QJA/GR/MIRSD/DOP/28014/2023-24

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

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.
Yacoobali Venture Commodity Broking Private Limited	**INZ000081033**

In the matter of trading at the National Spot Exchange Limited

BACKGROUND

1. The Securities and Exchange Board of India (for brevity's sake hereinafter referred as the **"SEBI"**) had appointed a Designated Authority (for brevity's sake hereinafter referred to as the **"DA"**) to enquire into and to submit a report on the activities of Yacoobali Venture Commodity Broking Private Limited (for brevity's sake hereinafter referred to as the **"Noticee"**) as a stock broker bearing Registration No. INZ000081033 in the matter of its trading on the spot exchange platform provided by the National Spot Exchange Limited (for brevity's sake hereinafter referred to as the **"NSEL"**) resulting in the possible violation by the Noticee of Regulations 5(e), 9(b) and 9(f) of the SEBI (Stock Brokers) Regulations, 1992 (for brevity's sake hereinafter referred to as the **"Stock Brokers Regulations"**) read with Schedule II of the SEBI (Intermediaries) Regulations, 2008 (for brevity's sake hereinafter be referred to as the **"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 December 31, 2020 (for brevity's sake hereinafter be referred to as the **"Enquiry Report"**) in terms of Regulation 27 of the Intermediaries Regulations as it read at the relevant point of time prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021, wherein based on various factual findings and observations so recorded in the said Enquiry Report, the DA recommended that the registration of the Noticee as a stock broker may be cancelled. The relevant excerpt of the Enquiry Report is reproduced below:

> *"48. 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 i.e. Yacoobali Venture Commodity Broking Pvt Ltd [Registration No. INZ000081033] as a commodities derivatives broker may be cancelled."*

3. A notice dated January 20, 2021 (for brevity's sake hereinafter be referred to as the **"SCN"**) enclosing the Enquiry Report and certain other documents referred to in the said SCN, was issued to the Noticee under 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 for cancelling the certificate of registration or any other action as may be considered appropriate, should not be taken against it. The SCN further advised the Noticee to submit its reply, if any, within 21 days of receipt of the said SCN. The Noticee filed its reply vide letter dated April 10, 2021.

4. During the interim, certain developments ensued that have a bearing to the case under consideration. In respect of five separate orders passed by SEBI during February 2019 rejecting the applications filed by the five entities seeking registration as commodity brokers who were stated to be involved in the NSEL matter, the entities filed five separate appeals before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as the **"SAT"**) which, vide its common

order dated June 9, 2022, remanded the SEBI orders for reconsideration 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..."*

5. In light of this order and other subsequent orders passed in a similar set of cases by the Hon'ble SAT, relevant additional documents/ material were provided to the Noticee vide a supplementary notice dated February 17, 2023 (for brevity's sake hereinafter be referred to as the **"SSCN"**, and along with the original notice, is collectively referred to as the **"SCNs"**) 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. In response, the Noticee, submitted its reply dated April 11, 2023.

6. It is pertinent to mention that Regulation 27 of the Intermediaries Regulations was amended with effect from January 21, 2021. Pursuant thereof, the procedure for action on receipt of the recommendation of the DA was duly incorporated in the amended Regulation 27 of the Intermediaries Regulations. Thus, these proceedings are being considered under the amended Regulation 27 of the Intermediaries Regulations.

7. Accordingly, the Noticee was granted an opportunity of personal hearing on April 27, 2023 through video conferencing. On the scheduled date of hearing, Ms. Rishika Harish and Mr. Suyash Bhandari, the Authorised Representatives of the Noticee appeared and made submissions in line with the earlier responses and also requested that the replies be read in conjunction. Based on their request, the Noticee was granted additional opportunity for making post hearing

submissions, if any. The Noticee sent its additional submissions vide letter dated May 04, 2023.

8. Thus, all the principles of natural justice have been adhered to in the present matter which is fit to be proceeded with, on merits, based on the material contained in the SCNs as well as the replies of the Noticee available on record and the oral submissions advanced during the course of the personal hearing.

9. The reply dated April 10, 2021 filed by the Noticee while denying all the allegations is summarized hereunder:

   a. The Noticee was engaged in the business of commodity trading activities approximately for the last 11 years with a client base of 90 clients and its compliance track record is impeccable and it has not been held guilty of any violations relating to securities or commodity market.
   b. SEBI does not have the jurisdiction in the present matter since it does not regulate the spot markets as substantiated by the letter of the Ministry of Finance dated November 20, 2015 and certain case laws.
   c. The Enquiry Report and the present proceedings are *void ab initio* and vitiated in effect since such proceedings cannot be initiated under the SEBI Regulations since following the mandate of Section 29A of the Forward Contract (Regulation) Act, 1952 (for brevity's sake hereinafter be referred to as the **"FCRA"**), any action done before the repeal of FCRA was to be tried according to the FCRA but considering that FCRA has not been repealed, the present proceeding, initiated under the Intermediaries Regulations alleging violation of Stock Brokers Regulations is invalid and not tenable.
   d. The Noticee was granted the certificate of registration on September 15, 2016 after thorough due diligence that it was a fit and proper person under the Stock Brokers Regulations and hence SEBI is estopped from retracting from its own decision at the time when it has specific knowledge regarding the NSEL scam which is evident from the fact that:

(i) FMC vide its order dated December 17, 2013 has observed violation of stipulated conditions of NSEL by Notification dated June 05, 2007; and

(ii) the interim report dated April 04, 2015 of the Economic Offence Wing (for brevity's sake hereinafter be referred to as the **"EOW"**) was forwarded by the Mumbai Police to FMC.

e. The letter dated December 30, 2014, from the Ministry of Finance, made observations against the NSEL and not the Noticee.

f. SEBI has failed to provide the trade log and order log based on which it has been alleged that the Noticee has participated and/ or facilitated the trading of paired contracts at NSEL.

g. The SCNs and Enquiry Report are vague and illegal/ ultra-vires.

h. The Noticee was not party to the orders/ reports which have been relied upon by the DA for ascertaining the fit and proper status and hence the observations of the various authorities are *in rem* which do not specifically deal with the conduct of the Noticee. Further, Noticee has not been given cross examination of the author of the FMC report or the Grand Thornton Report in order to determine the veracity of the observations in the report.

i. The Noticee cannot be held liable for the violations until and unless the clients of the Noticee who may have actually indulged in trading in paired contracts launched by NSEL are also held liable.

j. The reference to the outstanding amount as stipulated in the Grand Thornton cannot be relied upon to hold the Noticee liable of any allegation of participating/ facilitating trading in paired contracts.

k. The reliance on the observation of the Hon'ble Bombay High Court – *Jignesh Prakash Shah vs. State of Maharastra* (Criminal Bail Application No. 1263 of 2014) is misplaced since the Notice has not been made party to the order.

l. The Noticee was never associated or related with NSEL or the alleged paired contracts.

m. The alleged past actions of the Noticee cannot be scrutinized based on the prospective applicable laws which lack a provision as to the retrospective application of the SEBI Regulations, made applicable on the Noticee in 2015.

n. The mere trading on the platform of NSEL is not *per se* illegal. The products/ contracts launched on the NSEL platform were introduced by the Board of NSEL in concurrence with the Forward Market Commission (for brevity's sake hereinafter be referred to as the **"FMC"**) and since the Noticee came under the regulatory remit of NSEL, it had no suspicion about the internal working of the NSEL and the legal validity of the products introduced on the trading platform.

o. While working as a trading member/ broker at NSEL, it was merely acting as an agent of the clients and NSEL and solely based on the instructions and directions of the clients the Noticee entered into trades on the platform of NSEL. An agent cannot be held liable for the alleged illegal acts of its principals i.e., the clients and NSEL.

p. The Noticee had never induced any investor to invest in any of the products at NSEL

q. In order to hold a stock broker liable, it must be proved that it knowingly participated in the illegal contracts but merely executing trades on behalf of their clients will not make the brokers liable.

r. The cancelation of the certificate of registration is a very serious step which may endanger the very existence of the Noticee and jeopardize those who depend on the Noticee for their earnings and living and hence the same should not be taken without establishing the wrongs of the Noticee.

s. The terms 'fails' and 'contravenes' as stated in Regulation 23 of the Intermediaries Regulations means that the said provision is applicable only when the default is committed by the person after the registration of the person with SEBI.

t. SEBI cannot exercise any powers pertaining to trades and transactions at the NSEL platform, since being an unrecognised association it cannot be deemed to be a recognised stock exchange.

u. The DA has failed to acknowledge that the finality of the paired contracts is admittedly *sub-judice* and so the matter should not be proceeded with further till the finality is reached.

10. In reply to the SSCN, the Noticee vide reply dated April 11, 2023 and May 04, 2023, made additional submissions which are summarized hereunder:
    a. The additional documents have been provided vide SSCN after an exorbitant delay and thus the proceedings ought to be set aside.
    b. Regulation 27 of the Intermediaries Regulation does not provide for reliance on any other document or information which was not considered by the DA and subsequent to the submission of the Enquiry Report by the DA.
    c. The additional documents, i.e., criminal complaint under Section 154 of the Code of Criminal Procedure, 1973 (for brevity's sake hereinafter be referred to as the **"CrPC"**) by SEBI and the FIR is post-facto justification of the recommendation of the DA and cannot be considered as a valid basis to assess the correctness or as a reason to justify the recommendation of the DA.
    d. In case additional documents are considered by the Competent Authority which were never on record or earlier considered by the DA; the same would amount to conducting a review of the Enquiry Report.
    e. The order of SAT dated June 09, 2022 is not applicable to the Noticee since it pertains to an order against five brokers who were not granted the certificate of registration and SEBI was at liberty to consider and apply the amended Intermediaries Regulations and rely on additional documents.
    f. There is no basis on which it could be said that the Noticee was closely associated with NSEL and that it was a trading member of NSEL and the fact that it had done trade on the platform of NSEL cannot be held against the Noticee.
    g. The SEBI Regulations cannot be made applicable retrospectively. The amendment of the criteria for fit and proper person laid out in Schedule II of the Intermediaries Regulations took effect from November 17, 2021 which is much after the initiation of the present proceedings. Therefore, any retrospective reliance on such an amendment that took place later in time would be gross violation of law and principles of natural justice.
    h. If reliance is placed on the complaint filed by SEBI or FIR, the same would be in gross violation of the principle that a person/ entity is considered innocent until proven guilty – *Dataram vs. State of Uttar Pradesh* (2018) 3 SCC 22.

i. The Noticee's name does not appear as an accused in the final charge sheet file by EOW before the Court of Special Session Judge, Greater Bombay and hence the complaint filed by SEBI and the FIR registered by EOW for charges of violation of FCRA and allied charges cannot be taken at face value and have to be disregarded.

CONSIDERATION OF ISSUES AND FINDINGS

11. I have carefully perused the contents of the Enquiry Report, the SCNs issued to the Noticee and the replies dated April 10, 2021, April 11, 2023 and May 04, 2023 filed by the Noticee, the oral submissions advanced on its behalf during the personal hearing and other material/ information available on record. After considering the same, the principal issue which arises for my consideration is whether the Noticee satisfies the 'fit and proper person' criteria for functioning as a registered stock broker in the securities market.

12. 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 to in the present proceedings which are reproduced for ease of reference:

SEBI Act, 1992

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

12.(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,
(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

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. (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.

13. Prior to the merger of FMC with SEBI on September 28, 2015, the commodity brokers including the Noticee were not required to be registered with either FMC or any other regulatory authority under the FCRA. The Parliament sought to rectify this vacuum through the enactment of the Finance Act, 2015, which brought them under the regulatory supervision of SEBI with effect from September 28, 2015. This was even 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".

14. Pursuant to the merger of FMC with SEBI, 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. The Finance Act, 2015, *inter alia*, conferred powers upon SEBI to regulate commodity derivatives brokers, which included their registration as a commodity derivatives broker with SEBI. In this regard, 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 erstwhile 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. The ambit of SEBI on the violation of the provisions of FCRA also 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."

15. It is thus clear that the aforesaid provision empowers SEBI 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. Accordingly, pursuant to the merger of FMC with SEBI, it was well within the powers of SEBI to initiate proceedings under Chapter V of FCRA. Thus, the filing of the criminal complaint dated September 24, 2018 by SEBI before EOW requesting 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 is well within the powers vested upon SEBI under law.

16. The Noticee applied for a certificate of registration as a broker with effect from September 15, 2016 and continues to function as a registered market intermediary, but in light of the activities undertaken by it on the NSEL platform and the consequent action taken by FMC and SEBI, i.e. filing the criminal complaint before the EOW under Section 154 of the CrPC, the present proceedings have been initiated to adjudge the 'fit and proper person' status of the Noticee under the Stock Brokers Regulations and the Intermediaries Regulations.

17. It is a settled preposition of law that every registered intermediary in the securities market is required to fulfil the fit and proper criteria at all points of its functioning including any additional criteria from time to time. Otherwise, there would arise an anomalous situation where an entity obtained a certificate of registration after fulfilling the said criteria but then after a period of time, fails the 'fit and proper person' test, during its continued functioning in the securities market.

18. Hence, 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 and there is no merit in the argument that simply because SEBI granted registration to the Noticee on September 15, 2016 itself, SEBI would be estopped from retracting from its own decision of granting it the said registration certificate. The principle of estoppel does not apply to the instant case and 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. Further, the due presumption on the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field even till date and hence any arguments to the contrary are not maintainable. The Noticee is obligated to maintain the fit and proper person criteria on a continuous basis and it is well within the jurisdiction and powers of SEBI to adjudge the said 'fit and proper' status of the market intermediaries in the interest of the securities market.

19. The Noticee has contended that it has not been provided with the relevant documents in the matter such as trade log and order log. I note that Sub-regulation (3) and (4) of Regulation 25 of the Intermediaries Regulations specifies 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. On perusal of para 28 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 FMC Order No. 4/5/2013-MKT-1/B dated December 17, 2013 in the matter (for brevity's sake hereinafter be referred to as the **"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; and
h. data containing registration documents of 299 members and Annual Return documents of 234 members.

20. Further, the contention of the Noticee that since the trade and order logs have not been provided to it, it is not possible to provide the justification for the said trades, lacks merit since SEBI vide email dated June 18, 2020, provided the Noticee with its trade data. Notably, all the relevant and relied upon documents pertaining to the instant proceedings were provided to the Noticee as Annexures to the SCNs and vide email dated June 18, 2020, and hence the argument of the Noticee requires to be rejected outright. The facts and events elaborated above clearly indicate that all the necessary documents relied upon by SEBI for framing charges against the Noticee have been provided and every principle of natural justice has been adhered to while conducting these proceedings.

21. The Noticee has also forcefully argued that to hold it liable, it would have to be proved that the Noticee had participated in the illegal contracts 'knowingly' and that merely executing trades for itself and on behalf of the clients would not make it liable. I note that Noticee has not denied trading in the commodities contracts including the alleged 'paired contracts' by itself and on behalf of its clients. Further, I note that 'knowledge' as a *'mens rea'* is not an indispensable requirement for civil violations in view of the following observation of the Hon'ble Supreme Court on *SEBI vs Shriram Mutual Fund & Anr.* decided on 23 May, 2006:

> *"In our opinion, mens rea is not an essential ingredient for contravention of the provisions of a civil act. In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart that unless the language of the statute indicates the need to establish the element*

of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred."

22. The Noticee has contested reliance on the reports authored by the Grant Thornton, EOW and FMC and submitted that it has not been provided a cross-examination of the authors of the said reports. I note that the Noticee has not shown any specific prejudice that may have been caused to it in the absence of cross examination and instead opted for this ground of challenge as a convenient *alibi,* only to avoid its onus to prove its innocence, if any, by producing any evidence whatsoever to defend its case. Moreover, the Noticee has not spelt out reasons or the basis for doubting the veracity of the said reports. Thus, I find the plea for cross examination to be merely an evasive tactic adopted by the Noticee.

23. I 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. Subsequently, a SSCN, enclosing a copy of the order passed by Hon'ble SAT on June 9, 2022, as mentioned at paragraph 4 above, (for brevity's sake hereinafter be referred to as the **"SAT Order"**), was issued to the Noticee calling upon the Noticee to show cause why the following information/ material along with the Enquiry Report should not be considered against it 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 (hereinafter referred to as the "FIR") dated September 28, 2018; and
    c. Amended Schedule II of the Intermediaries Regulations.

24. Noticee has contended that the aforesaid additional documents were provided after an exorbitant delay and that Regulation 27 of the Intermediaries Regulation does not provide for reliance on any other document or information which was not considered by the DA and that if additional documents are considered by the Competent Authority which were never on record or considered by the DA, the

same would amount to conducting review of the Enquiry Report. In this regard, I note that the Hon'ble SAT, vide order dated June 09, 2022, has in a case relating to the issues under consideration, *inter alia*, observed as follows:

> *"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...".*

25. The Noticee has however argued that the present matter is different from that those 5 cases as in the extant matter, the Noticee is already holding a Certificate of Registration whereas, in those 5 cases, the entities had filed applications seeking certificate of registration, which were pending at the time of passing those orders. In this regard, I note that the Hon'ble SAT in *Joindre Commodities Ltd. vs. SEBI* dated July 20, 2022, while remanding the matter to the Whole Time Member of SEBI observed the following:

> *"Thus, for the reasons stated in our order dated June 9, 2022 in Appeal no. 214 of 2022 and other connected companion appeals, the impugned orders passed by the WTM against the brokers / appellants in the present appeals cannot be sustained and are quashed. The appeals of the brokers are allowed. The matters are remitted to the WTM to decide the matter afresh in the light of the observation made in our order dated June 9, 2022 in accordance with law after giving an opportunity of hearing to the brokers."*

26. I am relying upon the principle contained in these Orders where the essence is that the Whole Time Member of SEBI has been advised to provide the documents which SEBI intends to use/ rely in the present proceedings so that the entity would be provided with adequate opportunity to prepare its defense, if any, on these documents and which would serve the just cause of ensuring due observance of the principles of natural justice. Due opportunity to evaluate the materials and to be heard addresses the principles of natural justice. It is not in dispute that the Hon'ble SAT had already granted permission to SEBI to issue SSCN which was complied with in this regard. In view of the same, the contention of the Noticee that documents or information which was not considered by the

DA cannot be considered by the Competent Authority is untenable. In any event, the order of SAT was not *qua* the Noticee and the additional documents have become relevant to the 'fit and proper criteria' only post the amendment to the Schedule II (much later after the relevant competent authorities passed the orders which were the subject matter of the aforesaid SAT proceedings); and hence the question of those documents being produced earlier could not possibly arise.

27. Before moving forward to consider the matter on merits and test the fulfilment of the 'fit and proper person' criteria by the Noticee, on the basis of available material including the additional material as detailed at paragraph 23 above, the background facts related to the Noticee and necessary for the present proceedings are narrated in brief, hereunder:

    a. The Noticee is a commodity derivatives broker registered with SEBI having Registration No. INZ000081033 with effect from September 15, 2016.
    b. NSEL was incorporated in May, 2005 as a Spot Exchange, inter alia, as an electronic exchange for trading in commodities. In exercise of the powers conferred under Section 27 of the FCRA, the Central Government vide its 2007 Exemption Notification granted an exemption to all forward contracts of 'one-day duration' for the sale and purchase of commodities traded on the NSEL from the operations of the provisions of the FCRA, subject to 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".
    c. In October 2008, NSEL commenced operations providing an electronic trading platform to its participants for spot trading of commodities, such as bullion, agricultural produce, metals, etc. and 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, involving the same counterparties. The transactions were structured in a manner that the buyer of the short duration contact always ended up making profits.

d. 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 2007 Exemption Notification, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measures, if needed, to protect investors' interest. FMC had accordingly called for the trade data from different spot exchanges, including NSEL in the prescribed reporting formats. 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 that the condition of *'no short sale by members of the exchange shall be allowed'* was being not 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 also in violation of the conditions specified by the Government of India in its 2007 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.

28. From the perusal of the FMC Order in respect of the 'paired contracts', which were traded on the NSEL platform during the relevant period, I note that the FMC had, *inter alia*, observed that the following conditions stipulated in the 2007 Exemption Notification were violated:

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 going 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. As per the FCRA, the "ready delivery contracts" were required to be settled within 11 days of the trade and 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 2007 Exemption Notification.

29. It is observed that the NSEL was given permission to setup as a Spot Exchange for trading in commodities. It was essentially meant to only offer forward contracts having one-day duration as per 2007 Exemption Notification. In its order, FMC had observed that the 55 contracts offered for trade on the NSEL were with settlement periods exceeding 11 days and that all such contracts traded on the NSEL were in violation of provisions of FCRA. 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 the said definition contained in the FCRA, FMC was of the view that all the contracts traded on the NSEL which provided settlement schedule exceeding 11 days were treated as Non-Transferable Specific Delivery contracts. It is, therefore, seen that even though MCA had stipulated in the 2007 Exemption Notification that only forward contracts of 'one-day duration' contracts of one-day duration 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. However, what is beyond doubt is that the NSEL had permitted 55 contracts of various commodities having duration longer than 11 days and these contracts were in contravention of the exemption granted to NSEL.

30. At this stage, 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) (for brevity's sake hereinafter be referred to as the **"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".*

31. The Noticee has contended that it was not a party to the FMC Order wherein the FMC found fault with the operation of NSEL and therefore cannot be relied upon. In this regard, it would be necessary to place on record that the reference of the FMC Order is to take cognizance of the nature of the trades of the Noticee given the nature of contracts being traded on the NSEL and determine the violations of the relevant provisions of law, if any, in order to ascertain its fit and proper status in the securities market under the Intermediaries Regulations and hence for ascertaining the fit and proper status of the Noticee, it is not a pre-condition that the Noticee should be party to the FMC Order.

32. Noticee has also submitted that the finding of the DA that the paired contracts were not contracts in commodity but in the form of financial transactions, etc., are not relevant and are devoid of any force in light of the decision of the Hon'ble Bombay High Court in the matter of *63 Moons' Technologies Limited vs. State of Maharashtra* dated August 22, 2019, wherein the Hon'ble High Court in the said matter has held that the paired contracts were not financial transactions but were trades in commodity as per regulations and bye laws of NSEL. I find this submission of Noticee to be totally untenable in light of the judgement dated April 22, 2022 of 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) (for brevity's sake hereinafter be referred to as the **"MPID matter"**), wherein the Hon'ble Supreme Court while drawing reference to the representations made by the NSEL in respect of the paired contracts, *inter alia*, held that:

"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 return the deposits on demand. Therefore, the State of Maharashtra was justified in issuing the attachment notifications under Section 4 of the MPID Act."

33. Thus, I note that the Hon'ble Supreme Court has already described the nature of the 'paired contracts' offered on the NSEL platform. In the merger petition (*63 Moons Technologies Ltd. vs. UOI*), it was 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 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 had also observed that the NSEL were advertising assured and uniform returns of 16% p.a. for the 'paired contracts' traded on the NSEL platform where the return offered was the same across the commodities. It was observed that the return remained the same irrespective of the duration of the contract. At Para 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. It was thus noted in the judgement of the Hon'ble Supreme Court in the MPID matter that the 'paired contracts' were being marketed as an alternative to fixed deposits and that the overwhelming majority of the sale leg of the 'paired contracts' which were executed were short sales i.e., commodities to back such sales were not available at the designated warehouses of the NSEL.

34. These facts are highlighted from the order of the Hon'ble Supreme Court only to emphasise the point that the paired contracts were not contracts in commodity but in the nature of financing transactions which were not envisaged under the Exemption Notification.

35. I note from the Enquiry Report that Noticee has executed trades in the '*paired contracts*' of multiple commodities. The details of paired contracts in which trading was done by the Noticee during the period from February 2012 to April 2012 are given below:

Contract Name	**Contract Description**
CASTKADI3	GUJARAT CASTOR SEED SMALL EX-KADI
CASTKADI36	GUJARAT CASTOR SEED SMALL EX-KADI
CWOILKDI2	INDIAN COTTONSEED WASH OIL EX KADI
CWOILKDI25	INDIAN COTTONSEED WASH OIL EX KADI
PDY1121HR2	PADDY BASMATI PUSA 1121 VARIETY
PY1121HR25	PADDY BASMATI PUSA 1121*
PDYTRADHR2	PADDY BASMATI TRADITIONAL
PYTRADHR25	PADDY BASMATI TRADITIONAL

***As per NSEL circular Ref no NSEL/TRD/2011/151 dated September 29, 2011, the commodity description reads as "Paddy Basmati of Pusa 1121 Variety is only deliverable"*

36. The Enquiry Report has illustrated certain paired contract trades executed by the Noticee wherein the two legs of trades were executed for the same commodity on the same day within few seconds / minutes. One leg of trade being a buy trade involving T+2 or T+3 settlement cycle and the other leg of the trade being sell trade involving T+25 or T+36 settlement cycle. For instance, the Noticee purchased 139 units of CASTKADI3 for an amount of ₹ 3,70,087.50 at 15:24:48 Hrs on April 16, 2012. Immediately afterwards at 15:25:18 Hrs on the same day, the Noticee sold 139 units of CASTKADI36 for an amount of ₹ 3,79,678.50.

Client Member Name	**Trading Member Name**	**Trading Date and Time**	**Sell/ Buy**	**Quantity**	**Trade Value (in Rs.)**	**Scrip Code**
YACOOBALI VENTURE COMMODITY BROKING PVT	YACOOBALI VENTURE COMMODITY BROKING PVT	2012-04-16 15:24:48	Buy	139	3,70,087.50	CASTKADI3

YACOOBALI VENTURE COMMODITY BROKING PVT	YACOOBALI VENTURE COMMODITY BROKING PVT	2012-04-16 15:25:18	Sell	139	3,79,678.50	CASTKADI36

37. I note from the NSEL Circular Nos. NSEL/TRD/2009/125 and NSEL/TRD/2009/127 both dated September 19, 2009, that the contract symbols CASTKADI3 and CASTKADI36 refer to the trading in Castor Seed Traders' Ex-Kadi (T+3) and (T+36) Contracts, respectively. I find that the Noticee was simultaneously executing trades in a short term buy contract (T+3, i.e. 3 days' settlement) and a long term sell contract (T+36, i.e. 36 days' settlement). Thus, the Noticee is found to be non-compliant with the conditions that there should be no short sale and compulsory delivery of outstanding position at the end of the day, as was stipulated in the Notification dated June 05, 2007 and thus had facilitated transactions in paired contracts for its clients which were clearly in the nature of 'Paired Contracts' during the period from February 2012 to April 2012.

38. The Noticee has contended that mere trading on the platform of NSEL is not *per se* illegal and that the products/ contracts launched on the NSEL platform were introduced by the Board of NSEL in concurrence with the FMC, and that since the Noticee came under the regulatory remit of NSEL, it had no suspicion about the internal working of the NSEL and the legal validity of the products introduced on the trading platform. Noticee has further contended that while working as a trading member/ broker at NSEL, it was merely acting as an agent of the clients and NSEL, and that solely based on the instructions and directions of the clients did it enter into any trades on the platform of NSEL.

39. Considering the deliberations and discussions recorded above and the submissions of the Noticee, in order to give the benefit of doubt to the Noticee I would like to examine whether while facilitating transactions in paired contracts for its clients, it was under the bonafide belief that such transactions were actually spot contracts in commodities or whether just because 'paired contracts' were offered meant that NSEL was offering contracts which were not resulting in compulsory delivery and, therefore, the Noticee should have been aware that

such a product was not actually a spot contract in commodities. As stated above, such contracts were being advertised as an alternative to fixed deposits and the return offered was fixed (e.g. 16%) across all commodities irrespective of the nature of the contract or the duration. These contracts were structured in a manner which ensured that the buyer always made pre-determined profits. In the undeniable background that there was a settlement default at NSEL, it is clear that there were enough red flags which should have alerted the Noticee when these products were first offered by NSEL. Even with a knowledge of basic arithmetic, it can be seen that these contracts were with settlements ranging from T+2 to T+32. With the material on record, it is further clear that any prudent person (including the Noticee, who is an intermediary and well versed with financial and commercial knowledge) would have come to the conclusion that what was being offered were not spot contracts in commodities, that they were contrary to the FCRA and the 2007 Exemption Notification and rather had 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*.

40. The non-defaulting intermediaries and their clients by using the T+2/T+3 'buy' contracts, purchased commodities using a 'warehouse receipt' in exchange for money on the relevant settlement date. The simultaneously executed T+26/T+36 'sell' contract would be used to effectively reverse the aforesaid transaction by selling the said warehouse receipt for a higher price [which was determined when the paired contracts were simultaneously executed] would be receivable on the relevant settlement date for the T+25/T+36 contract (the spread between the two contracts executed on the same date with different settlement dates was the fixed profit). Thus, since this was effectively marketed and used as a financial contract, the counterparty (in this case; the Noticee) never really bothered to check the existence of the goods against which the warehouse receipt was issued, even when it had possession of the warehouse receipt in the interregnum period between the T+2/T+3 settlement and the T+25/T+36 settlement. Thus, the counterparty were more than an equal beneficiary of the paired contract as were the counterparty defaulting brokers and their clients.

41. The Noticee being an intermediary was expected to do due diligence on the products which it offered for trading to its clients. An assumption as to the legality of 'paired contracts' clearly shows that the Noticee failed to do exercise adequate due diligence. The Notification regarding approval of only spot contracts/ forwards of one-day duration, permitted on NSEL was in public domain and FMC had never approved the 'paired contracts', especially when paired contracts were started i.e. 2009 and NSEL was exempt from FCRA. The mere fact that NSEL may refer to any approval of FMC for the purpose of introduction of any contracts in its bye-laws is irrelevant when in fact, it was clear that the FMC was not even the relevant authority for NSEL when paired contracts were introduced and had never approved the same. This is a clear indication of lack of due diligence by the Noticee of operating in a manner without following the rules.

42. Thus, the Noticee failed to perform basic due diligence of the contracts offered *vis-a-vis* the conditions specified in the 2007 Exemption Notification and the FCRA. Noticee has contended that there is no basis on which it could be said that it was closely associated with NSEL and the fact that it was a trading member of NSEL and had done trade on the platform of NSEL, cannot be held against it. I note that the irrespective of the lack of association with NSEL, for the clients, the face of the NSEL and the 'paired contracts' was the Noticee itself and the 'paired contracts' could not have been executed in large volumes, across the several clients without the action and facilitation of the Noticee. I find that such association or active engagement of the Noticee in the 'paired contracts' has seriously questioned the reputation, fairness, honesty, integrity and character of the Noticee in the securities market. The association of the Noticee with NSEL cannot be denied since Noticee was observed to be facilitating the clients to trade in the 'paired contracts'.

43. Noticee has strongly argued that no reliance can be placed on the FIR and EOW report since the name of Noticee does not appear as an accused in the final charge sheet filed by EOW before the Court of Special Session Judge, Greater Bombay. On such a protest, I am of the considered view that there is no assertion

of guilt made in the SCNs as the present proceedings pertain to testing the continuing 'eligibility criteria' of the 'fit and proper criteria' of the Noticee. Besides, no material has been brought on record by the Noticee to dispute the fact that the said FIR validly subsists as on date. It is neither the case of the Noticee that the said FIR has been quashed or that a C-Summary has been filed by the authority concerned in this regard. In the absence of the above discussed factors, I am not inclined to accept the submissions put forth by the Noticee in this context. Needless to say, the relied upon case laws cited to buttress the said submissions also do not come to the rescue of the Noticee.

44. Having established that the Noticee has traded in 'paired contracts' for its clients, I now proceed to examine the allegations levelled against the Noticee in the SCNs. It is noted that the main allegation against the Noticee, as levelled in the SCN, is that by facilitating in the trading in 'paired contracts' on the NSEL platform during the relevant period as a Trading Member/ Clearing Member, the continuance of the registration of the Noticee as a broker is detrimental to the interest of the securities market and the Noticee is no longer a 'fit and proper person' for holding the certificate of registration as a broker in the securities market, which is one of the conditions for continuance of registration 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.

45. While it is true that the Noticee was granted a Certificate of Registration No. INZ000081033 by SEBI on September 15, 2016 in terms of provisions of the FCRA and SEBI Circular No. CIR/MIRSD/4/2015 dated September 29, 2015, SEBI was yet to conclude any violation of law by the brokers which would be relevant under the fit and proper criteria at the time the registration was granted as mentioned in the earlier part of the order, on the basis of certain documents/ material that came to light, SEBI formed an opinion to proceed against the brokers and to file the Complaint dated September 24, 2018 and FIR dated September 28, 2018 as has been provided to the Noticee vide SSCN. Thus, it is incorrect to state that the mere grant of registration would operate as an estoppel for any possible enquiry proceedings when the *prima facie* determination with

respect to the violations of the Noticee had not then taken place and SEBI had sufficient time till September 29, 2018 to initiate relevant action.

46. The SCNs further alleged that in light of the aforesaid documents as well as observations against the Noticee in the Enquiry Report, the Noticee is not a 'fit and proper person' for holding the certificate of registration being in violation of Regulation 5(e) of the Stock Brokers Regulations read with amended Schedule II of the Intermediaries Regulations.

47. I note that 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. 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.

48. Noticee has contended that SEBI Regulations cannot be made applicable retrospectively and that the amendment of the criteria for fit and proper person laid out in Schedule II of the Intermediaries Regulations took effect from November 17, 2021 which is much after the initiation of the present proceedings. In this context, as noted above, the Noticee is holding a Certificate of Registration since September 15, 2016. In order to continue to hold such a Certificate of Registration from SEBI, the Noticee is also required to satisfy the conditions of eligibility, which, inter alia, included, continuance of its status as a 'fit and proper person'. The above condition to be a fit and proper person is not a one-time condition applicable only at the time of seeking registration. Rather, as detailed in the earlier part of my order, the provisions governing the criteria show that this is 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. Therefore, the criteria of 'fit and proper person', is an ongoing requirement throughout the period during which the Noticee remains operational in the Securities Market as a registered intermediary.

49. Furthermore, as and when the 'fit and proper' criteria changes, the Noticee would be required to comply with the revised criteria, including as in this instance, the criteria as revised vide the amendment in November 2021. It is noted that 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*, includes the following:

> *"(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;"*

50. In this regard, the Noticee has submitted that reliance on the FIR is misplaced since it amounts to a violation of the principle that a person/ entity is considered innocent until proven guilty. I note from the SSCN that an FIR has been registered with the MIDC Police Station, Mumbai, against the Noticee under section 154 of the CrPC on September 28, 2018 and that the same has not been challenged, quashed or stayed by any competent court *qua* the Noticee. The disqualifications listed under paragraph 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations are unambiguously clear and no exemptions from such criteria has been provided. Once the disqualification is triggered, the 'fit and proper' person criteria is open for determination by SEBI. It is, therefore, noted that the disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations is also triggered *vis-à-vis* the Noticee.

51. Thus, the fact that the Noticee has traded in the 'paired contracts' on behalf of its clients and as a broker and as a member of NSEL, represented NSEL to the investors shows the undisputed participation of the Noticee in the said scheme to provide its platform for trading in 'paired contract' that was not permitted under

the 2007 Exemption Notification as it was purely financial contracts promising assured returns under the garb of spot trading in commodities (as held by the Hon'ble Supreme Court of India referred *supra*), which has caused loss to the market stated to be to the extent of ₹ 5,500 Crore. Therefore, the Noticee by its conduct and as a member of NSEL has acted as an instrument in promoting and/or dealing in 'paired contracts' which were in the nature of financing transaction (as held by the Hon'ble Supreme Court of India referred *supra*). The Noticee, by trading and by providing access for taking exposure to 'paired contracts' has exposed its clients to the risk involved in trading in a product that did not have regulatory approval and thereby raises doubts on its competence to act as a registered securities market intermediary. Thus, I am of the view that the trading activities of the Noticee in 'paired contracts' for its clients on the NSEL platform has seriously jeopardized its reputation, SEBI's belief in its competence, fairness, honesty, integrity and character, which compelled SEBI to file the criminal complaint against such brokers including the Noticee.

52. 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 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 above, the principle of *'ignorantia juris non excusat'* or that *'ignorance of law is no excuse'* becomes squarely applicable.

53. Thus, while examining the consequences of the conduct of the Noticee, the fact that is undeniably clear to me is that the conduct as has been displayed by the Noticee in its trading on the NSEL platform which was detrimental to the interest of the investors in the securities market resulted in the filing of a criminal complaint by SEBI. 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 the complaint filed by SEBI and the FIR that was registered by the EOW based on the said complaint of SEBI.

54. Given the discussion and deliberations, I am constrained to conclude that the Noticee, presumably driven by its desire to earn brokerage and/ or profit, provided access to its clients to participate in an illegal product, which raises serious questions on its ability to conduct proper and effective due diligence regarding the product itself. Such activities of the Noticee as a registered broker cannot be condoned and deserves to be meted with appropriate measures to prevent such wrong doings from recurring.

CONSIDERATION OF THE RECOMMENDATION OF DESIGNATED AUTHORITY

55. 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.

56. As discussed in the preceding paragraphs, the facts and circumstances in the instant matter also lead to the conclusion that since the Noticee attracts the disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations, the Noticee is not a "fit and proper" person. Once an entity is declared to be not "fit and proper", 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.

57. In the present case, the Noticee has been found to be not 'fit and proper" for the reason that its conduct, integrity and reputation has been found wanting on account of the Noticee's involvement in trading of "paired contracts" on the NSEL platform and also for the reason that since the 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.

58. 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.

59. Thus, the Intermediaries regulations envisage 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 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.

60. Considering the above, the question now arises for determination is whether the certificate of registration of the Noticee should be cancelled 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, after curing the issues that have led to such an action.

61. 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 commensurate to the violations brought out in the present case.

ORDER

62. 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. INZ000081033) of the Noticee i.e., Yacoobali Venture Commodity Broking Private Limited, for a period of three months from the date of this Order or till an order is passed by a Court of competent jurisdiction discharging or acquitting the Noticee, whichever is later.

63. The Noticee shall, immediately after receipt of this order, inform its existing clients, if any, about the aforesaid direction in paragraph 62.

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

Sd/-

Place: Mumbai
Date: July 10, 2023

BABITHA RAYUDU
EXECUTIVE DIRECTOR
SECURITIES AND EXCHANGE BOARD OF INDIA