**QJA/GBR/MIRSD/DOP/29108/2023-24**

**SECURITIES AND EXCHANGE BOARD OF INDIA**

**ORDER**

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**UNDER SECTION 12(3) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATION 27 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008**

**Against**

| NAME OF THE NOTICEE | SEBI REGISTRATION NO. |
|---|---|
| **Adroit Commodities Services Private Limited** | **INZ000052535** |

**In the matter of trading at the National Spot Exchange Limited**

**BACKGROUND**

1. On September 24, 2018, the Securities and Exchange Board of India (**"SEBI"**) appointed a Designated Authority ( **"DA"**) to enquire into and to submit a report on the trades alleged to have been executed by Adroit Commodities Services Private Limited ('**Adroit'**/'**Noticee'**) as a stock broker bearing Registration No. INZ000052535 on the spot exchange platform provided by the National Spot Exchange Limited (**"NSEL"**) resulting in the possible violation of Regulations 5(e), 9(b) and 9(f) of the SEBI (Stock Brokers) Regulations, 1992 (**"Stock Brokers Regulations"**) read with Schedule II of the SEBI (Intermediaries) Regulations, 2008 ( **"Intermediaries Regulations"**).

2. Upon conclusion of the enquiry in the manner envisaged under Regulation 25 of the Intermediaries Regulations, the DA submitted a report dated July 27, 2020 (**"Enquiry Report"**) in terms of Regulation 27 of the Intermediaries Regulations as it read at the relevant point of time, recommending that the registration of the Noticee as a stock broker may be cancelled.

3. The relevant excerpt of the Enquiry Report is reproduced below:

> *"40. In view of the facts and circumstances of the case and material placed before me, I am of the view that the Noticee is not a 'fit and proper' person in terms of Regulation 5(e) read with Regulation 27(iv) of the Broker Regulations read with Schedule II of the Intermediaries Regulations. Therefore, in terms of Regulation 27 of the Intermediaries Regulations, I recommend that the registration of the Noticee, viz. Adroit Commodities Pvt. Limited (SEBI Registration Nos. INZ000052535] as a commodities derivatives broker may be cancelled."*

4. A notice dated August 11, 2020 (**"SCN"**) enclosing the Enquiry Report and certain other documents referred to in the said SCN, were sent to the Noticee in terms of Regulation 28(1) of the Intermediaries Regulations, as applicable at the relevant time, calling upon it to show cause as to why the recommendation of the DA cancelling its certificate of registration should not be accepted or any other action as may be considered appropriate, should not be initiated against it. The Noticee was further advised to submit its reply, if any, within 21 days from the date of receipt of the said SCN. In response, the Noticee filed its preliminary submissions vide letter dated August 31, 2020.

5. Regulation 27 of the Intermediaries Regulations was amended with effect from January 21, 2021. Consequently, the procedure for action on receipt of the recommendation of the DA has been incorporated in the amended provisions of Regulation 27 of the Intermediaries Regulations. These proceedings are being considered under the amended provisions of Regulation 27 of the Intermediaries Regulations.

6. It would be relevant at this juncture to refer to certain other developments that ensued and that have a bearing on the case under consideration. Against five separate orders earlier passed by SEBI in February 2019 rejecting the applications filed by five separate entities seeking registration as commodity brokers. The five entities filed separate appeals before the Securities Appellate Tribunal ("**SAT**") which, vide its common order dated June 9, 2022, remanded the matters for being reconsidered within six months from June 9, 2022 and, *inter alia,* held as under:

*"…*

*42...The matters are remitted to the WTM to decide the matter afresh in the light of the observations made aforesaid in accordance with law after giving an opportunity of hearing to the brokers. All issues raised by the brokers for which a finality has not been reached remains open for them to be raised before the WTM. It will be open to the WTM to rely upon other material such as the complaint letters of NSEL, EOW report, EOW charge sheet, etc. provided such copies are provided to the brokers and opportunity is given to rebut the allegations. Such additional documents relied upon by the respondent should form part of the show cause notice for which purpose, it will be open to the WTM to issue a supplementary show cause notice..."*

7. On the basis of this order and subsequently other orders passed in a similar set of cases by the SAT, the relevant additional documents were provided to the Noticee vide a supplementary notice dated February 17, 2023 (**"SSCN"**) with an advice to submit its reply/ comments/ clarifications in addition to its earlier replies, if any, within 15 days of the receipt of the SSCN. The SSCN along with the original SCN, is hereinafter collectively referred to as the **"SCNs"**. In response thereto, the Noticee filed its reply dated March 20, 2023 stating that it had filed an application for settlement under SEBI (Settlement Proceedings) Regulations, 2018 and requested SEBI to keep the present proceedings in abeyance until disposal of its settlement application. As in terms of Regulation 8(1) of SEBI (Settlement Proceedings) Regulations, 2018, filing of an application for settlement shall not affect the continuance of the proceedings save that the passing of the final order is kept in abeyance till the application is disposed of, a notice of hearing dated April 10, 2023 was issued to the Noticee to appear for a personal hearing on April 21, 2023 if it so desired and make its submissions, if any. The personal hearing in the matter was adjourned to May 08, 2023 at the request of the Noticee.

8. On the scheduled date of hearing, the Authorised Representatives of the Noticee appeared and made oral submissions. Subsequently, the settlement application of the Noticee was rejected by the competent authority of SEBI and communicated to the Noticee vide email dated June 02, 2023. The Noticee filed additional written submissions vide its letter dated August 01, 2023.

9. The gist of the submissions of the Noticee in its replies dated August 31, 2020 and August 01, 2023 and those advanced during the personal hearing is as under:

   a. There was an inordinate delay in the initiation of proceedings by SEBI.
   b. The SCN is in violation of the basic principles of law and natural justice as the Noticee has not been provided with an opportunity of being heard before issuance of the SCN.
   c. Noticee was not provided the inspection of all the documents sought by it.
   d. NSEL had been openly carrying out trading in a variety of commodities and the details of the same were being regularly reported to the Forward Market Commission ( “FMC”).
   e. Noticee had no role to play in NSEL in deciding to launch the alleged paired contracts. All contracts launched by NSEL were with the prior concurrence of FMC.
   f. Since FMC was performing the function of a regulator over NSEL from August 2011, the Noticee had no reason to doubt the legality or validity of these contracts.
   g. There was gross failure of FMC in performing its duties as an apex regulator of commodities market and its presence as a mere silent spectator is the root cause of the subject matter of the present proceedings.
   h. No adverse remarks/red flags were raised against various agencies like MMTC, FCI, NAFED, etc. that had executed trades on the NSEL platform as clients and who were also purported to be closely associated with NSEL. Hence the dealings of the Noticee on the NSEL trading platform should also be considered along the similar lines.
   i. The first leg of the alleged paired contract was always a “purchase” and the Noticee had fulfilled its trading obligations on execution of buy and sell contracts independently and had made full payment of consideration of the buy contract.
   j. Except having a member/ broker relationship with NSEL, the Noticee had no other connection or association with NSEL, its directors, promoters and key management persons in any manner whatsoever. Except earning the meagre

brokerage while executing trades for its clients, the Noticee had not derived any gain or benefit of any nature whatsoever.

k. The trades have been executed only on behalf of its clients under their instructions and authorization who had approached them at their own accord and no trades were executed in the Proprietary Trading Account. In support thereof, a copy of the affidavit of one of the clients Mr. Sanjeev Lalansingh Yadav was provided.

l. While granting registration to it, SEBI was fully aware that the Noticee had carried out the trades in the alleged paired contracts and therefore the principles of res judicata and estoppel would apply.

m. At the relevant time, SEBI was not the regulator of the NSEL and therefore, SEBI is not empowered to initiate any action against the Noticee under the provisions of the Intermediaries Regulations.

n. In view of the order of the SAT dated June 09, 2022, the various orders judgments/ reports passed/ issued by various regulatory authorities as referred in the Enquiry Report cannot be considered and observations in respect of the same should be quashed and set aside.

o. The Hon'ble Supreme Court in its Order dated April 30, 2019 in the matter of *63 Moons Technologies* has not made any adverse observations or finding against it or any other non-defaulting broker.

p. No flaws, non-compliances, deficiencies and breaches of trading in commodities were pointed out by any government department, FMC or by any other regulatory authorities.

q. The amendment to the fit and proper criteria of the Intermediaries Regulations is not applicable to the Noticee since the said amendment with respect to consideration of the 'criminal complaint' was with effect from November 17, 2021. However, the FIR against the Noticee was filed way back in 2018.

r. Such retrospective application of the amendments to the Intermediaries Regulations, which are substantive provisions, is in gross violation of the principle of natural justice.

s. FIR is only the first instance of reporting of a complaint that is lodged with the Police which is a preliminary document based on the one sided statement of the complainant without any adjudication of the same. Thus, SEBI cannot rely

on its own complaint dated September 24, 2018 pursuant to which FIR dated September 28, 2018 was filed.

t. The Observations of SAT in the matter of *Almondz Global Securities Ltd. vs SEBI* and Order dated October 18, 2022 passed by the Hon'ble Bombay High Court in the matter of *Geeta Lunch Home Vs State of Maharashtra & Ors*. were referred to contend that merely the filling of an FIR and no proven charge against it, should not be a ground to cancel its license.

u. It is illogical to contend that anyone who dealt in the alleged paired contracts as a member of NSEL would be declared as not a fit and proper person.

v. The clients registered with the Noticee had/ have no grievance and are fully satisfied with the services rendered by the Noticee.

w. The important criteria of being fit and proper i.e 'reputation', 'integrity', 'character', 'fairness' and 'competence' was consistently fulfilled by the Noticee.

x. Clients were not permitted to execute trades directly on the NSEL and had to do so through a registered broker;

y. The trading in NSEL was open and transparent and there was nothing surreptitious about it and no authority had ever questioned the legitimacy or validity of any contract/ trade;

z. The entire ecosystem of NSEL was similar to all other Exchanges and there were no 'red flags' to arouse any suspicion;

aa. Till the time the Noticee continued to act as a broker of NSEL, the reputation of NSEL had not been tarnished;

bb. The Noticee was not on any committee or the Advisory Board of NSEL and there was no relationship between NSEL and the Noticee apart from the member and exchange;

cc. MCX and NSEL had common directors and common shareholding and thus the two were closely associated but no proceedings have been initiated against MCX. On the other hand, the Noticee had no actual 'association' with the NSEL;

dd. The doctrine of proportionality and Wednesbury Rule/ Test should be consistently applied to ensure that relevant vital and material facts have been taken into consideration. It is a settled law that the punishment should not

only be reasonable but must fit the violation or breach of law for which the entity is sought to be penalised. The same is squarely applicable in the present case.

ee. In terms of regulation 5(e) of the Stock Brokers Regulations, the 'fit and proper person' criteria is looked into at the time of granting of certificate of registration and the Noticee was duly compliant with the criteria at the time of grant of certificate of registration.

ff. In terms of regulation 9(b) and 9(f) of the Stock Broker Regulations, the Noticee is required to abide by the rules, regulations and bye laws of the exchange and the Noticee has not lapsed in complying with the same and there is no allegation in this regard in the Enquiry Report/ SCN.

gg. Noticee has executed the contracts with utmost integrity and adhered to soundness, moral principles and character in terms of Clause A(1) of the Code of Conduct under the Stock Brokers Regulations.

hh. Clause A(2) of the Code of Conduct of Stock Brokers Regulations mandates a stock broker to act with due skill, care and diligence and the Noticee has duly exercised such due skill, care and diligence as a man of ordinary prudence is expected to do. The alleged violation of Clause A(5) of the Code of Conduct under the Stock Brokers Regulations is denied.

ii. Noticee has complied with the Rules, Regulations of SEBI and bye laws of the exchange(s).

**CONSIDERATION OF ISSUES**

10. I have carefully perused the contents of the Enquiry Report, the SCNs issued to the Noticee, the responses filed by the Noticee and the submissions made during the course of the personal hearing and other documents available on record as shared with the Noticee.

11. Before I proceed to examine this issue, it would be appropriate to refer to the relevant provisions of law, alleged to have been violated by the Noticee and/ or referred or relied upon to in the present proceedings that are reproduced for ease of reference:

## SEBI Act, 1992

***Registration of stock brokers, sub-brokers, share transfer agents, etc.***

*12.(1)…..*

*(2)……...*

*(3) The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations:*

*Provided that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard.*

## The Stock Brokers Regulations, 1992

***Consideration of application for grant of registration.***

*5. The Board shall take into account for considering the grant of a certificate, all matters relating to trading, settling or dealing in securities and in particular the following, namely, whether the applicant,*

*(a)…..*

*(b)…..*

*……...*

*(e) is a fit and proper person based on the criteria specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008.*

***Conditions of registration***

***9.****Any registration granted by the Board under regulation 6 shall be subject to the following conditions, namely, -*

*(a)…*

*(b) he shall abide by the rules, regulations and bye-laws of the stock exchange which are applicable to him;*

*…*

*(f) he shall at all times abide by the Code of Conduct as specified in Schedule II;*

***Liability for action under the Securities and Exchange Board of India (Intermediaries) Regulations, 2008.***

*27. A stock broker shall be liable for any action as specified in Chapter V of the Securities and Exchange Board of India (Intermediaries)Regulations, 2008 including suspension or cancellation of his certificate of registration as a stock broker, if he —*

*…*

*(iv) has been found to be not a fit and proper person by the Board under these or any other regulations;*

## The Intermediaries Regulations, 2008

*SCHEDULE II*

*SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008*

*[See regulation 7]*

(1) *The applicant or intermediary shall meet the criteria, as provided in the respective regulations applicable to such an applicant or intermediary including:*
   (a) *the competence and capability in terms of infrastructure and manpower requirements; and*
   (b) *the financial soundness, which includes meeting the net worth requirements.*

(2) *The 'fit and proper person' criteria shall apply to the following persons:*
   (a) *the applicant or the intermediary;*
   (b) *the principal officer, the directors or managing partners, the compliance officer and the key management persons by whatever name called; and*
   (c) *the promoters or persons holding controlling interest or persons exercising control over the applicant or intermediary, directly or indirectly:*
   *Provided that in case of an unlisted applicant or intermediary, any person holding twenty percent or more voting rights, irrespective of whether they hold controlling interest or exercise control, shall be required to fulfil the 'fit and proper person' criteria.*
   ***Explanation** –For the purpose of this sub-clause, the expressions "controlling interest" and "control" in case of an applicant or intermediary, shall be construed with reference to the respective regulations applicable to the applicant or intermediary.*

(3) *For the purpose of determining as to whether any person is a 'fit and proper person', the Board may take into account any criteria as it deems fit, including but not limited to the following:*
   (a) *integrity, honesty, ethical behaviour, reputation, fairness and character of the person;*
   (b) *the person not incurring any of the following disqualifications:*
      (i) *criminal complaint or information under section 154 of the Code of Criminal Procedure, 1973 (2 of 1974) has been filed against such person by the Board and which is pending;*
      (ii) *charge sheet has been filed against such person by any enforcement agency in matters concerning economic offences and is pending;*
      (iii) *an order of restraint, prohibition or debarment has been passed against such person by the Board or any other regulatory authority or enforcement agency in any matter concerning securities laws or financial markets and such order is in force;*
      (iv) *recovery proceeding s have been initiated by the Board against such person and are pending;*
      (v) *an order of conviction has been passed against such person by a court for any offence involving moral turpitude;*
      (vi) *any winding up proceedings have been initiated or an order for winding up has been passed against such person;*
      (vii) *such person has been declared insolvent and not discharged;*
      (viii) *such person has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force;*
      (ix) *such person has been categorized as a wilful defaulter;*
      (x) *such person has been declared a fugitive economic offender; or*

(xi) *any other disqualification as may be specified by the Board from time to time.*

(4) *Where any person has been declared as not 'fit and proper person' by an order of the Board, such a person shall not be eligible to apply for any registration during the period provided in the said order or for a period of five years from the date of effect of the order, if no such period is specified in the order.*

(5) *At the time of filing of an application for registration as an intermediary, if any notice to show cause has been issued for proceedings under these regulations or under section 11(4) or section 11B of the Act against the applicant or any other person referred in clause (2), then such an application shall not be considered for grant of registration for a period of one year from the date of issuance of such notice or until the conclusion of the proceedings, whichever is earlier.*

(6) *Any disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub -clause (b) of clause (3), shall not have any bearing on the 'fit and proper person' criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter: Provided that if any person as referred in sub-clause (b) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall replace such person within thirty days from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against the intermediary:*
*Provided further that if any person as referred in sub -clause (c) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall ensure that such person does not exercise any voting rights and that such person divests their holding within six months from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against such intermediary.*

(7) *The 'fit and proper person' criteria shall be applicable at the time of application of registration and during the continuity of registration and the intermediary shall ensure that the persons as referred in sub -clause s (b) and (c) of clause (2) comply with the 'fit and proper person' criteria."*

***Recommendation of action***

26. *(1) After considering the material available on record and the reply, if any, the designated authority may by way of a report, recommend the following measures, –*

*(i) disposing of the proceedings without any adverse action;*

*(ii) cancellation of the certificate of registration;*

*(iii) suspension of the certificate of registration for a specified period;*

*(iv) prohibition of the noticee from taking up any new assignment or contract or launching a new scheme for such the period as may be specified;*

*(v) debarment of an officer of the noticee from being employed or associated with any registered intermediary or other person associated with the securities market for such period as may be specified;*

*(vi) debarment of a branch or an office of the noticee from carrying out activities for such period as may be specified;*

*(vii) issuance of a regulatory censure to the noticee:*

*Provided that in respect of the same certificate of registration, not more than five regulatory censures under these regulations may be recommended to be issued, thereafter, the action as detailed in clause (ii) to (vi) of this sub-regulation may be considered.*

***Order***

*27. (1) …*

*(2)…*

*(5) After considering the facts and circumstances of the case, material on record and the written submission, if any, the competent authority shall endeavor to pass an appropriate order within one hundred and twenty days from the date of receipt of submissions under sub-regulation (2) or the date of personal hearing, whichever is later.*

12. In the backdrop of these provisions of law and non-compliances alleged against the Noticee, for a proper appreciation of the issues in this case, other background facts necessary to be referred to are narrated in brief hereunder:

(i) NSEL was incorporated in May, 2005 as a Spot Exchange, for trading in commodities. In exercise of the powers conferred under Section 27 of the FCRA, the Central Government vide its Notification No. SO 906 (E) dated June 05, 2007 (**"Exemption Notification"**) granted exemption to all forward contracts of 'one-day duration'; from the operations of the provisions of the FCRA, for the sale and purchase of commodities traded on the NSEL, subject to fulfilment of certain conditions, inter alia, that "*no short sale by the members of the exchange shall be allowed*" and that "*all outstanding positions of the trades at the end of the day shall result in delivery*". Thus, NSEL was granted permission to be setup as a Spot Exchange for trading in commodities and was essentially meant to only offer forward contracts of one-day duration as per Exemption Notification on its trading platform.

(ii) In October 2008, NSEL commenced operations for providing an electronic trading platform to its participants for spot trading of commodities, such as bullion, agricultural produce, metals, etc. NSEL introduced the concept of 'paired contracts' in September 2009 which allowed buy and sell in the same commodity through two different contracts at two different prices on the exchange platform wherein the investors could buy a short duration contract and sell a long duration contract and vice versa, at the same time and at a

pre-determined price. The trades for the Buy Contract (T+2 / T+3) and the Sell Contract (T+25/ T+36) used to happen on the NSEL on the same day at the same time and at different prices, but involving the same counterparties. The transactions were structured in a manner that the buyer of the short duration contact always ended up making profits.

(iii) On February 06, 2012, FMC was appointed by the Department of Consumer Affairs, Government of India as the 'designated agency' as stipulated in one of the conditions prescribed under the said Exemption Notification and was authorized to collect the trade data from NSEL and to examine the same for taking appropriate measures, if needed, to protect investors' interest.

(iv) FMC accordingly called for the trade data from different spot exchanges, including NSEL in the prescribed reporting formats. It was observed that the 55 contracts offered for trade on the NSEL were with settlement periods exceeding 11 days. After analyzing the trade data received from the NSEL, FMC passed an Order No. 4/5/2013-MKT-1/B dated December 17, 2013 (**"FMC Order"**) wherein it was, inter alia, observed that 55 contracts offered for trade on the NSEL platform were in violation of the relevant provisions of the FCRA and the condition of *'no short sale by members of the exchange shall be allowed'* was not being complied with by the NSEL and its members. FMC further observed that the 'paired contracts' offered for trading in the NSEL platform were in violation of the provisions of the FCRA and the conditions specified by the Government of India in its Exemption Notification, while granting exemption to the one day forwards contracts for sale and purchase of commodities traded on the NSEL, from the purview of the FCRA, specifically the following conditions:

a. <u>Short Sale</u>

NSEL had not made it mandatory for the seller to deposit goods in its warehouse before taking a sell position. Yet, the condition of *"no short sale by members of the NSEL shall be allowed"* was not being met by the NSEL and its trading/clearing members who traded in the 'paired contracts' during the relevant period.

b. Contracts with Settlement Period beyond 11 days

Some of the contracts offered for trade on the NSEL had settlement periods exceeding 11 days and therefore, such contracts were "non-transferable specific delivery" contracts under the FCRA. The "ready delivery contracts", as per the FCRA, were required to be settled within 11 days of the trade. Hence, the contracts traded on the NSEL, which provided settlement schedule for a period exceeding 11 days which were not allowed were in violation of the Exemption Notification.

13. It is a matter of record that prior to the merger of the FMC with SEBI on September 28, 2015, the commodity brokers including the Noticee were not required to be registered with either the FMC or any other regulatory authority under the FCRA. The Parliament sought to rectify this regulatory vacuum through the enactment of the Finance Act, 2015, which repealed the FCRA and brought the entities dealing with commodity derivatives under the regulatory supervision of SEBI with effect from September 28, 2015.

14. Pursuant thereto, SEBI was empowered through the Finance Act, 2015, to *inter alia*, regulate commodity derivatives brokers, which included granting them registration as a commodity derivatives broker with SEBI. Section 131B of the Finance Act, 2015, provided a transitory period of 3 months to all intermediaries associated with the commodity derivatives market under the repealed FCRA to continue to deal in commodity derivatives as a commodity derivatives broker, provided they applied for registration from SEBI within 3 months from September 28, 2015.

15. Thus, every commodity derivatives broker was mandatorily required to obtain a certification of registration from SEBI in case it sought to remain associated with the securities market as a commodity derivatives broker and SEBI is suitably empowered to grant the said registration upon fulfilment of the required conditions and to initiate action against the brokers for any violation thereof by them.

16. Specifically, the ambit of SEBI in so far as the provisions of FCRA are concerned, flows from the Finance Act, 2015, which amended the provisions of the FCRA through Section 29A of FCRA, as inserted by the Finance Act, 2015, and reads as follows:

> *"(1) The Forward Contracts (Regulation) Act, 1952 is hereby repealed.*
> *(2) On and from the date of repeal of Forward Contracts Act–*
> *(a)….*
> *(b)….*
> *(c)….*
> *(d)….*
> *(e) a fresh proceeding related to an offence under the Forward Contracts Act, may be initiated by the Security Board under that Act within a period of three years from the date on which that Act is repealed and be proceeded with as if that Act had not been repealed;*
> *(f) no court shall take cognizance of any offence under the Forward Contracts Act from the date on which that Act is repealed, except as provided in clause (d) and (e);*
> *(g) clause (d), (e), (f) shall not be held to or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal to matters not covered under these sub-sections."*

17. The above aspects were highlighted by the Hon'ble Bombay High Court in its Order dated October 04, 2018 while dealing with Writ Petition Nos. 3262, 3266, 3294 and 3295 of 2018 in the matter of *Anand Rathi Commodities Limited*, *Motilal Oswal Commodities Broker Private Limited*, *Geofin Comtrade Limited* and *IIFL Commodities Limited vs. SEBI wherein* the following was observed:

> *"…*
> *It is not in dispute that prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law including the FCR Act. We find that the said mischief was noticed by the Parliament. As such, by virtue of the Finance Act, 2015, the said intermediaries dealing with commodity derivatives have been brought under the control of SEBI. We find that the reason as to why by Finance Act, 2015, the said intermediaries were brought under the control of SEBI appears to be that the Parliament found that the activities of intermediaries dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority".*

18. It is thus clear that SEBI has been statutorily empowered to initiate a fresh proceeding with respect to the offences under FCRA within a period of three years from the date on which FCRA is repealed.

19. Since, pursuant to the merger of FMC with SEBI, it was well within the powers of SEBI to initiate proceedings under Chapter V of FCRA if so warranted against entities for their activities undertaken by them on the NSEL platform, SEBI filed the criminal complaint dated September 24, 2018 against such entities before the Economic Offence Wing (**"EOW"**) and requested the EOW to take appropriate action under Sections 20 and 21 and other provisions of FCRA against the brokers/ members of NSEL and other persons mentioned in the complaint.

20. Admittedly, the Noticee had executed the paired contracts offered on the NSEL platform for its clients as also evident from the trading data provided to the Noticee by the DA vide letter dated February 26, 2020. However, while justifying the execution of such trades, the Noticee has challenged the action proposed against it by raising the grounds summarized in paragraph 9.

21. I have analysed the argument of the Noticee that all the trades were executed in accordance with the rules and regulations specified by the NSEL, that NSEL had been openly allowing trading in the NSEL in a variety of commodities and that the details of the same were being regularly reported to the FMC, that the the first leg of the alleged paired contract was always a "purchase" and thus, there is no question of short sale and further that it had fulfilled its trading obligation on execution of buy and sell contracts independently and had made full payment of consideration of buy contract, I note that under the FCRA, a "forward contract" is defined as a "*contract for delivery of goods and which is not a ready delivery contract*". A 'ready delivery contract' is defined as "*a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days*". Given these definitions in the FCRA, all the contracts traded on the NSEL which provided for a settlement schedule exceeding 11 days were treated by the FMC as Non-

Transferable Specific Delivery Contracts. It is, therefore, seen that while the Ministry of Consumer Affairs had stipulated in the Exemption Notification that only forward contracts of 'one-day' were permitted to be offered on the NSEL, the FMC, in its order, relying on the definition of the "forward contract" under FCRA held that the NSEL was allowed to only trade in forward contracts of 'one-day duration' and was obligated to ensure delivery and settlement within 11 days. Thus, 55 contracts of various commodities, having duration longer than 11 days that were executed on the NSEL were paired contracts without regulatory approval and in contravention of the exemption granted to NSEL and thus clearly not in accordance with law.

22. In this regard, it is also pertinent to refer to the judgment of the Hon'ble Supreme Court of India passed in the matter of *63 Moons Technologies Ltd. (formerly known as* Financial *Technologies India Ltd.) & Ors. vs. Union of India & Others* (Civil Appeal No. 4476 of 2019 decided on April 30, 2019) (**"merger petition"**), wherein it was, *inter alia*, held that:

> *".....*
> *There is no doubt that such Paired Contracts were, in fact, financing transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA..."*

23. It would also be necessary to place on record the reference to the order of the Hon'ble Bombay High Court in the matter of *63 Moons' Technologies Limited vs. State of Maharashtra* dated August 22, 2019, wherein it was held that the paired contracts were not financial transactions but were trades in commodity as per the regulations and bye laws of NSEL. Upon appeal, the Hon'ble Supreme Court in the matter of the ***State of Maharashtra vs. 63 Moons Technologies Ltd.*** (Civil Appeal No. 2748-49 of 2022) (**"MPID matter"**), while drawing reference to the representations made by the NSEL in respect of the paired contracts, *inter alia*, held as follows:

> *"...*
> *The above representation indicates that 'paired contracts' were designed as a unique trading opportunity by NSEL under which a trader would, for instance, purchase a T+2 contract (with a pay-in obligation on T+2) and would simultaneously sell a T+25 contract (with a pay-out of funds on T+25). The price differential between the two settlement dates was represented to offer an annualized return of about 16%. NSEL*

*categorically represented that all trades were backed by collaterals in the form of stocks and its management activities included selection, accreditation, quality testing, fumigation and insurance.*

*Though NSEL has been receiving deposits, it has failed to provide services as promised against the deposits and has failed to return the deposits on demand. Therefore, the State of Maharashtra was justified in issuing the attachment notifications under Section 4 of the MPID Act…"*

24. The Hon'ble Supreme Court has thus well described the nature of the 'paired contracts' offered on the NSEL platform. In the merger petition (*63 Moons Technologies Ltd. vs. UOI*), the Hon'ble Court held that these contracts were in the nature of financing transactions. In the MPID matter (*The State of Maharashtra vs. 63 Moons Technologies Ltd.*), the Hon'ble Supreme Court enlarged the interpretation and held that such transactions come within the definition of 'deposits' under the MPID Act. While extensively referring to the claims made on the website of the NSEL and the contents of the publicity material and other investor resources, the Hon'ble Court also observed that the NSEL were advertising assured and uniform returns of 16% per annum for the 'paired contracts' traded on the NSEL platform where the return offered was the same across the commodities and that the return remained the same irrespective of the duration of the contract. At paragraph 45 of the said order, the Hon'ble Supreme Court also depicted certain examples of 'paired contracts', which offered assured returns. For example, a T+2 and T+25 paired contract in Steel had the same offered rate of return as a T+5 and T+35 paired contract in Castor Oil. Thus, the judgement of the Hon'ble Supreme Court in the MPID matter highlighted how the 'paired contracts' were being marketed as an alternative to fixed deposits wherein the overwhelming majority of the sale leg of the 'paired contracts' which were executed were in fact short sales and further that, the commodities to back such sales were not available at the designated warehouses of the NSEL

25. The contention of the Noticee that the order of Hon'ble Supreme Court dated April 30, 2019 in question did not make any adverse observations or findings against it or any other non-defaulting brokers is besides the point as these

observations and findings highlighted from the orders of the Hon'ble Supreme Court are referred only to emphasise the point that all such paired contracts were not held to be contracts in the commodity segment but in the nature of financing transactions which were not envisaged under the Exemption Notification.

26. Noticee's contention that in view of the order of the SAT dated June 09, 2022, various orders/ judgments/ reports passed/ issued by various regulatory authorities as referred in the Enquiry Report cannot be considered and observations in respect of the same should be quashed and set aside, is devoid of any merit. The Enquiry Report dated July 27, 2020 was prepared on the basis of material available on record at that point of time much before the SAT dated June 09, 2022. It is noted that in the present proceedings, no reliance has been placed on any of the grounds which have been specifically rejected by SAT, thus the contention of the Noticee in this regard is misplaced and is hence rejected.

27. As regards, the contention of the Noticees that no adverse remarks/red flags were raised against various agencies like MMTC, FCI, NAFED, etc. who had executed trades as clients on the NSEL platform and who were also purported to be closely associated with NSEL and that its dealings on the NSEL trading platform should also be considered on similar lines, I note that SEBI had passed an order dated August 02, 2023 against MMTC Limited in the matter of NSEL and cancelled its certificate of registration as a commodity broker for its role and involvement in the facilitation/trading in the paired contracts on the NSEL platform. I also note that proceedings have been proposed and initiated against several other entities based on the trades executed by them in the paired contracts on the NSEL platform and the accompanying facts and circumstances of their respective cases, solely relying on the material available on record. Since the Noticee was one such entity that had facilitated the trading in paired contracts on behalf of its clients, the present proceedings have been initiated against it. The extent of the role of the Noticee has been clearly brought out in the SCNs issued to it and as a quasi-judicial authority, the issue before me is to adjudicate the gravity of the allegations in the SCNs and arrive at a finding. Thus, the contention of the Noticee is devoid of any merit.

28. I also note that the scope of the present proceeding is to analyse the apparent impact as well as the consequences of the conduct of the Noticee as per the justification and contentions advanced and also to examine as to whether or not, the Noticee acted in a manner expected of a registered market intermediary. It cannot be denied that the involvement of the Noticee in trading in 'paired contracts' was neither permitted by the Exemption Notification nor by any of the applicable provisions of the FCRA. Under these circumstances, any conduct similar to that displayed by the Noticee in its trading on the NSEL platform would be detrimental to the interest of the securities market.

29. Despite the above and the discussion in the context of the facts of the case, I have examined at length the other submissions made by the Noticee and also examined whether while transacting in paired contracts, the Noticee could have been under the bonafide belief that such transactions were actually spot contracts in commodities or alternatively that since 'paired contracts' were offered, that meant that NSEL was offering contracts which were not resulting in compulsory delivery.

30. While Noticee has submitted that it had no role to play in NSEL in deciding to launch the alleged paired contracts and that all such contracts were launched with the prior concurrence of FMC trades, I note that there is no two opinion of the fact that the paired contracts were being advertised as an alternative to fixed deposit returns by offering fixed returns (approx. 16%) across all commodities, irrespective of the nature of the contract or the duration and were in fact structured in a manner which ensured that the buyer always made pre-determined profits. Any prudent person (including the Noticee, who is an intermediary and well versed with financial and commercial knowledge) would have or should have come to the conclusion that what was being offered were not spot contracts in commodities rather that they had the trappings of a financial product which offered fixed and assured returns, as has been already observed by the Hon'ble Supreme Court in *State of Maharashtra vs. 63 Moons Technologies Ltd*. which was contrary to the FCRA and the Exemption

Notification and which eventually caused losses to the market stated to be to the extent of ₹ 5,500 Crores.

31. The argument that NSEL was subject to the regulations issued by the FMC and that the NSEL failed to introduce effective preventive safeguards and mechanisms is not tenable in the undeniable background that there was a settlement default at NSEL and specifically under these circumstances all the members of NSEL, dealing in paired contracts were aware or ought to have been aware about the illegality of the contracts being offered on the platform of NSEL. The Noticee as an intermediary was expected to exercise due diligence on the products which it traded. The stated assumption by the Noticee as to the legality of 'paired contracts' is indicative of the fact that the Noticee not only failed to exercise adequate due diligence but even failed to take note of the Exemption Notification regarding approval of only spot contracts/ forwards of one-day duration, permitted on NSEL which was in the public domain and the fact that FMC had never approved the 'paired contracts' which were introduced only in 2009 when NSEL was not regulated under the FCRA. Assuming that NSEL referred to any approval of FMC for the purpose of introduction of any contract in its bye-laws is also irrelevant, considering that the FMC was not even the relevant authority for NSEL when paired contracts were introduced and had in fact never approved the same. This more than anything is a clear indication of a complete lack of due diligence on the part of the Noticee who functioned in a manner without following the rules. The display of utter lack of integrity in its functioning that was bound to affect the interest of the investors indicates that the 'paired contracts' could not have been executed in large volumes without the association or active engagement of the Noticee with NSEL. For these reasons, the Noticee is found to have violated Clause A(1), A(2) and A(5) Code of Conduct of Stock Brokers Regulations.

32. Another argument raised by the Noticee that while granting registration to it, SEBI was fully aware that it had carried out the trades in alleged paired contracts and therefore the principles of res judicata would apply, is misconstrued and holds no ground. I note that principles of res judicata as provided under Section 11 of

the Code of Civil Procedure, 1908 provide that *no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.* Thus, the principles provide that if a suit filed for a cause of action and the dispute is resolved or judged by the competent court within its jurisdiction limits then the subsequent suit filed for the same cause of action is barred by the principle of Res Judicata. In the present proceedings, the issue of fit and proper status of the Noticee has not been decided by SEBI before but is under consideration in the present proceedings. Thus the issue of applicability of res judicata does not arise and the contention of the Noticee is misconceived.

33. It is a settled position of law that every registered intermediary in the securities market is required to fulfil all the conditions of its registration at all points of its functioning including any additional criteria statutorily provided for, from time to time. Else, there would arise an anomalous situation where an entity that has obtained a certificate of registration after fulfilling the said criteria would fail the test after a period of time and yet continue to function in the securities market despite not fulfilling the required criteria.

34. On this premise, it can be said that the requirement of being a 'fit and proper' person, is a continuing 'eligibility criteria'/ statutory requirement, which ought to be satisfied by all registered entities at all points of time. This condition is not a one-time condition applicable only at the time of seeking registration. Rather, the provisions governing the grant of registration provides that this is a condition which every registered intermediary is required to fulfil, on a continuous basis as long as the entity remains associated with the securities market as a registered intermediary. Therefore, the criteria of 'fit and proper person', is an ongoing requirement throughout the period during which an entity remains operational in the securities market as a registered intermediary and for this reason, the principles of estoppel do not apply to the instant case of the Noticee. If the

continued applicability of the fit and proper criteria to its functioning is challenged, there would exist a market where the overall interest of the investors would stand compromised

35. On the Noticee's plea that there has been inordinate delay in initiating the present proceedings and issuance of the SCNs, it would be relevant to refer to the judgements of the Hon'ble Supreme Court in *Adjudicating Officer, Securities and Exchange Board of India v. Bhavesh Pabari*[1] wherein the court was pleased to observe that delay in issue of the SCNs itself would not exonerate the defaulters from the default. Reference may also be made to the order of the Hon'ble Supreme Court in the matter of *SEBI v. Sunil Krishna Khaitan and Ors*[2] on the aspect of delay and its impact on proceedings in the context of SEBI. The Hon'ble Supreme Court while referring to its earlier decision in the matter of *Bhavesh Pabari* (supra) held as follows:

> *"81. This Court in the judgment authored by one of us (Sanjiv Khanna, J.) in Bhavesh Pabari (supra) had examined the question of delay and laches in initiating proceedings under Chapter VI-A of the Act and the principle of law that when no limitation period is prescribed proceedings should be initiated within a reasonable time and what would be reasonable time would depend upon facts and circumstances of each case. In this regard, it was held as under:*
>
> > *"35. The Appellants have also contended that in the absence of any prescribed limitation period, SEBI should have issued show-cause notice within a reasonable time and there being a delay of about 8 years in issuance of show-cause notice in 2014, the proceedings should have been dropped. This contention was not raised before the adjudicating officer in the written submissions or the reply furnished. It is not clear whether this contention was argued before the Appellate Tribunal. There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created, etc. The show-cause notice in the present case had specifically referred to the respective dates of default and the date of compliance, which was made*

[1] (2019) 5 SCC 90. Available at: https://main.sci.gov.in/supremecourt/2013/36291/36291_2013_Judgement_28-Feb-2019.pdf

[2] Civil Appeal No. 8249 of 2013, decided on July 11, 2022. Availabale at: https://www.sebi.gov.in/enforcement/orders/jul-2022/judgment-of-the-hon-ble-supreme-court-in-civil-appeal-no-8249-of-2013-sebi-vs-sunil-krishna-khaitan-and-ors-_61342.html

*between 30-8-2011 to 29-11-2011 (delay was between 927 days to 1897 days). Only upon compliance being made that the defaults had come to notice. In the aforesaid background, and so noticing the quantum of fine/penalty imposed, we do not find good ground and reason to interfere."*

*82. The directions given in the aforesaid quotation should not be understood as empowering the authorities/Board to initiate action at any time. In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period. What would be the reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge. Though, no hard and fast Rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors. Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/ officer to consider the question objectively, fairly and in a rational manner. There is public interest involved in not taking up and spending time on stale matters and, therefore, exercise of power, even when no time is specified, should be done within reasonable time. This prevents miscarriage of justice, misuse and abuse of the power as well as ensures that the violation of the provisions are checked and penalised without delay, thereby effectuating the purpose behind the enactment."*

36. In view of the aforesaid discussion, it is clear that no specific limitation period has been provided in the SEBI Act. Even in the absence of an express limitation period, there is no debate on the point that all proceedings have to be initiated in a timely manner which in the present matter was indeed done. The trades were executed during the period from 2012-2013, SEBI was vested with the jurisdiction to regulate the commodities segment only in 2015. Pursuant thereto, despite the magnitude of the NSEL scam, a detailed examination of all relevant records was undertaken and after identifying all the entities involved, proceedings were initiated. In this case, a show cause notice was issued to the Noticee by the DA on September 25, 2018. It must also be relevant to note that although the Noticee has raised the plea of delay, it has not stated that any prejudice has been caused to it. In any case, the purpose of the present proceedings is not to adjudge the violation of provisions of FCRA but to adjudge the '*fit and proper*' status of the Noticee, which as noted above, is a continuing

requirement under the Intermediaries Regulations. Accordingly, I am of the view that the plea of application of delay in the initiation of the proceedings raised by the Noticee is also not tenable.

37. Noticee has also contended that it was not provided with personal hearing before the DA even though there was no exemption/prohibition for grant of personal hearing by the DA under the Intermediaries Regulations. In this regard, I note that the DA had issued the show cause notice dated September 25, 2018 under the then existing Regulation 25(1) of the Intermediaries Regulations. Thereafter the Enquiry Report was submitted on July 27, 2020. The Intermediaries Regulations were amended vide the SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021. The amended Regulations now provide that the DA shall grant an opportunity of personal hearing and issue or cause to issue a notice scheduling a date for hearing. Thus, under the then existing Intermediaries Regulations prior to its amendment w.e.f. January 21, 2021, there was no legal requirement for providing the opportunity of personal hearing to the Noticee by the DA as contended by the Noticee vide its letter dated August 31, 2020. The Regulations specified granting of opportunity of personal hearing by the competent authority, which as has been detailed in the previous paras has been more than adequately provided to and availed by the Noticee. I also note from the SCN that the Noticee was called upon to show cause as to why the information/ material as brought out in the SCN and in the Enquiry Report concerning the fit and proper person criteria should not be considered for determining its fit and proper status. A SSCN, enclosing a copy of the order passed by the Tribunal on June 9, 2022, as mentioned at paragraph 6 above, (**"SAT Order"**), was also issued to the Noticee calling upon it to show cause why the information/ material detailed below along with the Enquiry Report should not be considered for determining whether the Noticee satisfies the 'fit and proper person' criteria as laid down under Schedule II of the Intermediaries Regulations:

a. SEBI complaint dated September 24, 2018 filed with EOW;
b. First Information Report (**"FIR"**) dated September 28, 2018; and
c. Amended Schedule II of the Intermediaries Regulations.

Thus, every opportunity was provided to the Noticee and no prejudice has been caused to the Noticee and there is no defect in the process followed in the present enquiry proceedings. Accordingly, the contentions raised by the Noticee in this regard are also misplaced and devoid of any merit.

38. The Noticees has vehemently contended that inspection of all the documents sought by the Noticee was also not provided to it. I note that Sub-regulations (3) and (4) of Regulation 25 of the Intermediaries Regulations specify that the copies of the documents "relied upon by SEBI" along with the extracts of relevant portions of the reports containing the findings arrived at in an inquiry, investigation or inspection, if any, shall be provided to the Noticee.

39. On perusal of paragraph 7 and 9 of the Enquiry Report, I note that the Noticee was provided with the following documents relied upon by SEBI in the present proceedings:

a. Copy of the relevant FMC Order with Annexures;
b. Copy of the Grant Thornton Report with various Annexures;
c. Copy of the Notification issued by the Ministry of Consumer Affairs dated June 05, 2007;
d. Documents explaining specifications of 'paired contracts' (as available in the Grant Thornton Report) (which is narrated in the FMC order);
e. List of trading members/ fund name and clearing member name and the amount mentioned against their name in the EOW interim report dated April 04, 2015, who have applied/ registered with SEBI (the amount indicates default amount of clients (investors) who traded through the said brokers);
f. Copies (total 11) of fortnightly reports submitted by NSEL to the erstwhile FMC;
g. List of 148 members against whom NSEL has pay-out obligations as on September 19, 2013 as mentioned in the Grant Thornton Report (as per Annexure 6 of the Grant Thornton Report) dated September 21, 2013;
h. Data containing registration documents of 299 members and Annual Return documents of 234 members; and
i. Data pertaining to Noticee's trades in paired contract on NSEL platform.

40. The Noticee was also provided with the opportunity to inspect all the documents relied upon and relevant for the proceedings which was availed by the Noticee. Thus the facts and events elaborated above clearly indicate that the processes in the proceedings were carried out in a timely and structured manner and all the necessary documents relied upon by SEBI for the purpose of framing charges against the Noticee were provided to it and that every principle of natural justice has been adhered to while conducting these proceedings.

41. The Noticee has challenged the applicability of the fit and proper criteria provided in Schedule II of the Intermediaries post its amendment on January 21, 2021 to state that the SEBI (Intermediaries) (Third Amendment) Regulations, 2021 is not applicable to the Noticee since the said amendment with respect to consideration of the 'criminal complaint' was with effect from November 17, 2021. However, the FIR against the Noticee was filed way back in 2018. Such retrospective application of the amendments to the Intermediaries Regulations, which are substantive provisions, is in gross violation of the principle of natural justice. To this, I record that the criteria mentioned is not exhaustive and the Noticee's contention is based on an incorrect understanding of the SCNs. The SSCN clearly mentioned and called upon the Noticee to show cause as to why "amongst other grounds", the 'amended Schedule II of the Intermediaries Regulations' should also not be considered against it for determining its fit and proper criteria. The fit and proper has to be adhered to by a registered intermediary on a continuous basis and not only at the time of grant of certificate of registration.

42. As detailed in the earlier part of the order, it was only when certain events and their related documents/ material came to light that SEBI formed an opinion to examine the certificate of registration of the entities to the extent of fulfilment of the conditions of registration for their continuance as an intermediary as specified in Regulation 5(e) of the Stock Brokers Regulations read with Schedule II of the Intermediaries Regulations as applicable at the relevant time. Accordingly, the decision was taken as was legally permissible to file the Complaint dated September 24, 2018 based on which the FIR dated September 28, 2018 was filed by EOW that has been provided to the Noticee vide the SSCN.

43. Regulation 5(e) of the Stock Brokers Regulations provides that for the purpose of grant of Certificate of Registration, the applicant has to be a 'fit and proper person' in terms of Schedule II of the Intermediaries Regulations and Regulation 9(b) of the Stock Brokers Regulations mandates a registered stock broker to abide by the rules, regulations and bye-laws of the stock exchange which are applicable to it. In terms of Regulation 9(f) of the Stock Brokers Regulations, a registered stock broker is required to abide by the Code of Conduct as specified in Schedule II of the Stock Brokers Regulations. I further note that the 'fit and proper person' criteria specified in Schedule II of the SEBI (Intermediaries) Regulations, 2008, was amended vide SEBI (Intermediaries) (Third Amendment) Regulations, 2021 with effect from November 17, 2021.

44. Thus, as and when any of the 'fit and proper' criteria change, every registered entity is required to comply with the revised criteria, including as in this instance, the criteria as revised vide the amendment in November 2021. The requirement is not a onetime condition applicable only at the time of seeking registration. Rather, the provisions governing the criteria provides it to be a condition which each and every registered intermediary is required to fulfil on a continuous basis as long as the entity remains associated with the securities market as a registered intermediary. It is well within SEBI's jurisdiction and powers to adjudge the said fit and proper status of the market intermediaries in the interest of securities market at any point of time.

45. The parameters provided under paragraph 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations lay down a list of disqualifications which, *inter alia*, include the following:

*"(1).....*

*(2).....*

*(3) For the purpose of determining as to whether any person is a 'fit and proper person', the Board may take into account any criteria as it deems fit, including but not limited to the following:*

*(b) the person not incurring any of the following disqualifications:*

*(i) criminal complaint or information under section 154 of the Code of Criminal Procedure, 1973 (2 of 1974) has been filed against such person by the Board and which is pending;*

*.....”*

46. As detailed in the SSCN, FIR was registered by the EOW with the MIDC Police Station, Mumbai, against the Noticee under section 154 of the CrPC on September 28, 2018. This has not been challenged, quashed or stayed by any competent court *qua* the Noticee till date. The disqualifications listed under paragraph 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations are unambiguously clear and no exemption from such criteria has been provided. Further, due presumption on the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field till date which is binding upon SEBI, and arguments to the contrary as advanced by the Noticee while referring to the observations of various SAT orders are not maintainable. Once the disqualification is triggered; the ‘fit and proper’ person criteria is open for determination by SEBI. The disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations has also been triggered *vis-à-vis* the Noticee.

47. Thus, by virtue of its conduct, trades and being a member of NSEL, the Noticee acted as an instrument in promoting and/or dealing in ‘paired contracts’ which were in the nature of financing transactions (as held by the Hon’ble Supreme Court of India referred *supra*). The Noticee has vehemently submitted that it was not closely associated with NSEL which has been suitably countered earlier. In any case, the present proceedings are not solely based on the Noticee’s relationship with NSEL as a trading member. Other factors such as the filling and continued pendency of FIR, facilitation of trading by the Noticee in paired contracts (which were found to be in violation of the 2007 Exemption Notification by the Hon’ble Supreme Court), and other material have been taken into account. By providing a platform for trading to its clients and by providing access for taking

exposure to such 'paired contracts', the Noticee exposed its clients to the risks involved in trading in a product that did not have regulatory approval.

48. I also note that the Noticee has submitted an affidavit from one of its clients; Mr. Sanjeev Lalansingh Yadav *inter alia* stating that he is a well-informed investor and does his own research and analysis and that he only carried out the trades in paired contracts and invested his own money. I am of the view that any argument on the lines that the clients demanded such access to the '*paired contracts'* after doing their own research and after investing their own money or that they hold no grievance with the Noticee who merely executed the contracts without soliciting, does not lessen the extent of its obligations. The lack of diligence required to be performed by an intermediary of prudence is indicative of lack of competence and integrity while acting as a registered intermediary. Undoubtedly such activities of the Noticee not only seriously jeopardized the integrity of market and that of its investors but also SEBI's belief in the reputation, character, competence and integrity of the Noticee and other brokers which compelled SEBI to file the criminal complaint against it as also against several other brokers. Thus, the Noticee has also incurred the disqualification under Clause 3(b)(i) of the amended provisions of Schedule II of the Intermediaries Regulations on account of this complaint filed by SEBI and the FIR that was registered by the EOW based on the said complaint of SEBI.

49. I note that when provisions of law specify certain acts to be done in a particular manner, the same is required to be honoured in letter and spirit. Law does not provide any exception to any person to perform such acts that are not permissible under an extant legal framework as per their whims and fancies. Therefore, if an exemption is granted in respect of all forward contracts of one-day duration for the sale and purchase of commodities traded on NSEL from the operations of the provisions of the FCRA subject to compliance with certain conditions, then it is obligatory on the part of a market intermediary to execute forward contracts of one-day duration only, subject to strict compliance with the said conditions. As noted earlier, the principle of *'ignorantia juris non excusat'* or that *'ignorance of law is no excuse'* becomes squarely applicable.

50. Given the above, I am inclined to conclude that the Noticee, presumably driven by its desire to earn profits, facilitated the trading in such illegal products, which raises serious questions on its ability to conduct proper and effective due diligence regarding any product. Such activities of the Noticee despite being a registered broker cannot be condoned and deserves to be met with appropriate action.

**CONSIDERATION OF THE RECOMMENDATION OF THE DESIGNATED AUTHORITY**

51. In the Enquiry Report, the DA has, after determining that the Noticee is not "fit and proper", recommended that the certificate of registration of the Noticee be cancelled.

52. In this regard, the facts and circumstances in the instant matter lead to the conclusion that since the Noticee also attracts the disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations, the Noticee does not fulfil the "fit and proper" criteria. Once an entity is declared to not fulfil the "fit and proper" criteria, in the interest of the securities market, such an entity should not be allowed to continue to act as an intermediary till the time it does not regain its "fit and proper" status. In this context, it is pertinent to mention that in several scenarios, a defect which is the reason for holding an intermediary as not "fit and proper" is curable at the hands of the intermediary, while in certain scenarios it is not.

53. In the present case, the conduct, integrity and reputation of the Noticee has been found wanting on account of its involvement in trading of "paired contracts" on the NSEL platform and also for the reason that since SEBI has filed a complaint on the basis of which an FIR dated September 28, 2018 has been registered by EOW, which is yet to be finally determined by a Court of competent jurisdiction, the disqualification provided in paragraph 3(b) under the amended Schedule II of the Intermediaries Regulations stands invoked.

54. Schedule II of the Intermediaries Regulations, in clause 4 provides that "*Where any person has been declared as not 'fit and proper person' by an order of the Board, such a person shall not be eligible to apply for any registration during the period provided in the said order or for a period of five years from the date of effect of the order, if no such period is specified in the order*". This clause, in my view, covers scenarios of 'cancelation' or 'suspension' of the certificate of registration of the intermediary.

55. Thus, the Intermediaries regulations envisage a deeming time limit of 5 years or specification of a time limit by the deciding authority, within which the intermediary may cure the defects which led to the determination of its status, if the same is done at its end. The said specification of period also serves as a reformative direction against the intermediary.

56. Considering the above, the question that now arises for determination is whether the certificate of registration of the Noticee should be cancelled as recommended by the DA or whether it should be suspended for a specific period. A direction of cancellation, even when the EOW charge sheet is the subject matter of *lis* before the MPID Court, would entail the complete winding up of the business of the Noticee. On the other hand, "suspension for a specific period" would serve the purpose of keeping the Noticee out of the securities market for a specified period, after which, the Noticee may resume its business, upon curing the issues that have led to such an action.

57. Given the peculiar facts and circumstances of the case, I am of the considered view that a direction of suspension of certificate of registration of the Noticee for a period of three months or till discharge/ acquittal of the Noticee by a Court of competent jurisdiction, whichever is later, would be more appropriate, and proportionate to the violations brought out in the present case. This suitably addresses the contention of the Noticee that the doctrine of proportionality has not been applied.

**ORDER**

58. In view of the foregoing discussions, I, in exercise of powers conferred upon me under Section 12(3) and Section 19 of the SEBI Act read with Regulation 27 of the Intermediaries Regulations suspend the certificate of registration (bearing No. INZ000052535) of the Noticee i.e. Adroit Commodities Services Private Limited, for a period of three months from the date of this Order or till such time an order is passed by a Court of competent jurisdiction discharging or acquitting the Noticee, whichever is later.

59. The Noticee shall after receipt of this order, inform its existing clients, if any, immediately about the aforesaid direction in paragraph 58.

60. The Order shall come into force with immediate effect. A copy of this order shall be served upon the Noticee and the recognized Market Infrastructure Institutions for necessary compliance.

**Place: Mumbai**
**Date: September 01, 2023**

**Sd/-**
**BABITHA RAYUDU**
**EXECUTIVE DIRECTOR**
**SECURITIES AND EXCHANGE BOARD OF INDIA**