BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/GR/BM/2021-22/13572]

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

Master Capital Services Limited (SEBI Registration No.: INZ000210539)

having address at: A-852-A, Basement, Sushant Lok, Phase-I, Gurugram – 122002.

In the matter of NSE Co-Location.

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 (**NSE**). In the wake of allegations of preferential access to Tick-by-Tick (**TBT**) data feed given by NSE to certain trading members (**TMs**), the matter was taken up for investigation by SEBI. Master Capital Services Limited (hereinafter referred to as "**the Noticee/ MCSL**") was one of the trading members identified for comprehensive investigation (including forensic audit) for primary and secondary server connects. Deloitte Touche Tohmatsu India LLP (hereinafter referred to as '**Deloitte**') was entrusted with the forensic audit of the Noticee, which submitted the final report to SEBI during September 2019.

2. SEBI initiated adjudication proceedings under Sections 15HA of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "**SEBI Act**") and 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**") against the Noticee. Adjudication proceedings have been initiated against the Noticee for the alleged violation of provisions of point 2(a) of Chapter V of NSE bye-laws read with clauses A(2) and A(5) 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 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**") and Sections 12A(a), 12A(b) & 12A(c) of the SEBI Act.

APPOINTMENT OF ADJUDICATING OFFICER

3. SEBI appointed the undersigned as Adjudicating Officer (hereinafter referred to as "**AO**") under Section 15I of the SEBI Act read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as the '**Adjudication Rules**') vide order dated July 20, 2020 to inquire into and adjudge under section 15HA and 15HB of the **SEBI Act** for the aforesaid alleged violations against the Noticee.

SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice No. EAD-4/ADJ/GR/RR/OW/2270/1/2021 dated January 28, 2021 (hereinafter be referred to as, the "**SCN**") was served upon the 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 of Section 15HA and 15HB of SEBI Act, 1992, for the alleged violations 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.

5. The allegations levelled against the Noticee in the SCN are summarized as below:

a) Connection to secondary server:

i. Deloitte, in its report, had stated that NSE Colo team had sent an email dated December 2, 2011 to MCSL, which, inter alia, stated that "Members are not supposed to connect to secondary server until exchange intimates to do so". Further, Clause 2 of the NSE colocation guidelines from NSE 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. Since Trading Members (TMs) 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.

ii. Further, during the statement recording, the representatives of MCSL acknowledged that they had received NSE Colocation Guidelines from NSE, and had reviewed the same.

iii. Secondary server was provided by NSE in order to enable members to connect to the same in case of disconnection / failure to connect to primary server. Therefore, it's not considered to be normal when brokers repeatedly connect to secondary server without justifiable cause.

iv. From February 2012, TBTCOLO27 and TBTCOLO17 were the secondary servers in the FO segment and the CM segment, respectively. Further, since the restriction on secondary server came in to effect from 2012, SEBI, Investigation had analysed data from 2012 onwards till introduction of MTBT (Tick by Tick Data via multicast) in the respective segments. Segment wise secondary server connects by MCSL is tabulated below:

FO Segment:

Year	Total number of trading days**	Number of days connected to secondary server	%age
2012	251	31	12.35%
2013	250	206	82.40%
2014*	67	50	74.63%

CM Segment:

Year	Total number of trading days**	Number of days connected to secondary server	%age
2012	252	13	5.16%
2013	250	12	4.80%
2014*	207	1	0.48%

* 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

v. As seen from the table above, in the FO segment, MCSL was seen to have connected to the secondary server on 82.40% and 74.63% of the trading days during calendar years 2013 and 2014, respectively. Further, it was observed that during the period under review, MCSL had raised colocation related issues with NSE only on two occasions, viz., emails dated January 14, 2011 and April 10, 2013. However, Deloitte analyzed the complaint log data provided by NSE for MCSL, and noted only seven documented complaints by MCSL regarding performance issues or disconnection related issue for TBT TCP IP during the review period. Therefore, MCSL did not have sufficient reasons to connect to secondary server, and therefore, it was alleged that the Noticee has violated the NSE Colocation Guidelines read with Point 2(a) of Chapter V of NSE bye-laws. Further, as MCSL connected to the secondary server repeatedly without valid reason, it has indulged in unfair trade practices, therefore, it was alleged that the Noticee has violated Regulations 3(b), 3(c), 3(d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations,

2003 (hereinafter referred to as “PFUTP Regulations”), read with Sections 12A(a), 12A (b) & 12 A(c) of SEBI Act.

vi. It was contended by MCSL that Omnesys was managing some of its servers. However, Omnesys, in its statement dated August 14, 2019 stated that *“We connected the NSE servers as per details provided by the broker. The decision to connect to the secondary server was always taken by the broker and we would act as per instructions of the broker”*. In this regard, it was noted that Omnesys was appointed by the Noticee, and it was primary obligation of the Noticee to adhere to the NSE colocation Guidelines.

vii. As the number of secondary server connects of MCSL in the CM segment was not very significant, Investigation had not drawn any adverse findings in this regard.

b) Connection to secondary server despite NSE emails:

i. Deloitte in its report has stated that on two occasions, viz., on April 18, 2012 and May 18, 2012, NSE had asked MCSL to connect to the primary server instead of secondary server. Deloitte stated in its report that despite such email instruction from NSE, MCSL continued to connect to the secondary server. In fact, it was observed that MCSL continued to connect to secondary server in FO segment on the subsequent days, viz., May 21, 2012, May 23, 2012 and May 25, 2012. Therefore, MCSL did not comply to the email instructions from NSE and continued to connect to the secondary server.

ii. Point 2 (a) of Chapter V of the Exchange's Byelaws states 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."*

iii. In view of the above, it was alleged that the Noticee has violated the Exchange Bye Laws and hence violated Clause A(2) and Clause A(5) of Code of Conduct as specified in Schedule II of Regulation 9 of Stock Brokers Regulations.

6. **Submissions by the Noticee:**

a) I note from available records that the SCN was duly delivered to the Noticee. Thereafter, the Noticee, vide letter dated March 8, 2021, requested for inspection of documents and cross examination of entities. The said request of the Noticee was not acceded to. The Noticee was granted an opportunity of hearing on April 20, 2021, vide hearing notice dated March 23, 2021 which was postponed because of prevailing circumstances owing to Covid-19 pandemic and was rescheduled to September 14, 2021, vide hearing notice dated September 1, 2021. Meanwhile, the Noticee, vide letter dated April 12, 2021, submitted the reply to the SCN.

b) The Authorised Representatives ('ARs') of the Noticee attended the hearing on September 14, 2021 through WebEx video conference and reiterated the written submissions dated April 12, 2021 submitted by the Noticee. The ARs undertook to make post hearing written submissions in the matter within one week of the hearing. The Noticee made post hearing written submissions in the matter vide letter dated September 21, 2021. The Noticee inter alia made the following submissions vide the aforesaid letters dated April 12, 2021 and September 21, 2021:

i. Defiance of principles of natural justice – the basic requests of the Noticee for granting complete inspection of the documents referred to and relied upon by SEBI, and for cross-examining the external experts and such persons whose reports/statements are relied upon by SEBI for drawing adverse allegations qua the Noticee, were denied. It is submitted that, in such event, such documents, reports and statements ought to be discarded and not be relied upon by SEBI.

ii. *Inordinate delay – due to passage of time (of more than 9 years) and absence of guidelines for storing data, the Noticee also is unable to retrieve relevant records pertaining to complete details of its servers and connections. On the other hand, even SEBI or NSE do not have access to various crucial records. On the ground of inordinate delay itself, the present proceedings ought to be dismissed.*

iii. *Limitations in the material relied upon by SEBI appointed Expert – the Deloitte Spectre Report contains fatal qualifications and limitations in respect of availability of data. Even within its limited findings, there is nothing found against the Noticee. Important links that invalidate the very allegations against the Noticee are missing.*

iv. *Lack of data available with NSE itself – There is no data of the Noticees' latency/speed testing. There is also no data of the Noticee/Omnesys trying and failing to connect to primary server on the relevant days.*

v. *No regulatory framework for the Colo facility – the colocation facility, being extended as an operational step for enhancing efficiency of data processing, had no rules, regulations, byelaws or circulars governing its usage. NSE had only issued a welcome message, followed by guidelines to acquaint the investors with certain 'processes' for using the facility. There were no norms/law whatsoever, restricting or regulating the usage of the facility including access to Secondary Server.*

vi. *Even NSE admitted to the absence of any restrictions over access to Secondary Server – as there were no rules, regulations or law over connecting to the Secondary Server. Moreover, the guidelines / process notes issued by NSE expect the trading members "to always check" that the Secondary Server parameters are "working fine." Since it was a permitted activity, NSE also never monitored such connections by the brokers. A trading member cannot undertake such "checking"*

without actually receiving data packets, as trade information would automatically flow once connection is made.

vii. *No advantage in connecting to the Secondary Server – in any event, there was not better placed on advantageous as compared with the primary server. There was no way the Noticee, or any other trading member could determine its rank in receipt, and even if a trading member had received early data, the same would not result in any advantage as 'receipt of tick' is not the same as 'dissemination of a tick'.*

viii. *Genuine issues faced – the Primary Server had constant issues of disconnection, delay, buffering and packet loss, etc., which led the Noticee (and also large number of other brokers) to connect to the Secondary Server. The same was the very reason why NSE gave unfettered access to the Secondary Server. It is submitted that the Noticee only connected to the Secondary Server when the Primary Server failed, or when it had to check that the Secondary Server parameters were working fine.*

ix. *There is no allegation or any record provided by SEBI to show that the Noticee connected to Secondary Server for regular trading or for continuous receipt of data. The Noticee only connected to check the parameters and for such connection as directed by the NSE, the Noticee cannot be equated with other members who relied and connected to the Secondary Server for continuous connection and data feed. The Noticee had connected to the Secondary Server for receipt of data and trading only when the primary server faced issues. However, merely for such connection which is in line with the Circular / Colo Guidelines, which is stated to be in breach by the Noticee, there cannot be any wrong doing on the part of the Noticee.*

x. *While there was a detailed investigation conducted by SEBI and forensic audit done by various external agencies, SEBI did not consider*

it relevant to identify this issue on the nature of connection to the Secondary Server which would have identified the number of connections by the members for regular connectivity and usage and differentiated the members like the Noticee who only connected to check the connection and confirm if the parameters are working fine. There was no other way of checking the connection by any member.

xi. *The Noticee (and many other trading members) placed various complaints. However, undisputedly, NSE often failed to deal with the complaints of the trading members.*

xii. *Intention of Noticee – SEBI investigation reveals that it suspects that the trading members were accessing Secondary Server to receive advantage through 'early receipt of data'. Had the Noticee intended so / been aware of the same, it would have attempted to login 'first' to the Secondary Server. There is not one instance alleging the same against the Noticee. Moreover, while interactive connectivity was available at a speed of 400 msg/sec, the Noticee only subscribed to the speeds of 100 msg/sec and 200 msg/sec. The learned Member ought to evaluate the present matter taking these circumstances into consideration.*

xiii. *The Noticee cannot be made responsible for actions of Omnesys – had the Noticee been aware of the alleged advantage of logging in to the Secondary Server, the Noticee would have also tried to login first, crowded out the trading members and also connect to the Secondary Server in other segments of CM and CD (like another trading member viz. OPG as can be seen from the WTM Order against OPG). Moreover, it was Omnesys that managed the servers of most of the TMs at the relevant time and its role cannot be undermined. SEBI cannot simply rely upon the statements of Omnesys (an entity in which NSE was the 2nd largest shareholder) without any supporting proof of emails from the Noticee, and all the more so, since no opportunity was given to the Noticee to cross-examine Omnesys.*

xiv. *No violation of the PFUTP or Brokers Regulations - Any of the ingredients of the charges under Regulations 3 and 4 of the SEBI PFUTP Regulations are not applicable to the present case. The trades in question were conducted in the normal course of business on the floor of the stock exchange. There is no allegation with regards the trades placed by the Noticee. The entire matter pertains to the access to the Secondary/backup Server of the NSE, for placing genuine trades.*

7. As the inquiry in the matter has been completed, I now proceed to decide the case on the basis of SCN issued, replies made by the Noticee and material available on record.

CONSIDERATION OF ISSUES AND FINDINGS

8. The issues that arise for consideration in the instant matter are:

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?*

Issue No. 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 No. 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?*

9. 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:

SEBI ACT

CHAPTER VA

PROHIBITION OF MANIPULATIVE AND DECEPTIVE DEVICES, INSIDER TRADING AND SUBSTANTIAL ACQUISITION OF SECURITIES OR CONTROL

Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

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.*

SEBI Act:

Penalty for fraudulent and unfair trade practices.

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.*

Penalty for contravention where no separate penalty has been provided.

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.*

SEBI (STOCK-BROKERS) REGULATIONS, 1992

CHAPTER VI

PROCEDURE FOR ACTION IN CASE OF DEFAULT

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.

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?***

10. I note that the Noticee in his submissions has raised the issue regarding non furnishing of documents/ information causing breach of Principle of Natural Justice and prejudice to it. In this respect, I note that documents which have been relied upon in the SCN to make allegations against the Noticee, have been provided to the Noticee as annexures to the SCN. In this regard, I note that Hon'ble 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...."*

11. I also note that Hon'ble SAT, in its order dated February 12, 2020, in the matter of Shruti Vora vs. SEBI had held that: *"Reliance was also made of a decision of the Supreme Court in Union of India and Others vs E. Bashyan (1988) 2 SCC 196 which has no bearing to the controversy involved in the present context, in as much as, the said decision relates to a disciplinary proceedings wherein the Supreme Court observed that the inquiry report was required to be made available to the delinquent. An inquiry report is totally distinct and different from an investigation report. The inquiry report considers all the materials in the inquiry proceedings which form the basis of the final order and therefore the said report is required to be made available to the delinquent. In the instant case, the show cause notice relies upon certain documents which have been made available. Thus the investigation report is not required to be supplied".*

"The learned counsel has also placed reliance upon a minority view of this Tribunal in Price Waterhouse vs Securities and Exchange Board of India decided by this Tribunal in Appeal No. 8 of 2011 on June 1, 2011 wherein it was observed that fairness demands that the entire material collected during the course of investigation should be made available for inspection to the person whose conduct was in question and that said material should also be supplied. In our opinion, the said minority view is directly against the decision of the Supreme Court in Natwar Singh case (supra)".

"A bare reading of the provisions of the Act and the Rules as referred to above do not provide supply of documents upon which no reliance has been placed by the AO, nor even the principles of natural justice require supply of such documents which has not been relied upon by the AO. We are of the opinion that we cannot compel the AO to deviate from the prescribed procedure and supply of such documents which is not warranted in law. In our view, on a reading of the Act and the Rules we find that there is no duty cast upon the AO to disclose or provide all the documents in his possession especially when such documents are not being relied upon."

12. Further, the Hon'ble SAT in the matter of Anant R Sathe Vs SEBI (Appeal No. 150 of 2020) vide Order dated July 17, 2020 has reaffirmed the principle elucidated in the judgment of Shruti Vora's case, which was reproduced herein above and ruled that: *"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".*

13. 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 the Noticee has not been prejudiced in any manner. Therefore, I am now proceeding further and examining the matter on merits.

14. The charge against the Noticee is based on the fact that it frequently logged in to secondary server in FO segment during the investigation period without any sufficient reason during the period of investigation. In the FO segment, Noticee connected to secondary server on 206 and 50 days respectively during the year

2013 and 2014 (till April 7), which works out to 82.40% and 74.63% of the total trading days. I note that the Noticee has not disputed the above facts.

15. I further note from the Deloitte report that MCSL had connected to the secondary server, "TBTCOLO27" instead of the primary server for 196 days from May 18, 2012 to February 18, 2014. I also note from the Deloitte report that there were 8 instances of first connects made by the Noticee in CM segment in 2012 and 2013 and none in FO segment.

16. I note that, 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."* The 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, the Noticee continued to login to the secondary server without valid reasons during 2012 and 2013 in FO segment. This can be seen from the exceptionally high number of connections.

17. I further note that during the period under review, Master Capital had raised colocation related issues with NSE only on two occasions, viz., emails dated January 14, 2011 and April 10, 2013. However, Deloitte analyzed the complaint log data provided by NSE for Master Capital, and noted only seven documented complaints by Master Capital regarding performance issues or disconnection related issue for TBT TCP IP during the review period.

18. Further, it is noted that NSE vide email dated May 18, 2012 clearly instructed the Noticee not to connect to secondary server without exchange intimation. However, it is observed that Notice continued to connect to secondary servers on the immediately succeeding days, i.e., on May 21, 2012, May 23, 2012 and May 25, 2012. In 2013 and 2014 (till the introduction of MTBT in the FO segment on April 7, 2014), the Noticee connected to the secondary server on

256 out of 317 trading days, i.e., 80.75% of the trading days without having sufficient reasons to connect to secondary server. Therefore, I note that the Noticee connected frequently to the secondary server in violation of the NSE colocation guidelines, thereby also failing to exercise due skill care and diligence in conducting its trading operations.

19. Noticee has made a contention that on the ground of inordinate delay itself, the present proceedings ought to be dismissed. I find it relevant to 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. Subsequently, in the present matter SEBI has contemplated various actions including prosecution and adjudication proceedings.

20. In this context I find it relevant to refer to the order passed by Hon'ble SAT in the case of 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."*

21. Further, I would like to rely upon the judgement of Hon'ble SAT in the case of Ravi Mohan & Ors. vs. SEBI (SAT Appeal No. 97 of 2014, DoD 16/12/2015) wherein it was held that : -

".....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no.114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central

Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice.....".

22. Considering the facts and circumstances of the matter, as aforesaid, I find no merit in the arguments of the Noticee in this regard.

23. 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. Further, NSE, in its e-mail dated May 18, 2012, advised the Noticee to connect to primary server and not to connect to the Secondary Server without exchange intimation. 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. In this case, it is established that the Noticee had connected to the secondary server on several occasions and the same was not disputed by the Noticee.

24. It is noted that in the FO segment, MCSL was seen to have connected to the secondary server on 82.40% and 74.63% of the trading days during calendar years 2013 and 2014, respectively. Further, it was observed that during the period under review, MCSL had raised colocation related issues with NSE only

on two occasions, viz., emails dated January 14, 2011 and April 10, 2013. However, Deloitte analyzed the complaint log data provided by NSE for MCSL, and noted only seven documented complaints by MCSL regarding performance issues or disconnection related issue for TBT TCP IP during the review period. Further I also note that, 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." The guidelines indicate that secondary source for TBT data is to be used in the event of non-availability of data from TBT primary source and that Trading Members should not routinely connect to the secondary server. As the Noticee continued to login to the secondary server without valid reasons during the period April 16, 2012 to May 17, 2012, it is noted that NSE vide email dated May 18, 2012, clearly instructed the Noticee not to connect to secondary server without exchange intimation. However, it is observed that Notice continued to connect to secondary servers even on the immediately succeeding days on several occasions, i.e., on May 21, 2012, May 23, 2012 and May 25, 2012. The Noticee connected to the secondary server on 256 out of 317 trading days, i.e., 80.75% of the trading days in 2013 and 2014 (till the introduction of MTBT in the FO segment on April 7, 2014) without having sufficient reasons to connect to secondary server and consistently failed and neglected to comply with the instruction of the exchange.

In this connection, the Noticee has now made a submission that it only connected to the Secondary Server when the Primary Server failed, or when it had to check that the Secondary Server parameters were working fine. In other words Noticee has also not denied the said fact of connecting to the Secondary Server instead of Primary Server as alleged.

Further, I note that Point 2 (a) of Chapter V of the Exchange's Byelaws states 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."*

In view of the above, I do not agree with the aforesaid contention of the Noticee because it is very clear that the Noticee had been instructed not to connect to the secondary server without the intimation to the exchange even when the said NSE guidelines existed but it was otherwise.

25. Noticee has made a contention that the Noticee cannot be made responsible for actions of Omnesys as it was Omnesys that managed the servers of most of the TMs at the relevant time. I find no merit in the arguments of the Noticee in this regard as I note that Omnesys was appointed by the Noticee and it was Noticee's obligation to comply with the NSE Colocation Guidelines.

26. 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. "*

27. Thus it is established that the 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 and Clause A(2) of the Code of Conduct specified under Schedule II read with regulation 9(f) of the Stock Broker Regulations.

28. Noticee is also alleged to have induged in unfair trade practice by repeatedly connecting to the secondary server. In this regard, Noticee has placed reliance to the Adjudication Orders bearing no. ORDER/SS/SK/2019-20/4608 dated September 25, 2019, in the matter of SMC Global Securities Ltd(SMC), ORDER/MC/DS/2020-2021/9097 dated September 22, 2020, in the matter of Advent Stock Broking Pvt. Ltd. and ORDER/AP/SK/2020-2021/9661 dated November 25, 2020, in the matter of Crosseas Capital Services Private Limited. Noticee has contended that in orders in above cases, it is categorically stated that the trading members/noticees have not indulged in any banned, prohibited or fraudulent activities. Noticee has also stated that the noticees / trading members made "no unfair or illicit gains" out of the Secondary Server

connections and there is no alleged advantage accrued over other trading member's by establishing Secondary Server connections;

29. In this regard, I note that the material on record does not establish any unfair gain or advantage which may have accrued to the Noticee as a result of connecting to the secondary server. 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 and there is also no material to say that the early connection could have benefitted the Noticee in any manner. Further, it is noted that the Noticee made only 8 first connects in 2012 and 2013 in CM segment and none in FO segment.

30. In view of the above, it cannot be said that the 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.

31. With respect to the charge under Regulation 4(1) of the PFUTP Regulations, which prohibits indulgence in a fraudulent and unfair trade practice in securities, the material on record does not bring out any instance where the Noticee has indulged in fraudulent and unfair trade practice in securities. In my view, connecting to secondary server without making any complaint / reference to NSE i.e. valid reason alone cannot be deemed to be per se fraudulent.

32. I note that Regulations 3 and 4 of the PFUTP Regulations are not applicable to the present facts of the case as neither the Investigation Report did not find anything to show any collusion between the Noticee and NSE nor did it record a finding that Noticee gained any unfair advantage / gain on Secondary Servers. In the absence of any evidence in this regard, I am unable to conclude that there is an existence of "fraud" in this case. Therefore, the present case does not fall within any of the abovementioned clauses of the PFUTP

Regulations and as such, the charge under PFUTP Regulations is not made out.

Issue No. 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?***

&

Issue No. 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?***

33. As it is established that 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, I am of the view that it warrants imposition of monetary penalty under Section 15HB of the SEBI Act on the Noticee, text of which is reproduced as under:

SEBI Act:

Penalty for contravention where no separate penalty has been provided.

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.*

34. While determining the quantum of penalty under Section 15HB the SEBI Act, the following factors stipulated in Section 15J of the SEBI Act, have to be given due regard:

a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

35. I note that the material on record does not bring out any gains made or unfair advantage availed or loss caused to investors by the Noticee due to the aforesaid violations. The Noticee has connected to the secondary server connection roughly on 81% or 256 days out of total around 317 trading days in the FO segment during the period 2013 and 2014 (till April 7, 2014) even after emails from NSE. Therefore, it is established that the Noticee has failed to comply with aforesaid guidelines and hence, violated the aforesaid provisions of the NSE bye-law and Code of Conduct specified under Stock Broker Regulations, 1992.

ORDER

36. 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.3,00,000/- (Rupees Three Lakh only) under section 15HB of the SEBI Act upon the Noticee i.e. Adjudication Order in respect of Master Capital Services 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.

37. 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

38. 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 III), Securities and Exchange Board of India, SEBI Bhavan, Plot No. C –4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai –400 051.

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

39. 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.

40. 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: September 29, 2021 **G RAMAR**

Place: Mumbai **ADJUDICATING OFFICER**