BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/VV/AS/2022-23/16254]

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

In respect of

PACE Stock Broking Services Pvt Ltd

In the matter of NSE Co-Location.

A. BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"), had received multiple complaints pertaining to allegations of malpractices with respect to the co-location facility being provided by the National Stock Exchange of India Limited (hereinafter referred to as "**NSE"**). In the wake of allegations of preferential access to Tick-by-Tick (hereinafter referred to as "**TBT"**) data feed given by NSE to certain trading members (hereinafter referred to as "**TM**"), the matter was taken up for investigation by SEBI. PACE Stock Broking Services Pvt Ltd (hereinafter referred to as "**Noticee/PACE/you**") was one of the trading members identified for comprehensive investigation (including forensic audit) for primary and secondary server connects. Ernst & Young LLP (hereinafter referred to as **'EY'**) was entrusted with the forensic audit of the Noticee, which submitted the final report dated October 18, 2019 (hereinafter referred to as **'EY Report'**) to SEBI. The Period of investigation with respect to various segment are given below:

S. No.	**Segment**	**Reference Period**
1	Future ND Options(FO) Segment	June 2010 to April 2014
2	Cash Market(CM) Segment	October 2010 to November 2014
3	Currency Derivatives(CD) Segment	January 2012 to April 2014

2. SEBI initiated adjudication proceedings to inquire into and adjudge under
    a) Sections 15HA of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the **"SEBI Act"**), for the violation of regulations 3(b), 3(c), 3(d) & 4(1) of SEBI 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 2003"**) read with Sections 12A(a), 12A(b) & 12A(c) of the SEBI Act and
    b) Section 15HB of the SEBI Act, read with Regulations 26(xvi) and 26(xx) of SEBI (Stock Brokers & Sub Brokers) Regulations, 1992 (hereinafter referred to as "**Stock Broker Regulations 1992**") for the violation of provisions of Clause 2(a) of Chapter V of NSE Byelaws including NSE Colocation guidelines, Clause A(2) and A(5) of Code of conduct specified under schedule II read with Regulation 9(f) of the Broker Regulations.

B. APPOINTMENT OF ADJUDICATING OFFICER

3. Shri B J Dilip was appointed as the Adjudicating Officer (hereinafter referred to as **"Erstwhile AO"**) by communiqué dated July 20, 2020 under section 19 read with section 15-I(1) of the SEBI Act, 1992 and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as **"Adjudication Rules"**) to conduct adjudication proceedings in the manner specified under Rule 4 of Adjudication Rules read with section 15I (1) and (2) of SEBI Act, and if satisfied that the Noticee is liable, impose such penalty as deemed fit in terms of Rule 5 of Adjudication Rules read with Section 15HA and Section 15HB of SEBI Act. Pursuant to the transfer of erstwhile AO, *vide* communiqué dated December 31, 2020 the case has been transferred to undersigned. It has been advised that except for the change of the Adjudicating Officer the other terms and conditions of the original orders '*shall remain unchanged and shall be in full force and effect*' and that the "*Adjudicating Officer shall proceed in accordance with the terms of reference made in the original orders".*

C. SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice No. EAD-6/BJD/AA/19714/2020 dated November 13, 2020 (hereinafter be referred to as the **"SCN"**) was duly served upon Noticee under Rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be held and penalty be not imposed against it under the provisions under sections 15HA and section 15HB of SEBI Act for the aforesaid violation.

5. The allegations levelled against Noticee in the SCN are summarized as below:
   i. As per the EY report, based on review of logs provided by NSE, PACE connected on to the secondary server for 124 trading days in CD/IRF segment, 319 days in FO segment and 399 trading days in CM segment. Segment wise secondary server connects by PACE is tabulated below:

Table No. 1

Year	FO Segment			CM Segment			CD/IRF Segment		
	Total number of trading days**	**Number of days connected to secondary server*****	**%age**	**Total number of trading days****	**Number of days connected to secondary serves****	**%age**	**Total number of trading days****	**Trading Days**	
2011	247	-		247	-	-	241	-	-
2012	251	23	9.16%	252	40	15.87%	243	43	17.70%
2013	250	230	92.00%	250	180	72.00%	245	81	33.06%
2014*	67	66	98.51%	207	179	86.47%	62	-	-
Total		319			399			124	

* MTBT was introduced by NSE on April 7, 2014 for FO and CD/IRF segments, and on November 10, 2014 in CM segment; hence data analyzed till that date

** As received from NSE vide email dated May 23, 2018

***Connection logs as received from EY

   ii. As seen from the tables above, in the FO segment, PACE was seen to have connected to the secondary server on 92% and 98.51% of the trading days during calendar years 2013 and 2014, respectively. Further, in the CM segment, PACE connected to the secondary server on 72% and 86.47% of the trading days during calendar years 2013 and 2014, respectively. Even in the CD/IRF segment, PACE connected to the secondary server on 33.06% of the trading days during calendar year 2013, including on two occasions, *viz.*, on January 21, 2013 and

September 12, 2013, wherein it connected to secondary server without connecting to primary server at all.

iii. Clause 2 of the NSE colocation guidelines from NSE (Document No. SEIL/ITSM/INT/072, last visited on April 16, 2012) reads as "…….*in case of non-availability of data from TBT primary source they can move to secondary source*". The aforesaid restriction on secondary server came into effect from April 2012. Therefore, trading members were permitted to Secondary POP server only in case of disconnections to primary POP Server, the load on Secondary POP Server was generally very low. PACE contended that it had raised several colocation related issues with NSE. EY had analysed the email dump of PACE. *Vide* email dated December 18, 2019, EY provided 19 instances during the review period wherein PACE had raised issues w.r.t. NSE TBT server, which include the instances pointed out by PACE. Thus, it is seen that during the period under review, PACE connected for more than 300 days on secondary server, it complained only on 19 instances. It is inconceivable that a TM would face disconnections on such large number of occasions, yet generally not complain to the concerned Exchange. While the evidence produced by PACE do indicate that on certain occasions, it was facing disconnection issues, such instances were very limited as can be seen from the number of complaints filed by PACE.

iv. It was observed that during the period under investigation, *vide* email dated March 7, 2014, NSE Colo support team asked PACE to "….*provide reason for connecting secondary online server, since morning you haven't tried connection to primary server*". Thus, it is observed that NSE Colo support had informed PACE that it should connect to the primary server. However, based on the connection log of PACE as provided by EY, it is seen that PACE continued to connect to the secondary server throughout 2014 for 133 immediately succeeding days in CM segment and 19 immediately succeeding days in FO segment. Therefore, it is alleged that PACE did not pay heed to the NSE instruction dated March 7, 2014, and continued to connect to the secondary server.

v. In view of the foregoing, it is alleged that PACE continued to login to the secondary server without valid reasons in all three segments during 2013 and in the FO and CM segments in 2014, as can be seen from the exceptionally high number of connections. Further, immediately after receiving an instruction from NSE on March 7, 2014 asking PACE reasons for connecting to the secondary server, PACE continued to connect to secondary server in FO and CM segment on the immediate subsequent days. Therefore, it is alleged that PACE has violated the NSE Colocation Guidelines read with Point 2(a) of Chapter V of NSE bye-laws with regard to its unauthorized connection to the secondary server of the exchange.

vi. As PACE connected to the secondary server repeatedly without valid reason, it is also alleged that it has indulged in unfair trade practices, thereby violating Regulations 3(b), 3(c), 3(d) and 4(1) of PFUTP Regulations, read with Sections 12A(a), 12A(b) & 12 A(c) of SEBI Act. Being a registered intermediary, PACE has, by its aforesaid conduct of connecting to secondary server repeatedly without valid reason as well as connecting to secondary server despite contrary instruction by NSE, has also allegedly violated Clause A(2) and Clause A(5) of Code of Conduct as specified in Schedule II of Regulation 9 of Broker Regulations.

6. I note, from available records, that the SCN was duly delivered to the Noticee. Thereafter, the Noticee, *vide* letter dated December 04, 2020, requested for extension of time for filing reply to the aforesaid SCN hearing due to difficulties faced by COVID-19 pandemic it is not possible for the Noticee to move to office and search documents. Thereafter, *vide* hearing notice dated February 15, 2021 the Noticee was granted an opportunity of personal hearing in terms of rule 4(3) of the Adjudication Rules on March 09, 2021. On the perusal of

aforesaid hearing notice, Noticee filed its preliminary submission by *vide* letter dated February 25, 2021 and also requested for the inspection of documents along with adjournment of hearing. Inspection of documents given on May 11, 2021.

7. In the view of the request made by Noticee, hearing rescheduled to September 28, 2021 as mentioned on letter dated September 07, 2021. Thereafter, *vide* letter dated September 22, 2021 Noticee again requested for postponement of the hearing since transaction mentioned in the SCN are 8 years old and concerned staff who were aware of subject matter are no longer associated with the company, consequently, it is taking longer time to collect necessary data/documents/details which is necessary to defend. I note that in the interest of principles of natural justice, I acceded to the request of Noticee and *vide* email dated September 28, 2021 granted another opportunity of hearing on October 07, 2021. Pursuant to this, Noticee again requested for adjournment of hearing. I have granted final opportunity of personal hearing on October 21, 2021 with the direction that "*in case of absence at the said hearing, the matter shall be decided based on available records. No further request for adjournment shall be entertained since sufficient opportunities of hearing have already been granted to you".* Accordingly, Noticee filled its final reply on October 18, 2021.

8. The hearing has been finally conducted on October 21, 2021. In view of the prevailing circumstances owing to COVID-19, the hearing was scheduled through video conferencing on WebEx platform. On the scheduled date of hearing, the authorized representative of the Noticee appeared before me through video conference and made oral submission on the lines of written submissions *vide* letter dated October 18, 2021.

9. The key submission made by Noticee are summarized below:

    a) The SCN has issued more than 6 years from the date of alleged violation and maximum period for which Brokers are required to maintain their records is 5 years, the Noticee also is unable to retrieve relevant records pertaining to complete details of its servers and connections. On the ground of inordinate delay itself, the present proceedings ought to be dismissed.

b) Noticee submitted that as far as electronic evidence is concerned it must have complied with the conditions as stipulated u/s 65B of Indian Evidence Act, 1872. Thus, it is submitted that in case any document relied upon or referred to by SEBI which have been obtained on email/extracted from the database or electronic system, ensure that the aforesaid requirement of law has been submitted.

c) Noticee submitted that SEBI failed to conduct Independent investigation and reliance placed entirely upon the third-party Expert Report i.e. EY report. Further, Noticee submitted that material on the basis of which he is alleged to have violated certain provisions of law is not full proof and have deficiencies. In absence of independent verification of facts and figures, no action outght to be initiated against Noticee.

d) Noticee submitted that comparison of no. of days connected to secondary server has not been properly done. As per Noticee, the right way of the calculation should be the no of TBT counts days (No of TBT IP's * Trading days pertaining to particular year) and see percentage of his connection to secondary server based on TBT days' count. The basis for calculation of days is erroneous considering that all our IP's on those days were connected to secondary server, whereas the fact is that we have multiple TCP-TBT IP's and only a few out of the same were connected to secondary server on those days.

e) Details of which mentioned in the below table:

Segment	Period	No. of Trading days	Average No. of TBT IP's	Average No. of TBT IP's Connections *****	TBT Days Count	TBT Connections Count	No, of days Connected as SCN	%age of TBT IP's days connection to secondary server	%age as per SCN internal Page No. 9 and 10
	A	B	C	D	E (b*c)	F (d*g)	G	H[(F/E)*100]	I [(G/B)*100]
FO	2011	247							
	2012	251	7	2	1,757	46	23	2.6	9.16
	2013	250	30	4	7500	920	230	12.3	92
	2014	67	51	4	3,417	264	66	7.7	98.51
CM	2011	247							
	2012	252	7	2	1,764	80	40	4.5	15.87
	2013	250	12.4	2.3	3100	414	180	13.3	72
	2014	207	17.8	1.8	3685	322	179	8.7	86.47
CD	2011	241							
	2012	243	3	1	729	243	43	33.3	17.7
	2013	245	3	1	735	245	81	33.3	33.06
	2014	62							

*******As the data w.r.t.exact number of TBT Connections isn't available therefore this data has been prepared only on approximate basis.*

f) Noticee submitted that he has not given an opportunity to cross-examine the external experts and inspection of documents. Further, Noticee reiterate his request to an opportunity of inspection of documents as mentioned in *vide* letters dated February 25, 2021 and May 12, 2021 since these documents are essential for the purpose of preparation of defense in response to various findings and allegations made against us in the SCN.

g) Noticee submitted that SEBI had issued SCNs in the NSE Colo matter to several other entities also. During the course of proceedings for one such entity *viz*. OPG Securities, a report commissioned by Accel Trading and conducted by Indian Institute of Technology, Madras professor Ramakrishna Pasumarthy was submitted to SEBI which counters the findings of separate investigations into this matter that SEBI had conducted over three years. This report establishes that far from benefitting from alleged preferential access or secondary connections, OPG made lesser profits from secondary connections.

h) Noticee submitted that NSE had made submissions before SEBI wherein under Para 8.2.16.3. (Internal Page No. 72) of Order 30.04.2019 passed by Hon'ble Whole Time Member, SEBI in the matter of NSE Co-location, it is mentioned that "*To ensure that members could easily and quickly switch to the Secondary Server if the primary server failed, the backup server was always in active-active mode — i.e., the members would be able to connect to the Secondary Server at all times and receive data*". Thus, Noticee submitted that there was no stringent requirement adopted by NSE at the relevant time as far as connection to Secondary, TBT server is concerned.

i) Noticee submitted that it's responsibility of NSE to ensure that no one should face any difficulty to log in primary server. So, there would be no need to have logged in secondary server.

j) Noticee submitted that *vide* email dated December 18, 2019 by EY which provided with 19 instances during the review period wherein PACE had raised issues w.r.t NSE TBT server. Further, in the said Email there is an attachment by the name of "Colo ticket —, CPR, PACE & Parwati" in form of an Excel File. On analysis of the said Excel file it is submitted that there are 23 Instances wherein PACE has pointed out raised: issues w.r.t NSE TBT server. Hence, it is humbly submitted that there is a discrepancy in the SCN.

k) Further, Noticee submitted that from analysis of the limited it is submitted that there are more 9 instances wherein we have complained about the TBT connectivity to NSE Colo and the same have not been considered in the SCN. Further, it is also taken in to account that there was regular communication also on calls *i.e.* verbally as mentioned in the 15 emails cited in Noticee's reply dated October 18, 2021. Therefore, Noticee submitted that the EY report is erroneous in concluding on the number of occasions on which we complained about TBT.

l) Noticee submitted that complaint mails were followed up with reminders about the TBT connectivity over the next few days indicating that the problem continued for several days resulting in connecting to secondary server on continuous days. For the purpose of calculating instances, they ought to be considered only as singular instance instead of counting total number of days connected to the secondary server.

m) Noticee submitted that there are discrepancies in number of days PACE connected to the Secondary Server. As per the Noticee, it connected on to the secondary server for 6 instances in CD/IRF segment, 10 instances in FO segment and 8 instances in CM segment. The details for the same has been mentioned below:

Year	**FO Segment**			**CM Segment**			**CD/IRF Segment**		
	Total number of trading days**	**Number of days connected to secondary server*****	**No. of times Noticee got Connected to Secondary Server**	**Total number of trading days****	**Number of days connected to secondary serves****	**No. of times Noticee got Connected to Secondary Server**	**No. of days connects**	**Trading Days**	**No. of times Noticee got Connected to Secondary Server**
2011	247	-		247	-		241	-	-
2012	251	23	7	252	40	1	243	43	2
2013	250	230	3	250	180	3	245	81	5*****
2014*	67	66		207	179	5*****	62	-	-
Total		319	10		399	8		124	6

***** 1 Instances is continuation of 2013. Hence total Instances is 8.

n) Noticee submitted that NSE *vide* email dated November 22, 2013 informed us that they had activated our secondary interactive/ multi cast ports on our TBT. It is pertinent to mention that NSE also requested him to avail of the secondary ports. It does not mention that he has to connect to secondary only if there is a problem with the primary port connectivity the email also does not even mention that we have to revert to primary port after we have connected to the secondary port. Further, in spite of the said email to connect to the secondary server, Noticee did not connect to the secondary server. In view thereof, NSE sent reminder emails dated December 05, 2013 and January 09, 2014 to connect the secondary port. Therefore, Noticee submitted that he is not aware of unfair advantage.

o) Noticee submitted that they were continuously complaining about performance on secondary server. Further, it is pertinent to mention that we were never reprimanded by NSE for using secondary server. The same has been confirmed by Report dated 18.10.2019 by EY. Relevant extract from the aforesaid is reproduced herein under: *"Member was not reprimanded by NSE for connections made to secondary server. "*

p) Noticee submitted that the NSE Co-location service is a legal, paid premium services to get tick by tick data faster and any TM who has availed the Colo facility has an advantage over those who have not availed the Colo facility. Therefore, the question of preferential data cannot be applied w.r.t. any non-Colo access. The entire purpose of availing the Colo facility is high speed connectivity and importantly better market data dissemination infrastructure, as approved by SEBI.

q) Noticee submitted that Colo facility was available only for Algo trading, and as such no "Investor" was accessing the Colo facility, other than the algorithmic traders. Irrespective of whether a member accessed the primary or secondary server, by virtue of being in Colo, it had faster access to data than anyone else who was not in Colo (i.e. "Investors"). Thus, there cannot be any case that "Investors" were put to any disadvantage on account of secondary server login or that they suffered any loss on this count.

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s) Noticee submitted that while TAP-IP was provided by NSE for sending orders to the Exchange server, TCP-TBT-IP was provided to TM to obtain broadcast from the Exchanges' server. NSE's real time tick-by-tick data feed was disseminated to TMa only in TCP-IP format until April 2014, when the alternative of multicast was introduced, initially to replace the TCP feeds. Eventually, both systems of data dissemination i.e. TBT as Multicast were provided to members in parallel. *Vide* Circular dated Spetember 19, 2016, NSE announced its intention to discontinue TCP-based TBT data broadcast with effect from November 30, 2016. Hence, the subject matter of connecting to secondary server has become redundant.

t) Noticee submitted that circular/guidelines issued by NSE to its trading members in respect of the Colocation Facility during the relevant period are: i) Circular No. 693 bearing reference no. NSE/MEM/ 12985 dated 31.08.2009, (ii) NSE Colocation Guidelines Document No. NSEIL/ITSM/ INT/072 dated 08.08.2011, (iii) NSE Colocation Guidelines Document No. NSEIL/ITSM/INT/ 072 dated 08.08.2011 (as revised on 16.04.2012). None of the aforesaid regulation/guideline barred the Noticee connection to the secondary server. In fact, the updated Colocation Guidelines (as on 31.07.2012) contained one of the 'processes' (which were in the nature of guidance) which made reference to the Secondary Server while stating that "*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*". Thus, it only advised the TMs to connect to the Secondary Server for smooth functioning.

u) Noticee submitted that, NSE has also in all its communications to the trading members and to SEBI during the course of investigation, admitted to the fact that there was no bar whatsoever on trading members' accessing the Secondary Server. In fact, on several occasions NSE encouraged its members to avail of the Secondary TBT Server facility as is sufficiently evident from the above as well as succeeding paras.

v) Noticee submitted that by connecting to secondary server it cannot be assumed that we received information ahead of others. There are numerous factors that have to remain constant for all the members to enable us to receive information first. Even if all such factors and assumptions are fulfilled even then possibility of 'gaining advantage' thereafter is again contingent on a plethora of factors and assumptions. In fact, there is vast a difference between 'receipt of tick' and 'dissemination of a tick'. Further, reference has been drawn towards 2 blogs articles for this purpose: i) Did early login help in NSE TBT architecture? (ii) Data Dissemination part 5: Secondary TBT servers.

w) Noticee submitted that the SCN merely refers to general legal provisions being Regulations 3(b), 3(c) and 3(d) of the PFUTP Regulations without even attempting to apply the facts and circumstances to the ingredients of the above regulations. Further, the definition of 'fraud' under the PFUTP Regulations requires a person to do an act or omission with a view to *'induce another person to deal in securities'*. The SCN has failed to attribute any such conduct against it. The test for determining 'inducement' under the PFUTP Regulations has been laid down by Supreme Court of India (Hereinafter referred to as **"SC"**) in **SEBI vs Kanaiyalal Baldevbhai Patel** (Civil Appeal No.2595 of 2013), dated September 20, 2017. SC held that *"56. The test to determine whether the second person had been induced to act in the manner he did or not to act in the manner that he proposed, is whether but for the* *representation of the facts made by the first person, the latter would not have acted in the manner he did….*"

x) Noticee submitted that for the applicability of regulations 3 and 4 of the PFUTP Regulations, an act alleged to be fraudulent should have an element of some motive or ill- conceived idea or design. From the above contention, it is inferred that connection to secondary server was not with the motive or ill-conceived idea or design to defraud or induce any other person to deal in securities. Further, the connection to secondary server is fair and equitable and not prone to market abuse and the same was done in good faith. In light of the above and owing to the absence of any evidence to suggest connivance, Noticees's connection to secondary server cannot be deemed to be per se fraudulent.

y) Noticee submitted that contravention of 4(1) of PFUTP regulation denied. As stated in the foregoing paragraphs, our conduct or the connection to secondary server does not satisfy the ingredients of fraud. As regards, 'unfair trade practices', we submit that the concept of 'fairness' in relation to the PFUTP Regulations has been explained by SC in the **SEBI vs Kanaiyalal Baldevbhai Patel** (Supra) "*45. Now we come back to Regulations 3 and 4(1) which bar persons from dealing in securities in a fraudulent manner or indulging in unfair trade practice. Fairness in financial markets is often expressed in terms of level playing field. A playing field may be uneven because of varied reasons such as inequalities in information, etc. Possession of different information, which is a pervasive feature of markets, may not always be objectionable. Indeed, investors who invest resources in acquiring superior information are entitled to exploit this advantage, thereby making markets more efficient. The unequal possession of information is fraudulent only when the information has been acquired in bad faith and thereby inducing an inequitable result for others.*" Further, the standard for determining equality had been discussed by SC in **Khandige Sham Bhat & Anr vs Agricultural Income Tax Officer,**

Kasaragod (Petition No. 103 and 104 of 1961), dated August 29, 1962, *If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment.* Noticee submitted that its actions are completely honest with respect to connection to secondary server and the same was done in good faith.

z) Noticee made following legal submission and placed reliance on:

   i. SAT order in the matter Kalpena Plastiks Limited vs BSE (Appeal No. 78 of 2011, dated November 09, 2011)
   ii. (SEBI) Adjudication Order dated September 25, 2019 bearing reference no. ORDER/SS/SK/2019-20/4608 wherein the captioned subject matter is similar and no allegation of PFUTP Regulations was alleged against them.
   iii. (SEBI) Adjudication Order dated November 25, 2020 bearing reference no. ORDER/AP/SK/2020-21/9661 in the matter of Crosseas Capital Services Pvt. Ltd.
   iv. (SEBI) Adjudication Order dated 15.06.2021 bearing reference no. Order/AP/SK/2021-22/ 12253 in the matter of IKM Investors Private Limited.
   v. (SEBI) Adjudication Order dated 29.07.2021 bearing reference no. ORDER/SM/SK/2021-22/12799 in the matter of Excel Stock Broking Private Limited.
   vi. (SEBI) Adjudication Order dated 29.09.2021 bearing reference no. Order/GR/BM/2021-22/13572 in the respect of Master Capital Services Limited in the matter of NSE Co-Location.

aa) In light of the above, we submit that there is no allegation of unfair advantage accrued/loss suffered by investors in our case also. Also, there are no investor/s complaints against us. On consideration of the orders passed in the matter as referred by us in the preceding paragraphs, we respectfully submit that doctrine of 'Stare Decisis' obligates Hon'ble courts/ quasi-judicial bodies to look to precedents adjudicating the matter. For this purpose, reliance has been placed on SAT Orders in the matter of **M/S R. M. Shares Trading Private Limited Vs. SEBI** (Appeal No. 204 of 2014, dated August 07, 2014) and **Krishna Enterprises vs. SEBI** (Appeal No. 131 of 2015, dated April 20, 2016), wherein it was held that passing conflicting orders would not promote the development of securities market and would not be in the interest of the securities market.

bb) Noticee submitted that CoLo guidelines dated April 16, 2012 has been relied upon by SEBI in which no parameters were laid down. NSE maintained no policing system, and therefore NSE never 'warned' or 'reprimanded' us for connecting to secondary server for the larger period of the TCP-IP regime, despite the fact that most of the Secondary Server connections were established by the TMs before the market opening hours. There was no mechanism was available to verify whether primary connections are now available, hence on receipt of communication from NSE, Noticee used to shift to primary server again as soon as possible. In any case there is not any violation of any rule, regulation, guideline or circular as he connected to secondary server only when he was facing non-availability and/or inefficient/ inadequate data. Further, not all of its IP's got connected on any given day to secondary server.

D. <u>CONSIDERATION OF ISSUES AND FINDINGS</u>

10. I have considered the SCN along with all the Annexures referred to in the SCN, the replies received from the Noticee in response to the SCN and the submissions made by the Noticee during the hearing granted to them; and all other relevant material available on record. I find that there are three main issues for consideration in this case:

i. *Whether Noticee is in violation of Point 2(a) of Chapter V of NSE bye-laws read with Clause A(5) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations,* *Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations and Regulations 3(b), 3(c), 3(d) and 4(1) of PFUTP Regulations read with Sections 12A(a), 12A (b) & 12 A(c) of SEBI Act as alleged in the SCN?*

ii. *If yes, whether the failure, on the part of the Noticee would attract monetary penalty under Section 15HA and 15HB of the SEBI Act read with Regulations 26(xvi) and 26(xx) of Stock Broker Regulations?*

iii. *If yes, what would be the monetary penalty that can be imposed upon the Noticee taking into consideration the factors stipulated in Section 15J of the SEBI Act read with Rule 5(2) of the Adjudication Rules?*

Issue No. I:* *Whether Noticee is in violation of Point 2(a) of Chapter V of NSE bye-laws read with Clause A(5) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations, Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations and Regulations 3(b), 3(c), 3(d) and 4(1) of PFUTP Regulations read with Sections 12A(a), 12A (b) & 12 A(c) of SEBI Act as alleged in the SCN?

11. Before proceeding further, I would like to refer to the relevant provisions of NSE bye-laws, SEBI Act, PFUTP Regulations and Stock Broker Regulations as below:

<u>SEBI ACT</u>

CHAPTER VA

<u>Prohibition of Manipulative and Deceptive Devices, Insider Trading and Substantial Acquisition of Securities or Control</u>

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

12A. No person shall directly or indirectly—

(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange,

any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

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

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

PFUTP Regulations

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

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

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

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

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

4. Prohibition of manipulative, fraudulent and unfair trade practice

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

SCHEDULE II

Securities and Exchange Board of India (Stock Brokers) Regulations, 1992

Code of Conduct for Stock Brokers

[Regulation 9]

A. General.

(2) Exercise of due skill and care: *A stock-broker shall act with due skill, care and diligence in the conduct of all his business.*

(5) Compliance with statutory requirements: *A stock-broker shall abide by all the provisions of the Act and the rules, regulations issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him.*

<u>NSE Byelaw</u>

(2) (a) Trading members shall adhere to the Bye Laws, Rules and Regulations of the Exchange and shall comply with such operational parameters, rulings, notices, guidelines and instructions of the relevant authority as may be applicable.

<u>SEBI Act</u>

<u>Penalty for fraudulent and unfair trade practices.</u>

15HA*. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.*

<u>Penalty for contravention where no separate penalty has been provided.</u>

15HB*. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.*

<u>SEBI (STOCK-BROKERS) REGULATIONS, 1992</u>

<u>CHAPTER VI</u>

<u>Procedure for Action In Case Of Default</u>

Liability for monetary penalty.

26. A stock broker shall be liable for monetary penalty in respect of the following violations, namely—

(xvi) Failure to exercise due skill, care and diligence.

(xx) Violations for which no separate penalty has been provided under these regulations.

12. I note that Noticee has raised the preliminary issue with regard to inordinate delay in issue of SCN after a gap of almost 6 years from the date of alleged violations. I note that the investigation generally is a detailed process involving analysis of various data, gathering of evidences, etc. that shall stand the test of legal scrutiny at various judicial fora. This, generally, consumes considerable time and efforts depending on the number of entities involved, the complexity of the transactions, correspondences with the entities involved etc. I note that Noticee's contention that maximum period for which Stock Broker are required to maintain records is 5 years, is factually incorrect. Noticee did not provide any documentary evidence/placed reliance on any rules or regulation for this purpose.

13. In the present case, after receiving multiple allegations with reference of preferential access to Tick by Tick ("TBT") data feed given by NSE to certain TMs, SEBI initiated investigation in this matter. Investigation period pertains to June 2010 to April 2014 in Future and Option Segment, October 2010 to November 2014 in Currency Derivative Segment, January 2012 to April 2014 in Currency derivative segment. For this purpose, Noticee has been identified as one of Stock Brokers for investigation including forensic audit. Accordingly, EY (forensic auditor of Noticee) submitted the forensic report *i.e.* EY report dated October 18, 2019 to SEBI. In the present matter, After the completion of investigation, adjudication proceedings have been initiated against Noticee. For

this purpose, B.J. Dilip appointed as Adjudication officer *vide* communiqué dated July 20, 2020. Accordingly, SCN dated November 13, 2020 has been issued. Pursuant to the transfer of erstwhile AO, *vide* communiqué dated December 31, 2020, the case has been transferred to undersigned. Therefore, in the view of above facts and circumstances, I find that there is no unreasonable delay in the present adjudication proceedings. For this purpose, reliance has been placed on following judgments: -

a) **Hemant Sheth vs SEBI** (Appeal No. 521 of 2021, DoD: 07.01.2022) held that: *"….. Insofar as the delay is concerned, we find that after the observation made by the WTM in its order of May 10, 2013 SEBI took action and appointed the AO dated July 4, 2013. No doubt the show cause notice was issued in January 2016 but the delay in the issuance of the show cause notice in the instant case will not vitiate the proceedings initiated against the appellants in the peculiar facts and circumstances of the case. Consequently, we are not inclined to quash the proceedings only on the ground of inordinate delay as asserted by the learned counsel for the appellant*."

b) **Metex Marketing Pvt. Ltd. vs. SEBI** (order dated June 4, 2019) wherein Hon'ble SAT held that: "This Tribunal has consistently held that in the absence of any specific provision in the SEBI Act or in the Takeover Regulations, the fact that there was a delay on the part of SEBI in initiating proceedings for violation of any provision of the Act cannot be a ground to quash the penalty imposed for such violation.

14. Noticee has contended that insofar as the electronic evidence is concerned, it must be accompanied by an appropriate certificate as stipulated under section 65B(4) of the Indian Evidence Act, 1872. Noticee further contended that due procedure was not followed by the forensic auditor. In this regard, I note that the data relied upon by the forensic auditor was from the device of NSE and as such they are not in possession of the said device from which the document is produced and hence, they cannot be required to produce certificate under Section 65B(4) of the Evidence Act. In this regard, I place reliance on the judgement of Hon'ble Supreme Court in the matter of **Shafhi Mohammad vs**

The State Of Himachal Pradesh [SLP(Crl.) No.2302 of 2017] on 30 January, 2018, wherein it has been inter-alia held that –

> "(*11) The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.*
>
> *(12) Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.*"

Therefore, applying the rationale of the aforesaid judgement on the case under consideration, I do not find merit in the contentions of Noticee.

15. I note that Noticee has contended the independence of investigation done by third party expert and selectively relies upon the opinions given in the Expert Report *i.e.* EY report. Noticee also quoted the limitation provided under EY report. In this regard, I note that, SEBI has requested EY to conduct a forensic review of certain members including the Noticee with the objective to determine

if any member availing Colo facility were given preferential access/treatment at NSE either by possessing confidential information of NSE's TBT architecture or by way of collusion with the exchange officials and/or third parties. In the view of all these circumstances it clearly established that EY's forensic audit is part of SEBI's independent investigation who is the one of the experts of the area of forensic audit and therefore, I am unable to accept this contention of noticee.

16. Noticee has contended that the basis for calculation of days is erroneous considering that all our IP's on those days were connected to secondary server, whereas the fact is that we have multiple TCP-TBT IP's and only a few out of the same were connected to secondary server on those days. In this context, I note that as per the requirement of NSE Guideline (Document no NSEIL/ITSM/INT/072, released on April 16, 2012), Noticee need to inform the exchange before connecting to secondary server. This has to be done on daily basis. It is the number of trading days on which connection is made to secondary server in CD, CM and FO segment, which is to be considered. It can be clarified by illustration through *vide* email dated May 08, 2012, wherein Rahul Dogra (IT Personnel, PACE) wrote to Colo Support that they need to connect secondary server the next day and requested them to allow the same. Colo support of NSE replied "*As discussed you can connect your TBT IP on secondary part for tomorrow only and also request you to revert on Primary server after tomorrow EOD*."(emphasis supplied). Therefore, I find that such contention of Noticee with respect to calculation of days is erroneous, is devoid of any merits.

17. Noticee made a contention regarding not giving cross-examination of the external experts and non-furnishing of documents /informations such as copy of investigation report, copy of Annexures/ attachments as mentioned NSE's *vide* email dated 29.09.2015 and 16.06.2017 copy/ies of complaints received by SEBI pertaining to allegations of malpractices with respect to the colocation facility being provided by the NSE, details of telephonic calls and email communications exchanged between Noticee and NSE as submitted by NSE to SEBI etc. Further, Noticee contended that inspection of aforementioned

documents has not been provided, thereby SEBI caused breach of principles of natural justice. In this regard, I note that documents which have been relied upon in the SCN to make allegations against Noticee, have already been provided to the Noticee as annexures to the SCN. I note that Noticee time and again made a generic request to allow inspection of certain documents that are neither relied upon by SEBI nor are relevant to the proceedings. I am of the view that since the copies of the relevant and relied upon material which is the reports/login data/statements were given to it along with the SCN, no prejudice is caused to Noticee on this account. In this regard, I note that SAT in the matter of **Mayrose Capfin Private Limited vs. SEBI** (decided on 30.03.2012) held that: ".... *the principles of natural justice require that the inquiry officer should make available such document and material to the delinquent on which reliance is being placed in the inquiry. It is not necessary for the inquiry officer to make available all the material that might have been collected during the course of investigation but has not been relied upon for proving charge against the delinquent. No prejudice can, therefore, be said to have been caused to the appellant on this count*...."

18. I note that Hon'ble Supreme Court in **Natwar Singh vs. Director of Enforcement** (2010) 13 SCC 255 held that even the principles of natural justice do not require supply of documents upon which no reliance has been placed by the authority to set the law in motion and further held that the concept of fairness is not a one-way street and that the principles of natural justice are not intended to operate as a roadblock to obstruct statutory inquiries. The Supreme Court held that the principles of natural justice do not supplant the law of land but supplements it and, therefore, duty of adequate disclosure was only an additional procedural safeguard in order to ensure attainment of fairness which has its own limitations. In this regard, the Supreme Court held:

> *"31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles*

of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A notice is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the notice enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute."

19. The aforesaid principles were considered by SAT in **Shruti Vora vs SEBI Appeal(L) No. 28 of 2020 decided on 12th February, 2020** wherein SAT after analyzing the (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 Rules of 1995 held as under:

"16. However, we find that Rule 4 of the Rules does not provide any specific provision requiring the AO to supply copies of any documents along with the show cause notice nor requires the AO to furnish any list of documents upon which reliance has been placed by it. However, the principles of natural justice and doctrine of fair play requires the AO to supply the documents upon which reliance has been placed at the stage of show cause notice. 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."

20. Aforesaid court further held:

"18. 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.

21. In view of the above, since all the documents which were relevant and relied upon in the instant proceedings have been provided in the SCN, the principles of natural justice have been duly complied with, in the instant proceedings and that the interest of Noticee has not been prejudiced in any manner.

22. Now coming to the merits of the case, it is noted that the limited question for determination is whether the Noticee repeatedly continued to login to the secondary server significant times without valid justifications *i.e.* without making any complaint/reference about non-availability of data from TBT primary server. As it has been mentioned in detail in the aforementioned table 1, Noticee connected on to the secondary server for 124 trading days in CD/IRF segment, 319 days in FO segment and 399 trading days in CM segment. PACE was seen to have connected to the secondary server on 92% and 98.51% of the trading days during calendar years 2013 and 2014, respectively. Further, in the CM segment, PACE connected to the secondary server on 72% and 86.47% of the trading days during calendar years 2013 and 2014, respectively. Even in the CD/IRF segment, PACE connected to the secondary server on 33.06% of the trading days during calendar year 2013, including on two occasions, *viz*., on January 21, 2013 and September 12, 2013, wherein it connected to secondary server without connecting to primary server at all. I note that Noticee has not disputed the above facts.

23. The relevant colocation guidelines issued by NSE (Document no SEIL/ITSM/INT/072, revised on April 16, 2012) provides that: "*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*." I note that NSE has provided copies of emails dated December 4, 2012, June 14, 2013 and July 22, 2013, in which NSE had forwarded the said NSE Colocation Guidelines to PACE. The objective of the aforesaid guidelines is mentioned as "*to provide guidance to the member to follow the NSE Colocation Datacenter processes".* Therefore, I note that the aforesaid guidelines indicate that secondary source for TBT data is to be used in the event of non-availability of TBT primary source and that Trading Members should not routinely connect to the secondary server. However, Noticee continued to login to the secondary server without valid reasons. This can be seen from the exceptionally high number of connections (As discussed above in Table No. 1 and Para 22).

24. Further, *vide* e-mail dated March 07, 2014, NSE Colo support team clearly objected to the connecting to the secondary server by Noticee and wrote "*Provide reason for connecting Secondary Online server, since morning you haven't tried connection to primary server.*" I note that Noticee being a member of NSE which has the primary purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities listed and/or traded on its platform and is also the first-level regulator to monitor and regulate the conduct of its members. It is evident from the aforementioned e-mail dated March 07, 2014, NSE's clear advice to Noticee to not to connect to the secondary server unless permitted by NSE. For this purpose, NSE Colo Team sought an explanation from Noticee, the language and the tenor of the said e-mail demonstrate the intent of the NSE to convey its concern/objection to the Noticee's connecting to the secondary server and expectation of positive compliance by the Noticee. Notwithstanding, such clear objection form the NSE Noticee again connected to secondary servers on later occasions without consent of NSE. Based on the connection log of PACE as provided by EY, it is seen that PACE continued to connect to the secondary server throughout 2014

for 133 immediately succeeding days in CM segment and 19 immediately succeeding days in FO segment.

25. I note that in the present case it is established that Noticee had connected to the secondary / fall-back server on several occasions during the reference period without making complaint / reference to NSE and despite NSE's aforesaid reprimands / warnings / advices. I note that Point 2(a) of Chapter V of the Exchange's Byelaws, *inter-alia* provides that "*Trading member shall adhere to the Bye Laws, Rules and Regulations of the Exchange and shall comply with such operational parameters, rulings, notices, guidelines and instructions of the relevant authority as may be applicable.*" Further, for this purpose, reliance has been placed on **Chander Kanta Bansal vs Rajinder Singh Anand** {(2008) 5 SCC 117} wherein SC held that "due diligence" means careful and persistent application or effort. It requires careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. With regard to such obligations of intermediaries, it is relevant to mention that, as an intermediary, they play a crucial and pivotal role not only to their own or their clients' interests but also to the securities market at large. Often, it has been observed that this duty to exercise due care and diligence has come in conflict with the pecuniary interests of the intermediaries. It is seen that it has been a consistent stand of the SAT to seek a balance while dealing with such conflicting interests, with a justifiable tilt in favour of the larger interest of the securities market. For example, In **Madhukar Sheth vs SEBI** [SAT order dated 18.09.2003], Hon'ble SAT held that ".....*No doubt a broker is supposed to protect the interest of his client, but he is also expected to protect the interest of the securities market in which he operates.* ....". Further in **Sharedeal Financial Consultants Private Limited vs Chairman** [2003] 44 SCL 613 it held that "*Due skill, care and diligence in dealing with a client is not a one-time measure. It is a continuing*

exercise and a stock broker is required to take appropriate decision on the basis of the ongoing developments and cannot remain complacent." In **JM Mutual Fund and JM Capital Management Private Limited vs SEBI** [SAT order dated 22.11.2004] it was held that –

"*40. In our view no hard and fast rule or straightjacket method can be applied with regard to the principles of due diligence. Due diligence is nothing but a watchful caution and foresight as the circumstances of the particular case demands. (see P-Ramanathan Aiyar's Law Lexicon 1997 edition page 599)*

41. The due diligence is an obligation to exercise reasonable care. Black's Law Dictionary, 6th edition defines "Due Diligence" at page 457 as follows:"

"*Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case*."

26. Thus, the obligation of '*due diligence*' varies according to a given situation and the same cannot have hard and fast rule or straight jacket method for determination or any single sacrosanct nature. The general standard for the discharge of this obligation is that of a '*man of ordinary prudence*' positioned identically as the concerned intermediary. This does indicate that an intermediary is expected to maintain a standard of due care and diligence as can be expected from an intermediary of ordinary prudence in a similar situation. Therefore, this standard is higher than that of any person of ordinary prudence who does not operate as an intermediary.

27. In this case, connecting to secondary/fall-back server without consent/permission of NSE repeatedly despite several reprimands/warnings/ advices by the Noticee being a member of NSE and registered stock broker is by no standards an act which an intermediary of ordinary prudence would resort to after such reprimands/ warnings/advices from the NSE. I note that, from the

above facts and circumstances of this case, the conduct of the Noticee is blameworthy being in defiance of the obligations to exercise due skill, care and diligence in the conduct of its business.

28. I note that Regulation 9 (f) of SEBI Stock Broker Regulation 1992 states that – "*he shall at all times abide by the Code of Conduct as specified in Schedule II*". In the facts of this case, I find that conduct of Noticee as found in this case clearly indicates that the said trading member failed to abide by standards of integrity, due skill, care and diligence in the conduct of its business and ensure compliance with statutory requirements.

29. From the above facts and circumstances, I find that, that Noticee violated Point 2(a) of Chapter V of NSE bye-laws read with Clause A(5) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations, Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations.

30. Noticee contended that none of the regulation/guideline barred the Noticee's connection to the secondary server. Moreover, it only advised TMs to connect the Secondary Server for smooth functioning. Noticee also submitted that there were no norms/law whatsoever, restricting or regulating the usage of the facility including access to Secondary Server. This contention cannot be accepted as the Colo guidelines specifically states that the trading member can move to the secondary server in case of non-availability of data from primary server. It is evident from the e-mail correspondences between the Noticee and the NSE that the Noticee connected to the secondary server. The said correspondences indicate the concerns of NSE and the requirements that the Noticee needed to follow i.e. connecting to secondary server can be done only if it is unable to connect to the primary server. I note from the email the intent of the NSE to convey its concern /objection to the Noticee's connecting to the secondary server and expectation of positive compliance by the Noticee. The reasonable and legitimate expectation from the Noticee would be that it will adhere to all such rules and procedures as required by NSE from time to time in writing or

otherwise. Noticee has made a contention that the Colo facility had no restrictions on the usage of the secondary server access and there were no norms/law whatsoever, restricting or regulating the usage of the facility including access to Secondary Server. This contention cannot be accepted as the Colo guidelines specifically states that the trading member can move to the secondary server in case of non-availability of data from primary server.

31. Noticee submitted the para 8.2.16.3 of WTM order dated April 30, 2019 in the matter of NSE Colocation (as mentioned in para 9(h) of the order). In this regard, I note that Noticee intentionally cited the half of the para of the aforesaid WTM order. If we read the para 8.2.16.3 of aforesaid WTM order in entirely we came to know that order in itself provided that it is the legate expectation on part of TMs to ensure that they act in good faith. For the purpose of reference extract of the para 8.2.16.3 has been reproduced in herein below:

   To ensure that members could easily and quickly switch to the Secondary Server if the primary server failed, the backup server was always in active-active mode —i.e., the members would be able to connect to the Secondary Server at all times and receive data. However, it was expected that members would act in good faith and only connect to the Secondary Server when the primary server was down, and not otherwise —this was set out in the Colocation Guidelines issued by the Noticee. There was no form of access control employed in this regard, and members did not need to be 'enabled' by the Noticee to be able to connect to the Secondary Server.

32. Noticee contended that for the purpose of calculating instances, they ought to be considered only as singular instance instead of counting total number of days connected to the secondary server. In this regard, I note that as per the NSE guideline it is the duty of the Noticee to inform the NSE before connecting to secondary server and this obligation is not for once. This obligation arises each day whenever Trading day open. The relevant colocation guidelines issued by NSE (Document no SEIL/ITSM/INT/072, revised on April 16, 2012) provides that: "….. *in case of non-availability of data from TBT primary source they can move to secondary source*." This implies that at the beginning of the

day the broker has to first try to connect to the primary server and in case of any issues they could move to the secondary server. A member shall act with due skill, care and diligence in the conduct of all his business. This is done to maintain the integrity of the market and keep investors' morale high so that they continue to invest with confidence. Therefore, I note that continuously connecting to the secondary server is in violation of the aforesaid NSE guidelines and the such contention of Noticee is of bereft of any merits.

33. Noticee contended that there is discrepancy in the observation that during the review period PACE had raised issues w.r.t NSE TBT server in only 19 instances. Noticee contended that as per the records there was 23 instances wherein Noticee filed complaint. Further, while counting SCN failed to take into account on those mail where telephonic complaint has been done and recorded by other 15 mails. In this regard, I note that even if I consider all the instances as suggested by Noticee i.e. 39 days. it is seen that during the reference period, PACE connected for more than 300 days on secondary server, it complained only on 39 instances. It is inconceivable that a TM would face disconnections on such large number of occasions, yet generally not complain to the concerned Exchange. While the evidence produced by PACE do indicate that on certain occasions, it was facing disconnection issues, such instances were very limited as can be seen from the number of complaints filed by PACE. I note that such contention Noticee is of no use since Noticee has informed the NSE only few times and connected to secondary server for a substantial number of days.

34. Noticee submitted that *vide* Circular dated September 19, 2016, NSE announced its intention to discontinue TCP-based TBT data broadcast with effect from November 30, 2016. Hence, the subject matter of connecting to secondary server has become redundant. In this regards, I note that the present proceeding initiated against the Noticee with reference to any violation commited by Noticee during the reference period when the relevant NSE Colo guidelines is in enforce. Therefore, such contention of Noticee is bereft of merits.

35. The Noticee has not disputed its number of connections to the secondary server and in fact, the same was confirmed from the logs provided by the Noticee itself. I note that it is a settled position that the onus is upon the Noticee to prove its claim that complaints/references were made on occasions when it had connected to the secondary server and that it had done so with the consent /permission of NSE. However, even if we take the time period after the e-mail dated March 07, 2014 it is seen that PACE continued to connect to the secondary server throughout 2014 for 133 immediately succeeding days in CM segment and 19 immediately succeeding days in FO segment. Therefore, I cannot accept such contentions of the Noticee.

36. I note that the material on record does not establish any unfair gain or advantage which may have accrued to Noticee as a result of connecting to the secondary server. I also note that Noticee was not reprimanded by NSE for the secondary server connections. The material on record establishes that Noticee connected to secondary server, but does not state whether these were early connections vis-à-vis other brokers. There is also no material to say that the said connection could have benefitted Noticee in any manner.

37. In view of the above, it cannot be said that Noticee employed a device, artifice or scheme which would operate as a fraud upon investors. Thus, it cannot be held that the Noticee violated provisions of Regulations 3(b), 3(c), and 3(d) of PFUTP Regulations read with Sections 12A(a), 12A(b) and 12 A(c) of SEBI Act.

38. Regulation 4(1) of PFUTP Regulations states that "*without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.*" I note that Regulation 3 prohibits certain dealings in securities, whereas regulation 4 prohibits manipulative, fraudulent and unfair practices. While 'unfair trade practice' is not defined in the PFUTP Regulations, Supreme Court in **SEBI vs Kanaiyalal Baldev Bhai Patel** (2017) 15 SCC 1 held that: "...*Although unfair trade practice has not been defined under the regulation, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear-cut generalized definition of the*

'unfair trade practice' may not be possible to be culled out from the aforesaid definitions. Broadly trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions. It is to be noted that unfair trade practices are not subject to a single definition; rather it requires adjudication on case to case basis. Whether an act or practice is unfair is to be determined by all the facts and circumstances surrounding the transaction. In the context of this regulation a trade practice may be unfair, if the conduct undermines the good faith dealings involved in the transaction. Moreover, the concept of 'unfairnesses' appears to be broader than and includes the concept of 'deception' or 'fraud'. Further, Supreme Court in the case of **SEBI vs Rakhi Trading Private Limited** (2018) 13 SCC 753, held that: "*Having regard to the fact that the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not have to labour much on the meaning of unfair trade practices in securities. Contextually and in simple words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market…."*

39. In light of above findings of Supreme Court and facts and circumstances of the present case, I am of the view that, the practice of routinely connecting to the secondary server against the clear guidance given by NSE amounts to an unfair trade practice. The secondary server was meant for use in case of non-availability of data from the primary source. By circumventing the primary source on a regular basis, Noticee engaged in conduct which undermined the trading system set up to provide fair and equitable access to all brokers who connected to it. Hence, Noticee, by such conduct, engaged in unfair trade practice in violation of Regulation 4(1) of the PFUTP Regulations.

40. From the foregoing paragraphs, I find that Noticee has failed to comply with aforesaid guidelines and therefore, I note that the Noticee has violated the provisions of point 2(a) of Chapter V of NSE bye-laws r/w clause A(5) of the Code of Conduct specified under Schedule II r/w regulation 9(f) of the Stock Broker Regulations, 1992, clause A(2) of the Code of Conduct specified under

Schedule II r/w regulation 9(f) of the Stock Broker Regulations, 1992 and regulation 4(1)of the PFUTP Regulations, 2003.

Issue II: If yes, whether the failure, on the part of the Noticee would attract monetary penalty under Section 15HA and 15HB of the SEBI Act read with Regulations 26(xvi) and 26(xx) of Stock Broker Regulations?

&

Issue III: If yes, what would be the monetary penalty that can be imposed upon the Noticee taking into consideration the factors stipulated in Section 15J of the SEBI Act read with Rule 5(2) of the Adjudication Rules?

41. I am of the view that both of issue II & III have been taken together. I note that it has already been established that Noticee's conduct is in violation of Point 2(a) of Chapter V of NSE bye-laws read with Clause A(5) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations, Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations, and Regulation 4(1) of the PFUTP Regulations 2003. I am of the view that it warrants imposition of monetary penalty, under sections 15HB and 15HA of the SEBI Act, on Noticee. For this purpose, reliance has placed on **Chairman**, **SEBI vs Shriram Mutual Fund** (2006) 5 SCC 361, wherein it held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and therefore, the intention of the parties committing such violation becomes immaterial.".*

42. Having regard to the factors listed in section 15J of SEBI Act and in the light of Supreme Court's judgment in the matter of **SEBI vs Bhavesh Pabari** (2019) 18 SCC 246 it is noted that from the material available on record, any quantifiable gain or unfair advantage accrued to Noticee or the extent of loss suffered by the investors as a result of the default in this case cannot be computed. There are no investors complaints on record arising out of such defaults. The NSE Co-Location Guidelines dated April 16, 2012, permitted connection to secondary server when the TBT primary server data was not

available. The only default on the part of the Noticee is that it connected to the secondary server repeatedly without making complaint/reference to NSE. Further, PACE was not reprimanded by NSE for connections made to server. I note that, taking into account the facts and circumstances in the present matter, the facts of the case clearly establish the violation committed by Noticee and I consider it necessary to impose monetary penalty which would act as deterrent to Noticee in future.

E. ORDER

43. After taking into consideration all the facts and circumstances of the case, gravity of violations and material available on record, I, in exercise of powers conferred upon me under Section 15I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose a penalty of Rs. 5,00,000/- (rupees five lakh only) under section 15HA of the SEBI Act and 1,00,000/- (rupees one lakh only) under section 15HB upon the Noticee i.e. PACE Stock Broking Services Pvt. Ltd. for violation of Point 2(a) of Chapter V of NSE bye-laws read with Clause A(5) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations and Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations. I am of the view that the said penalty is commensurate with the violation committed by the Noticee.

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

    ENFORCEMENT > Orders > Orders of AO > PAY NOW

45. The said demand draft or forwarding details and confirmations of e-payments made (in the format as given in table below) should be forwarded to "The

Division Chief, Enforcement Department (EFD1 – DRA II), Securities and Exchange Board of India, SEBI Bhavan, Plot No. C –4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai –400051.

1. Case Name:	
2. Name of payee:	
3. Date of payment:	
4. Amount paid:	
5. Transaction no.:	
6. Bank details in which payment is made:	
7. Payment is made for: (like penalties/ disgorgement/ recovery/ settlement amount etc.)	

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

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

Date: April 29, 2022
Place: Mumbai

VIJAYANT KUMAR VERMA
ADJUDICATING OFFICER