XCIX. In terms of Answers to Questions nos. 15 to 17 raised to Mr. Jayant Saran (Deloitte), it can be noted that Deloitte never conducted analysis of MTBT system nor did they find any evidence to suggest that a TM especially OPG would prefer Unicast over Multicast during the overlap period.

C. There is direct evidence to show that OPG was gradually shifting its IPs to Multicast TBT in 2014. The same is enlisted below:

- Emails dated April 08, 2014, May 06, 2014 demonstrate that OPG moved all the 4 racks on Multicast TBT. [3 racks (C6, F9 and I9 on day of introduction of Multicast) and 1 rack (L7) on May 06, 2021].
- Email dated June 02, 2014 demonstrates that OPG surrendered 26 Unicast TBT IPs on that day.
- Email dated October 14, 2014 demonstrates that 4 more IPs were surrendered.
- On April 10, 2014, Multicast version of Acceletrade strategies MTBT were approved by NSE.

CI. During the overlap period, there was no restriction on the TMs to choose between the Unicast and Multicast system. Yet, OPG chose to surrender 26 Unicast IPs and moved to Multicast by April 13, 2014 (wrongly written as April 13, 2024 in the Written Submissions). The same shows that OPG never received any benefit from secondary server access, as it would have continued with the system which was allegedly giving it unfair gains.

CII. The ISB Report, 2023 has not excluded the trades conducted on the Multicast systems. The same has been admitted by Prof. Ram during the cross-examination (Answers to Questions nos. 113 to 117).

CIII. The overlap period where OPG was nearly entirely trading from the Multicast system and only 4-5 IPs were connected to Unicast and out of which only 1-2

IPs were connected to the secondary server, constitutes about 250 out of 631 secondary days.

CIV. Each Algo user known as user id/CTCL is identified by a unique user id. The said user id data was available with ISB in the raw data provided by NSE to ISB. The existence of said data was also confirmed in Answers to Questions nos. 233 to 234 asked from Prof. Ram.

CV. Based on such answers, the following submissions are made:

i. Orders that are sent to Exchange from NON-NEAT terminal are sent through Non-Neat Front (NNF) terminals.

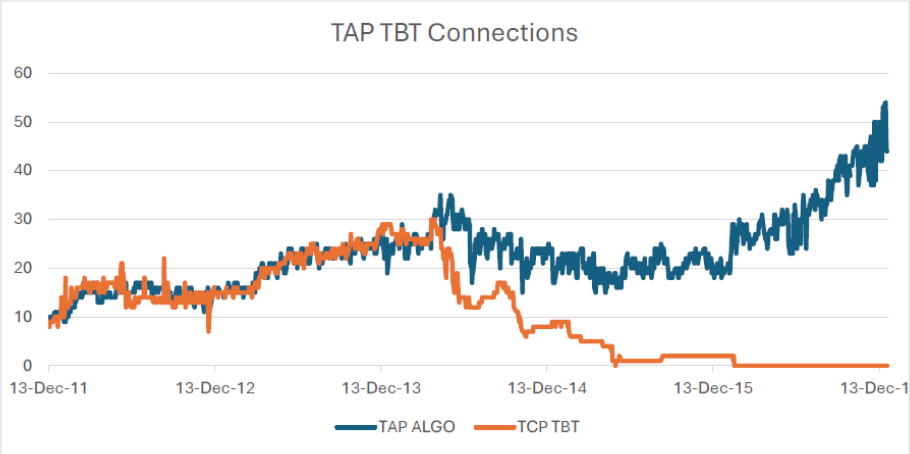
ii. As per NSE Circular dated December 14, 2010, TMs are required to mandatorily populate the 15 digit code in the NNF filed for orders emanating from NNF terminal. The said Circular also provides the mechanism to identify an ALGO order as an order in which 13th digit of the NNF field is 0.

iii. The aforesaid information is used to identify CTCL/user id from which Algo orders were executed.

iv. The day-wise trading member unique connections details show a 93% correlation in the pure Unicast period of December 13, 2011 to April 04, 2014.

v. The analysis of day wise unique Algo user id along with day wise total unique Unicast TBT connections of OPG clearly shows that during December 13, 2011 (day identified as first day 0 secondary server connection by OPG) and April 7, 2014 (pure Unicast period), each OPG TAP IP/Algo CTCL ID was mapped to one TBT IP.

Image no. 1



vi. The above chart depicts a sharp fall in TCP/IP TBT connections post April 07, 2014 on account of OPG shifting to Multicast. The Algo User ID remained the same and rather continued to increase in the overlap period.

vii. The ISB Report, 2023 also records that there is no statistically significant fall in OPG's profits from Unicast to Multicast period. The said proves the fact that OPG traded primarily from Multicast TBT post April 07, 2014.

viii. The email of OPG requesting NSE to enable it on Multicast on April 07, 2014 itself also proves the contention noted above.

ix. A monthly summary is also provided in support of above contention and the emphasized portion is being reproduced hereunder:

Table no. 5

2014	Apr	535	486
2014	**May**	**653**	**418**
2014	**Jun**	**602**	**280**
2014	Jul	530	280

x. Though this data is available in the raw connection logs and trade files in ISB's possession, yet Prof. Ram has stated that ISB did not have details of OPG's connections to the Multicast TBT during the overlap period. The said information was also available with SEBI as it was provided by *Noticees.* Yet, the said information was not considered in the ISB Report, 2023, rendering the conclusions to be erroneous.

D.5.7 No bifurcation of profits on days of early login on a day classified as 'Secondary Day' by the ISB Report, 2023

CVI. The ISB Report submitted in November, 2022 classifies a day as secondary first on the basis of the methodology of ISB Report, 2017. At pages 57 and 83 of the ISB Report of November, 2022, the following is recorded:

> *"Looking at the profits between days of logging into and of not logging into the secondary servers,* ***it does not appear that the brokers who logged into the secondary servers earned abnormally high profits on such days.****"*
>
> *….*
>
> *"OPG Securities and PACE Stock Broking Services make substantially* ***higher proprietary profits on days that they logged in first to the secondary server when compared to days that they did not login first to the secondary server****. The profits are Rs.*

69.02 crores and Rs. 4.28 crores, respectively, for OPG Securities" (emphasis supplied by *Noticees)*

CVII. The ISB Report, 2023 basis the new methodology of classification as Secondary-First analyses at pages 92 and 137 as below:

"*Even though Shaastra Securities Trading made larger proprietary profits on days that they logged into the secondary server than on days that they did not log into the secondary server, they made slightly larger proprietary profits on days that they did not log in first to the secondary server (Rs. 53.40 crores) than when they did login first to the secondary server (Rs. 35.60 crores),* ***which indicates that any gain from the secondary server was simply by logging into the secondary server and not whether they logged in first to the secondary server or not*****.** "

*"OPG Securities made substantially proprietary profits both on the days that they logged in first to the secondary server and when they did not login first to the secondary server (****Rs. 38.05 crores and Rs. 48.26 crores, respectively). This shows that the advantage was simply gained from logging into the secondary server, whether they were first or not***" (emphasis supplied by *Noticees)*

CVIII. Based on the above, it can be seen that even for the increased period of 2009-2016, OPG made a profit of INR 4.2 Crore on days when OPG logged in to the secondary server but OPG was not first to login. While the same is computed by ISB Report, 2023 at INR 48.26 Crore.

CIX. The change in methodology is an after-thought exercise with mal-intentions. The said submission is corroborated by the manner in which ISB has been made to change the methodology basis the illegal intervention and meeting between SEBI's investigating authority and Prof. J R Varma on March 21, 2023.

CX. The ISB Report, 2023 conducts an analysis and computes profits from first login days classified as secondary days. The said report is annexed to the SCN seeking response on the allegations of secondary server access.

CXI. The ISB Report, 2023, does not show the bifurcation of profits on days when there is overlap of both the allegations determined by the said report.

D.5.8 'Overnight profits' wrongly included into the computation of profits by the ISB Report, 2023

CXII. The ISB Report, 2023, failed to exclude the alleged profits of overnight trades. The very essence of the allegations is obtaining advantage out of speed would be lost if the positions are kept open overnight. Any benefit out of Co-located facilities will accrue in an algorithmic intra-day trades. The same is also supported by Prof. Ram during his cross-examination in following questions and answers:

> *"Q186 Is it correct that any speed advantage that allegedly accrued to the Trading Member/broker from logging in first to the Primary server or logging in to the Secondary server did not carry over to overnight trades, as per the Report, 2023?*
>
> *A186 Any speed advantage that allegedly accrued to the Trading Member/broker from logging in first to the Primary server or logging in to the Secondary server* ***did not affect overnight profits.***
>
> *Q187 Reference is drawn to Tables in Appendices A, C, D and E of the Report, 2023.*
>
> *Is it correct that* ***abnormal overnight profits/overnight profits*** *as per Report, 2023* ***did not accrue on account of logging in first to the Primary server or logging in to the Secondary server?***
>
> *A187 It is unlikely."* (emphasis supplied by *Noticees)*

CXIII. The above quote-answers show the falsity in the computations made in the ISB Report, 2023. Despite the Author knowing that the overnight profits would not have relevance for the 'abnormal' profits gained out of speed advantage in a colocation facility, these numbers have still been included in the ISB Report, 2023.

CXIV. It also shows that the engagement terms were not specific to the requirement of SEBI under the remand directions of the 2023 SAT Order.

D.5.9 'Non-algo trades' wrongly included into the computation of profits by the ISB Report, 2023

CXV. OPG was executing both Algo and non-Algo trades. Only Algo trades can be executed from the Colocation facility and therefore only such Algo trades can form the subject matter of the present proceedings.

CXVI. ISB Report, 2023 has erred in excluding the non-Algo trades and SEBI has also not applied its mind before using these figures for the SCN. The said argument

is corroborated from the cross-examination of Prof. Ram (Answers to Questions nos. 170 to 175 and 247).

CXVII. The same shows that the ISB Report, 2023 has made false assumptions. When the data received is transferred outside to conduct the non-Algo trades, the speed advantage is lost.

CXVIII. The raw data provided to ISB contained the headers "buy_colo_ind" and "sell_colo_ind" (Question no. 233 of the cross-examination of Prof. Ram). As clarified by ISB vide its email dated July 12, 2024, the said headers identifies whether a trade was executed from colocation or non-colocation. However, such non-Algo trades have also been included in the ISB Report, 2023.

CXIX. ISB identifies that OPG entered into 10,18,41,748 trades on its Proprietary account in the FO segment in the period 2009-2016. The "buy_colo_ind" or "sell_colo_ind" says "No" for 3,8233,874 trades (38% of the 10,18,41,748 trades), as depicted below:

Image no. 2

	No		Yes	
Year	buy_colo_Ind	sell_colo_ind	buy_colo_Ind	sell_colo_ind
2009	693,591	706,855	-	-
2010	366,364	380,716	1,463,941	1,460,365
2011	258,757	264,806	2,494,275	2,491,665
2012	5,435,885	5,408,217	-	-
2013	8,447,800	8,393,125	128	136
2014	3,124,979	3,118,243	4,589,132	4,562,439
2015	347,799	358,461	9,418,477	9,470,531
2016	459,209	469,067	13,736,706	13,920,079
Total	**19,134,384**	**19,099,490**	**31,702,659**	**31,905,215**
		38,233,874		**63,607,874**
				38%

D.5.10 Impact of 'market variables / factors' not factored in by the ISB Report, 2023

CXX. The ISB Report, 2023 admittedly did not take into consideration the variables and factors that are subsisting in the real market scenario. The factors like capital deployed, strategy, algorithms, trading expertise, number of traders deployed and number of servers deployed, were considered to remain at constant for all trading members. The following extract of the cross examination of Prof. Ram is relied upon to support the submission:

"Q91 Is it correct that Report, 2023 draws an analysis between early login and connection to secondary server with the trades of trading members to arrive at the computation of alleged abnormal profits?

A91 Yes.

Q92 Is it correct that various factors such as capital deployed by trading members, strategy, algorithms, trading expertise, number of traders deployed and technical infrastructure such as number of servers deployed, amongst other factors would impact the trades executed by a trading member?

A92Yes.

Q93 Is it correct to state that the factors mentioned in Question 92 amongst other factors are different for different trading members?

A93 Yes.

Q94 Does Report, 2023 consider/account for the impact of the factors mentioned in Question 92 amongst other factors on the conclusions/computation of alleged abnormal profits?

A94 No.

Q95 Is it correct that excluding the impact of factors mentioned in question 92 amongst other factors results in the conclusion/computation of alleged abnormal profits being different from actual/real world market scenario?

A95 It could be.

Q96 Question from WTM: When you say it could be, can it be more, less or both?

A96 It could go either way.

Q97 Attention is drawn to page 32 footnote 4 of Report, 2023.

Is it correct that the assumption does not reflect/represent the real market scenario?

A97 It may not.

Q98 Is it correct that a trading member may be able to earn alleged abnormal profits per Report, 2023 on account of greater capital deployed by trading members, better strategy, more efficient algorithms, greater trading expertise, larger number of traders deployed and better technical infrastructure such as greater number of servers deployed, amongst other factors, irrespective of TBT IP connection to secondary POP server?

A98 It is possible."

CXXI. The above clearly shows that apart from secondary server access, there are other factors which have direct impact on the profits of a TM. Further, such factors are not common for all TMs.

CXXII. Contrary to assumptions made by ISB, OPG's trading capacity, technology used and strategies were altered/upgraded each year.

D.5.11 Gross profits and not net profits computed by the ISB Report, 2023

CXXIII. In the 2019 SEBI NSE Order, the net profit margin was taken into consideration for determining the disgorgement amount payable. Reliance is placed on the orders of Hon'ble SAT passed in the matters of *Janak Chimanlal Dave Vs. SEBI (Appeal no. 446 of 2020; date of decision: September 20, 2021)* and *SRSR Holdings Private Limited (supra).*

CXXIV. Disgorgement amount deserves to exclude the statutory charges and other legitimate expenses, however, the ISB Report, 2023 has not excluded any of such charges, as admitted by Prof. Ram during his cross-examination (Answers to Questions nos. 100 to 105).

CXXV. The details of statutory and regulatory charges incurred by OPG were available in its financial statements and balance sheet, which were submitted to SEBI and a summary of the balance sheet was also submitted before Hon'ble SAT.

CXXVI. The balance sheet shows that the consolidated revenue of OPG from trading was INR 155.20 Crore and profit after tax was only INR 10.88 Crore. Mere statutory charges (total: INR 1,401,811,248) such as STT (INR 878,425,049), NSE transaction charges (INR 414,677,717), SEBI fees (INR 30,92,675), NSE Colo Charges (INR 78,515,808) represents 62.82% of the Income from Share trading (INR 2,231,342,754), which have been ignored in the ISB Report, 2023. A CA certificate prepared on the basis of ISB Report, 2017 shows that there was total intra-day revenue loss of INR 672.36 Lakh on secondary days.

D.5.12 In the absence of TBT-TAP/CTCL mapping, one cannot identify trades from TBT IP connected to Secondary Server and estimate the alleged gains/benefits from connecting to Secondary Server. Mere receipt of data does not determine profitability, but it is necessary that orders basis the data so received are executed

CXXVII. ISB Report, 2023 has also failed to consider that mere early receipt of data is not sufficient for the purpose of gaining profits and the TM is also required to fire orders and execute trades using such data so as to make profits. Therefore, considering all profits made on a day when OPG had accessed the secondary server for disgorgement is erroneous.

CXXVIII. The F&O segment is a zero sum game. It has always been a contention of SEBI that it is impossible to quantify the losses caused to TMs on account of alleged preferential access to secondary server connections. SEBI also contends that just because losses cannot be quantified does not mean that there were no losses.

CXXIX. During the present proceedings, SEBI has confirmed that it has not collected the data pertaining to TAP IP, through which orders are placed on the stock exchange.

CXXX. SEBI/ISB has not taken into account the mapping between TCT IP/TBT (data receiving server) to TAP IP (trade filing server) even in the ISB Report, 2023, and has alleged that all trades from TAP IP were unlawful trades, irrespective of the fact whether the said TAP IP was connected to the TBT IP, which in turn was connected to secondary server or not.

CXXXI. ISB Report, 2017 records that the TMs use multiple TAP IPs to route their trades, and it was unknown to ISB whether TMs used same TAP IP connected to TBT IP (that had alleged advantage of early login/secondary server) to route most or all of their trade orders. The said portion read as: *"It is not clear if they use the same IP address to route most or all of their orders given that a number of them subscribe to multiple IP address. The tick-by-tick data provided to us does not identify the IP address through which an order (proprietary or client) is sent to the PDC"*

CXXXII. The following extract of the cross-examination of Prof. Ram are referred to:

> "*Q118* ***Is it correct that had you considered the mapping/connections of TBT IPs to TAP IPs of every trading member, you would have been able to segregate the trades originating from primary POP servers and secondary POP servers?***
>
> *A118* ***Yes, if the trading member had done such mapping/connections between TBT and TAP IPs.***
>
> *Q119 Would the availability and consideration of information referred to in Answer 118 have affected the conclusions and computation of abnormal profits in Report, 2023?*
>
> *A119* ***Yes, it may have affected the conclusions and computation of abnormal profits in Report, 2023.***
>
> *Q120 Given that the availability of the data referred to in Question 118 and Answer 119 concerning the TAP connections would have affected the conclusions and computations of abnormal profits in Report, 2023 and given that the Report, 2023 focuses on trades to ascertain alleged profits, what was the reason for excluding data pertaining to TAP connections of trading members in Report, 2023?*
>
> *A120 We were* ***not aware*** *that such data was available.*

Q121 Is it correct that reliance on TBT connection data for arriving at the reasoning for execution of trades via TAP connections is misplaced?

A 121 This limitation is recognized at page 1 of Report, 2023 as a limitation of the study as bullet point 4.

Q 122 ***Is it correct to state that trading members cannot place orders through TBT IP connections to POP servers?***

A122 ***That is my understanding****."* (emphasis supplied by *Noticees)*

CXXXIII. Further, the Author of EY Report has stated in his cross-examination that in absence of any study undertaken to review the TAP TBT mapping, one cannot determine the trades generated from a broker's TBT IP on secondary server. SEBI never undertook the same, even though it was specifically requested by OPG. Following extract of cross-examination has been referred to:

"Q7 Does inclusion of the TBT to TAP mapping of the Trading Members on each particular day helped more accurately determine the revenue, profits and losses, directly attributable to information received from Primary servers and secondary servers, respectively?

A7 We have not done review of OPG. ***But yes, it will more accurately determine the revenue, profits and losses, directly attributable to information received from Primary servers and secondary servers, respectively.*** *However, none of the Trading Members that we reviewed had this kind of mapping and consequently, the data was not presented for review.*

Q22 ***How in the absence of TBT to TAP mapping data, is it possible to determine which particular trade by a Trading Member was generated from IPs connected to a Primary server or IPs connected to a Secondary server?***

A22 This was not part of the scope of the Project Kairos and OPG was not reviewed by us as part of Project Courtage. ***As part of Project Courtage, we were explained that Trading Members had not retained the TBT to TAP mapping data as well as what Algo trading strategies they were using, that's why it could not be ascertained. If this data was available, it could have been possible to compute the same.***

Q23 Is it correct to state that in the absence of TBT to TAP mapping data, it is not possible to determine whether a specific

trade by a Trading Member was generated from IPs connected to a Primary server or IPs connected to secondary server?
A23 OPG was not reviewed as part of Project Courtage by EY.

It is based on the architecture at each Trading Member as well as the strategies that they are executing, and in absence of the retention of the TBT to TAP mapping, it is difficult to determine the same.

Q25 Can the number of IP connections of a Trading Member to the Primary server vis-à-vis the number of IP connections to the Secondary server on a particular day, be used to approximate what percentage of trades on that particular day may have been executed basis IPs connected to Secondary server vis-à-vis IPs connected to Primary server?
A25 ***It will be entirely dependent on the architecture at the Trading Member and specifically to the TBT to TAP mapping as well as the trading strategies of the Trading Member on that particular day.*** *Also, if the Trading Members strategies employed on that particular day are time sensitive, then such proportionality cannot be ascertained as logically the Trading Member would act on the fastest information received from IPs connected to any server relative to his other IPs.*" (emphasis supplied by *Noticees)*

CXXXIV. The above shows that the Author of ISB Report was aware that orders cannot be placed through TBT IP connections, and therefore, mere receipt of data could not automatically translate into profits.

CXXXV. The Author of ISB Report was unaware of the analysis based on mapping data that was submitted by *Noticees* to SEBI, and the same is also annexed to the SCN as Annexure 18.

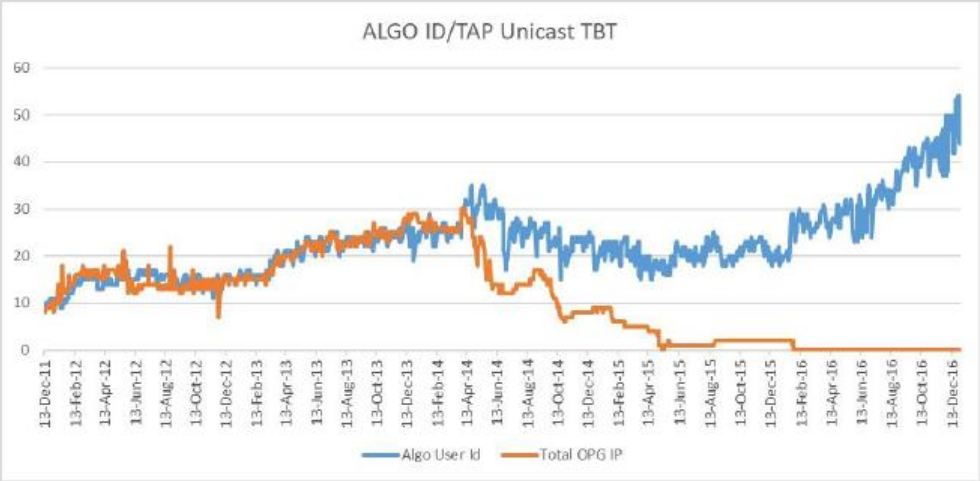
CXXXVI. The Author agrees that mapping data would have enabled to distinguish between trades originating from primary and secondary servers, and would have affected the computations of abnormal profits in the ISB Report, 2023, rendering ISB Report, 2023 as a mere academic exercise.

CXXXVII. TMs use multiple TBT IPs to receive data from the Exchange and use multiple TAP IPs to route orders to the Exchange. In the case of OPG, each TBT IP was mapped to only one TAP IP/CTCL ID, and the same has been represented to SEBI and Deloitte at meetings held during 2017-2018. Such mapping data can also be verified from database and application logs submitted by OPG to SEBI/Deloitte in November, 2018.

CXXXVIII. OPG has also got a forensic exercise to validate the authenticity and tamper proofness of the said logs from Acquisory, which was also submitted before Hon'ble SAT.

CXXXIX. As evidenced from the data pertaining to timeline of application and buildup of TCP/IP TBT and that of TAP IP of OPG at the time when OPG architecture was being designed, each TBT IP was mapped to only one TAP IP/CTCL.

Image no. 3



CXL. Each TAP IP procured by a TM results in a new CTCL/terminal ID. It can be seen that OPG TBT and TAP IP moved in tandem.

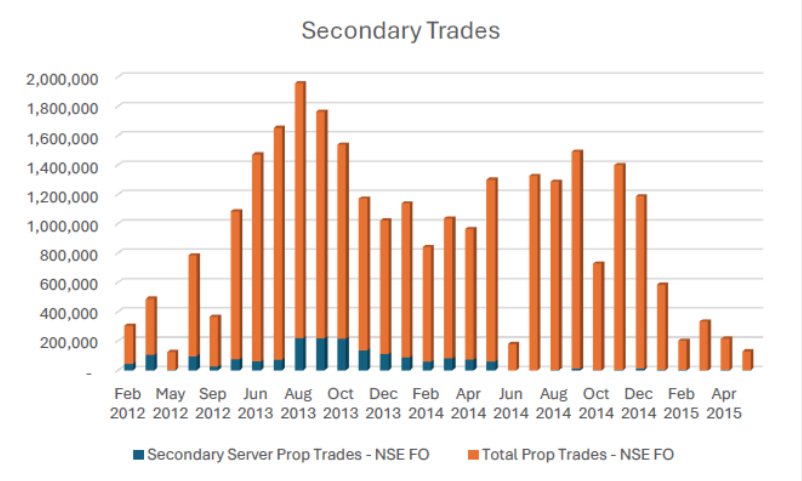
CXLI. In terms of ISB Report, 2017, OPG had made an average revenue of INR 5.77 Lakh on days it connected to secondary server, and made average revenue of INR 7.75 Lakh on days when it did not make such connection to secondary server.

CXLII. Out of 30 days analysed (SEBI TAC report) during TCP TBT Period, there were 11 days when OPG was not connected to secondary server and still remained top ranked UMLO player at NSE. The same shows that OPG's trading UMLO rank was not dependent on connecting to secondary server.

CXLIII. The SCN alleges that OPG connected to the secondary server in the FO segment on 670 days and as per "FO_SEC_ALL" file, total secondary server IP connections across such connections are 1429. OPG has the database and application logs available for 840 secondary server IP connections, which also contains the TBT IP to TAP IP/CTCL mapping. The said log files also contain trade data for the said User ID/CTCL and such data exactly reconciles with the actual trades executed on the said CTCL.

CXLIV. The said reconciliation is available for 487 days out of 670 days, and it can be seen that merely 6.81% trades, i.e., 17,87,543 trades out of 2,62,62,162 trades were executed on terminals mapped to TBT IP connected to the secondary server.

Image no. 4



D.5.13 Computation basis comparison of benchmark samples provides inaccurate conclusions on profits actually gained by a trading member

CXLV. ISB Report, 2023 computes the average of profits of sample benchmark set, and concludes that if any TM has made profits that are above the average, then such profits are stated to be 'abnormal'.

CXLVI. The said rationale for computing profits on the basis of benchmark set of broker is flawed due to following reasons:

I. The sample benchmark brokers have been selected because they used Collocated facilities and traded on similar number of days. Only on the basis of these factors, the other factors like trading expertise, strategies (Ref.: Answer to Question no. 141 of the cross-examination of Prof. Ram), have been considered to be automatically applied.

II. In footnote 4, page 32 of the ISB Report, 2023, a fundamentally flawed assumption has been made: "*One implicit assumption is that broker's trading expertise is the same within and across the SEBI and benchmark samples*". Further, it has been informed during inspection proceedings dated September 04, 2023, SEBI has stated that day-wise margins/collateral/capital by TMs have not been referred in the ISB Report, 2023.

III. The WTM has asked the follow up questions from Prof. Ram during the cross-examination:

> "*Q142 Question from WTM:*
> *If trading strategy were to influence attribution of abnormal profit, is it reasonable to assume that such trading expertise would remain same for a particular broker across time?*
>
> *A142 Yes*

Q143 Question from WTM: If a particular Broker has a particular strategy in a particular year, is it going to work the next year also with the same effectiveness?

A143 The strategy may not be effective every year but the ability to identify strategies that are profitable is unlikely to change every year."

IV. ISB Report, 2023 has considered all external and internal factors as constant year by year between multiple market participants and has determined abnormal gains by comparing fictional figures against an average median of sample set of fictional figures.

V. Only 30 brokers were included in the benchmark sample set, and it shows an assumption that all other brokers have not been considered for the analysis.

VI. The set of 30 brokers has been identified and provided to ISB by NSE, which itself is a conflicted party. SEBI has also ignored that observations of the 2023 SAT Order pertaining to investigation conducted by SEBI (para 255).

CXLVII. The information pertaining to the capital deployed by a broker is available with SEBI through daily collateral files from clearing corporations. Further, the information with respect to algorithms and softwares can also be obtained from NSE, so as to see that nature of algo strategies are very different across brokers.

CXLVIII. The Audited Financial Statements of brokers analysed by ISB Report, 2023 will clearly show the vast difference in nature of business, capital deployed etc. All these factors should have been considered by SEBI to identify the trading behavior/pattern of brokers.

CXLIX. The profitability of a TM depends on the trading strategies and technical infrastructure rather than connections to the server. The said submission is also supported by: email dated April 03, 2018 of Prof. J R Varma in critical assessment of ISB Report, 2017; Deloitte Borse Report, 2016 and Deloitte Regler Report, 2018 (page 6); ISB Report (page 109).

CL. Further, the Tables nos. 58 and 59 of the ISB Report, 2023 itself note significant variation across and the average daily profits of brokers across and within SEBI sample and the Benchmark set in the Pre-colo, Unicast and Multicast period. In the SEBI sample, OPG, Adroit and Pace made INR 12.31 Lakh, INR 15.91 Lakh and INR 11.35 Lakh on average, per day, in the Prop. account during the Unicast period, and they made an average Prop. profits of INR 11.31 Lakh, INR 14.82 Lakh and INR 9.85 Lakh in the Multicast period.

CLI. The Tables nos. 74, 75 of the ISB Report, 2023 note significant variation across the average daily Prop. profits of the brokers on secondary and non-secondary

days. OPG made more profits on average on Primary days than average profits on secondary days made by nearly all of the brokers in SEBI sample and Benchmark set.

D.5.14 No basis provided for selection of either SEBI Sample Set or the Benchmark Set of Brokers

CLII. ISB Report, 2023 *inter alia* states as: "*this list of 28 brokers was provided by the Securities and Exchange Board of India (SEBI). No information on the criteria used to select these 28 brokers was provided*."

CLIII. The identification and classification of SEBI sample and Benchmark Sample had multiple issues like: (i) Brokers in SEBI sample were not the top brokers having highest number of secondary server connections; (ii) there are brokers in Benchmark sample set/SEBI sample who have a greater number of secondary server connections than OPG.

CLIV. On the query of *Noticees* seeking the basis of selection of brokers in SEBI sample set and 30 brokers in Benchmark sample and as to how these brokers are comparable to OPG, SEBI has responded that the basis is stated in the ISB Report. However, ISB Report, 2023 categorically states that it was not provided with any information on the criteria of selection of brokers.

CLV. It has also been confirmed by SEBI that the comparable analysis has not been done on the basis of day-wise margins/collateral/capital by brokers.

D. 5. 15 Identification of secondary server login

CLVI. The minutes of meeting dated March 21, 2023 (containing discussion between author of ISB Report, SEBI and Prof. J R Varma) provide for a new method of identification of secondary server login in comparison to the ISB Report, 2017. The said revision is without any basis or logic and the revised method also includes the trades entered by a TM on its primary server and even on the Multicast TBT.

CLVII. In terms of the following extract of the cross-examination, Prof. Ram did not understand the rationale behind the change in methodology:

> " *Q205 Attention of the witness is drawn to "identification of 'Secondary' server login" as mentioned in the aforesaid minutes of meeting.*
>
> *What was the basis for the proposed change of classification of secondary login?*
>
> *A205 This was based on the relatively fewer logins on the secondary server. Hence, any preferential advantage by logging into the secondary server whether first or not, could be greater than logging in first to a POP server."*

D.5.16 Because of OPG's trading expertise, there was no significant change in its profits even after switching over to MTBT

CLVIII. The ISB Report, 2023 itself admits that profits more than median can be made due to better strategies: *"There is nothing wrong in earning greater profits than other brokers because these brokers may have better trading strategies than others. However, it is possible that some brokers made these large profits because of the undue advantage gained from logging in first to the POP servers."* (*ref: page 109, ISB Report, 2023*).

CLIX. The proceedings of inspection dated September 04, 2023 indicates that there is no basis for the assumption that the Benchmark set of brokers would have the same trading expertise.

CLX. As the profits of a TM are dependent on the trading expertise, there would not be a glaring difference in its profitability while trading on Unicast and Multicast. In the case of OPG also, there is no such difference and the same has also been confirmed in the cross-examination of Prof. Ram (Answer to Question no. 137).

CLXI. OPG's average profit on non-secondary days is more than most of the TMs average profit on non-secondary days and OPG's average profit on non-secondary days is more than the most of the TM's average profits on secondary days.

D.5.17 Absence of any correlation between the actual profits and secondary server connections

CLXII. There is no correlation between actual profits of OPG and connections to secondary server connections. The analysis of per day intraday and overnight profits of OPG on primary and secondary days will show the following:

I. There are more than 27 primary days on which OPG profit is more than OPG profit on 490 (90%) Secondary Days.
II. There are more than 115 primary days on which OPG profit is more than OPG Profit on 408 (75%) Secondary Days
III. OPG has similar per trade profits on secondary days as compared to profit per trade on primary days.
IV. OPG's average profits per trade on primary days is more than 3-4 times of average profit per day of most of the benchmark brokers on secondary days.

CLXIII. ISB has not carried out any analysis to ascertain to if underlying data actually supports the hypothesis that lesser load on the secondary server correlates with higher profits for OPG.

CLXIV. In this regard, a simple correlation study of IP load on secondary servers and OPG profits across days show no correlation with the connection and profits.

CLXV. Under the section 'key findings', the ISB Report, 2023 *inter alia* records as:

> "*Adjusting for the difference in the number of trading days in the three periods by comparing daily average profits, there is no significant difference in proprietary profits across the three periods for any of the SEBI sample brokers. Similarly, there is no significant difference in daily average non-proprietary profits earned by the SEBI sample brokers across the three periods* ***except for Way2Wealth Brokers, whose daily average increases from Rs. 1.75 lakhs during the PreColo period to Rs. 10.46 lakhs during the Unicast period to Rs. 35.98 lakhs during the Multicast period.*** *Similarly, for the brokers in the benchmark sample, there is no significant difference in the proprietary and non-proprietary profits across the three time periods.* ***Interestingly, among these brokers, Kotak Securities and Religare Securities have their highest non-proprietary profits during the PreColo period***
>
> ….
>
> *On average, the SEBI sample brokers made larger proprietary and non-proprietary profits on days when they did not login to the secondary server than on days that they did login to the secondary server. The same is true for the benchmark sample brokers*" (emphasis supplied by *Noticees)*

CLXVI. OPG is part of SEBI sample broker, and ISB analysis states that adjusting for number of days, there is no significant difference in proprietary profits across period of Pre-colo, Unicast and Multicast. Still, ISB has claimed that profits earned on days when 1-2 IPs connected to secondary server were due to undue advantage from such connections.

CLXVII. The ISB Report, 2023 shows that certain trading members including OPG, were outliers in profitability, whether in Unicast or Multicast. This can be possible with advanced trading expertise.

D.5.18 With evidence now on record, the Ld. WTM is requested to consider the actual number of disconnections faced by OPG and the actual number of complaints made

CLXVIII. Based on the connections logs received from ISB, the following needs to be highlighted:

I. OPG was facing heavy disconnections throughout the investigation period and the summary of the same is captured in the table below:

Table no. 6

Year	Avg number of IP Disconnections per day	Total number of disconnected Ips	Total Number of disrupted days	Avg connection per day	Total unique connections	total unique days
2010	0.77	79	54	3.12	318	102
2011	1.31	337	128	6.45	1658	257
2012	2.46	634	200	13.70	3534	258
2013	3.71	960	239	20.88	5408	259
2014	3.37	886	227	16.22	4265	263
2015	0.16	40	30	2.98	753	253

II. The total number of complaints raised and unresolved by OG

III. Even other TMs were facing disconnections similar to OPG.

IV. It was an industry wide norm where other TMs were also connecting to the secondary server during the pre-market hours.

V. The total number of complaints raised by OPG and unresolved (by NSE) during the relevant period were 433 instead of 240 as wrongly stated by Deloitte. Deloitte has only considered the complaints made via telephone.

D.5.19 Expert Reports submitted by the *Noticees* wrongly rejected/not considered in the earlier proceedings

CLXIX. In the earlier proceedings, SEBI has wrongly rejected the report submitted by *Noticees,* as prepared by Dr. Ramakrishna Pasumarthy, IIT Madras ("**Pasumarthy Report**"). The said rejection by SEBI was further wrongly upheld by Hon'ble SAT.

CLXX. Pasumarthy Report demonstrated the contradictions in the SEBI reports. Pasumarthy Report was prepared by an Associate Professor, IIT, who had the same stature as compared to SEBI experts, and it better qualified and experienced as compared to the SEBI experts. The said Report deserves to be considered in the present proceedings as the issues have been reopened.

CLXXI. Since, in the earlier proceedings SEBI had denied the request for having the data underlying Pasumarthy Report validated independently through Deloitte, *Noticees* have engaged Acquisory Consulting LLP (**Acquisory**) to validate the data.

CLXXII. Acquisory has prepared an interim forensic report dated June 21, 2021 and the same was also filed before Hon'ble SAT. However, the said report did not find any mention in the 2023 SAT Order.

CLXXIII. As the present SCN has considered the ISB Report, 2023 which was being prepared since 2021, the reports being submitted by *Noticees* should also be considered.

CLXXIV. A chart highlighting the impact of incorrect assumptions and methodologies adopted by SEBI/ISB has been submitted to show that maximum profit could be considered as INR 15-26 Lakh by adjusting the following:

- Actual number of complaint being 433 days need to be considered.
- Further, in 2019 SEBI OP Order, benefit of doubt was given for 135 days and the same needs to be considered in the present proceedings also. SCN alleges 631 days of connection to secondary server, out of which 381 days is prior to introduction of Multicast. 2019 SEBI OPG Order relied upon the ISB Report, 2017 to restrict the unauthorized connection days to 134. Therefore, in the present computation, the benefit ought to be provided is (381-135/385), i.e. 64.57%.
- 2019 SEBI OPG Order refers to a period when there was availability of both Multicast and Unicast, from April 7, 2014 in FO segment and November 10, 2014 in CM segment. This period of introduction of Multicast TBT is required to be excluded from the calculation of profits. Computation of day wise profit and loss data provided by SEBI is also enclosed.
- Profits from non-colo trades also need to be excluded.
- OPG has database and application logs for 840 secondary server IP connections along with the TBT IP to TAP IP/CTCL mapping. The log files also contain trade data for said User ID/CTCL and the said data exactly reconciles with the actual trades executed on the said CTCL for each days. Such reconciliation is available for 487 days out of 670 days. Merely 6.81% , i.e., 17,87,543 trades out of 2,62,62,162 executed on these 487 days were on terminals mapped to TBT IP connected to Secondary Server.
- After considering expenses like STT, transaction charges, colocation charges etc., it is noted that 62.82% of the total income from share trading is the total statutory and exchange charges.

CLXXV. *Noticees* vide engagement letter dated July 05, 2023 have already engaged Grant Thornton to conduct audit process and certain preliminary observations have already been made and a detailed report is awaited.

D.6 Major Deviations across the ISB Reports of November 2017, June 2022, November 2022 and April 2023- Sans Directions from Hon'ble SAT, and only at the behest of SEBI

D. 6. 1 Meaning of Secondary Day

CLXXVI. The meaning and scope of the term 'Secondary Day' has completely been altered in arbitrary manner during the internal discussions between SEBI's IA, Prof. J R Varma and ISB. The count of secondary days has changed from 269 to 631 days.

D.6.2 Advantage: out of early login vs. secondary server access

CLXXVII. The ISB Reports of June, 2022 and November, 2022 were prepared to analyse the advantage gained from first logins, and not from logins to secondary server. However, there is a complete dichotomy from the analysis of the expert, as can be seen from the following:

I. ISB Report, June 2022 (Page 20):

"For all the analyses, the data is divided into two categories: days of first login and days of non-first login. Days of first login refers to days on which a broker was able to login first into any one port of the server that logged in first to the PDC. Other days are categorised as days of non-first login. ***Distinction between primary and secondary servers are not made in this study because the advantage is gained by simply logging in first into any of the ports of any server. Further, the profits generated from logging in first to the secondary server are small***."

II. ISB Report of November, 2022 (pages 57 and 83):

"Looking at the profits between days of logging into and of not *logging* into the secondary servers, **it does not appear that the brokers who logged into the secondary servers earned abnormally high profits on such days.**"

……

"OPG Securities and PACE Stock Broking Services make substantially higher proprietary profits on days that they logged in first to the secondary server when compared to days that they did not login first to the secondary server. ***The profits are Rs. 69.02 crores and Rs. 4.28 crores, respectively, for OPG Securities***"

III. ISB Report, 2023 (Pages 92 and 137):

"*Even though Shaastra Securities Trading made larger proprietary profits on days that they logged into the secondary server than on days that they did not log into the secondary server, they made slightly larger proprietary profits on days that they did not log in first to the secondary server (Rs. 53.40 crores) than when they did login first to the secondary server (Rs. 35.60 crores),* ***which indicates that any gain from the secondary server was simply by logging into the secondary server and not whether they logged in first to the secondary server or not.***"

*"OPG Securities made substantially proprietary profits both on the days that they logged in first to the secondary server and when they did not login first to the secondary server (****Rs. 38.05 crores and Rs. 48.26 crores, respectively). This shows that the advantage was simply gained from logging into the secondary server, whether they were first or not***" (emphasis supplied by *Noticees).*

D.6.3 Attribution/Definition of 'Abnormal' Profits

CLXXVIII. The alleged abnormal profits have been anlaysed by ISB in June and December 2022 versions of reports on a different yardstick as used in the final ISB Report, 2023 which compares profits made between OPG against a new set of "Benchmark sample" brokers. Further, the assumptions made in ISB Report, 2023 including the change in methodology have changed the quantum of alleged advantage from INR 15.57 Crore to INR 132.28 Crore. The relevant extracts of the said reports are reproduced hereunder:

I. ISB Report, June / December 2022 (ref: page 19 of the June 2022 Report; page 21 of the November 2022 Report) –

*"The letter of engagement between SEBI and ISB mentions a set of brokers to compare the profits and other performance measures of the above 28 brokers to****. The performance of a comparable set of brokers would help establish what "normal" levels of trading profits and performance should have been to compare the profits of the 28 brokers to determine any "abnormal" profits and performance. This comparable set of brokers would have been***

needed had the performance and profits of the above list of 28 brokers had been very similar to each other. During the course of the analyses, it was noted that there were substantial differences and variations among these 28 brokers itself, which negated the need for a comparable set of brokers. These variations and differences helped us establish a comparable set of brokers from within the set of 28 brokers"

II. ISB Report, 2023 (ref: page 32-33)

"The letter of engagement between SEBI and ISB mentions a set of brokers to compare the profits of the above 28 brokers to. The profits of a comparable set of brokers would help determine what the "normal" levels of trading profits should have been if the brokers did not receive any speed advantage from not logging in first to the PDC and POP server.4 The following suggestions were provided to the NSE to identify the set of comparable brokers:

1. *Get a list of all brokers who have used the NSE's collocated facilities going back to 2010 when collocation was first introduced.*
2. *Look at the top 60 biggest users of collocated facilities between 2010 and 2016.*
3. *Remove the 28 brokers listed in the SEBI sample.*
4. *Share the list of the 28 biggest collocated facilities users from the remaining list.*

There is no confirmation if NSE used the above suggestions but they provided the following list of 30 brokers, which we call the benchmark sample in the rest of the report:

Footnote 4 – One implicit assumption is that broker's trading expertise is the same within and across the SEBI and benchmark samples.

Footnote 5 – ***This is slightly different from the methodology in the 2017 report submitted to the NSE. In the 2017 study, a broker was classified as having logged in first if they were first to login to a port on any POP server AND also logged in (first or not) to the POP server that logged in first to the PDC that day. The speed advantage exists only if a broker logs in first to a port on the POP server that connects first to the PDC. Simply logging in to the POP server that connected first to the PDC does not give an advantage to the broker nor does logging in first to a port on a POP server that did not connect first to the PDC yield that***

advantage. Hence, the methodology in this report has been refined to truly reflect the speed advantage gained by logging in first to one of the ports of the POP server that logged in first to the PDC on that day.

Footnote 6 – The secondary server analyses applies only for the Unicast period because there was no separate secondary POP server during the Multicast period.

Footnote 7 – ***In the 2017 report submitted to the NSE, if a broker logged into the secondary server after logging into one of the other POP servers, such days were not categorised as having logged into the secondary server. In other words, only days on which a broker logged in first to the secondary server before any other POP server were categorised as having logged into the secondary server. However since the load on the secondary server tended to be low, the speed advantage existed regardless of whether a broker logged into the secondary server before or after logging into one of the other POP servers. In this report, all days on which a broker logged into the secondary server are categorised as secondary login days, regardless of whether they logged into any of the other POP servers that day and regardless of whether those logins were before or after they logged into the secondary server****."*

D.6.4 Deviations between ISB Report, 2017 and ISB Report, 2023

CLXXIX. There are notable deviations in the ISB Report, 2017 and ISB Report, 2023 and SEBI is also surprised by such deviations, as can be noted from its email dated February 21, 2023 issued to ISB with the subject: "*RE: difference in profit of certain stock brokers in the ISB report of 2017 and 2022"*.

D.6.5 Inherent contradictions with in ISB Report, April 2023

CLXXX. The ISB Report, 2023 makes contradictory statements:

"Overall, it does not appear that the SEBI sample brokers used the Unicast system to their advantage to generate abnormally larger profits" (ref: page 110, April 23 Report)	*"Overall, it appears that some brokers did earn larger profits during the Unicast period by taking advantage of the Unicast system" (ref: page 113, April 23 Report)*

CLXXXI. If advantage of early receipt of information existed in Unicast period, then such advantage would exist for all TMs. However, if OPG or any other TM was aware of such advantage, he would have availed the advantage for non-proprietary trades also. However, the following extracts of ISB Report, 2023 would show that this is not the case:

I. From non-proprietary trades by the SEBI sample brokers in Table 60, "*The largest increases from PreColo to Unicast are seen for Barclays Securities, OPG Securities and Way2Wealth Brokers. For OPG Securities and Way2Wealth Brokers, there is a substantial increase in average daily profits from the Unicast to Multicast periods, which would be contrary to what one would expect if brokers were generating profits purely from any advantage that may have gained from logging in first to the POP servers during the Unicast period*" (ref: page 113 of the ISB Report, 2023)

II. "*For proprietary trades by the SEBI sample brokers, between PreColo and Unicast, Quadeye Securities and OPG Securities saw the largest increase in daily profits (average daily profits increase by at least four times for both), which are statistically and economically significant increases*" (ref: page 111 of the ISB Report, 2023)

III. ‘‘*Between Unicast and Multicast, eleven brokers saw a statistically significant decrease in their average daily profits. For two of them (Excel Stock Broking and Yug Securities), it was not an economically significant change because their average daily profits during Unicast and Multicast were less than Rs. 1 lakhs. Way2Wealth Brokers and SMC Global Securities made a loss during the Unicast period and a larger loss during the Multicast period. For the other seven (CPR Capital Services, Crosseas Capital Services, GKN Securities, GRD Securities, Kredent Brokerage Services, Parwati Capital Market and Quadeye Securities), there is an economically significant decrease in profits from the Unicast to Multicast period.” (ref: pages 111-112 of the ISB Report, 2023).*

CLXXXII. If OPG was aware of the advantage from logging into the secondary server, it would have logged in to secondary server in CM and CD segment frequently.

D.7 Charge of Connivance and Collusion

D.7.1 Charge of collusion cannot be made in isolation

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

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

CLXXXV. The SCN attempts to make allegations of collusion/connivance between *Noticees* and employees of NSE, and all such employees have been exonerated at different stages of the proceedings.

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

D.7.2 <u>No additional evidence in the present Show Cause Notice to support this charge</u>

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

CLXXXVIII. There is overwhelming evidence that directly proves the impossibility of there being any collusion between *Noticees* and employees of NSE, as mentioned in the Chapter IV and Chapter VI of the written submissions.

D.7.3 <u>OPG's secondary server access was never driven by collusion/connivance, nor there existed any early access advantage in connecting to the secondary server</u>

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

CXC. 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 has been made against such brokers. The details are given in the following table:

Table no.8

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**

D.7.4 Even when allocation of IPs was manually controlled, yet preferential treatment was not meted to OPG

CXCI. 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 can be made. It is also an admitted position that dissemination of the tick data was made sequentially on a port, which are again sequentially connected to a server.

CXCII. While dropping the charges of first connect/early login, the 2019 SEBI OPG Order has noted that there has 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 is not the case.

D.7.5 On the contrary, OPG was facing genuine issues with the primary servers is why as a precautionary measure, it had allocated 1-2 IPs (~9% of its business) to the secondary server

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

CXCIV. 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).

CXCV. 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.

CXCVI. 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)"

CXCVII. 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.

D.7.6 Crowding out - there cannot exist any collusion / connivance for an act which is impossible to achieve

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

D.7.7 SEBI did not even intend to re-open this issue, but for directions of Hon'ble SAT

CXCIX. 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 is no evidence for making charges of collusion. The internal notings 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.

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

D.7.8 Confirmation of absence of alleged advantage, received from Deloitte during inspection proceedings

CCI. Vide email dated December 05. 2023, Deloitte has 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 issuance of the SCN.

D.8 Charge of Crowding Out

D.8.1 Directions in the Final SAT Order (2023 SAT Order)

CCII. Under para 266 (h) of the 2023 SAT Order, SEBI has been directed only to 'reconsider' the charge of crowding out.

D.8.2 Allegations in the Show Cause Notice

CCIII. The SCN also discusses the charge of 'first connect' which is admittedly dismissed in the 2019 SEBI OPG Order and confirmed by Hon'ble SAT. 2023 SAT Order did not remand back the issue of first connect.

CCIV. In the 2019 SEBI OPG Order, the allegation of crowding out were dropped because the ports allocated to OPG did not allow it to stand on a higher rank vis-à-vis the array/dissemination sequence formed on such POP server. It was also observed that all TMs received a similar process of allocation of their IPs to a single port, and it was concluded that OPG was not deriving any beneficial treatment in comparison to other TMs. It was also observed that when NSE had the policy to allocate multiple IPs of same TM to one port, such TM would at times get the 1st, 2nd, 3rd and 4th connects to such port.

D.8.3 No additional evidence in the present Show Cause Notice to support this charge

CCV. Without any additional material, there was no reason to issue SCN with the charges of crowding out.

D.8.4 Even the earlier Show Cause Notices had no evidence in support of this allegation

CCVI. There was no common definition across reports of 1st dissemination, there was no common understanding of who was disseminated data 2nd, 3rd and so on. Both SEBI and Deloitte have wrongly assumed that 1st one to establish connection was disseminated data first, and the 2nd one got the data second.

CCVII. While SEBI and Deloitte observed that there existed a single connection which was disseminated data 2nd, 3rd etc. EY and ISB Report, 2017 suggested that

multiple members were disseminated data simultaneously. EY even observed that approx. 40% ticks were disseminated first simultaneously to multiple members (at the same microsecond).

CCVIII. The 'absolute first' to be disseminated data on a TBT POP server would be first to connect to its Sender Port 1 (10990). There could be two connections which might have been disseminated data second: Member IP that connected second in time to its Sender Port 1 (10990) and member IP that connected first in time to its Sender Port 2 (10991). The member IP that connected second in time to a TBT POP server may not necessarily have been allocated to Sender Port 1 (10990) and/or Sender Port 2 (10991). Under those circumstances, such a connection will never be disseminated data second and there will be multiple members who will always be disseminated data ahead of such a member connection.

CCIX. SEBI and Deloitte failed to distinguish between time of connection to a server and rank on various ports. NSE did not have a concept of 2nd, 3rd etc.

CCX. To crowd out, a TM should have been connected on the 1st, 2nd and 3rd position on each of the 3 ports of that TBT POP server, and to crowd out at NSE level, the TM should have been first three ranked on all the ports of each of the TBT POP servers.

CCXI. As per Expert Committee appointed by SEBI-TAC, there is no well-defined definition of 2nd and 3rd and so on. TAC therefore records that someone who logs in third on some server may get that information before someone who logs in first on some other server.

CCXII. The non-application of mind is also evident from the fact that even the Experts claim that there is no way to define 2nd, 3rd(Ref. Answer to Question no. 66 of the cross-examination of Mr. Om Damani in previous proceedings).

D.8.5 Confirmation of absence of collusion received from ISB during inspection proceedings

CCXIII. The email dated November 17, 2023 issued by ISB to SEBI shows that ISB has confirmed the absence of any crowding out by OPG considering that its average daily profit on crowding out days (INR 14.63 Lakh) was lower than the average daily profit on now crowding out days (INR 19.86 Lakh). The said clarification was obtained by SEBI after issuance of SCN.

D.9 Disgorgement is an untenable direction under the present proceedings

D.9.1 Disgorgement is an equitable relief and not a penal provision

CCXIV. The burden of proving that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on SEBI. However, SEBI has

failed to demonstrate the fundamental ingredients for disgorgement are attracted in the present case.

CCXV. There is absence of any illegal act so as to attract allegation of disgorgement as logging into secondary server was a permissible activity and the TMs had unfettered access.

CCXVI. There was a revenue loss of about INR 6 Crore to OPG and no profits were made. Even if one were to take into account the entire revenue, the profits of OPG would stand at INR 7 Lakh.

CCXVII. There is no quantification of gains from secondary server access and evidence produced by *Noticees* has demonstrated that the trading was agnostic to the alleged preferential access to the secondary server.

CCXVIII. It is a settled positon of law that disgorgement is not a punitive measure but an equitable one. [*Dushyant N. Dalal Vs. SEBI 2010 SCC Online SAT 328*, *Gagan Rastogi Vs. SEBI (2019 SCC Online SAT 79) and Karvy Stock Broking Ltd. Vs. SEBI (Appeal No. 06, 2007 decided on May 02, 2008)]*

CCXIX. It is also held by Courts that disgorgement is essential repayment of ill-gotten gains (*United States of America v. Joseph P. Nacchio; 573 F.3d 1062 and United States of America v. Marshall Zolp & Ors.; 479 F.3d 715).*

D.9.2 *Noticees* did not make any profits

CCXX. ISB Report, 2023 has computed gains on several assumptions disregarding several important factors. The ISB Report, 2023 fails to take into account bifurcation of profits of early login on days considered as secondary server. ISB Report, 2023 has wrongly included overnight profits and non-algo trades.

D.9.3 Without prejudice, computation in the ISB Report, 2023 is not representative of actual gains of *Noticees*, if any

CCXXI. Hon'ble SAT in the matter of *Gagan Rastogi* (*supra*) laid down the following ingredients for tracing the unlawful enrichment: (a) the person concerned has been enriched; (b) He has been enriched at the expense of the victim; (c) It would be unjust to allow him to retain the benefits.

D.9.4 SEBI failed to discharge its burden and onus

CCXXII. Further, Hon'ble SAT has held in the matter of *Karvy Stock Broking Ltd. (supra)* that the burden to prove that *Noticees* are liable to disgorge the amount is upon SEBI.

D.10 Allegations against the *Noticees nos. 2 to 4*/Directors of OPG

D.10.1 Liability to disgorge the amount is individual and not collective

CCXXIII. It has been held in many cases that the liability to disgorge the amount is individual and not collective. *Noticees nos. 2* to *4* cannot be directed to disgorge

the amount jointly and severally [(*Mahavirsingh N. Chauhan vs. SEBI) Appeal No. 393 of 2018; date of decision: October 18, 2019*)].

CCXXIV. The *Noticees 2* to *4* are wrongfully arraigned in the proceedings as no actual allegation qua *Noticees nos. 2* to *4.* Further, the SCN as well as the 2023 SAT Order does not lay down any role played by *Noticees nos. 2* to *4* except for the fact that they were directors of OPG.

D.10.2 Vicarious liability of the Directors

CCXXV. Merely being directors, vicarious liability cannot be fastened on *Noticees nos. 2* to *4.*

CCXXVI. *Noticee no. 3* is a house wife and was inducted as a director of OPG in April, 2010. *Noticee no. 4* is 82 years old retired individual and has been a director of OPG since 2009. However, both of them have not been involved in the day to day affairs of OPG.

CCXXVII. Hon'ble Court have held that when company is an offender, liability can be fastened on its directors only if there is direct evidence of their active role. Hon'ble Supreme Court has held in the matter of *Sunil Bharati Mittal Vs. Central Bureau of Investigation (Criminal Appeal No. 34 of 2015)* that unless the statute specifically provides so, vicarious liability of the Directors cannot be automatically imputed when the Company is an offender. Even in cases where statutes provide for vicarious liability of Directors, it is obligatory to make requisite allegations which would attract provisions constituting vicarious liability.

CCXXVIII. Further, in the matter of *SMS Pharmaceuticals Vs. Neeta Bhalla & Anr. [(2005)8 SCC 89],* Hon'ble Supreme Court has *inter alia* held as:

> *"8. ...There is no universal rule that a Director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no magic as such in a particular word, be it Director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary."*

CCXXIX. There is no vicarious liability unless the statute specifically provides so. None of the provisions alleged to be violated contemplates an automatic presumption of the doctrine of vicarious liability. Reliance is placed on the judgment of Hon'ble Supreme Court in the matter of *Maksud Saiyed Vs.State of Gujarat (AIR ONLINE 2007 SC 332),* and order of Hon'ble SAT passed in the matter of *Sayanti Sen Vs. SEBI (Appeal no. 163 of 2018; date of decision: August 09, 2019).*

D.11 *Noticee no. 2* cannot be made liable for destruction of any evidence

D.11.1 *Noticee no. 2* did not destroy any evidence

CCXXX. The allegation of performing a factory reset made in the SCN is vague. SCN fails to point out the data/content which has been destroyed by *Noticee no. 2.*

D.11.2 *Noticee no. 2* has fully co-operated with SEBI during the investigation

CCXXXI. *Noticee no. 2* has remained cooperative during the investigation and there is no allegation for non-providing any document or device sought during investigation and during the proceedings, SEBI has not alleged that *Noticee no. 2* has caused any impediment in giving access to his records/devices.

CCXXXII. *Noticee no. 2* had handed over all the data contained in the electronic devices, emails and the phones as it is. From the perusal of the chain of custody (Annexure 37), it can be noted that all content in the devices were intact.

CCXXXIII. The communication dated September 12, 2017 was restricted to providing access to computers/terminals/electronic records/IT logs, communications and did not mention phone.

CCXXXIV. *Noticee no. 2* had handed over two phones that he possessed at that time. The phone in question was not purchased by *Noticee no. 2* during the impugned investigation period.

D.11.3 The second phone belonged and was in possession of the *Noticee no. 2* after the impugned investigation period

CCXXXV. The second phone was purchased in the year 2017, i.e. much after the investigation period of 2012-2014. As can be noted from the chain of custody, the said phone was handed over as it is. Therefore, with the help of forensic advisors, any purported data could be retrieved. However, SEBI has not carried out such audit and had proceeded to levy allegations based on surmises. It is also incomprehensible as to why *Noticee no. 2* would delete contents of new phone which was purchased much after the investigation period. All data/contents of the said phone are intact in the cloud/drive, barring a few personal photographs or data, which were erased after consultation with Deloitte.

D.11.4 SEBI fails to prove that the *Noticee no. 2* has destroyed any crucial evidence

CCXXXVI. SEBI has failed to showcase the ingredients required to prove destruction of evidence.

CCXXXVII. Hon'ble SAT in the matter of *NSE Vs. SEBI (Appeal no. 445 of 2022; date of decision: December 14, 2023)* had merely imposed a monetary penalty of INR 10 Lakh for the alleged destruction of evidence in that case and held that:

> *"78….. Further, there is nothing on record to indicate that Netaji had in fact deleted the emails. There is also nothing on record to suggest that these emails were material evidence relating to the charges contained in the show cause notice."*

CCXXXVIII. In another case, the AO had imposed a penalty of INR 1 Lakh only as the *Noticees* had not handed over the phones and failed to co-operate with SEBI during the investigation.

CCXXXIX. Despite co-operating with the investigation, a penalty of INR 10 Lakh was imposed on *Noticee no. 2* for the alleged act of resetting the phone.

98. As noted above that from the perusal of submissions made by *Noticees,* it is noted that in answer to the SCN, *Noticees* have made submissions on preliminary issues as well as on the merits of the case. Therefore, before dealing with the issues on merits of the case, the preliminary issues are dealt with at the initial stage of the order itself.

E. CONSIDERATION

E.1 <u>Preliminary Issues</u>:

E.1.1 Whether there is jurisdiction to proceed in the present matter?

99. *Noticees* have contended that SEBI did not have the jurisdiction to proceed in the present matter, and during the proceeding also, it had been contended that SEBI should first decide the issue of jurisdiction.

100. In this connection, I note that the present proceeding is quasi-judicial in nature, which is normally mandated to be conducted ensuring compliance of principles of nature justice and is not subjected to be conducted in strict compliance of the procedure or law as is required to be followed in judicial proceedings. This is also to ensure that delay of any sort should be avoided to the possible extent. Keeping this in mind, even Hon'ble Tribunal, constituted as a body to hear appeal against an order passed by the Board (SEBI), has been directed under sub- section (1) of

section 15U of the SEBI Act, 1992 to conduct its proceeding while being guided by the principles of natural justice. The aforementioned provision specifically bars that procedure laid down by the Code of Civil Procedure, 1908 shall not be applicable. Under the circumstances, it may not be right on the part of *Noticees* to request disposal of each issue separately by passing separate orders instead of all issues being decided together. In this respect, it is observed that at no stage of proceeding, *Noticees* have been given to understand that issues raised by them would not be considered. On the contrary it has been made clear through emails as well as during the course of hearing that they are free to raise issues and advance submission, which would be duly considered while passing the final order. I have already stated earlier in the order that in the hearing conducted on May 27, 2024 I had informed *Noticees* that issue of jurisdiction will be decided in the final order. However, *Noticees* instead of advancing arguments on merit, preferred to file Appeal no. 372 of 2024 before Hon'ble SAT. Hon'ble Tribunal after hearing them held, vide its order dated June 24, 2024, that the issue of jurisdiction can be dealt in the final order. Accordingly, I shall deal with the issue of jurisdiction first, before proceeding to deal with the other issues in this order.

101. *Noticees* have raised three questions in the present proceedings pertaining on the issue of jurisdiction. These three questions are being considered herein below.

(i) Whether there exist jurisdictional facts

102. *Noticees* have contended that the SCN lacks jurisdiction. In order to deal with the said contention, I briefly record the background of the present matter.

103. SEBI had received certain complaints in January and August 2015 inter alia alleging that preferential access was given by NSE to OPG for tick-by-tick data feed. Subsequently, the 2019 SEBI OPG Order came to be passed against *Noticees* herein. In the said order, it was *inter alia* held that OPG gained unfair advantage over other TMs and indulged in unfair trade practices in securities. It was also held that the profits that accrued to OPG on account of connections made to the secondary server were unlawful, and directions of disgorgement of such profits were passed. On the charge of crowding out other TMs and the charge of collusion/connivance of OPG with NSE, the 2019 SEBI OPG Order granted exoneration to OPG.

104. In the appeals filed challenging the said order of SEBI, Hon'ble SAT confirmed the findings that OPG gained an unfair advantage by consistently logging into the secondary server for large number of days (refer para 238 of the 2023 SAT Order as reproduced at para 13 of this order). Hon'ble SAT held that the complete disregard for the norms and manner in which OPG was connected to the secondary server amounted to unfair practice, and was in violation of sub-regulation (1) of regulation 4 of PFUTP Regulations. However, Hon'ble SAT directed that the quantum of disgorgement amount out of the trades executed by connecting to the secondary sever needed to be recomputed. Further, Hon'ble SAT did not agree with the exoneration of the charges of crowding out and collusion/connivance granted in the 2019 SEBI OPG Order and directed these issues to be reconsidered. Hon'ble SAT also directed to decide the issue of directions/penalty for concealment/destruction (of) vital information by the *Noticee no. 2.*

105. Accordingly, Hon'ble SAT remanded the matter back to SEBI to decide the four issues as stated in para no. 2 above.

106. I note that the present proceedings are restricted to the four issues remanded by Hon'ble SAT. Hence, this authority has acquired jurisdiction *qua Noticees* with respect to four issues remanded by Hon'ble SAT in the 2023 SAT Order.

107. *Noticees* have submitted that the present proceedings are barred by *res judicata* and doctrine of issue estoppel and have also relied upon certain judgments like *Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad & Ors., (2003 SCC OnLine Cal 215). Noticees* have submitted that the charges of collusion and crowding out were dropped in the 2019 SEBI OPG Order after detailed deliberation and therefore, the same issue is not open for fresh consideration and adjudication.

108. 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.***[5] (judgement dated September 23, 2021), observed that in order to attract the principles 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;

[5] [2021 sec Online SC 792]

(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.

109. 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 is 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 collusion were decided in favour of *Noticees* in the earlier proceedings and continuation of the same would be barred in normal circumstances. However, in the extant matter, I note that Hon'ble SAT, in the 2023 SAT Order, has set aside findings on those issues and remanded the matter back to SEBI for re-adjudication on the four issues listed at para no. 2 above. Accordingly, SEBI issued the SCN dated May 17, 2023 to *Noticees Nos*. *1* to *5* (including Mr. Aman Kokrady), in compliance with the order of Hon'ble SAT.

110. I note that one of the ingredients to attract the principles 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 the order of Hon'ble Tribunal. Hence, they cannot not be said to be "finally decided".

111. 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 four issues

and the same is required to be re-adjudicated by this authority and 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 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."

112. Therefore, the instant proceedings are not the institution of a fresh proceedings but continuation of the previous proceedings 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 proceedings can't be initiated and hit by the principle of *res judicata* and *issue estoppel.*

113. In this connection, I also note that in the appeal (C.A. no. 1961 of 2023, Om Prakash Gupta and others Vs. SEBI) filed by *Noticees* before Hon'ble Supreme Court against the 2023 SAT Order, no interim relief has been granted. Hon'ble Supreme Court has passed the following order on April 05, 2023:

> ***"****Issue notice and tag with Civil Appeal Nos. 1692-1694/2023.*
> *Notice will be served by all modes, including dasti.*
> ***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.***
> *Order, if any, passed on remand would be placed on record before this Court."* *(Emphasis supplied)*

114. Under the circumstances, the proceeding is bound to be continued in compliance with the directions passed by Hon'ble SAT and Hon'ble Supreme Court.

115. Further, it has been argued that Investigating Authority (IA) as well as the WTM have become *functus officio* upon passing of the 2019 SEBI OPG Order and therefore, issuance of a new SCN exercising power under section 11B of SEBI Act, 1992 is untenable in the absence of fresh appointment of IA and approval by the competent authority. *Noticees* have also contended that in terms of the 2023 SAT Order, the original show cause notices were required to be considered along with the evidence forming part of the said notices and it was not open to issue a fresh show cause notice incorporating new charges based on new evidence. As noted earlier, the present proceeding is a proceeding being conducted under the remand directions, therefore, the said argument has no strength. It is also noted that the opening paragraph of the SCN itself refers to the 2023 SAT Order, hence mere mentioning of provisions of SEBI Act, 1992 would not make the SCN illegal. If certain issues emanating out of the 2019 SEBI OPG Order are directed to be re-adjudicated by Hon'ble SAT, it is the duty of SEBI to issue a show cause notice which infact gives an opportunity to *Noticees* to submit their defence. Infact, the re-adjudication of remand issues without a fresh show cause notice on those issues would be inappropriate and in violation of principles of natural justice.

116. Further, I seek reliance on the order dated October 26, 2018 passed by Hon'ble Delhi High Court in *Writ Petition (Civil) No 9114 of 2018,* titled as *RRPR Holding Private Limited Vs. Securities and Exchange Board of India & anr*. The relevant extract of the said order dated 26.10.2018, passed by Hon'ble High Court of Delhi

rejecting the prayer to stay the proceeding challenging the issuance of the show cause:

> "8.*Mr. Mehta is correct that the petitioner is required to reply to the show cause notice to enable the respondent No.1 pass a final order against which the petitioner has a remedy of appeal before the SAT. We have been informed one of the noticee has already approached the SAT.*
>
> 9.*That insofar as the subsequent notices are concerned, we agree with the submission of Mr. Mehta, appropriate for the petitioner is to give reply to the said notices. In any case, if any order is passed to the prejudice of the petitioner, remedy is for the petitioner to approach the SAT. The Court is not inclined to entertain this application, the same is dismissed."*

117. Thus, it is clear that jurisdiction cannot be challenged on the basis that the SCN cannot be issued. Infact the new SCN makes *Noticees* aware about the issues under re-adjudication and gives them the opportunity to put forward their replies. Thus, no prejudice is caused to *Noticees* by issuing new SCN. Infact, the issuance of the SCN is in accordance with the principles of natural justice. In view of the above discussion, it is held that there exist sufficient jurisdictional facts for this authority to proceed in this matter.

(ii) Whether the contents of the SCN falls within the purview of the directions of Hon'ble SAT

118. I note that *Noticees* have contended that the SCN travelled beyond the directions of remand and it could not deviate from the findings of the 2019 SEBI OPG Order. In this connection, I have already noted that the 2023 SAT Order has directed consideration of four issues which have been reproduced in the para 2 of this order. A perusal of the SCN in the present proceedings indicate that the

allegations made in the same are confined to the afore-referred four issues remanded by Hon'ble SAT and no allegation has been made beyond the directions of the 2023 SAT Order.

119. I also note that *Noticees* have referred to para 2 (vi) of an internal noting dated March 03, 2023 to contend that the said noting reveals the intent of SEBI to give effect to findings of its parallel investigation. In this connection, I note that *Noticees* have selectively referred to the noting wherein it was stated that the remand by Hon'ble SAT, although directed for different reasons, may be considered as an opportunity to revise the methodology for calculation of unlawful gains. While referring to the said noting, *Noticees* have conveniently ignored facts stated in para nos. 2 (i) to 2 (v) explaining the reasons which formed the basis of such proposed revision of calculation of gains. The said para nos. 2 (i) to 2 (vi) are reproduced hereunder for ready reference:

"*..2. As noted, with regard to the determination of disgorgement amount, LAD vide notes on pre-page 16-17, paragraph 16 to 23 has stated the followings: -*

i. For determining the disgorgement amount, the WTM (Para 8. 44 of the WTM Order dated April 30, 2019) intended to consider total number of days when the OPG had connected to the secondary server (269 days).

ii. However, as noted by SLD, the data received from the NSE indicated that the OPG had connected to the secondary server for 393 days instead of 269 days as per the ISB report.

iii. ISB informed that in the total number of days when the OPG had connected to the secondary server (269 days), they have not included the days when OPG had logged into primary server before the secondary server (124 days); since it is likely that OPG got the information first from the primary server than the secondary server. Considering the same, the total number of days OPG had accessed the secondary server would be 393 days (269 days + 124 days = 393 days)

iv. ISB informed that the total intraday and overnight profits would be Rs 53.46 Crores (considering 393 days) instead of Rs 31.26 (considering 269 days) Crores as considered in the WTM Order.

v. Upon perusing the WTM Order, it appears that the exclusion of those 124 days was not intended by the WTM.

vi. Therefore, the remand by the SAT to consider the disgorgement amount afresh, although for different reasons; may be considered as an opportunity to revise the methodology for calculation of the unlawful gains made by the OPG during the relevant period."

120. As can be seen from the contents of para nos. 2 (i) to 2 (vi), that the above note only pertains to exclusion of 124 days from the ambit of calculation of profits of OPG in the 2019 SEBI OPG Order. It may not be appropriate to overlook or ignore that the 2023 SAT Order has also affirmed that acts of getting connected to secondary server by OPG was an unfair act. Further, Hon'ble Tribunal has further directed to recalculate the disgorgement amount as the methodology adopted in the 2019 SEBI OPG Order was not found to be appropriate. Under the circumstances, when the amount determined to be disgorged as unlawful gain was set aside and its quantification has been remanded for recalculation based on secondary days' login, it was the duty of SEBI to ensure that the SCN contains unlawful gains from all days of secondary server login including days where primary server login was done prior to the secondary server login. This is for the reason that Hon'ble SAT has held that there is speed advantage from logging in to the secondary server. Thus, even if the time wise login to the primary server was made prior to the login to the secondary server, the speed advantage would ensure that ticks would be received by IPs connected to the secondary server faster before others. Thus, it would be out of context for *Noticees* to pick up one word 'opportunity' to paint otherwise proper action of SEBI as malicious.

121. *Noticees* have also contended that the SCN should not include a new charge in a set aside matter. They have relied upon the order passed by Hon'ble SAT in the matter of *Devendra Suresh Gupta (supra)* to support their contention that the compliance with the directions of Hon'ble SAT required consideration of the original show cause notice and evidence forming part of it, and it was not open to issue a fresh show cause notice incorporating new charge based on new evidence (Ref. para 31 (VIII) of this order). It is seen that the contention of *Noticees* is not correct. There is no new charge in the SCN, Hon'ble SAT has remanded four issues for re-adjudication. The SCN and this order is confined to those four issues.

122. Apart from above, it is also noted that a few judgments have been cited by *Noticees* like *Gorkha Security Service (supra)* etc., to submit that a show cause notice should contain precise charge so that the delinquent can efficiently reply to the same. In this connection, I note that the opening para of the SCN specifies in clear terms about the 2023 SAT Order and the issues remanded. The SCN further elaborates those issues and has also quantified the proposed amount of disgorgement. Therefore, reliance on *Gorkha Security (supra)* is a bare objection having no merit to deserve consideration.

(iii) Whether SEBI was authorised under the directions of Hon'ble SAT to introduce the ISB Report, 2023?

123. *Noticees* have also submitted that before passing of the 2023 SAT Order, SEBI had already engaged ISB, which led to preparation of the ISB Report, 2023. It has been contended that such an action of engaging ISB before passing of the order could not be treated to be in compliance with the directions passed by Hon'ble

SAT. Further, it has been submitted that the revision of methodology to quantify the quantum of unlawful gains did not fall within the scope of remand directions passed under the 2023 SAT Order.

124. *Noticees* have contended that there was no direction of Hon'ble SAT for fresh report from ISB which had used completely new methodology and which was under preparation for last two years, prior to passing of the 2023 SAT Order.

125. I note as a background that SEBI had received certain complaints in January and August 2015 *inter alia* alleging that preferential access was given by NSE to OPG for tick-by-tick data feed. In the proceeding that emanated from the said complaint, NSE had engaged ISB to calculate the profits earned by Trading Members, on days when they logged in first or connected to the secondary server. ISB submitted a Report in November, 2017 and the said Report was utilised for the purposes of passing the 2019 SEBI OPG Order, wherein *Noticees* were directed to disgorge INR 15.57 Crore, which it earned by connecting to the Secondary Server. The said 2019 SEBI OPG Order was challenged before Hon'ble SAT and Hon'ble SAT, vide 2023 SAT Order, *inter alia* directed SEBI to decide the quantum of unlawful gains afresh as the methodology adopted for calculation was found to be inappropriate.

126. From the records, it is noted that the Report of ISB was forwarded to SEBI by NSE vide its letter dated November 14, 2017. The said Report was deliberated upon and it was decided by SEBI that further analysis of the data captured in the ISB Report, 2017 needed to be carried out. It was also decided that engaging a new institute/researcher might lead to taking considerable time, and as ISB had already undertaken the exercise for NSE, the further analysis of data might also

be carried out by ISB. Accordingly, by a letter of engagement dated June 07, 2021, ISB was engaged by SEBI for the analysis, and a Report was submitted to SEBI by ISB in April, 2023.

127. When the plea of *Noticees* is considered in the light of the afore-stated sequence of events, it is noted that the said plea is only based on the timeline of events, i.e., ISB was engaged by SEBI before passing of the 2023 SAT Order. I note that Hon'ble SAT remanded the matter back to SEBI to compute the unlawful profits made by OPG. After passing of the said order, SEBI received the ISB Report, 2023. There is nothing wrong in using the same report for the calculation of disgorgement amount in the SCN so long as the methods adopted in the ISB Report, 2023 is not at variance with the directions of Hon'ble SAT.

128. There was no bar prescribed by Hon'ble SAT against using any new report or new methodology as long as it calculates unlawful gains from connecting to the secondary server, in a reasonably accurate manner. The timing of commissioning of the report is of no consequence, so long as the calculation of such unlawful gains is based on a sound reasoning. I note that when a report is available with SEBI which provides for the computation of unlawful gains in a reasonable manner, the same can be relied upon as an evidence in the SCN. Hence, the use of the ISB Report, 2023 is not in conflict with the directions of Hon'ble SAT and cannot be held to be without jurisdiction.

129. Without prejudice to the above, I also refer to the following judgments:

I. **R.M. Malkani Vs. State of Maharashtra (1973 AIR 157):**

In the said case, Hon'ble Supreme Court was confronted with the question of admissibility of evidence allegedly obtained through improper or illegal means. The relevant findings of Hon'ble Court are reproduced herein below:

> *"The Judicial Committee in Kurma, Son of Kanju v. R.(7) dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence….*
>
> *This Court in Magraj Patodia v. R. K. Birla & Ors. dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of respondent No. 1. The correspondence was between respondent No. 1 the elected candidate and various other persons. The witness who produced the file said that respondent No. 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court.* ***This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved. (emphasis supplied)***

II. **Umesh Kumar Vs. State of A.P. (AIR 2014 Supreme Court):**

> *"..27. It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained…"*

130. In view of the above discussion, it is clear that so long as evidence is admissible, it does not matter how it is obtained. I hold that since the ISB Report, 2023 computes the unlawful gains made by OPG by connecting to the secondary server in *prima facie* reasoned and practical manner, and since such report was available with SEBI at the time of issuance of the SCN, there is no impropriety or illegality in relying upon such report in the SCN. It has been examined subsequently that the methodology adopted in the ISB Report, 2023 is not at variance with the directions of Hon'ble SAT in the 2023 SAT Order and hence can be admitted as an evidence.

131. *Noticees* have also challenged the increase in scope in the new methodology to calculate unlawful gains in ISB Report, 2023. It is seen that while remanding the issue of calculation of disgorgement amount, Hon'ble Tribunal has not laid down any specific methodology/formula/criteria for the purposes of such calculation. The direction passed by Hon'ble Tribunal is: "*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*."

132. Infact, *Noticees* themselves have submitted that the underlying data for the ISB Report, 2017 and ISB Report, 2023 is same. Further, the methodology adopted in ISB Report, 2017 has not been held to be appropriate by Hon'ble SAT and therefore, there was a requirement to apply new methodology on the same set of data. Under the circumstances, the only issue that is required to be examined is whether increase in scope in this new methodology is in line with the directions of Hon'ble SAT. This is examined later in this order. In view of the above discussion, it is held that there is sufficient jurisdiction to proceed in the matter and there is

nothing wrong in issuing SCN based on calculation of unlawful gains in the ISB Report, 2023.

E.1.2 ISB was re-engaged by SEBI despite its clear conflict of interest

133. *Noticees* have also objected that there is a conflict of interest as Prof. Ram had conducted various studies from NSE in 2013, 2014, 2015 and 2019 and had also received funds/grant against the same. It is seen that unlike the ISB Report, 2017, ISB Report, 2023 was commissioned by SEBI and not by NSE. Moreover, the scope of ISB Report, 2023 was only to calculate unlawful gains made by SEBI sample brokers and had nothing to do with the role of NSE. Thus, on both counts (who engaged it and the scope of study), there does not appear to be any conflict. Therefore, merely because NSE had also engaged Prof. Ram to conduct certain studies in the past, there does not seem to be any kind of conflict of interest in the present proceeding, where SEBI had engaged Prof. Ram for calculating the unlawful gains of SEBI sample brokers.

E.1.3 The author of the ISB Reports lacks necessary qualifications and expertise to prepare the Report

134. *Noticees* have objected that Prof. Ram is not an expert in technology and the codes used to analyse and the data was written by his assistants. At this stage, I refer to the judgment of Hon'ble Supreme Court of India passed in the matter of *State of Himachal Pradesh Vs. Jai Lal and others (1999 AIR SCW 3309)*, wherein the Hon'ble Court has held *inter alia* as:

> *"…13. An expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have a special knowledge of the subject."*

135. In this connection, I deem it fit to refer to the profile of Prof. Ram, as explained by him during the cross-examination held on February 08, 2024:

> *I am an Associate Professor of Finance and Deputy Dean, Academic Programmes at the Indian School of Business based out of Mohali Campus. My educational qualifications are: BE Chemical Engineering from BITS Pilani, MS in Statistics from the University of South Carolina at Columbia and Ph.D in Finance from Indiana University, Bloomington. I have been with ISB for over 17 years. My research interests are in the area of* ***Market Efficiency and Market Microstructure and I teach courses on securities markets and derivatives securities****. I am a* ***Member of NSE's Expert Advisory Committee on Surveillance practices****. I am also on Board of Directors of CDSL Ventures Limited and an Independent External Person in India International Exchange (IFSC) Limited Regulatory Oversight Committee. I am also Independent External Person on India International Clearing Corporation's (IFSC) Limited's Regulatory Oversight Committee. (emphasis supplied)*

136. The qualification and credentials of Prof. Ram, as quoted above, adequately speak about his competence for analysing vast data provided to him and I do not find any doubt on his competence to analyse data to calculate unlawful gains earned by SEBI sample brokers in a reasonable manner. *Noticees* have also objected that the report was prepared by his assistants as Prof. Ram had no coding experience. On this issue, I find it appropriate to refer to a few of the Answers to Questions asked from Prof. Ram, before the objection is deliberated further for the decision. These answers are reproduced hereunder:

> *"Q6 Were there any other persons involved in the preparation of the Report, 2023?*
>
> *A6 No, not in the writing of the Report.*
>
> *Q7 In what capacity, were the other persons involved in the preparation of the Report, 2023?*
>
> *A7 They helped with data organization and data analysis.*
>
> *Q8 The attention of witness is drawn to the first page of the Report, 2023.*

The Authorship of the Report only names you whereas, in the answer quoted above, you have mentioned that other persons helped in data analysis. What do you have to say?

A8 I did not give authorship because they were working under my directions.

Q9 Who were the persons assisting you?

A9 The names of the persons are mentioned in the Acknowledgement section of the Report, 2023.

Q10 Can you point out the specific portions of the analysis carried out by other persons, who are not named as Authors?

A10 All the tables in the Report, 2023 were created by them.

Q11 Question from WTM: Whether the tables were created by them on their own or under your guidance?

A11 They were created under my guidance.

…

Q21 Is it correct to state that you were not able to verify/debug the Programme/Code prepared in Python and Athena?

A21 I can verify the Code because that is based on logic. I may not be able to do debugging because I may not know the syntax of the Programming languages.

…

Q26 Did you verify the data entry in the Tables with the underlying data as mentioned in answer 22 at the time of preparation of the tables on a sample basis?

A26 Yes."

137. From the above, it becomes clear that the role of assistants to the Prof. Ram was limited to assisting him in analysing data under his guidance, based on which ISB Report, 2023 has been prepared. It is also noted that Prof. Ram is not alien to coding as he has stated that he can verify the Code written by his assistants. An expert may not write the code himself and may take the help of programmers to

do it. However, if he is able to verify the code based on logic prepared by him, he has the ownership of that analysis/report which is based on such logic. Thus, the argument about Prof. Ram being not competent to analyse the data, is not tenable.

138. I further note that during the cross-examination, Prof. Ram has remained cooperative and has answered all the questions (299 questions in cross-examination spread over 7 days) in an elaborate and firm manner, indicating that he has in depth knowledge of the data analysed in the said report. I also find it apt to record that *Noticees* have also not been able to point out and submit at any stage of the proceeding that Prof. Ram is not capable to answer the question raised pertaining to the report authored by him. Hence, the contention raised above by *Noticees* questioning the competence and expertise of Prof. Ram is not sustainable.

E.1.4 Whether the principles of natural justice with respect to inspection of documents, cross-examination and personal hearing, have been followed?

(i) Inspection

139. I have recorded the details of inspection of documents conducted by *Noticees* as well as personal hearings and cross-examination provided to *Noticees* in the present proceedings in addition to what has already been done in the early proceedings. The details of such proceedings are captured in the following table:

Table no. 7

Inspection of documents	
Sr. No.	Date
1.	04/09/2023
2.	15/03/2024
3.	21/05/2024
4.	07/06/2024
Personal hearing	
1.	01/02/2024
2.	16/02/2024
3.	27/05/2024
4.	19/06/2024
5.	20/06/2024
6.	05/07/2024
7.	08/07/2024

Table no. 8

Sr. No.	Details of the witness	Dates of cross-examination	No. of questions asked
1.	Prof. Ramabhadran S. Thirumalai, ISB	08/02/2024	1-50
2.		09/02/2024	51-125
3.		14/02/2024	126-160
4.		09/04/2024	161-202
5.		10/04/2024	203-232
6.		20/04/2024	233-260
7.		22/04/2024	261-299 **Total: 299**
8.	Amit Rahane, EY	17/04/2024	1-31 **Total:31**
9.	Jayant Saran, Deloitte	19/04/2024	1-23 **Total:23**

140. It is noted that along with the SCN, all the documents which were relied upon were provided to *Noticees*, as Annexures (19 Annexures) to the SCN. Subsequently, *Noticees* carried out inspection of documents on multiple occasions, and apart from the aforementioned documents relied upon, certain other documents like internal file noting were also provided for inspection. It is also noted that the emails exchanged by SEBI with Deloitte and ISB, after issuance of SCN were also duly and fairly shared with *Noticees*. It is also noted that clarifications with respect to documents already supplied were also provided to *Noticees* by the operational department over a conference call with the Counsels of *Noticees.* These apart, numerous documents and clarifications were requested to be provided by *Noticees* from the Expert Witnesses, during the cross-examination. The said witnesses have cooperated in providing documents/clarifications, as sought by *Noticees,* which have been noted in the preceding paras. It is also noted that in its order dated May 15, 2024 (passed in Appeal no. 299 of 2024), Hon'ble SAT has directed SEBI to provide inspection of additional documents, and in compliance with the same, inspection of these documents was further provided on May 21, 2024, and again on June 07, 2024. Subsequently, another appeal was filed by *Noticees* (Appeal no. 372 of 2024), and while dismissing the said appeal, Hon'ble SAT vide its order dated June 24, 2024 has *inter alia* noted that the order dated May 15, 2024 to provide inspection of documents has been complied with. Under the circumstances, I find that inspection of all documents relied upon have been provided to *Noticees;* and wherever possible, documents/clarifications have also been sought from the Expert Witnesses to provide the same to *Noticees.* It is also noted that certain documents have been denied for inspection as they were found to be not relevant for the proceedings or pertaining to third parties. The

reasons for not allowing inspection was provided to *Noticees* and the said exemptions are found to be in line with the principles laid down in the judgment of *T. Takano.* The claim of *Noticees* of seeking inspection after inspection cannot be held to be having unlimited and unfettered right under the guise of affording fair opportunity to defend the allegation. It is under these circumstances that Hon'ble SAT has vide its orders dated May 15, 2024 and June 24, 2024, dismissed the appeals filed by *Noticees* herein, in which one of the reliefs sought was seeking inspection of further documents.

141. At this stage, the findings of Hon'ble Tribunal in the matter of *Anant R. Sathe vs SEBI (Appeal no. 150/2020; date of decision July 17, 2020)* are also relevant and the same is reproduced herein below for the purposes of reference:

> "7. *Having heard the learned counsel for the parties, we are of the opinion that the controversy involved in the present appeal is squarely covered by the decision of this Tribunal in Shruti Vora's (supra) wherein the Tribunal held that:*
>
> > *"In the light of the aforesaid, we are of the opinion that concept of fairness and principles of natural justice are in-built in Rule 4 of the Rules of 1995 and that the AO is required to supply the documents relied upon while serving the show cause notice. This is essential for the person to file an efficacious reply in his defence."*
>
> 8. *The said principle elucidated in Shruti Vora's judgement is squarely applicable in the instant case. The authority is required to supply the documents that they rely upon while serving the show cause notice which in the instant case has been done and which is sufficient for the purpose of filing an efficacious reply in his defence.*
>
> 9. *In Natwar Singh vs Director of Enforcement and Another (2010) 13 SCC 255 the Supreme Court held that the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima-facie unfairness irrespective of whether the material in question arose*

before, during or after the hearing. The Supreme Court further held that the law is fairly well settled, namely that if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he could prepare his defence.

142. In this regard, I further note that Hon'ble Tribunal, in the matter of *Reliance Commodities Ltd vs* SEBI, in its order dated July 23, 2019, has observed as under:

> *"2. Having heard the learned counsel for the parties and having perused the list of documents so required for inspection we are of the opinion that the documents sought for is nothing but a roving and fishing enquiry. We accordingly do not find any merit in the submission of the learned counsel for the appellant that these documents are essential for the purpose of filing an appropriate reply.*
> *3. However, we are of the opinion that if any document is relied by the respondent while disposing of the matter such document should be made available to the appellant. The appeal is accordingly disposed of. Misc. Application No.189 of 2019 is also disposed of."*

143. Further reference is made to the order of Hon'ble SAT passed in the matter of *Madhyam Agrivet Industries Ltd Vs. SEBI (Appeal no. 258 of 2024; date of decision: May 22, 2024),* wherein also while rejecting the prayer of appellants to have access to the complete chain of communication between SEBI and the Forensic Auditors including the inter departmental communication, Hon'ble Tribunal has held that

> 12. *With regard to other documents being pressed by the Appellants, we note that the Forensic Audit Report along with Addendum and the Investigation report have been allowed to the appellants. In our view, these reports are the final product of the communication between Forensic Auditor and respondent, the communication within the Authority and the interdepartmental movement of the proceedings. Even if instructions were issued by the Respondent to the Forensic Auditor, the results of such instructions would be reflected in the Forensic Audit Report based on examination by the Auditor. Similarly, internal notings*

and inter-departmental transfers are part of a process within the Board which culminates in the Investigation Report and finally leads to issuance of the show cause notices.

13. We may record that Appellants have mainly relied upon Paragraphs No: 44, 50, 52, 53 and 62 of the Hon'ble Supreme Court in the matter of ***T. Takano (supra)****. The conclusion is in paragraph No. 62. The other documents sought for by the appellant fall within the directions contained in the Paragraph 62(i). It is held herein that it is sufficient to disclose materials relied upon for issuance of show cause notice. In our view, the Forensic Audit with is addendum and the investigation reports form the basis for issuance of notice and those reports having been provided, Appellants' grievance is redressed.*

144. I note that all the materials pertaining to the show cause notice, that have been relied upon were duly furnished to *Noticees*. The above confirmation was also communicated by me during the hearing and it was also confirmed that no document that has not been provided to *Noticees* would be relied upon. Considering the same, the request of the authorized representatives for seeking inspection of non-relevant or extraneous documents that too in a proceeding having limited scope as being conducted only on remitted issues in my opinion, is not appropriate. The relevant question to answer is whether documents being relied upon in the SCN have been furnished to the *Noticees* or not. I find that inspection of all the documents which are relevant to the issue remanded have been provided. (The details of communication exchanged with *Noticees* on the issue of inspections of documents is captured in the Annexure A of this order).

145. I note that insistence of the authorized representatives of the *Noticees* for inspection of documents like file noting which do not have any bearings on the allegations in the SCN is inappropriate and not in line with the judicial precedents, hence does not merit any further consideration. Therefore, insofar as the issue of

inspection of documents is concerned, it is held that there is no violation of principles of natural justice.

(ii) Cross-examination

146. It is noted that the present case is build up on reports prepared by various experts. In the first round of proceeding leading to the passing of the 2019 SEBI OPG Order, detailed cross-examination of the experts was provided. It is also noted that scope of the present proceeding is limited to the issues remanded by the 2023 SAT Order and materials relied upon in the SCN are nothing but what were relied upon in the earlier proceeding, except the ISB Report, 2023, and the email dated November 17, 2023 of ISB and email dated December 05, 2023 of Deloitte. I have also explained in detail as to how reliance on ISB Report, 2023 is just and proper. As regard to the issue of providing opportunity of cross-examination while conducting the proceeding is concerned, I find that *Noticees* have conducted an extensive cross-examination of Prof. Ram, the Author of the ISB Report, 2023. Further, apart from the above, *Noticees* were also afforded cross-examination of Authors of Deloitte Reports and EY Report so as to provide them with sufficient opportunity to defend the allegations under adjudication. As can be noted from Table no. 8, detailed cross-examination of Prof. Ram (ISB) was carried out on 7 days and 299 questions were asked from him. Similarly, cross-examination of Mr. Amit Rahane (EY) and Mr. Jayant Saran (Deloitte) were also carried out for one day each.

147. It is also noted that during the course of proceedings *Noticees* have requested for cross-examination of certain SEBI officials as well as Prof. J R Varma. The request pertaining to cross-examination of SEBI officials was denied during the hearing

conducted on April 09, 2024, and the reasons for such denial have already been elaborated in paragraph no 60 of this order. Further, it is also noted that during the hearing conducted on May 27, 2024, I informed to *Noticees* that Prof. Ram had spoken about the role of Prof. Varma in his cross-examination, however, the request by *Noticees* was not made at that stage. Such a request was made by *Noticees* when the time granted by Hon'ble SAT for conducting the cross-examination was over. I note that *Noticees* have also contended that the role played by Prof. Varma came to their knowledge through office note dated January 24, 2019 provided to them under the inspection of documents conducted on May 21, 2024. I am of the view that irrespective of the timing of the knowledge about the role of Prof., J R Varma, it is an undisputed fact that the ISB Report, 2023 has been prepared by Prof. Ram, and his extensive cross-examination has been conducted by *Noticees.* Prof. Ram has categorically stated during the cross-examination that the role of Prof. Varma was limited to discussion he (Prof. Ram) held with respect to the methodologies to be used in the ISB Report, 2023 (Refer answer to question no. 189 reproduced as Footnote no. 3 in Para no. 79 of this order). At this stage, I refer to the order of Hon'ble SAT passed in the matter of *Madhyam Agrivet Industries Ltd. (supra)*, referred at para no. 143 of this order which clearly lay down the principle that the final report is the main evidence for which the cross-examination is required.

148. The findings of Hon'ble SAT referred above, also support my finding to reject the request of cross-examination of Prof. Varma as the final product in the present proceeding is the ISB Report, 2023, and an extensive cross-examination of author of the said report has been duly provided. There is no requirement to provide

cross-examination of Prof. Varma, who was merely an advisor to the author. When no report prepared by Prof. Varma has been relied upon in the present proceedings, there does not appear to be accrual of any right to his cross-examination by *Noticees.*

149. It is also noted that the request of cross-examination of SEBI employees was rejected and the reasons for the said rejection has already been recorded in para 56 of this order. Subsequently, the said request was never raised by *Noticees* and even the Written Submissions dated July 22, 2024 does not make any argument based on such request.

150. It is also noted that *Noticees* had during the course of cross-examination, raised certain objections related to the cross-examination of witnesses. For example, while conducting the proceedings, I had asked a few questions to the witness being cross-examined (cross-examination of Prof. Ram held on February 08, 2024, February 14, 2024 etc.), and the Ld. Counsel had opposed/objected to such raising/asking of questions by me during the cross-examination held on February 14, 2024. It was then stated by me to the Ld. Counsel that these questions were asked in the interest of justice, wherever clarity was required on the answers provided by the witness. I also note that in numerous judgments, Hon'ble Courts have underscored that an authority having the responsibility to hold proceeding including cross-examination cannot be a mute spectator during the proceeding and the authority enjoys all the right, rather has duty to put question to the witness which the authority views essential for the adjudication of the issues under consideration. Few of such judgments are quoted herein below:

I. **Anees Vs. State Government of NCT (2024 INSC 368):**

"*74. The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during the chief examination or cross-examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. (See: (para 12) of State of Rajasthan vs. Ani alias Hanif & Ors., AIR 1997 SC 1023)."*

II. **Munna Pandey Vs. State of Bihar (2023 INSC 793):**

"…*53. Sarkar (1999, 15th pp. 2319 etc.) says that a Judge is entitled to take a proactive role in putting questions to ascertain the truth and to fill up doubts, if any, arising out of inept examination of witnesses. But, as stated by Lord Denning in* ***Jones v. National Coal Board****, 1957 (2) All ER 155 (CA), the Judge cannot "drop the mantle of a Judge and assume the robe of an advocate".*

54. Of course, the Judge should not be a passive spectator but should take a proactive role as emphasized by Phipson (Evidence, 1999, 15th Ed, para 1.21 as under:-

> *"When the form of the English trial assumed its modern institutional form, the role of the judge was that of a neutral umpire. This is still broadly the position in criminal cases. In civil cases, the abandonment of jury trial except in a few exceptional cases led to some dilution of this principle. The wholesale changes in 1999 of the rules governing civil procedure has emphasized the interventionist role of the modern judge. Whereas formally the tribunal was a 'reactive judge (for centuries past at the heart of the English Common Law -- concept of the independent judiciary) instead we shall have a proactive judge whose task will be to take charge of the action at an early stage and manage its conduit."*
>
> *(Emphasis supplied)*
>
> *……*

68. The role of a judge in dispensation of justice after ascertaining the true facts no doubt is very difficult one. In the pious process of unravelling the truth so as to achieve the ultimate goal of dispensing justice between the

parties the judge cannot keep himself unconcerned and oblivious to the various happenings taking place during the progress of trial of any case. No doubt he has to remain very vigilant, cautious, fair and impartial, and not to give even a slightest of impression that he is biased or prejudiced either due to his own personal convictions or views in favour of one or the other party. This, however, would not mean that the Judge will simply shut his own eyes and be a mute spectator, acting like a robot or a recording machine to just deliver what stands feeded by the parties."

151. In the present case, wherever deemed necessary, I have stepped in to ask only a few questions (14 questions out of 299 questions) (Question no. 11; Question no. 54; Question no. 55; Question no. 58; Question no. 59; Question no. 65; Question no. 79; Question no. 85; Question no. 96; Question no. 134; Question no. 136; Question no. 142; Question no. 143; and Question no. 151) from Prof. Ram during the cross-examination as to seek clarifications to answers provided by him. Based on the guidance from the above judgments, I find that the objection raised by the Ld. Counsels on questions asked by me from the witness, is unsustainable. I may further note that this objection was not raised subsequently, either during the hearing or in the written submissions. Infact in the written submissions, *Noticees* have relied upon on the answers of Prof. Ram to a few of the questions asked by me.

(iii) Hearing

152. Further, on the issue of personal hearing, I note that *Noticees* were given 7 detailed hearings, details of which have been captured in Table no.8. It is also noted that in compliance with the directions of Hon'ble SAT, adequate time was granted to file written submissions to *Noticees,* and availing the said liberty, *Noticees* have filed their written submissions on July 23, 2024. The Written Submissions confirms that adequate opportunity was provided to *Noticees,* by *inter alia* stating as:

"A. At the outset, we thank the Ld. Member for patient and adversarial hearings held on February 1, 2024, May 27, 2024, June 19, 2024, June 20, 2024, July 5, 2024, and July 8, 2024 when we were able to articulate our submissions and deal with the allegations in the Show Cause Notice issued against the Noticees. We indeed appreciate the efforts taken by the Hon'ble Member in understanding our submissions in the matter."

153. In view of the above, I hold that there is no violation of principles of natural justice in the present proceeding and sufficient opportunity has been provided to *Noticees* to put forward their defence in a fair manner.

E.1. 5 Can remand proceedings increase the original amount of disgorgement?

154. It is also been contended that the higher amount of disgorgement could not be directed in comparison to the 2019 SEBI OPG Order as it would amount to enlarging the scope of remand. In this regard, I note that Hon'ble SAT has remanded the present matter *inter alia* for deciding the quantum of disgorgement afresh in the light of the findings in the said order. Therefore, there is no enlargement of the scope and the proceedings are being carried out within the four corners of the directions passed by Hon'ble SAT. I also note that *Noticees* have cited few judgments on the issue of scope of remand proceedings. I note from the judgment cited by *Noticees* in the matter of *Bidya Devi Vs. Commissioner of Income-Tax and others (supra)*, that Hon'ble Supreme Court has *inter alia* held as:

***"5….** The Assessing Officer could not sit in appeal over the decision by the order of remand. The matters finally disposed of by the order of remand cannot be reopened when the matter comes back after the final order upon remand on appeal or otherwise to the court remanding the matter. If no appeal is preferred against the order of remand, the matters finally decided in the order of remand can neither be subsequently reagitated before the court to which remanded nor before the court where the order passed upon*

remand is challenged in appeal or otherwise from such order. The court, to which the matter is remanded, has to act within the order of remand. It is not open to such court or authority to do anything but to carry out the terms of the remand even if it considers it to be not in accordance with law. Once a finality is reached, it cannot be reopened. Even if the Supreme Court holds otherwise even then the court cannot go back on its earlier order of remand. It can only be done through review of the order of remand. It cannot be achieved in the appeal against the order passed upon remand…"

155. When the aforesaid principle is applied in the facts of the present case, it is noted that the 2023 SAT Order in its paragraph 266 has passed categorical directions while remanding the matter to SEBI. The directions pertaining to *Noticees* have already been reproduced at paragraph no. 2. From that direction, it is clear that the mandate in the present proceedings is to re-compute the quantum of disgorgement afresh in the light of the observations in the 2023 SAT Order; to consider the charge of connivance and collusion of OPG and its directors with any employee/official of NSE; to decide the issuance of directions/penalty for destruction of information; and to reconsider the issue relating to crowding out other market participants. In the present order, only the aforesaid issues are being adjudged and no issue which is not covered in the directions of Hon'ble SAT is being reopened. On the issue of re-calculation of quantum of disgorgement, when Hon'ble SAT has rejected the earlier methodology and given directions for fresh calculation, it is not necessary that the new method will result in same or less amount of disgorgement. 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[6] of the Securities Appellate Tribunal (Procedure) Rule, 2000, has power to give

[6] 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.

directions as may be necessary to secure the ends of justice. Thus, the direction of Hon'ble SAT may result in higher amount of disgorgement than calculated in the order in the appeal before it.

156. Therefore, in light of the specific directions of remand on four issues, and by virtue of the order of Hon'ble Supreme Court, I hold that the SCN and the present proceedings are well within the remit of 2023 SAT Order, which conferred jurisdiction over SEBI to re-compute the disgorgement amount, which may result in the amount of disgorgement which is higher than the computation in the earlier order because of the issues not considered earlier or because of the change in the method of the computation.

E.1.6. Whether there is bias/prejudice against *Noticees*

157. I note that *Noticees* have referred to certain Adjudication Orders passed against other TMs and have contended that despite all such entities being similarly situated, minor monetary penalties had been imposed against them and the issue of connivance/collusion had not been raised in those proceedings.

158. In this regard, I note from the material available on record that other TMs are not party before me in the present proceedings which is being conducted to adjudicate the allegations made in the SCN against *Noticees.* 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* and imposition of minor monetary penalties on other TMs 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 proceedings initiated in due compliance of the order of Hon'ble Tribunal. Having perused once again the order dated January 23, 2023 of the Hon'ble Tribunal, I find that there is no adverse observation made by the Hon'ble Tribunal on the above issue of prejudice raised by *Noticees*. Since, there is no change in the facts of the matter while passing the 2019 SEBI OPG Order and the present proceeding so far as the issue of not alleging other TMs with connivance/collusion is concerned, I see no merit in the above submission of *Noticees*, more so, when nothing adverse has been found by Hon'ble Tribunal. 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 the proceedings was agitated. Hon'ble SAT had while rejecting the argument advance has 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."*

159. Notwithstanding the same, it is also noted that the SCN while referring to the ISB Report, 2023 notes that on average SEBI sample brokers logged into the FO segment's secondary server on 140 days, however, OPG logged in to the highest number of days being 631. Thus, in view of the aforesaid legal and factual position, I do not find any merit in the argument seeking parity with other TMs.

160. I shall now proceed to deal with the issues remanded by Hon'ble SAT, on merit.

161. At the outset, it is clarified that there are various issues raised by *Noticees* which are already decided by Hon'ble SAT and have attained finality so far as this authority is concerned. Such issues are not required to be re-adjudicated.

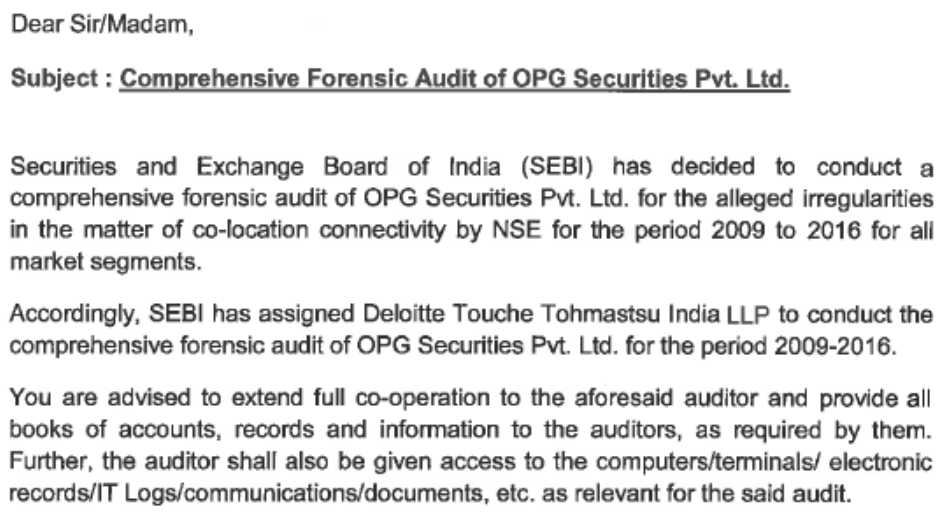
E.2 <u>Issues on Merit</u>

E.2.1 Issuance of directions/penalty (for) concealment/destruction of vital information by Mr. Sanjay Gupta

162. As the charge of destruction of evidence is restricted to the *Noticee no. 2* only, I shall first deal with the same.

163. It is noted that the SCN makes a charge of destruction of evidence on Mr. Sanjay Gupta, the *Noticee no. 2.* It is noted from the Annexure 44 of the investigation report that a letter dated September 12, 2017 was issued by SEBI to the *Noticee no. 1,* screenshot of relevant portion of which is reproduced hereunder:

Image no. 5



Dear Sir/Madam,

Subject : <u>Comprehensive Forensic Audit of OPG Securities Pvt. Ltd.</u>

Securities and Exchange Board of India (SEBI) has decided to conduct a comprehensive forensic audit of OPG Securities Pvt. Ltd. for the alleged irregularities in the matter of co-location connectivity by NSE for the period 2009 to 2016 for all market segments.

Accordingly, SEBI has assigned Deloitte Touche Tohmastsu India LLP to conduct the comprehensive forensic audit of OPG Securities Pvt. Ltd. for the period 2009-2016.

You are advised to extend full co-operation to the aforesaid auditor and provide all books of accounts, records and information to the auditors, as required by them. Further, the auditor shall also be given access to the computers/terminals/ electronic records/IT Logs/communications/documents, etc. as relevant for the said audit.

164. The copy of the said letter was also forwarded by SEBI vide email dated September 13, 2017, stating therein as:

> *"Dear Sir/Madam,*
>
> *Please find attached the soft copy of SEBI's letter for your reference and compliance.*
>
> *Further you are directed, not to dispose of / delete or make modification, to any of the records, emails, communications, IT Logs, etc."*

165. It is also noted that copy of the letter dated September 12, 2017 as well as the email dated September 12, 2017 were marked to Deloitte.

166. It is noted that Deloitte in its Report (Project Regler) submitted in July, 2018, *inter alia* recorded as:

> *"as per the review of the forensic image of Sanjay Gupta's mobile phone captured on **October 27, 2017**, we observed that a factory reset was performed on the phone immediately prior to handing it over for forensic imaging". (emphasis supplied)*

167. The SCN alleges that the above destruction of evidence further shows that the *Noticee no. 2* has acted fraudulently and destroyed crucial evidence. The SCN also records that the vital information was allegedly destroyed by the *Noticee no. 2* availability of which could have been helpful in providing better insight and arriving at more conclusive findings. Thus, there is an allegation of violation of provisions of sub-section (2) of section 11C of the SEBI Act, 1992, which reads as under:

> *11C (2) Without prejudice to the provisions of sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority*

or any person authorised by it in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

168. In response to the above allegation, it has been submitted that the *Noticee no. 2* could not be made liable for destruction of evidence as he did not destroy the evidence and had fully cooperated in the investigation. It was also submitted that he handed over all digital devices with all their respective contents intact. It has further been submitted that the *Noticee no. 2* had handed over another phone to Deloitte and contents of the other phone were intact. Even for the phone in question, all data was in the cloud/drive, and only few personal photos/data were erased after consultation with Deloitte. In addition, it has been submitted that this phone pertained to subsequent period which was not relevant for the investigation.

169. At the outset, I note that in the 2023 SAT Order, Hon'ble SAT has *inter alia* directed SEBI to decide the issuance of direction/penalty (for) destruction of evidence by the *Noticee no. 2.* Hon'ble Tribunal while referring to findings recorded in the 2019 SEBI OPG Order has observed that having recorded a finding to establish the allegation, no direction was issued for the said violation of destruction of evidence. From the above, it is seen that Hon'ble SAT has affirmed the violation and remitted the proceeding only for the issuance of direction/penalty. Thus, the mandate for this authority is not to examine whether there is a violation by the *Noticee no. 2* of the provisions of sub-section (2) of section 11C of the SEBI Act, 1992 through his act of factory setting of the mobile phone. That violation is already confirmed by Hon'ble SAT. The only issue before me is to decide the penalty/direction for this violation. Under the circumstances, I find that the *Noticee no. 2* deserves to be issued with direction for the act of destruction of evidence by

resetting the phone to factory settings, in violation of the provisions of sub-section (2) of section 11C of the SEBI Act, 1992.

E.2.2 Crowding out

170. In order to deal with the charge of crowding out, I note from the SCN that after 2012, the *Noticee no. 1* had a total of 45 TBT IPs in F&O segment. The said IPs were distributed to various servers in following manner:

Table no. 9

Particular	Server 21	Server 23	Server 24	Server 26	Total IPs
Number of IPs	10	10	18	7	45

171. As per the SCN, OPG was allocated/connected multiple IPs on certain ports in the F&O segment, with the following details:

Table no. 10

Year	TBTCOLO21			TBT COLO 23	TBTCOLO24		TBTCOLO 26			TBTCOLO27			Total IPs (excluding colo27)
Port	10991	10990	10992	10991	10991	10992	10990	10991	10992	10990	10991	10992	
2012	0	0	8	4	6	0	6	0	0	5	7	2	24
2013	0	0	8	7	8	4	4	1	1	3	6		33
2014	1	1	8	6	7	5	3	1	1	2	5	2	33
2015			2	2		2			2	2	1		8

172. The SCN further records that the *Noticee no. 1* was connecting 1st, 2nd, 3rd and even 4th on the same server on number of occasions during the relevant period. The server wise and year wise break up of such connections made by the *Noticee no. 1* is detailed in the following tables:

Table no. 11

TBTCOLO21

Year	1st connection	1st and 2nd connection	1st, 2nd and 3rd connection	1st, 2nd, 3rd and 4th connection	Login days of OPG
2012	83	79	65	15	224
2013	81	80	79	57	248
2014	48	38	23	15	243
2015	3	1	0	0	235

Table no. 12

TBTCOLO23

Year	1st connection	1st and 2nd connection	1st, 2nd and 3rd connection	1st, 2nd, 3rd and 4th connection	Login days of OPG
2012	181	165	145	71	212
2013	242	234	196	57	248
2014	82	81	74	47	229

Table no. 13

TBTCOLO24

Year	1st connection	1st and 2nd connection	1st, 2nd and 3rd connection	1st, 2nd, 3rd and 4th connection	Login days of OPG
2012	33	23	6	0	223
2013	16	16	16	11	248
2014	12	11	11	10	242
2015	5	0	0	0	154

Table no. 14

TBTCOLO26

Year	1st connection	1st and 2nd connection	1st, 2nd and 3rd connection	1st, 2nd, 3rd and 4th connection	Login days
2012	221	200	65	1	223
2013	248	234	130	4	248
2014	105	93	63	3	243
2015	2	0	0	0	38

Table no. 15

TBTCOLO27 (Secondary Server /Backup Server)

Year	1st connection	1st and 2nd connection	1st, 2nd and 3rd connection	1st, 2nd, 3rd and 4th connection	Login days
2012	58	38	21	8	79
2013	243	239	21	0	251
2014	102	86	0	0	239
Till May 2015	16	0	0	0	94

173. Further, in its Report, the Technical Advisory Committee (hereinafter referred to as **"TAC Expert Committee Report"**), an Expert Committee constituted by SEBI based on the sample data provided by NSE, observed the following with respect to login in of OPG during Calendar Years 2012 and 2013:

i. OPG was consistently logging in 1st on 3 of the TBT servers, namely, TBTCOLO23, TBTCOLO24 and TBTCOLO27.

ii. OPG was consistently logging in 2nd on 4 of the TBT servers.

iii. OPG was consistently logging in 3rd on 3 of the TBT servers.

iv. No other broker had shown a consistent login pattern during Calendar years 2012 and 2013.

174. The matrix of such consistent logging in of OPG as noted from the SCN is presented in the following table:

Table no. 16

Consistent Log-in Matrix - CY 2012 & CY 2013

	2012					2013				
Server Name	**TBT COLO 21**	**TBT COLO 23**	**TBT COLO 24**	**TBT COLO 26**	**TBT COLO 27**	**TBT COLO 21**	**TBT COLO 23**	**TBT COLO 24**	**TBT COLO 26**	**TBT COLO 27**
1st	-	OPG	USB	OPG	OPG	-	OPG	USB	OPG	OPG
2nd	OPG	OPG	USB	OPG	OPG	OPG	OPG	OPG	OPG	OPG
3rd	OPG	OPG	USB	-	OPG	OPG	-	OPG	OPG	-

175. I note that the TAC Expert Committee Report *inter alia* records as: "*OPG securities tried to exploit the loophole in TBT architecture by not only logging in 1st on select servers but it even tried to crowd out others by occupying 2nd, and 3rd positions on those servers……..*".

176. Further, in this respect Deloitte in its Report submitted in December, 2016 has *inter alia* recorded as:

> "*NSE IT team, by in a manner that may have resulted in some members/brokers gaining advantage over others in terms of their IPs being distributed across servers*".

177. The SCN further records that by assigning multiple IPs of OPG to single ports, NSE facilitated crowding by OPG and enabled OPG to establish 1st, 2nd, 3rd and 4th connection to the server. Such a practice by OPG allowed it to gain unfair advantage over other stock brokers.

178. Based on the factual details mentioned above, the SCN alleges that OPG gained such an unfair advantage by consistently logging in 1st, 2nd, 3rd and 4th. The SCN also alleges that the *Noticee no. 1* acted in a fraudulent manner and indulged in fraudulent and unfair trade practices in securities market for it acts of crowding out other TMs by consistently login in 1st, 2nd, 3rd and 4th.

179. Insofar as the issue of crowding out other TMs by OPG is concerned, I note that it has been submitted emphatically that the 2019 SEBI OPG Order had exonerating OPG from the said charge. In this respect, relevant portion as recorded in the 2019 SEBI OPG Order while dropping the charge of crowding out is as under :

> "*8.15 As mentioned earlier, data disseminated will first be sent to Port 1, Port 2 and then to Port 3 of the POP Server. OPG Securities 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 (as has also been made out in the preceding paragraphs). The allegation contained in the SCN that assigning multiple IPs of OPG Securities to single Ports by NSE allowed 'crowding out' by the said TM has been arrived at after considering the analysis of 1st, 2nd, 3rd, 4th connect made by OPG Securities on any Port of a POP Server. In this regard, it is stated that 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. Incidentally, I note that a similar process of allocating multiple IPs of a TM on a single Port was also followed by NSE in respect of other TMs (as noted from Annexure 24(a) of the Deloitte Report). In view of the aforementioned, I do not find merit in the allegation of 'crowding out' as made out in the SCN against OPG Securities."*

180. From the aforesaid paragraph, the reasoning for granting exoneration from the charge of crowding out is extracted below:

i. The data disseminated will be first sent to Port 1, Port 2, and then to Port 3.

ii. However, OPG was allocated Port 1 only on two servers (TBTColo26 and TBTColo27), and thus it was having limited advantage of early login.

iii. Since data dissemination occurs first to Port 1 of the POP server, the 1st, 2nd, 3rd and 4th connect to the Ports other than Port 1, will stand at relatively lower rank as compared to dissemination sequence on that POP server.

iv. NSE has allocated multiple IPs on a single Port to other Trading Members also.

181. Hon'ble SAT has held in paragraph 80 of the 2023 SAT Order that the conclusion drawn in the 2019 SEBI NSE Order to the extent that dissemination of the information at the Sender Port level of a particular server was in a predefined sequence, was not based on any evidence. Hon'ble Tribunal further referred to the reports filed by EY and held that the dissemination of a batch of information was received from PDC to each Port sequentially, as defined by the source code. However, the order of receipt of such batch of information at each Port within the same POP server was not defined by the source code. Hon'ble SAT in paras 80 (d), (i) and (j) of the 2023 SAT Order, referred to an illustration extracted from EY Report. The said paras are already reproduced in para 13 of this order

182. I note that in para 226 of the 2023 SAT Order (already reproduced at para 13 of this order), Hon'ble SAT has held the act of multiple loggings to single port was advantageous to OPG and disadvantageous to other TMs.

183. Further, under para 266 (h), Hon'ble Tribunal has *inter alia* directed SEBI as:

"*266. In view of the reasons given in the preceding paragraph:*

h. ….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."

184. A perusal of the directives of Hon'ble SAT makes it clear that the mandate in the present proceeding is to reconsider the issue of crowding out other market participants by OPG, in light of the observations recorded in the 2023 SAT Order.

185. I note that Hon'ble SAT has observed under paragraph no. 226 of the 2023 SAT Order (already reproduced at para 13 of this order) that by virtue of multiple logins on single port, an advantage was gained by OPG as the tick of data was received by OPG, atleast few seconds early than the other TMs, who had been allegedly crowded out. It is also noted from para 80 (i) and (j) of the 2023 SAT Order (reproduced at para 13 of this order) that the receipt of ticks on a particular Port is sequential and will be distributed in a sequence in which the TMs have logged in on any given day on that Port. Therefore, it is understood that by the practice of alleged crowding out there was an advantage of a few nano seconds to OPG over other TMs on that Port.

186. I note that there is no dispute to the factual position that OPG was allotted multiple IPs on same Ports by NSE. It is also alleged that, OPG had logged in through multiple IPs and had acquired 1st, 2nd, 3rd, and even 4th position on a particular Port. I also infer[7] from the cross-examination of Prof. Ram that any information procured in a time of 10^{-9} seconds can be used for executing algo trades. As OPG was logged in through multiple IPs on a particular Port, it is but natural that flow

[7] *Q173 Is it correct that any benefit obtained from procuring an information in nanoseconds (10-9) is lost while executing non-algo trades?*
A173 It is possible that the benefit is lost but it cannot be said for certain.

of ticks was being received by it in time slightly earlier than the other TMs, who were ranked below OPG in that particular Port. Based on the advantage of nano seconds accruing to OPG by virtue of it being at multiple IPs, it appears that the algo-trades could have been fired using the information, for the benefit of OPG and to the disadvantage of others. Thus, examination of the factors discussed above gives an indication that by logging in through multiple IPs on a Port, there could be some advantage that was accruing to OPG.

187. However, before coming to any conclusion, it is imperative that apart from the above undisputed facts, certain other factors also deserve consideration. This is because the above discussion talks about the advantage in the context of crowding out on a Port only, without taking into consideration the position on other Ports. The said factors are stated below:

I. The charge of crowding out is restricted to primary servers and not to the secondary server, since unlawful/abnormal gains made by connecting to the secondary server are already required to be computed separately. Considering crowding out on secondary server would result in double counting, which needs to be avoided.

II. In terms of the email of ISB dated November 17, 2023, when the profits of OPG on days when it had 1st, 2nd, 3rd to 4th login i.e. on crowding out days are compared with the days when it did not crowd out, it has been revealed that OPG earned lesser profit per day on days when it was having multiple loggings. Analysis of data further reveals that when OPG did not crowd out, the average daily profit earned by it comes to INR 19.86 Lakh, however, when it crowded

out, the average daily profits reduced to INR 14.63 Lakh, i.e., a decrease of 26.33%.

III. In terms of the findings recorded in para 80 (m)[8] of the 2023 SAT Order, a TM had no knowledge of his rank in the queue on a particular port. When such fact is not disputed, it becomes difficult to hold with certainty that there was intent to crowd out other TMs. Therefore, even if OPG was logged in through 4 different IPs on a particular Port, there does not seem to any measure through which it could know the order of connection of other TMs in that particular Port. Therefore, OPG could not have known whether its own IPs were crowding out others (being first four IPs) or OPG itself is being crowded out (by being last four IPs) or the IPs of OPG are scattered throughout the Port.

IV. It is noted that the 2023 SAT Order *inter alia* records that the ticks are disseminated from POP Server to the Port in a sequence, however, the data may not be received sequentially. Relevant paragraph no. 83 of the 2023 SAT Order is already reproduced in para 13 of this order.

V. The said finding is also confirmed by way of an example in para 80 (i) and (j) of the 2023 SAT Order (reproduced at para 13 of this order)

VI. In view of the above findings, even if OPG crowd out a Port of the server, it is possible that other TMs who were logged in to another Port of the server receive ticks faster. The finding of Hon'ble SAT as recorded in para 80 (a) (vii) of the 2023 SAT Order may be referred to (as reproduced in para 13 of this order).

[8] m. ***A TM had no knowledge of his rank in the queue on a particular Port.*** *A TM was also not aware of the order in which POP Server would connect to the PDC on a particular trading day nor was he aware whether he was logged in on the first Port of a particular server or was first on a particular Port.* ***A TM also did not know the order of connection of each TM to a Port. (emphasis supplied)***

VII. This findings is again confirmed in para 80 (d) of the 2023 SAT Order which is reproduced at para no. 13 of this order.

VIII. There is no evidence that OPG was able to crowd out all nine Ports across servers. The data in the SCN is server wise and not Port wise and the server wise data does not help. Further, 1st, 2nd and 3rd connection on a server does not mean that they are on the same Port of a server. Even if they are on the same Port, the advantage is lost if other TMs logged in to other Port receive the data earlier. Further, if a TM crowds out one server, other TMs logged on to other server may receive the data earlier. The data mentioned in the SCN does not indicate at all that all nine Ports across servers were crowded out.

188. When the facts stated in paras 185 and 186 above are contrasted with the facts stated in para 187, the inferential conclusion that can be legitimately arrived at on the basis of preponderance of probabilities, is that the facts in para 187 outweigh the facts in paras 185 and 186. As noted above, NSE was allocating IPs to all the TMs on an unequitable basis and such a practice has been found by Hon'ble Tribunal to be a result of human lapse/lack of due diligence. It has also been noted above that OPG could not have known whether it is in a position to "crowd out" others and such a finding is also supported by lesser amount of average daily profits on crowding out days, as compared to non-crowding out days. There is also no evidence that OPG was able to crowd out TMs on all nine ports across servers which would have given it an unfair advantage. It is also important to note here that the factual aspect of OPG having lesser daily average profit on crowding out days was not available in the proceeding leading to passing of the 2019 SEBI

OPG Order and 2023 SAT Order and is a fact discovered in the present proceedings based on the examination carried out by ISB.

189. Under the circumstances, based on the evidence available in support of the allegations and considering the detailed discussion, I hold that the charge levelled in the SCN that OPG crowded out other TMs is not successfully established.

E.2.3 Charge of connivance and collusion

190. *Noticees* have made many arguments with respect to the charge of connivance/collusion between NSE and its employees and *Noticees*.

191. At the outset, I note that the charge pertaining to connivance and collusion is restricted to examine whether the unfair practice of making connections by OPG to the secondary server was borne out of any collusion/connivance of *Noticees* with NSE/its employees. I also note that my findings being recorded with respect to the charge of connivance and collusion will not have a bearing on the computation of unlawful gains made by OPG connecting to the secondary server, since logging in to the secondary server (even without collusion/connivance) has already been held as unfair practice by Hon'ble SAT in the 2023 SAT Order and for that unlawful gains arising out of logging to the secondary server is required to be disgorged.

192. I note that in terms of the 2023 SAT Order, the only issue that required reconsideration in respect of NSE and its employee is pertaining to the charge of collusion/connivance of employees/officials with *Noticees.* The issue has been examined in that case based on submissions made by NSE and its employees as

well as by OPG. In that case, it has been noticed that evidences placed in support of the allegation of collusion/connivance are found to be same which were already available in the earlier proceeding. Based on examination of those evidences and after detailed discussion, order has been passed in that case simultaneously today. The final conclusion reached in that case is as under:

> *"54. Based on the above discussion, it is held that due to the absence of sufficient material/evidence/facts in the SCN of this case, the test of 'preponderance of probability' fails to produce enough justification for determination of collusion/connivance between OPG and its directors with Noticees."*

193. The findings on the charge of collusion/connivance alleged in that case shall apply *mutatis mutandis* to this case as well. The basis of arriving at this conclusion is contained in that order which shall also form part of this order, though not reproduced here for brevity. Hence, I hold that the charge of collusion/connivance is not successfully made out against *Noticees*.

194. Before I proceed on the aspect of computation of abnormal profits made by OPG, I note that certain technical/legal submissions pertaining to the issue of calculation of disgorgement amount deserves adjudication first.

E.2.4 Objections on ISB Report, 2023

(i) Absence of any correlation between actual profits and secondary server connection

195. *Noticees* have given some data to contend that there was no correlation between actual profits made by OPG and connections made to the secondary server. In this regard, I note that there is no scope in the present proceeding to adjudge the said data. In the 2023 SAT Order, it has already held that by consistently logging into the secondary server, OPG gained unfair advantage. The relevant para no. 238 of the 2023 SAT Order has already been reproduced in para 13 of this order.

196. This issue is already decided by Hon'ble SAT and is not open for re-adjudication.

(ii) Disgorgement is an equitable relief and the ISB Report, 2023 does not address that issue

197. *Noticees* have submitted that the ISB Report, 2023 itself records as a limitation that it was prepared for academic purpose and therefore, it did not directly answer the question of disgorgement. I note that the power of disgorgement has been granted to SEBI under the explanation to section 11B. However, for the purposes of arriving at the unlawful gains for disgorgement, the ISB Report, 2023 is relied upon as an evidence by SEBI. The report uses undisputed data to calculate profits in different situations which is then used for calculating unlawful gains. This calculation is being considered in the present proceeding and after considering the submissions of *Noticees*, a decision under section 11B of SEBI Act, 1992 is being taken.

198. *Noticees* while referring to the cross-examination of Prof. Ram (Questions nos. 261 to 291), have submitted that the ISB Report, 2023 was not a study to quantify any alleged advantage from the secondary server access. It is noted from the para 263 of the 2023 SAT Order that Hon'ble SAT has upheld the findings of 2019 SEBI OPG Order that OPG gained an unfair advantage by consistently logging in to the secondary server and made unlawful gains. The said para is reproduced hereunder for ready reference:

> *263. We also found that the WTM exonerated OPG and its Directors on issue of first login and crowding out other TMs. We, however, affirm the findings of the WTM that OPG gained an unfair access and advantage by consistently log in to the secondary server and made unlawful gains.*

199. Therefore, in view of the aforesaid findings of Hon'ble SAT as well as the reasons recorded by me, the argument of *Noticees* is not tenable. The calculation carried by the ISB Report, 2023 on undisputed data is a useful evidence for me to calculate unlawful gains for disgorgement.

(iii) Methodology deviates from earlier methodology

200. It is noted that the challenge to the use of the ISB Report, 2023 has already been dealt in the preliminary issues (Ref. paras 123-138 of this order). However, the other connected issues like definition of secondary days, inclusion of new segments and inclusion of overlap period shall be dealt herein.

A. Definition of secondary days

201. *Noticees* have submitted that there was reclassification of the definition of "secondary days" from the earlier ISB Report, 2017. In that report, if a TM had logged on to the primary server before his logging to the secondary sever, it was

not classified as “secondary day”. However, in the ISB Report, 2023, it is classified as “secondary day”. I have already noted that Hon’ble SAT in the 2023 SAT Order has held that the connection by OPG to the secondary server was in violation of sub-regulation (1) of regulation 4 of PFUTP Regulations. It is logical that if OPG was logged into the primary server earlier than its logging to the secondary server on that day, it is to be correctly classified as “secondary day”. It may be noted that ticks from the secondary server would arrive faster than the ticks from the primary server and based on the faster receipt of ticks from the secondary server, unlawful gains would be derived irrespective of the position on the primary server. This concept of unlawful gains due to faster receipt of ticks from the secondary server has already been upheld by Hon’ble SAT in the 2023 SAT Order. Hence, in my view, all days where OPG logged in to secondary server need to be classified as “secondary days” irrespective of their position on the primary server on that day.

202. It is noted that *Noticees* have submitted that the connection to the secondary server was misconstrued by Hon’ble SAT and it has wrongly come to finding about the number of days of connection only to the secondary server. I note that the said assertion is completely beyond the jurisdiction of this authority. The finding of fact arrived at by Hon’ble SAT cannot be challenged before this authority. Hence, the submission about wrong data on only secondary server connection is rejected.

203. In view of the above discussion, I hold that all days when OPG made connection to the secondary server, irrespective of the fact that before such connection it is also connected to the primary server, are rightly considered as “secondary days” in the present proceedings.

B. Change in period and overlap period

204. It has been submitted that the ISB Report, 2023 had expanded the earlier period of investigation which was from 2010 to 2015, to the period from 2009 to 2016. In this connection, I note that the period of investigation in the present proceeding remained the same, i.e., 2009 to 2016. I note that the opening of the period is immaterial as the calculation of number of days for the purposes of calculation of unlawful gains will start from the first day when connection to secondary server was made by OPG. In terms of the 2019 SEBI OPG Order, the first connection to the secondary server was made by OPG on December 11, 2011. (Ref. para 8.42 of the said order). With respect to the closing of the relevant period, I note that the plea of OPG to exclude overlap period (of Unicast and Multicast) is relevant to be discussed here.

205. It is noted from the records that out of 631 days on which connection to the secondary days was made by the *Noticee no. 1,* a total of 260 days fall in the overlap period (from April 07, 2014 to May 22, 2015) in the FO segment. (There is no overlap period for CM segment as the last connection to the secondary server in the CM segment was made before introduction of MTBT in CM segment).

206. It has been submitted that after introduction of Multicast, OPG started surrendering its IPs in Unicast. It has been contended that the assumption made in the ISB Report, 2023 (page 29-30)[9] that a TM is likely to choose Unicast over

[9] "… ***Hence, in order to establish whether or not a broker was using only the Multicast system after its commencement, it is determined whether the broker executes any trades but does not have any login information in the server log files for that particular date.3 Such days (no login information but broker traded) are categorised under Multicast. On other days, even during the Multicast period, the broker is treated as having used the Unicast system and hence such days are classified under Unicast. On***

Multicast was not correct as the said assumption is based on the Project Borse Report prepared by Deloitte (Page 9); however, Prof. Ram never consulted Deloitte and Deloitte never conducted an analysis of Multicast system.

207. I have carefully considered the above submission of *Noticees.* I note that Prof. Ram has in the answer to the question no. 155, stated the following:

> "*Q155 Is it correct that all trades/ revenues/ profits have been attributed to the perceived advantage of the Unicast system during the overlap between Unicast and Multicast system i.e. no trades/ revenues/ profits have been attributed to the Multicast system during the overlap period? This is assuming that during the overlap period some IPs were connected to the Unicast system despite using the Multicast system.*
>
> *A155 Yes, only on days when atleast one IP connected to the Unicast system."*

208. I note from the afore-quoted answer of Prof. Ram that even if one IP is connected to Unicast system, the profits have been attributed to Unicast system only. Further, in this order we are only considering these days where such connection is to the secondary server. *Noticees* have contended that the fact of them gradually surrendered their IPs upon introduction of Multicast, shows that the OPG never derived any benefit from the secondary server during the Multicast period.

209. At this stage, I note that the Multicast was introduced in phases with effect from April 07, 2014 and the system completely migrated from Unicast to Multicast w.e.f. December 03, 2016. Though, it has been submitted that with the introduction of Multicast in the year 2014, OPG had started surrendering its IPs, the records before

---

these days, the broker could potentially use both the Unicast and Multicast systems but given that there is a potential speed advantage with the Unicast system but not with the Multicast system, it is likely that the broker would favour the Unicast system on days they logged into the Unicast system. Hence, it is reasonable to classify these days under Unicast."

me and findings as recorded even in the 2023 SAT Order show that the *Noticee no. 1* kept on connecting to the secondary server under Unicast during the overlap period, till May 22, 2015 and the same in the calendar year 2014 was upto 95% of the trading days. The plea of the *Noticees* that overlap period has wrongly been considered for the purpose of disgorgement is contradicted by facts.

210. I have already noted that the present proceeding is being held in compliance with the directions passed in the 2023 SAT Order. Therefore, irrespective of the fact that the 2019 SEBI OPG Order had excluded the overlap period, I note that Hon'ble SAT has specifically given a finding of fact that even in 2014 (which included overlap period from April 07, 2014 to December 31, 2014), OPG was connected to the secondary server for 95% of the days and 92 trading days in the year 2015 (refer para 234, 235 of the 2023 SAT Order reproduced at para no. 13 of this order). In these paragraphs, Hon'ble SAT has clearly held that the unlawful gains through the secondary server connection continued beyond April 07, 2014. The period for calculation of wrongful gains in the ISB Report, 2023 is till May 22, 2015. It is clear that as per the final findings given by Hon'ble SAT, the unlawful gains due to connecting to the secondary server continued till such time there is a connection to the secondary server. Hence, it is held that unlawful gains due to the connection to the secondary server is required to be calculated till May 22, 2015 which includes overlap period from April 07, 2014 to May 22, 2015.

211. Therefore, in view of the aforesaid findings, the profit earned during the overlap period by connecting to the secondary server is also taken into consideration for the calculation of disgorgement amount.

C. Addition of new segments

212. *Noticees* have also objected to the addition of a new segment of Cash Market (CM) which was not in the earlier proceeding. It is noted that in the present SCN, apart from the profits made on FO segment, the profits made on CM segment have also been considered for the purposes of calculation of disgorgement amount. In this connection, I note that upon setting aside of the 2019 SEBI OPG Order, the matter has been remanded for fresh calculation of the disgorgement amount due to unfair practice of connecting to the secondary server. When Hon'ble SAT has held that OPG gained unfair advantage by connecting to the secondary server, all gains accruing to it on such days in both FO and CM segment, by connecting to the secondary server are required to be calculated. Thus, even if the secondary server connection is made in the CM segment (which was not included in the 2017 report), in this proceeding it is required to be considered for the purposes of the calculation of disgorgement amount.

213. It has already been discussed in para no. 156 of this order that once the issue is remanded for re-adjudication, it is open for this authority to consider all segments where connection to the secondary server is made by OPG. Hence, this objection is also not held to be valid.

(iv) Difference between draft reports of June and November, 2022 and the final ISB Report, 2023

214. *Noticees* have referred to the email of SEBI to ISB dated February 21, 2023, with the subject: *RE: difference in profit of certain stock brokers in the ISB Report of*

2017 and 2022. *Noticees* have also referred to the draft reports of ISB (June, 2022 and November, 2022) and have made submissions that there was change in the calculation of profits.

215. With respect to the email dated February 21, 2023, I note that in response to question no. 209, Prof. Ram has stated as follows:

> *"Q209 Attention of the witness is drawn to email dated 21/02/2023 by Mr. Shubhash Sinduria, named as Re: Difference in profits of certain stock brokers.*
>
> *What is the basis for the change in calculations of intra-day Proprietary profits in F&O segments, changing from INR 2792.50 Lakhs (as per ISB email dated May 20, 2019) to INR 7330 Lakhs (as per the Report of November 2022)?*
>
> *A209 The reason for the difference is because we had not made adjustments (prior to 2022), to prices, Lot sizes and traders' positions in the F&O segment due to stock splits and bonus issues."*

216. From the above, it is noted that Prof. Ram explained that there was a change in difference of profits as ISB had not made adjustments (prior to 2022) to prices, Lot sizes and traders' positions in the F&O segment due to stock split and bonus issues.

217. Further, with respect to the changes in the draft report and the ISB Report, 2023, the following extract of the cross-examination of Prof. Ram may throw some light:

> **Questions on behalf of *Noticees***
>
> *"Q150 At this stage attention is drawn to page 20 of the Report of June 2022*
>
> *"Distinction between primary and secondary servers are not made in this study because the advantage is gained by simply logging in first into any of the ports of any server. Further, the profits generated by logging in first to the secondary server are small."*

Has this basis/ inference been carried forward to Report, 2023?

A150 The basis for two versions of the Report was because the Reports of June 2022 and November 2022 did not fulfill the terms of the letter of Engagement dated 07.06.2021. This required additional analysis to be done on account of which atleast some of the inferences changed. The basis/inference to Report, 2023 does not change. The second sentence quoted above ("Further, the profits generated by logging in first to the secondary server are small.") was provided as a reason for not presenting the profits separately for days on which the SEBI sample of Brokers logged into the secondary server."

Question from WTM

"Q151 Question of WTM: Were any changes carried out by you from the draft reports to the final report influenced by any person from SEBI or any external person?

A151 No

Questions on behalf of *Noticees*

Q152 Does the underlying data change from Report of June 2022 to Report, 2023?

A152 No

…

Q192 Attention of the witness is drawn to page no. 21 of Report of November, 2022 and page no. 19 of Report of June, 2022.

"The letter of engagement between SEBI and ISB mentions a set of brokers to compare the profits and other performance measures of the above 28 brokers to. The performance of a comparable set of brokers would help establish what 'normal' levels of trading profits and performance should have been to compare the profits of the 28 brokers to determine 'abnormal' profits and performance. This comparable set of brokers would have been needed at the performance and profits of the above list of 28 brokers had been very similar to each other. During the course of analysis, it was noted that there were substantial

differences and variations among these 28 brokers itself, which negated the need for a comparable set of brokers. These variations and differences helped us establish a comparable set of brokers from within the set of 28 brokers." (emphasis supplied)

Is it correct that this understanding of a requirement of a comparable set of brokers has not been carried forward to Report, 2023?

A192 Yes, it has changed.

Q193 Is it correct to state that the reason for the change of understanding was on account of request made by SEBI team?

A193 Yes, it was based on a clarification of Item no. 3 (i) (c) in letter of engagement between ISB and SEBI dated 07/06/2021 which requests for a comparable set of brokers other than the 28 mentioned in Item no. 3 (i) (a) of the said letter of engagement.

Q194 Did the aforementioned change of understanding change the computation of alleged abnormal profits computed for the broker/Trading Members?

A194 In the June 2022 and November 2022 Reports, there was no abnormal profit calculation similar to Tables 1, 2, 3, 4, 5 and 6 of the Report, 2023. Hence, there was no change to the computation of alleged abnormal profits computed for the broker/Trading Members."

218. I have seen these replies of Prof. Ram and in my opinion, it is natural that there would be difference in the draft and the final report, as draft report is only a draft. From draft report to final report, discussions took place and findings are refined based on such discussions relating to the methodology and terms of reference. It is the final report which is submitted by the Expert witness and which lays down methodology followed which can be questioned by *Noticees.* However, *Noticees* cannot refer to draft reports to point out discrepancies in the final report. *Noticees* cannot make an argument that the ISB Report, 2023 is full of errors and

assumption as they are different from draft reports. Further, the different figures in the draft reports and the final report cannot form basis of the rejection of the final report (ISB Report, 2023) when the figure have been changed due to justified reasons like comparison with benchmark brokers or refinement in the definition of "secondary days". Without prejudice to above, the methodology in the ISB Report, 2023 is found in line with the observations of Hon'ble SAT in the 2023 SAT Order passed subsequently.

219. The admissible evidence in the proceeding would be the final report submitted by the Expert. In the present proceedings, the relied upon documents is the ISB, 2023, and any reference to the draft reports does not carry any weightage as the said reports have not been relied upon. This is more so because in answer to Question no. 151, Prof. Ram has clearly stated that no changes carried out from the draft reports to the final report were influenced by any person from SEBI or any external person.

(v) Overnight profits have been wrongly included in computing the quantum of unlawful gains

220. *Noticees* have contended that the 2023 SAT Order had restricted the re-computing of profits by ignoring the values arising out of 'First Prop' or 'overnight trades'. I have noted that the 2023 SAT Order does not direct for exclusion of overnight profits, as has been contended by *Noticees.* It is also noted that the overnight profits were considered in the 2019 SEBI OPG Order (Table XXI of the said order) and in absence of any findings from Hon'ble SAT, the principle to consider overnight profits as abnormal profits stays intact.

221. Further, reference is made to the cross-examination of Prof. Ram and the relevant portion is reproduced hereunder:

> *"Q185 Reference is drawn to Table A-1 to Table A-6 and page 40 of the Report, 2023.*
>
> *What is the reason to include overnight profits in your computation of abnormal profits in Report, 2023?*
>
> *A185 While calculating intra-day profits, I had to keep track of what positions different traders started the day with in each security. This made it relatively easy to compute overnight profits. Since we provided overnight profits for all segments, I decided to provide abnormal overnight profits also in the said Table.*
>
> *Simply stated, overnight profit was just a by-product for intra-day profit calculations."*

222. It is argued that Prof. Ram was of the view that connections to the secondary server did not affect the overnight profits. The relevant portion of the cross-examination are reproduced herein below:

> *"Q186 Is it correct that any speed advantage that allegedly accrued to the Trading Member/broker from logging in first to the Primary server or logging in to the Secondary server did not carry over to overnight trades, as per the Report, 2023?*
>
> *A186 Any speed advantage that allegedly accrued to the Trading Member/broker from logging in first to the Primary server or logging in to the Secondary server did not affect overnight profits.*
>
> *Q187 Reference is drawn to Tables in Appendices A, C, D and E of the Report, 2023.*
>
> *Is it correct that abnormal overnight profits/overnight profits as per Report, 2023 did not accrue on account of logging in first to the Primary server or logging in to the Secondary server?*

A187 It is unlikely."

223. Based on this, a plea has been made to exclude overnight profits. I have considered the above submission. This view of Prof. Ram and submission of Noticees about speed advantage not affecting overnight profits is not acceptable. There are two legs of any F&O derivative or intraday transactions. On the first leg, position is taken and on the second leg, the said positon is reversed or allowed to expire. Once first leg of transaction is undertaken based on speed advantage of early receipt of ticks by logging into the secondary server, the unlawful gains has accrued which is realised subsequently at the time of the second leg of the transaction. Hence, it does not matter if the second leg of the transaction is executed on the same day or on the subsequent days. I find that the overnight profits are also part of the unlawful gains, which were made by OPG by virtue of unfair connection to the secondary server. Therefore, the said submission of *Noticees* is rejected.

(vi) Non-algo trades have been wrongly included in computing the quantum of unlawful gains

224. *Noticees* have also submitted that from colocation facilities, only Algo trades could be executed and the ISB Report, 2023 had erred in including Non-Algo trades. It is also submitted that Non-Algo trades could have been identified based on the unique user id which was available in the raw data provided to ISB. I note that the contention pertaining to algo trading is taken for the first time in the present proceedings, as no such plea is found to have been recorded either in the 2019 SEBI OPG Order or in the 2023 SAT Order. I refer to the Answer to the Question no. 171 asked from Prof. Ram:

"Q171 What is the basis for you to not exclude non-algo trades in the Report, 2023?

A171 It is possible that any preferential access could have been used to profit from non-algo trades. Hence, I did not want to miss out on that possibility."

225. It is reiterated that Hon'ble SAT has held in the 2023 SAT Order that there was indeed an unfair speed advantage in connecting to the secondary server, with this finding; it does not matter how trades are fired subsequently (through algo or non-algo). Due to the speed advantage in receipt of data earlier; unlawful gains have accrued which is realised on execution of the trade. Hence, irrespective of how trades are executed, unlawful gains is required to be computed and disgorged in accordance with the directions of Hon'ble SAT.

(vii) Non-colo trades have been wrongly included in the computation of the unlawful gains

226. It is noted that similar arguments have been made by *Noticees* to contend that only 38% of their trades had been carried through collocated IPs and therefore profits of only such trades should be considered in the present proceedings. I have already elaborated in the previous paragraphs as to how unfair speed advantage has already accrued due to connection to the secondary server and it is of no consequence how that unfair advantage accrued is realised. In any case, the definition of "secondary days" consider only those days when there is logging to the secondary server and that logging can happen only through co-location facility. Hence, this argument of *Noticees* is also found to be not acceptable.

(viii) Gross Profit Vs Net Proft – SCN wrongly contemplated disgorgement of gross profits instead of net profits as unlawful gains

227. It is also noted that *Noticees* have sought relief of deduction of expenses of various nature (Taxes, fee, salary, operating cost etc.) from gross profit while calculating the amount to be disgorged as unlawful gains. It is also submitted that average net profit of 7.01% should be considered for disgorgement if at all something was to be disgorged. It relied on orders passed in the matters of *Janak Chimanlal Dave vs. SEBI (supra)* and *SRSR Holdings Pvt. Ltd. Vs. SEBI (supra)*.

228. The provision with respect to disgorgement under securities laws has been made as an Explanation to section 11B of the SEBI Act, 1992, which is reproduced herein below:

> *"Explanation. For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted lost by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention."*

229. A perusal of the aforesaid provision indicates that the provision talks about profit made or loss averted. There is no reference to deduction of expenses. The factors that are to be considered for calculating the disgorgement amount are "profits made" or "loss averted". Any expense incurred towards making of such profits or aversion of such loss is immaterial while adjudging the liability of disgorgement of such amount.

230. It is noted that *Noticees* have placed reliance on the orders of Hon'ble SAT passed in the matters of *Janak Chimanlal Dave (order dated September 20, 2021)* and *SRSR Holdings (order dated February 02, 2023)*. I note that apart from the above

cited decisions, there are other decisions of Hon'ble SAT also, on the same issue, which are being mentioned in the following paragraphs:

I. *Immix Trade Pvt Ltd Vs. SEBI [Appeal no. 406 of 2022; date of decision: November 10, 2023]*

> *"72. A reading of the aforesaid explanation shows that the law envisages disgorgement of profit / lass avoidance, made in violation of securities law, without any set-off of any expenses or loss suffered by the violation. Therefore, the contentions of the appellant that calculation of disgorgement amount should also take into consideration the amount of losses suffered by it is untenable."*

II. *Janak Chimanlal Dave Vs. SEBI (Appeal no. 446 of 2020; date of decision: September 20, 2021)*

> *"The contention that under Section 11B only unlawful gains could be disgorged and since he has incurred a loss no disgorgement can be made against him is erroneous... disgorgement in our opinion is an equitable remedy under Section 11B of the Act meant to prevent the wrongdoers from enriching himself by his wrong by wresting illgotten gains from the hands of the wrongdoer. The provisions relating to disgorgement is thus remedial in nature and is not punitive... In our opinion net profit from wrongdoing is the gain made by any business or investment, where both the receipts and payments are taken into account. We are further of the opinion that the appellant will not be allowed to diminish the show of profits by putting in unconscionable expenses or other inequitable deductions even though entire profits of a business may result from the wrongdoings of the appellants and therefore are not entitled for the deductions as prayed by them."*

III. *Purshottam Budhwani* Vs. SEBI (Appeal no. 91 of 2013; date of decision: January 15, 2015)

> "*This Tribunal also agrees with Ld. WTM regarding set-off of expenses of in perpetrating fraud from disgorgement amount and that these*

expenses have not been allowed and should not be allowed. Regarding set-off for income tax paid on unlawful gains, this Tribunal it of the view that same cannot be allowed and Appellant has the viable option of claiming refund of same, from income tax, authorities"

231. After considering the decisions cited by *Noticees* as well as the decisions cited above, I am of view that the decisions of Hon'ble SAT disallowing the deduction of taxes, expenses etc., from the unlawful profits are appropriately applicable in the present case. I note that in common parlance, disgorgement is an equitable remedy whereunder an entity which is found to have acted in contravention of law is directed to disgorge the profits earned or loss averted through such contravention. In this respect, even the explanation to section 11B of the SEBI Act, 1992 mandates the direction to disgorge an amount equivalent to wrongful gain made by an entity through indulgence in any transaction or activity in contravention of the provisions of the securities laws. The contention of *Noticees* seeking deduction in the name of statutory taxes and administrative expenses is not universally applicable for all instances, more particularly cases similar to the one in hand, where it is established that the *Noticee no. 1* has acted in gross contravention of the provisions of the securities laws by connecting to the secondary server. Denial to the above exemption can also be demonstrated through an illustration. If loss of INR 1,00,000 is caused to investors due to contravention by a delinquent, the acceptance of plea of deduction of expenses of INR 10,000 (for illustration), will not be a valid ground permitting deduction as in such case, the amount determined to be disgorged would be INR 90,000, whereas the loss is quantified at INR 1,00,000. This loss may be required to be refunded to the investors. Allowing a deduction would be contrary to the mandate of the law as in that approach, loss to investors would not be fully restored.

Therefore, acceptance of plea of deduction of expenses would defeat the very purpose of the concept of disgorgement. It may be clarified that not in all cases disgorgement is restituted to investors who lost money due to unfair trade practices. In some cases, as is the situation in this case, specific investors who lost money cannot be identified. Hence, the disgorgement goes to Investor Protection and Education Fund. However, this difference in treatment does not change the principle of disgorgement.

232. In the present case, I note that the very transactions executed from connecting to the secondary server has been held to be an act in contravention of PFUTP Regulations by Hon'ble SAT; the profits directed to be disgorged are those which are arising out such unfair activity of the OPG. As noted above, one of the objects of the legislature is to stop any attempt of contravention of law which can cause loss to the investors. The plea of considering net profit instead of gross profit is not the one that foster the object of the Act or prevent the mischief aimed to be curtailed, and therefore, the same is rejected.

(ix) TBT to TAP mapping

233. It is noted that multiple arguments have been made by *Noticees* pertaining to the TBT to TAP mapping and placement of orders.

234. It is useful to refer to some of the answers during to the cross-examination of Mr. Jayant Saran and further clarification provided by him, which are reproduced herein below:

Cross-examination of Mr. Jayant Saran

Q2 Attention of the witness is drawn to page no. 7 of the Regler Report, inter alia stating as:

"Certain trading members did not maintain complete or any logs of the TBT data. Hence, we could not conduct a complete analysis on the same. Further, we have relied on the TBT logs provided to us by SEBI for the secondary connects made in the F&O and cash market segments for our analysis and have also not verified the correctness or completeness of the same."

Was the TBT to TAP Mapping data of OPG Securities made available to you?

A2 As it is not referred to in my Report, I do not expressly recall if this data was provided to us. I do recall there was some data that was provided by OPG Securities that was not clear and we had sought their explanation on this.

…

Q4 Attention of the witness is drawn to the email dated 18/01/2018 issued by OPG and email dated 10/01/2018 issued by Mr. Rahul Talwar of Deloitte. Copy of the said emails are shared (over email) with SEBI as well as the witness, during the proceedings.

Were any additional information or clarifications sought from OPG regarding these logs after January 18, 2018 which were not provided by OPG?

A4 I will need to go back and check my records or any emails or conversations in this regard.

Q5 Is it correct that the details provided alongwith email of January 18, 2018 provides you with the year, month, day, server, order and trade information. This data specifically provides you with the User ID placing the order, the exchange order number, the trigger tick description and type, the TBT time stamp of the trade, the TBT sequence number, the exchange order received time, trade number, exchange traded time, terminal ID, user name password and database usernames passwords.

A5 I am not in a position to comment on the accuracy and completeness of the said data.

Q6 Is it correct that all the information mentioned in Question no. 5 are a part of January 18, 2018 email specifically log_file_desc.pdf?

A6 It is correct that this information is mentioned in the attachment in the said email.

Q7 Did you conduct the analysis to see the server wise and day wise order and trade committed, as mentioned in email dated January 10, 2018 basis the information provided to you by OPG Securities as mentioned in Answer no. 6?

A7 I will need to go back and check my records and emails in this regard.

…

Q14 Did you make any efforts to ascertain the TBT IP to CTCL ID/TAP IP mapping based on the data logs received from OPG at the time of the Regler Report?

A14 The data to be able to ascertain the above was sought from OPG. Clarifications were sought on the data provided. Please refer to Answers no. 4, 5, 6 and 7 with respect to clarifications sought.

Further clarification provided over email dated May 03, 2024:

Q3.

The clarifications sought were on 6th April 2018, where following were clarified:

1. Structure of the logs (app and DB) shared with us for review, and

2. Description and the content of the logs. It was also understood that the details of the connections (source IP and Port) established from the OPG server (Colo servers) to the TBT server (POP) is not available in the shared logs and hence these were not considered for analysis.

No response to this email was received from OPG Securities.

Q4.

Yes, clarifications were sought on email. Please refer to the above response.

235. Apart from the above, the relevant portion of cross-examination of Prof. Ram are also reproduced hereunder:

Cross-examination of Prof. Ram

"Q83 Would the number of TBT IPs connected to secondary POP server vis a vis primary POP server by a trading member on a day affect the conclusions arrived at in Report, 2023?

A83 I don't believe so.

Q84 What are the reasons for stating as above in Answer 83?

A84 Report, 2023 focused on any one of the TBT IPs of a trading member connecting first to a Port of a POP server, either primary or secondary which in turn connected first to the PDC on a day. It did not examine how many TBT IPs of a trading member connected to any POP server, either primary or secondary, on a day.

Q86 Is it correct that Report, 2023 does not consider the source of the TBT IP (connected to either primary or secondary POP server) for sending/placing an order through a specific TAP IP to NSE?

A86 Yes.

Q87 Is it correct that irrespective of whether the TBT IP was connected to a primary POP server, the trades executed by a trading member for the day have been classified as a trade from TBT IP connected to a secondary server provided that atleast one out of all the IPs of a trading member was connected to the secondary POP server on that day?

A87 Classification is not at a trade level, it is at a day level, whether the trading member logs onto the secondary server or not."

236. By referring to the afore-quoted cross-examination, *Noticees have* submitted that only 1-2 IPs were connected to the secondary server and majority of other IPs were connected to the primary server. It has been contended that more than 90% of the trades were executed through IPs connected through primary server and it was wrong to consider entire profit of secondary day as unlawful gains. It has also been contended that only 9% of its IPs were connected to the secondary server. *Noticees* have also submitted that the ISB Report, 2023 had not considered the TBT to TAP IP mapping. *Noticees* have submitted that only ticks received from 9% connections to the secondary server could be used for firing only 9% of the total trades executed by *Noticee no. 1.*

237. The question here is whether there is one to one mapping of TBT to TAP. That means, whether TAP IP (which is for placing the orders) would place orders based on information which is received from a particular TBT IP to which it claimed to be connected? Or there is no one to one mapping and order is placed through TAP IP based on information received from any TBT IP?

238. In this connection, I note that Hon'ble Tribunal at para 234 to 236 of the 2023 SAT Order has observed that OPG had connected to the secondary server on more than 90% of the trading days in 2013 and 2014; and on a few days OPG did not even connect to the primary server. It was also noted in the said order that it cannot be accepted that such connections were made due to any disconnection in the primary server. (The relevant portion of the 2023 SAT Order has been referred in para no. 13 of this order)

239. The facts established by Hon'ble SAT cannot be disputed before this authority. The above discussion clearly establishes the fact that Hon'ble SAT has rejected OPG contention that the business transacted from the secondary server was minimal. Thus, this is an issue which is already decided against *Noticees* and is not open before me for adjudication.

240. From the documents furnished by *Noticees,* it is seen that the claim of TBT to TAP mapping is shown in an internal document of the *Noticee no. 1* in the form of an excel sheet. It is also noted that no third-party independently verifiable document has been filed to support the submission of TBT to TAP mapping. It is also noted that the 2019 SEBI OPG Order in para 6.5 has held as:

> *"I also note that the direct evidence relied upon by the Noticee Company (execution of three parallel trade orders in a sequence to the Exchange) is not relevant as the* ***subject matter of adjudication relates to dissemination of TBT data from NSE to the TMs and did not pertain to execution of trade orders by such TMs upon receipt of said data***." (emphasis supplied)

241. It is further noted that the contention of *Noticees* that only 9% of its IPs were connected to the secondary server was rejected in the 2019 SEBI OPG Order by observing as:

> *"8.24 I find that OPG Securities' submission that only 9% of their TBT IPs were connected to Secondary POP Server is irrelevant since the material issue herein was not the percentage of TBT IPs connecting to such Server but rather the advantage gained over other TMs by connecting to the said Server, which was consistently the least crowded Server among all the POP Servers. Further, I also find that OPG Securities had failed to substantiate its submission that the business transacted (Volume traded) by the TBT IPs on the Secondary POP Server was extremely low."*

242. It is noted that the aforesaid findings of the 2019 SEBI OPG Order have not been challenged by *Noticees* as the same is not part of the grounds of appeal filed by

Noticees before Hon'ble SAT. In view of the same, the said finding has attained finality.

243. Notwithstanding the above, it is noted that Hon'ble SAT has directed this authority to calculate the quantum of unlawful gains made by OPG by connecting to the secondary server. The said directions do not specify calculation of profit based on any alleged linkage to the mapping of TBT to TAP. Further, as discussed at para no. 238 of this order, Hon'ble SAT has rejected *Noticees'* argument that the business transacted through the secondary server was miniscule.

244. This apart, it is also noted that on page 21 of Pasumarthy Report, the following has been noted with respect to TBT to TAP mapping:

> *"For Table 2, we picked up all OPG trading servers which connected to Primary TBT POP servers and compared them against OPG trading servers connected to secondary TBT POP servers. Table 2 shows the comparison during 2012-14.*

	Units	*Primary*	*Secondary*
Total Order Fired		*147,028,765*	*18,113,924*
Avg. number of orders per server per day		*17424.6*	*24119.7*
Total Trades Executed		*29,019,749*	*2,244,764*
Total Value of Trades Executed	*Rs. 1000Cr*	*1587.2*	*118.5*
% of Trading		*93.1*	*6.9*

Avg. number of trades executed per day per server		*3439*	*2989*
Avg. notional value of trades executed per server per day	*Rs. Cr*	*188.1*	*157.7*
Common Orders Ahead		*614430*	*373447*

Table 2: Comparing OPG trading servers connected to Primary and Secondary TBT sources"

245. I note in the earlier round of proceedings, *Noticees* have heavily relied upon the Pasumarthy Report. However, in the 2019 SEBI OPG Order, the said report was rejected by *inter alia* observing as under:

2019 SEBI OPG Order

> *"6.5 I have also noted the contents of the Pasumarthy Report (which have been reproduced as part of OPG Securities' reply dated March 15, 2019) as sought to be relied upon by the Noticees for substantiating their contentions in the instant proceedings. I note that the said Report is stated to have been prepared based on an analysis of data inter alia provided by OPG Securities including raw TBT data, source code of various modules of OPG Securities' trading software, detailed daily information of each OPG Securities trading server, etc. I am not inclined to accept the aforesaid Report as admissible evidence in this proceeding as the analysis has been done solely at the instance of the Noticee Company. I also note that the direct evidence relied upon by the Noticee Company (execution of three parallel trade orders in a sequence to the Exchange) is not relevant as the subject matter of adjudication relates to*

dissemination of TBT data from NSE to the TMs and did not pertain to execution of trade orders by such TMs upon receipt of said data.

6.6 As far as the findings of the Pasumarthy Report are concerned, I am of the view that the same cannot carry the same degree of credence as compared to the other Reports, which have been confirmed by NSE's IT team and have been prepared using the data and facilities provided and authenticated by NSE. …

….

6.8 Upon an appreciation of all the above facts and limitations, I am of the view that the Pasumarthy Report cannot be brought on record as part of the instant proceedings."

246. The said submission of *Noticees* was also rejected by Hon'ble SAT and the relevant portion of para 254 of the 2023 SAT Order have already been reproduced in para no. 13 of this order. As can be seen from the said paragraph, Hon'ble SAT has rendered a finding that the WTM rightly rejected the Pasumarthy Report. As the central charge in the present proceedings is connection to the secondary server by OPG, the aforesaid findings of Hon'ble SAT makes it clear that the reliance placed on Pasumarthy Report does not help the case of *Noticees.* In view of specific rejection by Hon'ble SAT, the principles of *res judicata* (as discussed in para no. 107-112 of this order) will apply on the aspect covered in Pasumarthy Report, which includes the calculation based on TBT to TAP mapping. Therefore, this issue being already rejected by Hon'ble SAT is not open before me for adjudication.

247. In addition to the above, my attention also gets drawn to a news article dated July 06, 2023(https://www.business-standard.com/markets/news/sebi-seeks-explanation-from-nse-over-misuse-of-its-tap-platform-report-123070600199_1.html). In terms of the said news article, in the year 2013, certain high frequency traders had manipulated the TAP software of NSE and executed thousands of orders without being detected

and crowding out others. In terms of the said article, such orders were placed by "bypassing" the TAP system altogether and SEBI has sought an explanation from NSE over such allegations. The article further states that NSE had filed an application to settle the matter, which was returned by SEBI, as the matter at that time was still under investigation. This article highlights the probabilities of bypassing TAP system completely, thus defeating the submissions of *Noticees* of TBT to TAP mapping. I may clarify here that my observations recorded in this paragraph is only supportive to the findings recorded in the immediate preceding paragraph and the observations in this paragraph are not the main reason to reject the submission of *Noticees* on TBT to TAP mapping.

248. As noted earlier, Mr. Jayant Saran, author of Deloitte Report, had vide his email dated May 24, 2024 has stated as under:

> "*OPG Securities did provide some data to us. We attempted to understand the nature and content of the data provided. Attempts were made to gain an understanding of this data. The emails provided evidence that we continued to seek clarifications on the data that was provided. In the absence of such clarification, I cannot conclusively comment on the nature of data provided, or its accuracy or completeness*."

249. Thus, Mr. Saran was also not provided with proper clarification on the data provided. In view of the above discussion and keeping in view the clear finding of Hon'ble SAT, the plea to take only 9% of the profit on secondary days for disgorgement is rejected.

(x) Disconnections

250. The SCN has mentioned that only on five days, the complaints in FO segment pertained to TBT disconnections. It has been contended by *Noticees* that OPG had

faced a total of 35, 817 disconnections from the primary server and NSE was aware of the issues faced by OPG relating to its dis-connection on the primary server. It has also been contended that Hon'ble SAT did not direct that WTM should not consider 135 complaint days as was considered by the WTM in the 2019 SEBI OPG Order.

251. It is noted that para 8.26 of the 2019 SEBI OPG Order records that analysis of complaints referred to by OPG showed that only on 5 days, the complaints in the FO segment pertained to TCP/IP disconnections; and other complaints were not on account of disconnection. Further, in paras 8.42 to 8.44 of the said order, based on the data recorded in the Deloitte Report, and without going into the merits of the complaints, 135 trading days were adjusted for the purpose of calculation of the disgorgement amount; presuming that the complaints were serious enough to warrant a switchover from the primary server to the secondary server.

252. I note that Hon'ble Tribunal, after having gone through the submissions did not find merit and rejected the argument of *Noticees* about 35, 817 disconnections and held it to be an after- thought and against material evidence. The relevant portion of para 234-236 of the 2023 SAT Order have already been captured in para 13 of this order. Thus, this issue has already been decided by Hon'ble SAT and is not open for re-adjudication.

253. It is noted that the 2023 SAT Order in para 266 (g) has directed SEBI to decide the quantum of disgorgement afresh in light of the observations recorded in the said order. Accordingly, the SCN records the following with respect to the claim of disconnection and complaints:

"i. *OPG's submission that they connected to secondary server due to disconnection issue related to primary server cannot be accepted. It is inconceivable that a broker would face such issues on 95-99% of trading days as can been seen from the login data in 2013-2014 (table 18). Further, the analysis of complaints indicates that in the FO segment only on 5 days (table 20), the complaints were pertaining to TBT disconnections."*

254. I note that the 2019 SEBI OPG Order the following para forms the basis to consider 135 trading days for the purpose of deduction from the total number of secondary days:

> *"8.42 From the Deloitte Project Regler Report, it is noted that OPG Securities had logged onto the Secondary POP Server for a total of 670 trading days during the period from January 2010 to May 22, 2015 (connection to Secondary POP Server was first established on December 11, 2011), out of which it had forwarded complaints to Colo Support* ***on only 240 trading days****; for the remaining 430 trading days, no complaints were made by OPG Securities to Colo Support in respect of Secondary POP Server connections.*
>
> *8.43 Out of the aforementioned 240 trading days when OPG Securities had forwarded complaints to Colo Support,* ***I note that for 105 trading days, the complaints pertained to Secondary POP Server connections made after the introduction of MTBT i.e. April 7, 2014 onwards****. Accordingly, OPG Securities had forwarded complaints to Colo Support for* ***135 trading days (240 days – 105 days)*** *during the period from January 2010 to April 5, 2014 in respect of Secondary POP Server connections.*
>
> *8.44 As stated earlier, the ISB Report had computed profit taking into consideration the 269 trading days when OPG Securities had connected to the Secondary POP Server during the period from January 2010 to April 5, 2014. During the aforesaid period, OPG Securities had forwarded complaints to Colo Support for 135 trading days.* ***Without getting into the nature and merit of the complaints, I presume, to the benefit of the Noticee(s) that the complaints were serious enough to warrant a switchover from the primary POP Server to the Secondary POP Server. I am therefore, driven to the conclusion that connections established to the Secondary POP Server for the remaining 134 days (269 days – 135 days) cannot be justified***." (emphasis supplied)

255. As can be seen from the above quoted paragraphs that the figure of 135 days was arrived after considering that on 240 days, some or the other complaint was sent by

OPG to Colo Support. From the said figure of 240, 105 days were falling after introduction of MTBT on April 07, 2014. Therefore, after deducting 105 days from 240 days, it was presumed that all complaints sent on 135 days (240-105) were serious enough warranting OPG to switchover from the primary server to the secondary server.

256. I note that by virtue of the 2023 SAT Order, the entire calculation has been remanded back to SEBI for fresh consideration and this authority is not bound by the method adopted in the earlier proceedings. Hence, in this proceeding, the actual number of disconnections are required to be relooked at.

257. Hon'ble SAT has categorically directed to re-compute the unlawful gains after considering the findings recorded in the 2023 SAT Order. Therefore, even for the aspect of deducting the number of days from the secondary days, I am bound by the findings of Hon'ble SAT. In the para 236 of the 2023 SAT Order (as reproduced in para 13 of this order), Hon'ble SAT has recorded that in terms of the 2019 SEBI OPG Order, the complaints were made by OPG in the Futures and Options segment on five days. The said order also records that OPG has not disputed these facts before Hon'ble SAT.

258. Under the circumstances, I hold that allowance/deduction for only five days of disconnection needs to be allowed.

E.2.5 Liabilities of *Noticee nos. 2* to *4*

259. Insofar as the liability of other individual *Noticees* is concerned, I note that it has been submitted that *Noticee no. 3* was a house-wife and *Noticee no. 4* was more than 80 years old and both of them were not involved in the day to day activities of the *Noticee*

no. 1 Company. Various case laws have been cited on the issue of liability of a director of a company for the acts of the company.

260. Without going into the merits of the submissions advanced, I note that in the 2019 SEBI OPG Order, *Noticees nos. 1* to *4* herein were directed to disgorge the amount of unlawful gains specified in the said order. The 2023 SAT Order has confirmed the violation and only directed to decide the quantum of disgorgement afresh. The recalculated disgorgement amount is required to be disgorged from the same entities/individuals, as in the original order. In view of the fact that the scope of the present proceeding is restricted to only calculation of disgorgement amount, I do not find any jurisdiction vested upon me to consider the arguments made on individual liability.

261. Without prejudice to the above, I also note that *Noticees nos. 3* and *4* were appointed as directors of *Noticee no. 1* from 2009 onwards, whereas *Noticee no. 2* was appointed as director of *Noticee no. 1* w.e.f April 01, 2010. It is also noted that despite taking the pleas stated above (old age/housewife), the said *Noticees* are still continuing as director of the *Noticee no. 1.*

262. At this stage, I refer to the judgment of Hon'ble Delhi High Court, passed in the matter of *Rajeev Jain and others Vs. Ashtech Industries Private Limited (Crl. M.C 1192/2022; date of judgment July 03, 2023).* In the said judgment, Hon'ble High Court has inter alia recorded the following submission of director claiming to be a mere housewife:

> *"10….Petitioner No. 4 (Neeru Jain) is merely a housewife and had agreed to join the company as a Director on account of her relationship with the Managing Director of the company. No specific averments have been made against any*

of the petitioners and it has not been stated in any manner as to how they were responsible for the conduct of the business of the company."

263. The aforesaid submission were rejected by the Hon'ble High Court by observing as:

"*34. Petitioner No. 4 (Neeru Jain) is an Executive Director of the accused company, and also the wife i.e., Ravi Kumar Jain (who is a Managing Director, although not present before this court). If an Executive Director wants the process to be quashed, on the ground that only a bald averment has been made, the onus of providing unimpeachable and incontrovertible evidence, or acceptable circumstances to substantiate the contentions lies on him/her. In my opinion, the petitioner no. 4 has failed to provide any evidence of sterling quality which may point to her innocence at this stage."*

264. In the present case, mere statements have been made that *Noticee no. 3* is a house-wife and *Noticee no. 4* is an old age man. No evidence has been filed to prove that despite being directors, they were not involved in day-day to activities of the *Noticee no. 1*. Therefore, in view of the above discussion, I hold that the liability to disgorge the amount of unlawful gains has to be in lines with the 2019 SEBI OPG Order, i.e., joint and several liability of *Noticees nos. 1* to *4*, as the same has been upheld by Hon'ble SAT in the 2023 SAT Order.

E.2.6 Plea of secondary server connection in other segments

265. It has been submitted that if OPG was aware of the advantage from connecting to the secondary server, it would have remained connected to the secondary server in CD and CM segments frequently. However, on examination it is seen that the reason for non-connection to the secondary server in CD & CM segment appears to be negligible business in these segments. This is also captured in the SCN as under:

Table no. 17

Financial Year	Turn Over - F & O (INR In crore)	Turn Over – CD (INR In crore)	Revenue (INR In crore)	Profit (Before Tax) (INR In Crores)
2009-10	31,356.43	0.00	23.77	3.71
2010-11	1,37,959.67	0.00	34.91	2.98
2011-12	1,20,046.69	0.00	29.90	.59
2012-13	1,61,251.90	0.00	40.21	1.36
2013-14	1,91,449.10	18,967.18	54.62	11.13

266. Without prejudice to the above, as discussed earlier, Hon'ble SAT has already given a clear finding that OPG gained unfair advantage by logging on to the secondary server and therefore, unlawful gains for such connections is required to be disgorged. Thus, the issue is not before me for adjudication.

E.2.7 Benchmarking with other brokers and other issues

(i) New Benchmarking

267. *Noticees* have challenged the benchmarking with other brokers in the ISB Report, 2023 by submitting that the 2019 SEBI OPG Order did not carry out any benchmarking and in the 2023 SAT Order, Hon'ble SAT had not directed to carry out the benchmarking for the purposes of calculating amount to be disgorged. I note when Hon'ble Tribunal has found fault with the methodology followed in the 2019 SEBI OPG Order, it is incumbent that the calculation is required to be given a new perspective and hence, the new method of benchmarking cannot be discarded as faulty. The above method

also does not contain any abnormality when *Noticees* themselves have admitted that even under this method, the underlying data used was similar and identical than what was used while preparing the ISB Report, 2017. Apart from the above, it is viewed that on a principle basis, the new methodology of using benchmarking in calculation of unlawful gains is beneficial to *Noticees*. I note here from the 2019 SEBI OPG Order that gains made by OPG on all secondary days were considered for disgorgement. However, in the present proceedings, the SCN based on the ISB Report, 2023 has arrived at the disgorgement amount by deducting the median value of gains that were made by 30 Benchmark brokers, so as to arrive at unlawful gains. In other words, instead of terming all the profits made by OPG on secondary days (as was the case in the earlier proceedings), only that profit that is over and above the profits earned by other 30 Benchmark brokers who also were using colocation facility, is proposed to be termed as unlawful gains.

268. With respect to the benchmarking with 30 brokers, *Noticees* have also submitted that the identification of Benchmark sample (30 brokers) is flawed. In this connection, it is noted from the records (Question no. 141 of the cross-examination of Prof. Ram) that the number of days on which SEBI Sample brokers and Benchmark sample brokers traded was almost equal (median being **1943** for SEBI sample Vs. **1940** for Benchmark sample). Further, Prof. Ram has also stated in reply to Question no. 141 that brokers in SEBI sample as well as Benchmark sample used Collocated facilities and traded on similar number of days, therefore, it is reasonable to assume that such brokers have same trading expertise/strategies etc.

269. Going further, it is noted that submissions have been made that ISB Report, 2023 has not considered factors like capital deployed, trading strategy, algorithms, trading expertise, trading infrastructure, number of traders deployed and number of servers deployed, to be constant for all TMs. It has been claimed that since these variables have not been factored in, the amount alleged as profit is faulty. It relevant to quote here the few of the questions and answers from the cross-examination of Prof. Ram:

> "*Q139 Is it correct that any difference of profits of any Broker from the median of the Benchmark sample Brokers in Report, 2023 has been attributed to the perceived advantage of the Unicast system irrespective of the existence of other factors such as trading expertise/strategies/capital deployed/traders employed etc.?*
>
> *A139 Yes, but assumption is that across the cross section of the Benchmark Brokers, these other factors would have been controlled for.*
>
> *Q140 What do you mean by "controlled for" in Answer 139?*
>
> *A140 It means that a set of Benchmark Brokers, who used Collocated facilities are likely to have similar or same levels of factors such as trading expertise/strategies/capital deployed/traders employed etc. Subtracting out their median profits of the Benchmark sample of Brokers from the profits of each Brokers of SEBI sample, removes the common effect of factors such as trading expertise/strategies/capital deployed/traders employed etc. on the profits generated/ earned by the set of SEBI sample Brokers.*
>
> *Q141 What is the basis for your assumption that trading expertise and other factors as mentioned in the aforesaid questions is the same across and within the SEBI sample and Benchmark sample of Brokers in the Report, 2023?*
>
> *A141 Tables 52 and 53 of Report, 2023, Brokers in SEBI sample and Benchmark sample trade on a similar number of days (median is 1943 vs 1940). Since Brokers in both the samples used Collocated facilities and traded on similar number of days it is reasonable to assume that they have similar/same trading expertise/strategies/capital deployed/traders employed etc. If they did not have similar / same trading expertise/strategies/capital deployed/traders employed etc. the Brokers in the Benchmark sample would have traded on average far fewer days than the Brokers in the SEBI sample."*

270. From the above, it is noted that Prof. Ram has explained the reasoning for considering that the external factors/variables like capital deployed, trading strategies etc., would be controlled for.

271. It may be noted that Hon'ble SAT has given a finding that there is an advantage that accrued to OPG by connecting to the secondary server which also resulted in unlawful gains. It has already been noted that the limited mandate in the present proceeding is calculation of such unlawful gains made by virtue of connecting to the secondary server. For the purposes of calculation, the ISB Report, 2023 is one of the evidence that is on record, which carries out such calculation.

272. I have already given my findings on the admissibility of the report and it is reiterated that so long as the evidence is based on correct data and analysis, it is an admissible evidence. The ISB Report, 2023 defines 'abnormal profits' at page 43 as under:

> *"On a particular day, a broker may be classified as having logged in first on any POP server or not (based on the determination of first login methodology described earlier). On the same day, it may be determined if the broker logged into the secondary server, regardless of whether they were first on the secondary server or not. Both determinations are independent. However, there are likely to be certain days when a broker logs in first to a POP server (either on the primary or secondary server) AND logs in to the secondary server (first or not). To determine if a broker has misused the collocated facilities by either logging in first to any one of the POP servers or by logging into the secondary server (first or not), a simple summation of profits earned on the days of first login and profits earned on days of logging into the secondary servers would double-count the profits on days on which the broker logged in first to any POP server AND logged in the secondary server, first or not. The sum of all profits, thus, need to be adjusted for this double-counting to calculate the correct profit from misusing the collocated facilities by subtracting the profits earned on days of first login AND logging into the secondary server from the sum of profits earned on days of first logins and profits earned on days of logging into the secondary profits."*

273. It is noted that in response to Question no. 145 during the cross-examination, Prof. Ram explained as under:

> *Q145 What is the definition of "abnormal" profits/gains in Report 2023?*
>
> *A 145 The definition is as follows- It is the profits made by a Broker in the SEBI sample on days of logging in first into atleast one port of a primary POP server that in turn logged in first to the PDC plus profits made by a Broker in the SEBI sample on days of logging in first to atleast one port of the secondary POP server that in turn logged in first to the PDC plus profits made by a Broker in the SEBI sample on days of logging in to the secondary server minus the profits made by a broker in the SEBI sample on the days on which they logged in first on any server and logged in to the secondary server minus the median profits made by the Benchmark sample of Brokers. The median profits made by the Benchmark sample of Brokers is calculated as the profits made by a Broker in the Benchmark sample on days of logging in first into atleast one port of a primary POP server that in turn logged in first to the PDC plus profits made by a Broker in the Benchmark sample on days of logging in first to atleast one port of the secondary POP server that in turn logged in first to the PDC plus profits made by a Broker in the Benchmark sample on days of logging in to the secondary server minus the profits made by a broker in the Benchmark sample on the days on which they logged in first on any server and logged in to the secondary server. This is calculated in Tables 5 and 6 of Report, 2023.*

274. As stated earlier, the mandate in the present proceedings is to calculate the unlawful gains made by OPG by connecting to the secondary server. It is noted that there is no formula which can be termed to be 100% accurate for calculating such gains. The only undisputed factual position before me is that OPG connected to the secondary server on 631 days and that has been held by Hon'ble SAT as unfair for which the amount required to be disgorged is to be calculated.

275. I note that profit earned by an entity is not easy to be segregated into legal and illegal profit. Any method deployed could only approximate as to how much of such profit is lawful and how much is unlawful. I note that there may be various ways to separate

unlawful gains from lawful gains, and in the present quasi-judicial proceedings, we have to select a method which is supported by good justification, has minimum limitations and approximates the unlawful gains in the most practical manner.

276. After carefully considering the method used in the ISB Report, 2023 and also considering the various objections raised by *Noticees,* it is clear that to the extent noted by Prof. Ram in the ISB Report, 2023, the study and the inferences drawn from the analyses are subject to some limitations.

277. A careful study of the ISB Report, 2023 indicates that following tables of the said report provide for average daily profits of SEBI sample brokers (including OPG) for secondary as well as non-secondary days and details about number of days traded:

FO segment

Intraday profits

Table 74: FO segment: Average Intraday profits (for Proprietary trades of SEBI sample) (for Secondary server during Unicast) – Providing daily average intraday profits for secondary as well as non-secondary days

Table 70: FO segment: Count of days traded (SEBI sample on secondary server during Unicast)

Overnight profits

Table E23: Average Overnight profits (for Proprietary trades of SEBI sample) (for Secondary server during Unicast) – Providing daily average overnight profits for secondary as well as non-secondary days.

Table E19: FO segment: Count of days traded (SEBI sample on secondary server during Unicast)

CM segment

Intraday profits

Table 42: CM segment: Average Intraday profits (for Proprietary trades of SEBI sample) (for Secondary server during Unicast) – Providing daily average intraday profits for secondary as well as non-secondary days.

Table 38: CM segment: Count of days traded (SEBI sample on secondary server during Unicast)

Overnight profits

Table D23: CM segment: Average Overnight Profits (for Proprietary trades of SEBI sample) (for Secondary server during Unicast)- Providing daily average overnight profits for secondary as well as non-secondary days.

Table D19: CM segment: Count of days traded (SEBI sample on secondary server during Unicast)

278. I note that the details of aforesaid tables as taken from the ISB Report, 2023 mentions about secondary server during Unicast period. In this connection, it is clarified that such connection also include connections made during the overlap period being April 07, 2014 to May 22, 2015. It has already been discussed earlier that these days are also required to be considered for the calculation of quantum of disgorgement.

279. In the case of OPG, it is seen from Table no. 74 of the ISB Report, 2023 that the daily average intraday profits in FO segment on "secondary days" during Unicast period (when OPG connected to the secondary server) is INR 15.86 Lakh, whereas, the daily average intraday profits on "non-secondary days" (when OPG did not connect to the secondary server) is INR 9.42 Lakh. Similarly, as noted from Table no. 42 of the ISB Report, 2023, the daily average intraday profits in CM segment on "secondary days" during Unicast period (when OPG connected to the secondary server) is INR 00.14 Lakh, whereas, the daily average intraday profits on "non-secondary days" (when OPG did not connect to the secondary server) is INR 00.06 Lakh.

280. With respect to overnight profits, it is seen that from Table no. E23 of the ISB Report, 2023 that the daily average overnight profits in FO segment on "secondary days" during Unicast period (when OPG connected to the secondary server) is INR 7.58 Lakh, whereas, the daily average profits on "non-secondary days" (when OPG did not connect to the secondary server) is INR 1.06 Lakh. Similarly, as noted from Table no. D23 of the ISB Report, 2023, the daily average overnight profits in CM segment on "secondary days" during Unicast period (when OPG connected to the secondary server) is INR 03.97 Lakh, whereas, the daily average intraday profits on "non-

secondary days" (when OPG did not connect to the secondary server) is INR 00.75 Lakh.

281. Based on the aforesaid factual information noted from the ISB Report, 2023, it is seen that quite clearly, there is significant difference between the daily average profit made on "secondary days" and "non-secondary days".

282. From these numbers, it is seen that if the daily average profits on non-secondary days represents normal and legal profit of OPG, then the difference between daily average profit made on "secondary day" and daily average profit made on "non-secondary day" can reasonably be termed to represent the daily average unlawful gains made by OPG by connecting to the secondary server. If this is multiplied by the number of secondary days, total amount of unlawful gains can be arrived at. This method, in my opinion, is more appropriate than the method used in the ISB Report, 2023 as it is not impacted by variable like different trading strategies, different trading infrastructure, different number of dealers, different capital employed etc. It would also be not impacted by method of selection of 30 benchmark brokers. Additionally, it is also noted from the Table no. 70 of the ISB Report, 2023 that the total number of secondary days of OPG are 631 and the total number of non-secondary days are 670. As the number of secondary days traded (631) is close to the non-secondary days traded (670), the average profit earned out of secondary days can be compared with average profit earned on non-secondary days, due to the numbers having similar base.

283. I note that the requirement to disgorge unlawful gains is based on the principle that a person who is guilty of violation should not be permitted to be unjustly enriched.

Noticees have placed reliance on the order of Hon'ble SAT passed in the matter of *SRSR Holdings (supra).* I have gone through the said order and I note the following:

I. Hon'ble SAT has held that that for the purposes of calculation of unlawful gains, no. of factors are required to be considered, and there is no hard and fast formula laid down with regard to the method of computation to be adopted in any given case. Hon'ble SAT also acknowledged that SEBI has wide discretion in choosing an appropriate method of calculation of unlawful gains, and such method needs to be non-arbitrary and based on facts of each case and on sound principles of law.

II. Hon'ble SAT also held that the method for computation has to be made on sound reasoning, and has to be practical and best suited to compute the unlawful gains.

III. Hon'ble SAT has also held that computation of unlawful gains is to be limited to only those amounts that are illegal.

284. Applying the aforesaid principles laid down by Hon'ble SAT in the facts of the present matter, I observe the following with respect to the formula discussed at para no. 275 to 282 of this order:

I. The present case is not a generic case where precedents are found guiding the calculation of profit. The present case is peculiar in its own sense.

II. The charge against the *Noticee no. 1* is of taking unfair advantage by connecting to the secondary server. In order to arrive at the quantum of abnormal profits,

the average profits made by it on days when it did not connect to the secondary server can be taken as benchmark of normal average lawful profits.

III. In my view, this methodology is non-arbitrary and based on sound principles.

IV. I also note that this method is better suited as it results into calculation of only that profits which is result of the unfair activity carried out by the *Noticee no. 1*, i.e., connecting to the secondary server.

285. I may point that I came across this method at the time of considering various objections raised by *Noticees* including the objection of calculating the unlawful gains by benchmarking with 30 other TMs who may have different variables. I found that this method is more rationale and would also address the objections of *Noticees.* Further, this would result in calculation of less abnormal gains than what has been confronted in the SCN. Therefore, though this new calculation method has not been confronted to *Noticees,* it can still be used as it is more logical, uses data that is already contained in the ISB Report, 2023 which has been provided to *Noticees* as part of the SCN, and is resulting in less disgorgement as compared to what was proposed in the SCN.

E.3 <u>Calculation of unlawful gains</u>

286. In the light of the above discussion, I now proceed to calculate the quantum of unlawful gains for disgorgement purposes.

287. The SCN based on the ISB Report calculates the abnormal profits earned by OPG, by connecting to the secondary POP server connections, as adjusted with the benchmark median. The said calculation for intraday and overnight profits made by OPG are mentioned in the following table:

Table no. 18

Intraday Profits			
Segment	All Secondary-Abnormal profit (A) (INR in Lakh)	All Secondary-Benchmark Median (B) (INR in Lakh)	Adjusted abnormal profit from secondary server (A-B) (INR in Lakh)
Future & Option (FO)	8,630	25	8,605
Cash Market (CM)	18	4	14
Total			**8,619**
Overnight Profits			
Segment	All Secondary-Abnormal profit (A) (INR in Lakh)	All Secondary-Benchmark Median (B) (INR in Lakh)	Adjusted abnormal profit from secondary server (A-B) (INR in Lakh)
Future & Option (FO)	4,123	10	4,113
Cash Market (CM)	496	0*	496
Total			**4,609**

**CM Segment: All Secondary-Benchmark Median is loss of INR 23 Lakh, hence taken as zero.*

288. I have already held in the paragraph no. 271 to 282 that the unlawful gains earned by OPG shall be calculated on the basis of comparison between the average daily profits made by it while it connected to the secondary server and the average daily profits made by it while it did not connect to the secondary server. It has also been held in para no. 258 of this order that for FO segment, the allowance/deduction of five days shall be allowed while computing for the days when the complaints of OPG pertained to disconnections in the primary server.

289. It is also seen that two types of profits have to be calculated, namely, intraday profits and overnight profits. Further, such profits need to be calculated for the FO segment as well as the cash segment for the respective number of days on which OPG had connected to the secondary server in the respective segments.

290. Accordingly, the calculation of the profits is being done as per following:

Table no. 19

Intra-day profits					
Segment	Average daily Profits made on secondary days (in INR Lakh) **A**	Average daily Profits made on non-secondary days (in INR Lakh) **B**	Abnormal daily average profits (In INR Lakh) **C = A-B**	Total number of days connected to secondary server **D**	Total Unlawful gains (In INR Lakh) **E: C*D**
FO Segment (Pure Unicast)	15.86 (Table no. 74 of the ISB Report, 2023)	9.42 (Table no. 74 of the ISB Report, 2023)	6.44	366 (631-260-5)	2357.04
FO Segment (Overlap)	15.86 (Table no. 74 of the ISB	9.42 (Table no. 74 of the ISB	6.44	260	1674.40

	Report, 2023)	Report, 2023)			
FO segment (Total)	15.86 (Table no. 74 of the ISB Report, 2023)	9.42 (Table no. 74 of the ISB Report, 2023)	6.44	626 (631-5) (Table no. 70 of the ISB Report, 2023)	4031.44
Cash Market (CM)	0.14 (Table no. 42 of the ISB Report, 2023)	0.06 (Table no. 42 of the ISB Report, 2023)	0.08	125 (Table no. 38 of the ISB Report, 2023)	10.00
Total					**4041.44**

Overnight profits					
Segment	Average daily Profits made on secondary days (in INR Lakh) **A**	Average daily Profits made on non-secondary days (in INR Lakh) **B**	Abnormal daily average profits (In INR Lakh) **C = A-B**	Total number of days connected to secondary server **D**	Total Unlawful gains (In INR Lakh) **E: C*D**
FO (Pure Unicast)	7.58 (Table no. E23 of the ISB Report, 2023)	1.06 (Table no. E23 of the ISB Report, 2023)	6.52	366 (631-260-5)	2386.32
FO (Overlap days)	7.58 (Table no. E23 of the	1.06 (Table no. E23 of the	6.52	260	1695.20

	ISB Report, 2023)	ISB Report, 2023)			
FO (Total)	7.58 (Table no. E23 of the ISB Report, 2023)	1.06 (Table no. E23 of the ISB Report, 2023)	6.52	626 (631-5) (Table no. E19 of the ISB Report, 2023)	4081.52
Cash Market (CM)	3.97 (Table no. D23 of the ISB Report, 2023)	0.75 (Table no. D23 of the ISB Report, 2023)	3.22	125 (Table no. D19 of the ISB Report, 2023)	402.50
Total					**4484.02**
Grand total					**8525.46**

291. Therefore, I hold that the total amount of unlawful gains of INR 8525.46 Lakh (INR 4041.44 Lakh as intraday and INR 4484.02 as overnight) (details given in Table no. 19) is held to be the unlawful gains that OPG earned by virtue of consistently connecting to the secondary server of the NSE Colocation facility.

292. The final disgorgement amount of INR 85.25 Crore (8525.46 Lakh) is higher than the amount of INR 15.57 Crore, directed to be disgorged in the 2019 SEBI OPG Order but set aside by Hon'ble SAT. However, the said amount is less than the proposed disgorgement amount of INR 132.28 Crore as confronted to *Noticees* in the SCN. The legal jurisdiction of how disgorgement amount can be higher in the remand proceedings than the earlier proceedings, has been given in the paragraph 154-156 of this order.

293. Before parting with the proceeding, I find it appropriate to recapture events that are pertinent for the effective disposal of the case in hand. It is observed that vide 2019 SEBI OPG order, *Noticees* were directed to disgorge INR 15.57 Crore, apart from being debarred for a period of 5 years from buying, selling or dealing in securities in any manner. The operation of directions issued vide the 2019 SEBI OPG order was stayed by Hon'ble SAT vide its order dates May 06, 2019, subject to payment of INR 7.5 Crore, which was duly deposited by *Noticees*. The above stay got vacated with the disposal of the appeal by passing of the 2023 SAT Order on January 23, 2023 and directions issued in 2019 SEBI OPG order came into force. Since, Hon'ble Supreme Court vide its order dated April 05, 2023 declined to grant any stay, directions of the 2019 SEBI OPG is in operation as on date, i.e. debarment period of 5 years is to be counted from April 30, 2019 to the date of stay order by Hon'ble SAT, i.e., May 06, 2019 and then from January 23, 2023 onwards.

F. ANSWER TO THE 81 QUERIES

294. I note from the written submissions that *Noticees* have framed 81 questions that in their view deserve to be answered in the present proceedings. As I have dealt with all the major contentions of *Noticees,* the said questions are answered herein below:

I. Whether it is a fact that the Ld. QJA became functus officio pursuant to Order dated 30 April 2019?

Ans I have already recorded by findings on this issue in para no. 115 to 117 of the order.

II. Whether it is a fact that the Investigating Authority became functus officio pursuant to Order dated 30 April 2019?

Ans No fresh investigation or fact finding is required to be conducted in the light of the remand directions. Therefore, question of IA becoming functus officio does not arise.

III. Whether it is a fact that the present proceedings before the Ld. QJA is pursuant to the Order of Remand dated 23.01.2023 of the Hon'ble SAT?

Ans I have already recorded by findings on this issue in para no. 103 to 106 of the order.

IV. Whether the Ld. QJA acquired jurisdiction to deal with the present Show Cause Notice pursuant to the Order of Remand dated 23.01.2023 of the Hon'ble SAT?

Ans I have already recorded by findings on this issue in para no. 107 to 117 of the order.

V. If the answer to the aforesaid questions is yes, then in that case, whether the jurisdiction of the Hon'ble WTM ought to be within the ambit of Order dated 23.01.2023 of Hon'ble SAT?

Ans I have already recorded by findings on this issue in para no. 113 to 114 of this order.

VI. Whether through the Order of Remand dated 23.01.2023, the Ld. QJA was only required to consider the original Show Cause Notice?

Ans I have already recorded by findings on this issue in para no. 115 to 117 of the order.

VII. Whether the Ld. QJA had jurisdiction to issue a fresh Show Cause Notice i.e. present Show Cause Notice?

Ans I have already recorded by findings on this issue in para no. 115 to 117 of the order.

VIII. Whether the present Show Cause Notice was issued by the Ld. QJA or the Chief General Manager and General Manager of SEBI?

Ans The SCN is issued in terms of SEBI (Delegation of Statutory and Financial Powers) Order, 2019

IX. Whether the jurisdiction was only vested in Ld. QJA pursuant to Order dated 23 January 2023?

Ans Hon'ble Tribunal has categorically directed the WTM to relook into the issues remanded in the 2023 SAT Order.

X. Whether any Investigating Authority (IA) was appointed, through a written order, pursuant to Order of Remand dated 23 January 2023?

Ans Being a remand matter requiring re-adjudication of limited issues, another IA was not required to be appointed. Further, reference may be made to Answer to the Question no. II.

XI. Whether any investigation was undertaken by IA pursuant to Order of Remand dated 23 January 2023?

Ans Already addressed in the previous question no. X.

XII. Whether jurisdiction provided to IA was pursuant to Order dated May 22, 2017?

Ans Yes; the IA was appointed on May 22, 2017.

XIII. Whether it is a fact that the jurisdiction vested in IA lapsed pursuant to Order dated 30 April 2019?

Ans The role of IA culminated with submission of the investigation report and approval of action based on such investigation report.

XIV. Whether it is a fact that no jurisdiction was vested in IA pursuant to Order of Remand dated 23 January 2023?

Ans In view of the fact that the present proceedings are pursuant to the order of Hon'ble SAT, the relevance of jurisdiction of IA does not arise at all. Jurisdiction of QJA has been discussed in para no. 99 to 132 of the order.

XV. Whether the IA had the requisite jurisdiction to appoint ISB, when its jurisdiction had lapsed pursuant to Order dated 30 April 2019?

Ans The appointment of ISB was not carried out by the IA. SEBI possesses the power to appoint an agency irrespective of the stage of examination of the matter. The relevance of the ISB Report, 2023 as an evidence has been discussed in para no. 123 to 132 of the order.

XVI. Whether the procurement of report from ISB was outside the scope of Order of Remand dated 23 January 2023?

Ans I have already recorded by findings on this issue in para no. 123 to 132 of the order.

XVII. Whether it is a fact that the ISB report was procured unlawfully and illegally?

Ans I have already recorded by findings on this issue in para no. 123 to 132 of the order.

XVIII. Whether it is a fact that the Hon'ble SAT directed the Hon'ble QJA to reconsider only two issues i.e. (1) Amount to be disgorged by M/s. OPG Securities Pvt. Ltd. & its directors; (2) Charge of collusion between M/s. OPG Securities Pvt. Ltd & its directors with NSE and its officials?

Ans Hon'ble SAT has directed for re-consideration of four issues, as reproduced in para 2 of the order.

XIX. Whether it is a fact that the earlier WTM Order had already determined issues of first connect, collusion, crowding out and of connections to Secondary Server?

Ans Yes.

XX. Whether it is a fact that the earlier WTM order had exonerated the Noticees with regard to the aforesaid charges?

Ans The WTM in the 2019 SEBI OPG Order has exonerated Noticees from the aforesaid charges, except for the charges of connecting to the secondary server and destruction of vital information by the Noticee no. 2.

XXI. Whether it is a fact that SEBI did not challenge the exoneration of the Noticees' with regard to the aforesaid issues?

Ans Yes.

XXII. Whether it is a fact that the Hon'ble SAT also did not dismiss the exoneration of the Noticees' with regard to the aforesaid issues?

Ans No. Hon'ble SAT categorically directed the WTM to relook into the issues of collusion/connivance and crowding out.

XXIII. Whether it is a fact that the Hon'ble SAT directed the Ld. QJA to only frame issues with respect to collusion, crowding out and destruction of evidence, and take a decision on the same?

Ans Not fully correct. Directions of Hon'ble SAT are contained at para 2 of the order.

XXIV. Whether it is a fact that the Ld. QJA disregarded the scope of proceedings as per the Order of Remand dated 23 January 2023 and traversed its jurisdiction outside the scope of the order of Hon'ble SAT?

Ans No. The proceedings have been conducted in the due compliance of principles of natural justice and confined to issues remanded back for re-adjudication and therefore not traversed its jurisdiction outside the scope of the order of Hon'ble SAT. This issue has been discussed elaborately in the order.

XXV. Whether it is a fact that the Ld. QJA cannot disregard and deviate from the findings already given by the Earlier WTM Order?

Ans QJA is bound by the directions of Hon'ble SAT and not by the findings of the earlier WTM on issues remanded by Hon'ble SAT.

XXVI. Whether it is a fact that the Ld. QJA is bound by the doctrines of issue estoppel and res judicata?

Ans Findings on the issue of applicability of the aforesaid doctrines in the present proceedings have been recorded in para no. 107 to 117 of the order.

XXVII. Whether it is a fact that the present Show Cause Notice has sought to re-introduce allegations in which the Noticees' stood exonerated?

Ans This has been done in compliance with the directions of Hon'ble SAT.

XXVIII. Whether it is a fact that the decision to seek any clarifications under the remit of Order of Remand was only with the Ld. QJA?

Ans Yes.

XXIX. Whether it is a fact that SEBI IA could not arbitrarily and illegally assume jurisdiction and try to better its case under the garb of remand?

Ans Relevance of ISB Report, 2023 as an evidence has already been discussed at para no. 123 to 132 of the order.

XXX. Whether it is a fact that Professor Ram in his cross-examination stated that ISB was engaged through a letter of engagement dated 07.06.2021?

Ans Yes.

XXXI. Whether it is a fact that the Ld. QJA did not appoint the ISB but rather the engagement Administration, Market Regulation Department?

Ans Yes. It was appointed by SEBI. MRD is only one of the departments of SEBI for administration and regulation.

XXXII. Whether it is a fact that Professor Ram in his cross-examination stated that he did not rely upon the Order of Remand dated 23 January 2023?

Ans Yes.

XXXIII. Whether it is a fact that apart from the Ld. QJA, no other authority under SEBI had the requisite authority to conduct inquiry?

Ans Relevance of ISB Report, 2023 as an evidence has already been discussed at para no. 123 to 132 of the order.

XXXIV. Whether it is a fact that quantification given by ISB in its Report of 2023 must be disregarded?

Ans Relevance of ISB Report, 2023 as an evidence has already been discussed at para no. 123 to 132 of the order.

However, after dealing with the contentions of Noticees, I have recorded my findings in para 279-285 of the order.

XXXV. Whether it is a fact that review period was enhanced from 2010-2015 to 2009 to 2016 for the ISB Report arbitrarily, and without any direction from the Hon'ble SAT?

Ans I have already recorded by findings on this issue in para no. 204 to 211 of the order.

XXXVI. Whether it is a fact that ISB Report, 2017 was prepared basis analysis of trades of OPG on the futures and options segment?

Ans Yes.

XXXVII. Whether it is a fact that ISB Report, 2023 included under its purview trades on the cash market and currency derivatives segments as well?

Ans Yes.

XXXVIII. Whether it is a fact that Ld. QJA had no jurisdiction to enhance the scope of investigation through the segment or the review period, as the Ld. QJA was not given any jurisdiction by the Hon'ble SAT?

Ans I have already recorded by findings on this issue in para no. 212 to 213 of the order.

XXXIX. Whether it is fact that the Final SAT Order never directed that the Ld. WTM should not consider the 135 complaint days, which were considered in earlier WTM Order?

Ans I have already recorded by findings on this issue in para no. 250 to 258 of the order.

XL. Whether it is a fact that the Final SAT Order never directed to introduce a methodology of computing 'abnormal' gain made by OPG, based on comparison of its profits with a benchmark set of 30 brokers provided by NSE?

Ans Yes. Hon'ble SAT has not directed any particular methodology to be adopted for the computation of the unlawful gains.

XLI. Whether it is fact that the Final SAT Order never directed for inclusion of overlap days, that is, period after the introduction of multicast on 07th April 2014 where some of the IPs of OPG were connected to the unicast TBT?

Ans I have already recorded my findings in para no. 204 to 211 of the order.

XLII. Whether it is a fact that Final SAT Order, being aware of the issue of segregating profits on days when OPG is both first login and Secondary Server login , directed that computation should only be made under the criterion of Non First Login on Secondary Days basis the Tables A11 and A15?

Ans Hon'ble SAT has directed to decide the quantum of disgorgement afresh in the light of the observations made in the 2023 SAT Order. Directions of Hon'ble SAT are reproduced at para 2 of this order. There is no such direction to rely on Tables 11 and 15 of the ISB Report, 2017.

XLIII. Whether it is fact that IA, JR Varma and ISB arbitrarily changed the methodology for identification and classification of a SECONDARY DAY and also changed the period under review and included multicast days from ISB 2017 to ISB 2023, even though there was no such direction from SAT and the count of alleged secondary day changed from 269 days to 631 days.

Ans No. I have already recorded by findings on this issue in para no. 201 to 203 of the order.

XLIV. Whether it is a fact that ISB was re-engaged by SEBI despite its clear conflict of interest?

Ans I have already recorded by findings on this issue in para no. 133 of the order.

XLV. Whether it is a fact that a complaint was raised against the engagement of ISB by a Member of Parliament, Shri Kirit Somaiya in view of ISB's conflict of interest?

Ans Yes. But it was in the context of hiring by NSE and not by SEBI. The issue of conflict of interest has been discussed at para no. 133 of the order.

XLVI. Whether it is a fact that Professor Ram had earlier been engaged by NSE on various studies?

Ans Yes.

XLVII. Whether it is a fact that ISB, through Prof. Ram, was not competent and qualified to conduct the investigation, as Prof Ram did not possess the requisite professional qualifications?

Ans I have already recorded by findings on this issue in para no. 134 to 138 of the order.

XLVIII. Whether it is a fact that existence of jurisdictional facts are absent in the present proceedings?

Ans I have already recorded by findings on this issue in para no. 99 to 132 of the order.

XLIX. Whether it is a fact that issues being dealt with present Show Cause Notice primarily deal with two categories of issues – (i.) issues that the Earlier WTM has already decided upon, and such findings that are not denied by the Hon'ble SAT; and (ii.) issues arising from investigation conducted by SEBI clandestinely without the knowledge of the Hon'ble SAT, and put to the Noticees under the guise of the remand directions of the Final SAT Order?

Ans I have already recorded by findings on this issue in para no. 118 to 120 of the order.

L. Whether it is a fact that the Ld. QJA ought to decide upon the existence of jurisdictional facts and validity of Show Cause Notice before deciding the issues on merits?

Ans I have already recorded by findings on those issues in para no. 99 to 132 of the order.

LI. Whether it is a fact that *Noticees* on numerous occasions requested the Ld. QJA to decide the issue of jurisdiction as a preliminary issue before proceedings on the merits of the case?

Ans Noticees were informed time and again that the preliminary issues will be decided while disposing of the matter, as first issues. Hon'ble SAT also gave its finding in its order dated June 24, 2024 that the it would be just and appropriate for the WTM to pass a comprehensive order on all issues including the jurisdictional issue.

LII. Whether it is a fact that the Ld. QJA ought to decide firstly, whether the issuance of the Show Cause Notice falls within the purview of the directions of the Hon'ble SAT or not?

Ans I have recorded my findings in para no. 118 to 122 of the order regarding existence of jurisdictional fact.

LIII. Whether it is a fact that 'Disgorgement' is an equitable relief and requires restitution of the amounts that are alleged to be 'unjustly enriched' from the alleged violations?

Ans I have already recorded by findings on this issue in para no. 197 to 199 of the order.

LIV. Whether it is a fact that Professor Ram was not even made aware that conclusions of ISB Report 2023 would be utilized for calculating the amount to be disgorged?

Ans Yes.

LV. Whether it is a fact that with regard to understanding and analysing the possibility of 'abnormal' gains, the ISB Report 2023 only provides the possibility of gains in comparison with a benchmark set of brokers?

Ans The issue of limitation in comparison with benchmark brokers has been discussed at para no. 267 to 285 of the order.

LVI. Whether it is a fact that no methodology has been provided as to how the said benchmark set of brokers was chosen?

Ans The issue of comparison with benchmark brokers has been discussed at para no. 267 to 285 of the order.

LVII. Whether it is fact that ISB Report is replete with fallacies when considered for issuance of a direction of disgorgement?

Ans No. As recorded in para 123 to 132 of the order, ISB Report, 2023 computes the unlawful gains made by Noticee no. 1 by connecting to the secondary server in a prima facie reasoned and practical manner.

LVIII. Whether it is a fact that methodology applied for computation of abnormal gains is academic and cannot be used as a yardstick to justify disgorgement?

Ans I have already recorded by findings on this issue in para no. 197-198 of the order.

LIX. Whether it is a fact that disgorgement being an equitable relief, statutory & regulatory charges ought to be included for the purpose of disgorgement?

Ans I have already recorded by findings on this issue in para no. 227 to 232 of the order.

LX. Whether it is a fact ISB Report 2023 did not include the said charges for the purpose of calculating of illegal gains?

Ans I have already recorded by findings on this issue in para no. 228 to 232 of the order.

LXI. Whether it is a fact that apart from OPG various TMs connected to secondary server?

Ans Yes.

LXII. Whether it is a fact that lower loads at a server does not lead to faster dissemination of data?

Ans Hon'ble SAT has already recorded a finding on this issue at para no. 243 of the 2023 SAT Order (reproduced at para 13 of this order).

LXIII. Whether it is a fact that OPG majorly connected to Primary Servers through its IP connections?

Ans No. I have already recorded my findings in para no. 236 to 239 of the order.

LXIV. Whether it is a fact that even when 1 out of 45 IPs, allocated to OPG, is connected to the secondary server, the entirety of its connections have been termed as 'unlawful gains'?

Ans I have already recorded by findings in para no. 236-239 of the order.

LXV. Whether it is a fact that the present Show Cause Notice fallaciously assumes that OPG only logged into secondary servers?

Ans I have already recorded my findings in para no. 236-239 of the order.

LXVI. Whether it is a fact that various fallacious assumptions have been assumed qua OPG when, in fact, various other brokers had applied the similar modus operandi?

Ans I have already recorded my findings in para no. 157 to 161 of the order.

LXVII. Whether it is a fact TMs used multiple IP to route orders?

Ans Investigation has noted allocation of multiple IPs to the TMs.

LXVIII. Whether it is a fact that any analysis which only countenance the IPs involving secondary server will not be a true measure for calculating the profits?

Ans Hon'ble SAT in the 2023 SAT Order has held that *Noticees* have derived unlawful gains by connecting to the secondary server.

LXIX. Whether it is a fact that period between April 2014 and December 2016 was the overlap period?

Ans I have already recorded my findings in para no. 204 to 211 of the order.

LXX. Whether it is a fact that during the course of the said period, TMs had access to both, the Unicast and Multicast colocation architectures?

Ans MTBT was introduced on April 07, 2014 in a phased manner and Unicast was finally replaced by MTBT on May 22, 2015.

LXXI. Whether it is a fact that the said overlap period did not form part of earlier Show Cause Notice proceedings?

Ans The earlier show cause notice in Table no. 11 mentions about the connections to the secondary server till May 22, 2015.

LXXII. Whether it is a fact that the said overlap period ought not to be included in the present Show Cause Notice proceedings?

Ans I have already recorded my findings in para no. 204 to 211 of the order.

LXXIII. Whether it is a fact that the present Show Cause Notice proceedings wrongly included the profits made by OPG on the day when it connected to both 'secondary' & 'primary' servers?

Ans I have already recorded my findings in para no. 201-203 of the order.

LXXIV. Whether it is a fact that the entire profits of OPG do not become illegal if it has connected to both the kind of servers?

Ans I have already recorded my findings in para no. 201-203 of the order.

LXXV. Whether it is a fact that 'overnight profits' are wrongly included into the computation of profits by the ISB Report, 2023?

Ans I have already recorded my findings in para no. 220 to 223 of the order.

LXXVI. Whether it is a fact that benefit of collocated facilities would only accrue to a TM in algorithmic intra-day trades?

Ans I have already recorded my findings in para no. 224 to 226 of the order.

LXXVII. Whether it is a fact that only 'algo trades' formed the part of the present Show Cause Notice proceedings?

Ans I have already recorded my findings in para no. 224 to 225 of the order.

LXXVIII. Whether it is a fact that 'non-algo' trades are not made from 'co-location' facility of NSE?

Ans Answer to question no. LXXVII may be referred to.

LXXIX. Whether it is a fact that 'non-algo trades' have been wrongly included into the computation of profits by the ISB Report, 2023?

Ans Answer to question no. LXXVII may be referred to.

LXXX. Whether it is a fact that ISB Report 2023 did not take into its consideration the variables & factors that operate in real market scenario i.e. capital deployed by TMs, strategy, algorithm number of traders deployed etc.?

Ans I have already recorded my findings in para no. 269 to 285 of the order.

LXXXI. Whether the present Show Cause Notice proceedings are in violation of Article 14 of the Constitution of India, 1950?

Ans The proceeding in the present matter have been conducted in due compliance with the Article 14. The findings on bias and prejudice have been answered in para no. 157 to 159.

G. Conclusion:

295. As noted in para 2 above, Hon'ble SAT had remanded four issues for re-adjudication. The summary of my findings on the said four issues is mentioned herein below:

i. The quantum of disgorgement has been re-calculated and the total amount has been arrived at INR 8525.46 Lakh.

ii. The charges of connivance and collusion of OPG and its directors with any employee/officials of NSE have not been established.

iii. Direction is being passed against the *Noticee no. 2* in this order for concealment/destruction of vital information.

iv. The charges of crowding out other market participants are not established.

H. Directions

296. It is noted that the Hon'ble SAT vide its order dated May 06, 2019, had *inter alia* directed that the effect and operation of the 2019 SEBI OPG Order shall be stayed subject to the appellants (*Noticees* herein) deposit INR 7.5 Crore with SEBI. In pursuance of the said order, an amount of INR 7.5 Crore was deposited with SEBI.

297. Further, I, in compliance with the orders passed by Hon'ble SAT dated January 23, 2023, June 09, 2023, December 01, 2023, March 08, 2024, March 15, 2024, May 15, 2024 and, June 24, 2024 and considering the findings at para 291, pass the following directions:

I. *Noticees* are directed to disgorge the amount of INR 8525.46 Lakh, jointly and severally along with interest at the rate of 12% per annum, calculated from May 22, 2015 till the date of payment.

II. In case *Noticees* have deposited INR 7.5 Crore (INR 750 Lakh) with SEBI in compliance with directions of Hon'ble SAT, the total amount payable (excluding interest) by *Noticees* will come to INR 7775.46 Lakh (INR 8525.46 Lakh- INR 750 Lakh). In such a case, the interest shall be charged on INR 7.50 Crore from May 22, 2015 to the date of deposit made with SEBI and interest on the remaining amount of INR 7775.46 Lakh would be charged from May 22, 2015 till date of its payment.

III. The *Noticee no. 2* shall be prohibited from accessing the securities market and from buying, selling or otherwise dealing in the securities market, either directly or indirectly, for a period of 6 months. The aforesaid debarment shall be in addition to the debarment of 5 years,

as directed vide the 2019 SEBI OPG Order and shall start after period of initial debarment of five years gets over.

IV. During the period of restraint, the existing holding of securities (including units of mutual funds) of the *Noticee no.2* shall remain frozen.

298. *Noticees* shall remit / pay the said amounts of disgorgement within a period of 45 days from receipt of the order through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders ->Orders of Chairperson/Members -> PAY NOW.

299. In case of any difficulties in online payment, the *Noticees* may contact the support at: portalhelp@sebi.gov.in. The said amount shall be remitted by the Noticees to Investor Protection and Education Fund (IPEF) referred to in sub-section (5) of section 11 of the SEBI Act, 1992, within 45 (forty-five) days from the date of this Order. An intimation regarding the payment of said disgorgement amount directed to be paid herein, shall be sent to “The Chief General Manager, MRD, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C-4, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai -400 051”.

300. A copy of this Order shall be forwarded to the *Noticees*, the Stock Exchanges, Depositories, Registrar and Share Transfer Agents to ensure necessary compliance.

301. A copy of the present order is directed to be placed before Hon'ble Supreme Court in compliance with the directions passed vide order dated April 05, 2023 in the C.A. no. 1961 of 2023, Om Prakash Gupta and others Vs. SEBI (as reproduced in para no. 113 above.

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

-Sd-

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

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA

Annexure A: List of dates related to inspection

Sr No	Request of Noticee	Relevant date(s) of communication from Noticee	Date(s) of SEBI Response
1.	Letter from Noticees seeking inspection of documents	08/06/2023	23/08/2023
2.	Inspection of documents conducted		04/09/2023
3.	Data sought by Noticee in hard drive	04/09/2023	06/09/2023
4.	Email from Noticees seeking additional documents	04/09/2023	07/09/2023
5.	Additional documents sought by Noticees	12/09/2023	25/09/2023
6.	Request for inspection of documents and addressing preliminary issues	21/09/2023, 05/11/2023, 05/12/2023, 04/01/2024, 31/01/2024, 06/03/2024, 14/03/2024	23/11/2023, 04/12/2023, 05/12/2023, 19/12/2023, 22/12/2023, 04/01/2024, 05/01/2024, 18/01/2024, 14/03/2024
7.	Inspection of documents conducted pursuant to SAT order	15/03/2024 (SAT Order)	15/03/2024, (Inspection of documents) 18/03/2024 (Soft copies provided)
8.	Inspection of documents conducted pursuant to SAT order	15/05/2024 (SAT Order)	21/05/2024 (Inspection of documents)
9.	Post inspection queries/ clarifications/additional documents sought	24/05/2024, 27/05/2024, 06/06/2024	25/05/2024 (Clarifications provided)
10.			07/06/2024 (inspection of documents conducted)
11.			11/06/2024 (Additional documents provided)
12.	Further clarification sought w.r.t documents provided	07/06/2024, 11/06/2024, 19/06/2024, 11/07/2024, 15/07/2024, 17/07/2024, 18/07/2024	11/06/2024, 19/06/2024, 11/07/2024, 12/07/2024, 15/07/2024, 19/07/2024, 23/07/2024,24/07/2024