QJA/VS/MIRSD/DOP/28587/2023-24

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

In respect of

Name of the Noticee	SEBI Registration No.
Padmakshi Commodities Private Limited	**INZ000017738**

In the matter of National Spot Exchange Limited ("NSEL")

BACKGROUND

1. The present proceedings originate from the Enquiry Report dated August 28, 2019 submitted by the Designated Authority (hereinafter referred to as the **"DA"**) in terms of regulation 27 of the SEBI (Intermediaries) Regulations, 2008, as it stood at the relevant point of time, prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021 (hereinafter referred as "**Intermediaries Regulations**"), wherein the Designated Authority (hereinafter referred to as "**DA**"), based on various factual findings and observations so recorded in the said Enquiry Report, has recommended that the certificate of registration of Padmakshi Commodities Private Limited (hereinafter referred to as "**Padmakshi/*Noticee***") as a stock broker may be cancelled.

2. On the basis of the factual details, material available on record and after considering the reply filed by the Noticee, the DA has made the following recommendation:

> *"36. In view of the facts and circumstances of the case and material placed before the Designated Authority, I am of the view that the Noticee is not a fit and proper person in terms of Regulation 5(e) of the Stock 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. Padmakshi Commodities P. Ltd. [SEBI Registration. No. INZ000017738] as a commodity derivatives broker be cancelled in the interest of the securities market."

3. After considering the Enquiry Report, a Post Enquiry Show Cause Notice dated January 08, 2020 (hereinafter referred to as "**SCN**") enclosing therewith the Enquiry Report of the DA 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 action of cancellation of Certificate of Registration as recommended by the DA or any other action as deemed fit by the Competent Authority, under regulation 28(2) of the Intermediaries Regulations (as applicable at the relevant time) should not be taken against it. The SCN further required the Noticee to submit its reply, if any, within 21 days of receipt of the same. In response to the said SCN, the Noticee, vide letter dated February 25, 2020 filed its reply. Pursuant to the same, personal hearing in the matter was scheduled before the then Competent Authority i.e. Whole Time Member (hereinafter referred to as "**WTM**") of the Securities and Exchange Board of India (hereinafter referred to as "SEBI") for January 07, 2021.

4. While proceedings in the present matter were ongoing, SEBI passed five separate orders during February 2019 rejecting the applications filed by five other entities for registration as commodity brokers. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**Hon'ble SAT**"). The Hon'ble SAT vide its common order dated June 9, 2022, remanded the aforesaid orders to SEBI to decide these matters afresh within six months from the date of the said order. While remanding the aforesaid SEBI orders, the Hon'ble SAT *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. Subsequently, due to administrative reasons, the competent authority of SEBI, reallocated cases and transferred the present matter to the undersigned for further proceedings.

6. In light of the aforesaid order of Hon'ble SAT and certain other subsequent orders passed by the Hon'ble SAT in similar set of cases from time to time, it was felt necessary to furnish certain additional documents/material to the Noticee before concluding the present proceedings. Accordingly, a notice of hearing dated November 11, 2022 scheduling personal hearing on December 21, 2022 was sent to the Noticee. In light of the aforesaid order of Hon'ble SAT, certain additional documents/material (as indicated in the hearing notice) were provided to the Noticee with the hearing notice and Noticee was advised to file its reply, if any, in respect of the additional documents/information/facts before or on the date of hearing. Vide the aforesaid notice of hearing, the Noticee was also informed that the additional documents/information/facts will be considered by the Competent Authority along with the Enquiry Report. The Noticee vide its letter dated December 02, 2022 sought inspection of documents which was scheduled for December 12, 2022 and later rescheduled to December 19, 2022 upon the request of the Noticee, when it was availed by it. Vide a letter dated December 20, 2022, the Noticee sought adjournment of personal hearing which was earlier scheduled for January 04, 2023 and was adjourned to January 18, 2023, upon the request of the Noticee. Vide an email dated January 03, 2023, the Noticee was advised to furnish certain information/documents which was provided by the Noticee vide its letter dated February 27, 2023.

7. On the scheduled date of hearing i.e January 18, 2023, the authorized representatives of the Noticee appeared before me and made submissions in line with the replies of the Noticee on record. Subsequently, the Noticee vide its letter dated July 07, 2023 filed additional written submissions.

8. The reply filed by the Noticee vide letter dated February 25, 2020 is summarized hereunder:

8.1. The Noticee denies the allegations levelled in the SCN;

8.2. The Noticee has contended that by not providing with the relevant information, data, trade/order log, investigation/inspection report or any other material relied upon by SEBI for issuing the SCN, the principles of natural justice have not been adhered to.

8.3. Noticee was advised to refer to publically available documents such as Forward Markets Commission (hereinafter referred to as "**FMC**") Order dated December 17, 2013. The reliance of SEBI on the FMC's Order is completely misconceived and misplaced as neither the Noticee was a party to the said Order nor the trades of Noticee in paired contracts were matter under consideration of FMC.

8.4. The DA has wrongly relied upon the case of *Kanwar Natwar Singh vs Directorate of Enforcement*[1] decided by Hon'ble Supreme Court as the Noticee has only requested for furnishing of documents which have been relied upon by SEBI but the said documents have not been provided to the Noticee.

8.5. The DA has wrongly held that the ratio of *DSJ Communications Ltd.* does not apply to the present case and the WTM of SEBI is empowered to appoint the DA pursuant to Section 3(2) of the SEBI (Delegation of Powers) Order, 2015 in terms whereof the power and functions delegated to any officer of the board can be exercised by any officer or authority higher in grade or rank to him. The powers delegated to the SEBI officers under the SEBI (Delegation of Powers) Order, 2015 cannot be in derogation of delegation of power which have been delegated under the SEBI Regulations.

8.6. In terms of Section 29A(2)(e) of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as "**FCRA**"), SEBI could initiate prosecution proceedings against the members of NSEL for alleged violation of FCRA and could not initiate enquiry proceedings under the Intermediaries

[1] (2010) 2 SCC 497

regulations. FCRA does not fall within the definition of 'Securities laws' as given in regulation 2(1)(k) of the Intermediaries regulations. The DA has given an erroneous finding that SEBI is statutorily empowered to initiate the proceeding to determine whether the Noticee is a fit and proper person or not. The action of the Noticee's at the relevant time were not governed by SEBI Regulations but were governed by NSEL's bye laws, Regulations, etc. and provisions of FCRA and hence SEBI could only initiate criminal proceedings against the Noticee which it has initiated.

8.7. The DA has not provided any answer to the Noticee*'s* contention that the SEBI regulations cannot be made applicable retrospectively.

8.8. The DA did not consider Noticee*'s* objection on SEBI's jurisdiction on spot market.

8.9. The DA has wrongly relied upon the case of Jermyn Capital LLC and Mukesh Babu, both decided by Hon'ble SAT, to show that close association with any person who does not enjoy a good reputation, is good enough to determine that the person in question is not fit and proper.

8.10. It is submitted that a member of a stock exchange or a person holding a Certificate of Registration from SEBI as an intermediary cannot be construed as having close association with the exchange or SEBI merely on the basis of being a member or intermediary.

8.11. The DA has set out certain observations made by Courts and certain authorities including the observations made by the Economic Offence Wing (EOW) which were not pertaining to the Noticee. The reliance has been placed upon the proceedings which were sub-judice or to which the Noticee was not privy.

8.12. Bombay High Court vide its Order dated August 22, 2019 has held that the paired contracts were not financial transactions but were trades in commodities as per regulations and bye laws of NSEL. Consequently, upon finding of Hon'ble High Court that NSEL is not a 'financial Establishment' and the paired contracts are not 'financial transactions' under MPID Act, the EOW case and SFIO Report, as far as they allege

paired contracts were financial transactions have become redundant and infructuous.

8.13. The reliance on Grant Thornton ("GT") Report and FMC Order which was based on GT Report is in violation of the Hon'ble Madras High Court Order dated July 26, 2018 wherein the Hon'ble Court had granted injunction against its use in any manner adverse to the Plaintiff i.e. *63 Moons Technologies Ltd.* which was extended till further order on October 23, 2018.

8.14. Assuming that any member of NSEL is found guilty of violating any provisions of FCRA, Regulations and bye laws of NSEL, it should be penalized under FCRA which provides for regulatory regime to deal with all such infractions.

8.15. SEBI has initiated enquiry not only against the Noticee but against other 304 members of NSEL also and it is legally untenable to contend that anyone who dealt in paired contracts as member of NSEL would be declared as not a "fit and proper" person.

8.16. It is not clear how the observations of the various agencies and Courts on the role of NSEL or the mismanagement of NSEL by its promoters/KMP can have bearing on the Noticee's criteria as a fit and proper person.

8.17. FMC's Order dated December 17, 2013 has found fault with the operations of NSEL for launching paired contracts and the role of its promoters and KMP. Neither the Noticee was a party to said proceedings nor the FMC considered the role/activities of the Noticee as member of NSEL.

8.18. The observations of Hon'ble Bombay High Court in the matter of 63 Moons Tech Limited vs Union of India have become redundant on account of the detailed judgement dated August 22, 2019 of the Hon'ble Bombay High Court.

8.19. The reliance of DA on the interim report of EOW is erroneous and misplaced and there are no specific charges made against the Noticee in the interim report. The Noticee had traded in/facilitated in the paired contracts as a member of NSEL in accordance with the business rules and

regulations of NSEL and as on date of closure of business of NSEL, an amount of ₹ 23,98,20,993 was outstanding which is nothing but loss on account of fraud committed by NSEL's management and defaulting brokers. The Noticee submits that an amount of ₹ 21,41,35,347 is receivable by the Noticee from NSEL.

8.20. The DA has failed to appreciate that the paired contracts were introduced by NSEL with the approval of its Board. The Noticee as a member of NSEL had no other option but to trade in such contracts by observing the business rules and regulations of NSEL. The finding of DA that Noticee as a commodity broker allowed itself to become an instrument and agent of NSEL is baseless.

8.21. The DA has not dealt with or given due consideration to various contentions like its clients were duly registered with proper KYC, trades were carried out as per NSEL system and no brochure/ pamphlets/ presentations on NSEL were issued or provided to its clients by the Noticee.

8.22. The said paired contract product was widely traded in the market and became popular amongst the risk savvy investors having investible surplus and intending to invest it in relatively low risk products. In this background, few of the Noticee's clients requested it to allow them to invest their funds. After carrying out the due diligence, the Noticee started trading in the product only for some of its clients.

8.23. Out of around 159 registered clients with the Noticee in the NSEL commodity broking entities, the Noticee executed trades only for 64 clients who had approached it at their own instance. The number itself proves that the Noticee neither marketed this product nor it had intention to do so. It earned brokerage of barely ₹ 38,28,440. There has been no complaints or grievances or allegations of any violations against the Noticee. The Noticee and its clients are also the victim of the fraud committed by NSEL and the defaulting members of NSEL as NSEL had pay out obligations of ₹ 23,98,20,993 out of which 43% belonged to own account (promoter, group companies and related family).

8.24. It is clear from the contents of the Government of India letter dated December 30, 2014 that the Government wanted FMC to take action against NSEL. The letter is conspicuously silent on the activities of member of NSEL or any contemplated action against them.

8.25. The Hon'ble Apex court in its Judgement and Order dated April 30, 2019, in the case of amalgamation of 63 moons by the Central Govt. with NSEL, has observed that the paired contracts of NSEL were in breach of exemption granted to NSEL and FCRA. The said judgement has no relevance so far as the role of members of NSEL or the Noticee is concerned.

8.26. The Hon'ble Supreme Court in its Judgment dated April 30, 2019 has held that no 'public interest' is involved in recovery of private dues of traders who traded on NSEL. Relying on the said observations of the Hon'ble Supreme Court, Hon'ble Bombay High Court in its Interim Order dated January 15, 2020 in *Moonish Rangari & Ors. vs Union of India* has held that the entire jurisdictional basis of the SFIO Investigation which was ordered by the Central Government in the purported 'public interest' vide its Order dated October 28, 2016 has ceased to exist. In view thereof, the SFIO investigation report appears to be without jurisdiction and hence cannot be relied upon by SEBI for drawing any adverse inference.

8.27. Broker operating on the stock exchange cannot be treated as a close associate of a stock exchange unless there is a common ownership, management and control. Since paired contracts were a product of NSEL in which the investors could trade, the same cannot be viewed as a person or entity enjoying good or bad reputation. Thus, alleging close association between the Noticee and paired contracts is flawed.

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9. The additional written submissions filed by the Noticee vide its letter dated July 07, 2023 and the oral submissions made during the course of personal hearing held on January 18, 2023, are summarized hereunder:

9.1. The Noticee, vide its letters dated December 02, 2022 and December 20, 2022 had sought copy of some documents which were not provided to it. In absence of relevant information and documents, it is not in a position to present the case in detail and has reiterated its request for providing the documents.

9.2. NSEL had been openly carrying out trading in variety of commodities and details of the same were regularly reported to FMC, who was performing the function of a regulator over NSEL. There was no reason to doubt the legality of these contracts.

9.3. It had executed trades on NSEL platform when at the relevant time around 500 Brokers were executing trades through thousands of terminals for lacs of clients including Government companies and Organizations like MMTC, FCI, NAFED, etc., no adverse remark/red flag were raised against any of the entities who were also purported to be closely associated with NSEL and alleged paired contracts. Thus, their dealing in NSEL trading platform be considered on similar lines.

9.4. On August 05, 2011, FMC was appointed as the designated agency for NSEL and it was expected to play a proactive role by monitoring trades at NSEL platform and its statutory compliance requirements in terms of Government of India notification dated June 05, 2007. There was gross failure of FMC in performing its duties as an apex regulator of commodities market and their presence as mere silent spectator is root cause of subject matter of present proceedings.

9.5. The first leg of the alleged paired contract was always a purchase and thus, there is no question of a short sale. There appears to be a misconception that a party has to go to the warehouse and take actual physical possession of commodities. The goods were represented by documents and there was never any default in delivery obligations for any of its contracts.

9.6. The paired contracts were also referred to as ‘Trader Contract’. Noticee had fulfilled its total obligation on execution of buy and sell contracts independently. Notably, it was acting as a ‘Member’ of NSEL and thus on execution of buy order, it made full payment of consideration on buy contract and were in totality delivery based transaction executed on NSEL. Thus on making full payment for buy contract, it had complied with entire obligation. With regard to sell contracts, on fulfillment of pay in obligation for delivery of underlying commodities, pay out was received by it. Thus, it had complied with its entire obligation qua sell contracts. On each buy and sell contracts, levy of VAT as applicable, warehousing charges and octroi as applicable were recovered and paid by it.

9.7. Except member/broker relation with NSEL, it has no other connection or association with NSEL, its directors, promoters and KMP in any manner whatsoever. Except earning meagre brokerage on execution of trades for few of the clients, it has not derived nay gain or benefit of any nature. The transactions were carried out in due compliance of Bye laws, Rules, Regulations and Circulars issued by NSEL from time to time and no grievance of any nature was raised against it by NSEL or FMC or any of the clients.

9.8. It has executed alleged paired contracts on behalf of clients under their instructions and authorization. No advice, presentation or inducement of any nature was provided or extended to the clients. The trades were executed on their own decision and no funding were given to the clients. 37 clients had voluntary submitted their affidavit stating that they had executed trades on their own decision and no funding were given to them.

9.9. 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 and estoppel would apply.

9.10. It was its genuine and bonafide belief that the alleged contracts were in compliance with the conditions of GOI notification and there was nothing contrary thereto. If any such alleged paired contract had to be considered to be illegal, then the same had to be annulled as void in law ab initio. Neither GOI nor FMC nor the department of Consumer affairs(DCA) nor

SEBI nor any authority has held that all such transactions need to be annulled.

9.11. At the relevant time, SEBI was not the regulator of the NSEL, and it ought not to have initiated any action under Regulation 23 of the Intermediaries Regulations on the purported ground of alleged contravention of "…*provisions of the securities laws or directions, instructions or circulars issued thereunder."*

9.12. There was no exemption/prohibition for grant of personal hearing by the DA under the Intermediary Regulations. Thus, the Noticee should have been granted an opportunity of personal hearing before issuing Enquiry Report.

9.13. It was NSEL which had introduced the concept of alleged 'paired contracts' and the brokers had no role to play in NSEL deciding to launch such alleged paired contracts. The trading in alleged paired contracts amounted to about 99% of the total trading in the NSEL as held in the Order dated December 04, 2017 of the Hon'ble Bombay High Court in WP No. 2743 of 2014. It could never have been held that such widely traded contracts were illegal or in violation of GOI notification dated June 05, 2007. The paired contracts were launched in accordance with the NSEL bye laws.

9.14. SEBI has placed reliance on various orders, judgements passed/issued by various regulatory authorities wherein the Noticee was not even a party to the said proceedings/order/Judgement. The observations made in these reports/orders were specific to the entities therein and not specific to the Noticee.

9.15. 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. The Hon'ble Court has held that this controversy in question was devised by a few trading members along with NSEL and Noticee is a victim in respect of the present matter.

9.16. No flaws, non-compliance, deficiencies and breaches of trading in commodities were pointed out by any government department, FMC or by

any other regulatory authorities when it was functional. The allegations against it are afterthought and without any cogent, incriminating material against it. At all the time, the Noticee had maintained fit and proper person criteria specified in Schedule II of the Intermediaries Regulations. It has always complied with the applicable rules, regulations and bye-laws of the Stock/Commodity Exchange.

9.17. The amendment to Schedule II of the intermediaries Regulation came into force from November 17, 2021 which is much after the initiation of present proceedings and the filling of the FIR and thus retrospective application of the same would be in gross violation of the principles of natural justice.

9.18. The Complaint/First Information Report (FIR) dated September 24, 2018 cannot be given any weightage for determining the 'fit and proper' status of the Noticee for the following reasons:

9.18.1. FIR is only the first instance of reporting of the complaint and is a preliminary document based on the one sided statement of the complainant without any adjudication of the same.

9.18.2. The main plank of the said FIR is that the Noticee like all other trading members of NSEL has traded in paired contracts on the NSEL platform. It appears that SEBI has initiated enquiry not only against the Noticee but also against 300 members of NSEL who allegedly participated in paired contracts. It is illogical to contend that anyone who dealt in alleged paired contracts as member of NSEL would be declared as not a 'fit and proper person'.

9.18.3. SEBI cannot rely on its own complaint dated September 24, 2018, pursuant to which FIR September 24, 2018 was filed. Thus, while SEBI itself has filed the FIR, by way of these proceeding, SEBI itself would be judging the same allegation. Thus, these proceedings are void ab initio.

9.18.4. Noticee has referred to the observations of Hon'ble SAT in the matter of Almondz Global Securities Ltd. vs SEBI and Order dated October 18, 2022 passed by Hon'ble Bombay High Court in the matter of Geeta Lunch Home Vs State of Maharashtra & Ors. to

contend that only a FIR is filed against the Noticee and charge against it is not proven and thus reliance on FIR is misplaced.

9.19. The Noticee was meeting all the important criteria for being fit and proper person provided under Schedule II at the relevant time i.e. prior to the SEBI (Intermediaries) (Third Amendment) that was w.e.f November 17, 2021.

9.20. As regards the Noticee's 'close association' with NSEL, the following is submitted:

9.20.1. No clients were permitted to execute trades directly on the NSEL and had to do so through a registered broker;

9.20.2. 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 contracts/ trades;

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

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

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

9.20.6. 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;

9.21. The punishment of being declared as not fit and proper is the ultimate punishment and should be imposed sparingly in case of repeated offences while consistently applying the doctrine of proportionality.

9.22. In terms of regulation 5(e) of the 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;

9.23. In terms of regulation 9(b) of the Broker Regulations, the Noticee was 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;

9.24. In terms of regulation 9(f) of the Broker Regulations, the Noticee was required to abide by the Code of Conduct as specified in the Schedule II therein and the Noticee has always abided by the same while carrying out transactions at NSEL;

9.25. The 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 Brokers Regulations;

9.26. Clause A(2) of the Code of Conduct of 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.

CONSIDERATION OF ISSUES AND FINDINGS

10. I have carefully perused the Enquiry Report dated August 28, 2019, SCN dated January 08, 2020 and the replies/written submissions dated February 25, 2020, February 27, 2023 and July 07, 2023 and the oral submissions made by the Noticee during the personal hearing held on January 18, 2023 and other materials/information available in the public domain and also made available to the Noticee. After considering the allegations made/charges levelled against the Noticee in the instant matter as spelt out in the SCN, the issue which arises for my consideration in the present proceedings is whether the Noticee satisfies the '*fit and proper person*' criteria as laid down under Schedule II of the Intermediaries Regulations.

11. Before I proceed to examine the charges vis-à-vis the evidences available on record, it would be appropriate at this stage to refer to the relevant provisions of law, which are alleged to have been violated by the Noticee and/or are referred to in the present proceedings. The same are reproduced below 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.

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

Conditions of registration.

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

(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

SCHEDULE II

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

CODE OF CONDUCT FOR STOCK BROKERS [Regulation 9]

A. General.

(1) Integrity: A stock-broker, shall maintain high standards of integrity, promptitude and fairness in the conduct of all his business.

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

(5) Compliance with statutory requirements: A stock-broker shall abide by all the provisions of the Act and the rules, regulations

issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him.

Liability for action under the Enquiry Proceeding Regulations.

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;

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.

12. Before coming to the merits of the case, it is relevant to deal with the contention of the *Noticee* regarding the process followed by SEBI in conducting the present proceedings. The Noticee has stated that the power to appoint a Designated Authority (DA) has been vested with the Executive Director while in the instant case the DA was appointed by the WTM of SEBI, thereby raising a concern about the irregularity in the appointment of DA. The Noticee has also submitted that it was not provided with personal hearing before the DA and there was no

exemption/prohibition for grant of personal hearing by the DA under the Intermediaries Regulations. In this regard, I note that Section 3(2) of the Securities and Exchange Board of India (Delegation of Powers) Order, 2015 (hereinafter referred to as "DoP Order")) specifically provides that, "*The powers and functions delegated to any member or officer of the Board or authority under the Order can be exercised by any officer or authority higher in grade or rank or position to him*". Thus, the appointment of DA by an authority i.e. WTM of SEBI who is higher in grade, rank and position to the Executive Director of SEBI, is clearly in compliance with Intermediaries Regulations read with DoP Order. Further, the Noticee has also argued that the aforesaid stance as regards the appointment of DA is not valid, in view of Section 3(1) of the DoP Order, submitting that the said order cannot be in derogation of powers/ functions specified under the Securities Laws. To this argument, I note that while the Intermediaries Regulations provide for appointment of DA by an Executive Director, the same, when read along with the aforementioned Section 3(2) of the DoP Order, empower the Whole Time Member also to make the appointment.

13. Further, with regard to the Noticee's submission as to not being provided an opportunity of hearing by the DA, I note that the DA had issued the show cause notice dated September 24, 2018 under the then existing Regulation 25(1) of the Intermediaries Regulations and Enquiry Report was submitted on August 28, 2019. The Intermediaries Regulation were amended vide the SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021 and the amended Regulations now provides that the DA shall grant an opportunity of personal hearing and issue or cause to issue a notice scheduling a date for hearing. It is pertinent to note that 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. However, the Regulations specified granting of opportunity of personal hearing by the competent authority, which in the present case, has been provided to and availed by the Noticee. Thus, there is no defect in the process followed in the present enquiry proceedings and accordingly, the contentions raised by the Noticee, in this regard are misplaced and devoid of any merit.

14. I note that the Noticee has vehemently contended that it had sought certain set of documents and information which were not provided to it. The Noticee has reiterated its request for providing the documents and information. It is also contended that by not providing the relevant information, documents and material, the principles of natural justice have not been adhered to. In this regard, I note from the Enquiry Report that all relevant material relied upon by the DA pertaining to the instant proceedings had already been provided to the Noticee. Further, I note that pursuant to the issuance of SCN, additional material like SEBI complaint letter dated September 24, 2018, FIR dated September 24, 2018 registered with EOW and amended Schedule II of the Intermediaries Regulations has also been provided to the Noticee along with the Notice of Hearing dated November 11, 2022. The Authorized representative of the Noticee also undertook inspection of the documents on December 19, 2022. Further, I find that no prejudice has been caused to the Noticee on account of not providing any such document which has been sought by it, but has neither been relied upon nor is relevant to the present proceedings. Thus, I am of the view that the principles of natural justice have been adhered to while conducting the present proceedings and contention of the Noticee that it was not provided with the relevant information and documents does not merit further consideration.

15. The Noticee has also raised objections on the jurisdiction of SEBI to initiate action against the Noticee for the alleged violations of FCRA. It is submitted that the DA has given an erroneous finding that SEBI is statutorily empowered to initiate the proceedings to determine the fit and proper status of the Noticee. As argued, the actions of the Noticee's at the relevant time were not governed by SEBI Regulations but were governed by NSEL's bye laws, Regulations etc. and provisions of FCRA. It is also submitted that any member of NSEL if found guilty of violating any provisions of FCRA, Regulations and bye laws of NSEL, should be penalized under FCRA which had provided for regulatory regime to deal with all such infractions. It is further contended that SEBI does not have the power and jurisdiction to regulate the Spot Market. In this regard, I note that the issue for consideration in the present proceedings is limited to the determination of "*fit and proper"* status of the Noticee under the Intermediaries Regulations. It is a settled position that SEBI has the statutory authority to

determine the "*fit and proper"* status of the intermediaries registered with it. Accordingly, to argue that the 'fit and proper' status of an entity can be adjudged only on the basis of violation of SEBI Act or allied regulations would not be correct. Since the Noticee is an intermediary registered with SEBI, I am of the considered view that SEBI is within its jurisdiction to determine the "*fit and proper"* status of the Noticee.

16. Moreover, SEBI had filed a complaint dated September 24, 2018 with the concerned police authorities for initiating appropriate action for the violations of the provisions of FCRA *inter alia* alleged to have been committed by the Noticee. I also note from the records that on the basis of the said complaint of SEBI, a FIR dated September 28, 2018 was registered with MIDC Police Station, Mumbai and the same is subsisting. In the background of these facts, it is pertinent to see the scope and scheme of Section 29A(2)(e) of the FCRA which is reproduced as under for ease of reference:

> *"**29A. Repeal and savings. —** (1) The Forward Contracts (Regulation) Act, 1952 (74 of 1952) is hereby repealed.*
>
> *(2) On and from the date of repeal of Forward Contracts Act—*
>
> *(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;"*

17. A bare perusal of the aforesaid provision would reveal that it is an enabling provision which enables SEBI to initiate fresh proceedings within a period of three years from the date on which the FCRA is repealed. As stated above, SEBI has *inter alia* filed complaint against the Noticee within the stipulated period as specified in the FCRA. Accordingly, I note that SEBI has taken appropriate steps for the alleged violation of the provisions of the FCRA. Further, the contention of the Noticee that transactions done by the Noticee prior to September, 2015 are beyond the regulatory ambit of SEBI is also misplaced as Section 29A(2)(e) of the FCRA mandates SEBI to initiate appropriate proceedings within the given timeframe for the offences committed under the FCRA.

18. Further, Noticee has also submitted that FCRA does not fall within the definition of 'securities laws' as given in regulation 2(1)(k) of the Intermediaries Regulations. The said contention of the Noticee, in my considered opinion, is misplaced. It is a settled position that SEBI, as a market regulator, is within its four walls to adjudge the fit and proper status of intermediaries registered with it. The intent of the Intermediaries Regulations, as regard judging the fit and proper status of a registered intermediary, is that any entity who is not fit and proper, should not remain active/ enter in the securities market ecosystem. It is very much possible that a registered intermediary is declared as not fit and proper for violation/ activities not pertaining to securities market/securities laws. To further strengthen the said understanding, I deem it fit to place reliance on clause 3(b)(v) of Schedule II of the Intermediaries Regulations which states as under:

"(v) an order of conviction has been passed against such person by a court for any offence involving moral turpitude;"

On a bare perusal of the above requirement, it is clear that disqualification of fit and proper can come into play for violations not specifically pertaining to securities laws and thus, it is immaterial if the FCRA falls within the definition of securities laws as defined under Regulation 2(1)(k) of the Intermediaries Regulations.

19. I note that prior to the merger of FMC with SEBI (w.e.f. September 28, 2015), the Noticee was not required to be registered under FCRA or any other regulation to be a commodity derivatives broker, however, after the merger of FMC with SEBI, a commodity derivatives broker is required to mandatorily have a certification of registration from SEBI in case it is desirous to remain associated with the Securities Market as a commodity derivatives broker. It is seen that the Finance Act, 2015 (as notified on May 14, 2015) conferred the power of regulation over intermediaries dealing in commodity derivatives to SEBI and also mandated regulation of commodity derivatives brokers by SEBI, which included their registration as commodity derivatives broker with SEBI. In this regard, vide Section 131B of the Finance Act, 2015, a transitory period of 3 months was provided to all the intermediaries which were associated with commodity derivatives market under the erstwhile FCRA, but did not require a

registration certificate earlier, to continue to deal in commodity derivatives as a commodity derivatives broker, provided it made an application of registration to SEBI within 3 months from September 28, 2015. Accordingly, the Noticee submitted an application to be registered as a Stock Broker and was subsequently registered as a broker and since then it has been acting as a market intermediary registered with the SEBI.

20. I further note that the provisions in the Finance Act, 2015 effecting the merger of FMC with SEBI in September, 2015 do not, prima facie, confer any power on SEBI to take charge, deal, inquire and resolve NSEL settlement crisis that broke out in 2013. Pursuant to repeal of FCRA and dissolution of FMC in terms of Section 131 of Finance Act, 2015, all recognized associations under the FCRA became deemed recognized stock exchanges under the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the "SCRA"). NSEL was not a recognized association under FCRA, and therefore the question as to NSEL falling under the regulatory jurisdiction of SEBI does not arise. Thus, the contention of the Noticee that FMC was acting as the regulator of NSEL is not tenable.

Scope of the present proceedings vis-à-vis order passed by the Hon'ble SAT on June 09, 2022

21. In light of the order passed by the Hon'ble SAT on June 09 2022, as mentioned at paragraph 4 above in the NSEL matters and in the interest of natural justice, the following documents/information were enclosed along with the notice of hearing dated November 11, 2022 and the Noticee was informed that these additional documents/information would be considered by the competent authority along with the Enquiry Report submitted by the DA.

    21.1. SEBI complaint dated September 24, 2018 filed with Economic Offence Wing ('**EOW**');

    21.2. First Information Report ('**FIR**') dated September 28, 2018; and

    21.3. Amended Schedule II of the Intermediaries Regulations.

22. In this regard, I find it apposite to encapsulate to list the grounds on which the SEBI orders were set aside by the Hon'ble SAT, which consequently led to

issuance of the aforesaid documents, along with the hearing notice, to the Noticee in the present matter:

22.1. The observations of the Hon'ble Bombay High Court in the matter of *63 Moons vs. Union of India*[2] cannot be relied upon as the said judgement has been set aside in appeal[3] by the Hon'ble Supreme Court vide judgment dated April 30, 2019.

22.2. The observation from the Order dismissing the Writ Petition filed by NSEL against the invocation of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (for short "**MPID Act**") (***NSEL vs. State of Maharashtra***[4]) cannot be relied upon, as in a subsequent Writ Petition[5] moved by 63 Moons, a Division Bench of the Hon'ble Bombay High Court has allowed the prayer and held that NSEL is not a financial establishment and therefore the provisions of the MPID Act are not applicable. The Division Bench also observed that the *prima facie* observations made by the single bench while dismissing NSEL petition could not be relied upon as they were preliminary observations and such observations do not foreclose the issue about the applicability of the provisions of the MPID Act. The Hon'ble Tribunal, I note, was of the opinion that *prima facie* observations cannot be utilized to judge the reputation, character or integrity of NSEL.

22.3. The observations in the bail rejection order dated August 22, 2014, passed by the Hon'ble Bombay High Court in the matter of ***Jignesh Prakash Shah vs. The State of Maharashtra***[6], cannot also be relied upon as the observations made in a bail order were limited to the fact as to whether the bail should be granted or not.

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[2] Writ Petition No. 2743 of 2014, Also available at - https://indiankanoon.org/doc/66704740/

[3] (2019) 18 SCC 401, Also available at - https://indiankanoon.org/doc/169098295/

[4] Writ Petition No. 1403 of 2015, Also available at - https://bombayhighcourt.nic.in/generatenewauth.php?bhcpar=cGF0aD0uL3dyaXRlcmVhZGRhdGEvZGF0YS9qdWRnZW1lbnRzLzIwMTUvJmZuYW1lPUNSV1AxNDAzMTUucGRmJnNtZmxhZz1OJnJqdWRkYXRlPSZ1cGxvYWRkdD0wMS8xMC8yMDE1JnNwYXNzcGhyYXNlPTA5MDIyMzEyMzU0Ng==

[5] MANU/MH/2309/2019, Also available at - https://indiankanoon.org/doc/178307788/

[6] Criminal Bail Application No.1263 Of 2014, Also available at -http://www.nationalspotexchange.com/HC-order.pdf

22.4. Reliance on the SFIO Report, the Tribunal has held, was misplaced. The report only directs EOW/Police to initiate appropriate proceedings against NSEL and its directors/promoters. Based on the SFIO Report, the Special Sessions Judge took cognizance of the matter by an Order dated July 29, 2019. But this Order was challenged by NSEL and two other accused and has since been stayed by the Hon'ble Bombay High Court. Also, no complaint yet has been filed against the Appellants pursuant to the SFIO Report.

22.5. Effect of SFIO Report under the Code of Criminal Procedure, 1973, as to whether such report could be treated as evidence, was not considered by SEBI.

22.6. Reliance placed on decisions of the Hon'ble Tribunal in the matter of ***Jermyn Capital vs. SEBI***[7] and ***Mukesh Babu Securities vs. SEBI***[8] is misplaced as decisions in the said matters are distinguishable on facts. Jermyn Capital was held to be in relation to an Interim Order passed by SEBI, and the Tribunal was of the view that the criteria for passing an Ad Interim Order are based on a different criterion, namely *prima facie* case, the balance of convenience and irreparable injury which are distinct and different while considering an application for grant of Certificate of Registration. The decision in the matter of *Mukesh Babu Securities* was distinguished by the Hon'ble Tribunal on the basis that in the matter a criminal complaint was filed against the Chairman of the Company. The Hon'ble Tribunal noted that there is no evidence to show that any proceedings have yet been initiated against the appellants in the matter under consideration.

22.7. Reputation of the applicant cannot be lightly considered based on observations which are not directly related to the applicant.

22.8. Grant Thornton Forensic report commissioned by SEBI does not find any close connection between applicant and NSEL. This was overlooked by SEBI.

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[7] Appeal No. 26 of 2006, decided on September 06, 2006, Also available at - https://indiankanoon.org/doc/1511076/
[8] Appeal No. 53 of 2007, decided on December 10, 2007, Also available at- https://indiankanoon.org/doc/129504/

22.9. SEBI Order does not state for how long the rejection of application will continue. The Hon'ble Tribunal was of the view that the rejection cannot continue indefinitely, and in such cases, a time period should be provided during which the applicant will become ineligible to seek fresh registration.

23. Thus, the Hon'ble SAT in the aforesaid Order has already observed that no reliance can be placed on the SFIO report and its Orders in the matter of *Jermyn Capital* and *Mukesh Babu Securities.* Thus, I do not find it necessary to deal with the contentions of the Noticee in this regard mentioned in the preceding paragraphs.

24. It is also noted from Hon'ble SAT's Order that the matter was remanded to SEBI, taking into consideration the contention made by the counsel appearing on behalf of SEBI that there was additional material available, which had come into existence after the SEBI orders, based on which the findings in the said order could be sustained. The Hon'ble Tribunal, taking into consideration the submissions made on behalf of SEBI, held that:

> *"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. It will also be open to SEBI if it considers necessary, to conduct an independent enquiry proceeding against the connected entities and persons associated with the brokers against whom evidence is available."*

25. Before moving forward to consider the matter on merits and test the compliance of the Noticee with the *'fit and proper person'* criteria, on the basis of the additional material that has been brought on record post Hon'ble SAT's order (as detailed at paragraph 21 above), the background facts necessary for the present proceedings are narrated in brief, hereunder:

25.1. The Noticee, Padmakshi Commodities Private Limited, is a commodity broker registered with SEBI.

25.2. NSEL was incorporated in May 2005 as a Spot Exchange *inter alia* with a purpose of developing an electronic Spot Exchange for trading in commodities. In exercise of 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 NSEL from operations of the provisions of the FCRA subject to certain conditions, *inter alia* including "*no short sale by the members of the exchange shall be allowed*" and "*all outstanding positions of the trades at the end of the day shall result in delivery*".

25.3. 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. It is observed that NSEL had introduced the concept of '*paired contracts*' in September 2009 which allowed buy and sell in 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 NSEL on the same day at same time and at different prices, involving the same counterparties. The transactions were structured in a manner that buyer of the short duration contract always ended up making profits.

25.4. On February 06, 2012, the erstwhile 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 measure, if needed, to protect investors' interest. The 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 NSEL, the FMC passed Order No. 4/5/2013-MKT-1/B dated December 17, 2013 in the matter (hereinafter referred to as "**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 NSEL platform were in violation of the provisions of FCRA and also in violation of the conditions specified by the Government of India in its 2007 Exemption Notification, while granting exemptions to the one day forwards contract for sale and purchase of commodities traded on NSEL, from the purview of the FCRA.

26. It is contended that the Noticee was neither a party to the FMC order nor the trades of Noticee in paired contracts were matter under consideration of FMC and thus FMC order cannot be relied upon. In this regard, I note that reference has been drawn to the FMC Order is to recognize the nature of contracts being traded on the NSEL and violations of the relevant provisions of law in order to ascertain the fit and proper status of the Noticee in the securities market. From the perusal of the FMC Order in respect of the '*paired contracts*', which were traded on 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. Short Sale

NSEL had not made it mandatory for the seller to deposit goods in its warehouse before taking a sell position. Hence, the condition of "*no short sale by members of the NSEL shall be allowed*" was not being met by 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 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 NSEL, which provided settlement schedule for

a period exceeding 11 days were not allowed and were in violation of 2007 Exemption Notification.

27. Thus, I note that NSEL was granted conditional exemption from the provisions of FCRA by the Department of Consumer Affairs, Ministry of Consumer Affairs (for short "**MCA**"), Food and Public Distribution, Government of India, vide Gazette Notification No. S0906 (E) dated June 05, 2007, in exercise of the powers conferred under Section 27 of the FCRA, for (i) forward contracts, (ii) for sale and purchase of the commodities, of one–day duration traded on NSEL subject to certain conditions which, *inter alia*, included that '*no short sale by members of the NSEL shall be allowed*' and that all '*outstanding positions of the trade at the end of the day shall result in delivery*'. It was also stipulated that all information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency. The spot exchanges were envisaged as a platform for providing transparent and secure trading in commodities with a view to boost the agriculture sector in the country. Thereafter, NSEL commenced operations in October 2008.

28. In this regard, the relevant observations of the FMC as recorded in its Order dated December 17, 2013 and also captured in the SCN are reproduced as under:

> *"...a large number of NSEL exchange trades were carried out with paired back-to-back contracts. Investors simultaneously entered into a "short term buy contract" (e.g. T+2, i.e. 2 day settlement) and a "long term sell contract" (e.g. T + 25 i.e. 25day settlement). The contracts were taken by the same parties at a pre-determined price and always registering a profit on the long-term positions. Thus, there existed a financing business where a fixed rate of return was guaranteed on investing in certain products on the NSEL..."*
>
> *NSEL conducted its business not in accordance with the conditions stipulated in the notification dated 05.06.2007 granting it exemption from the operation of FCRA, 1952, with regard to the one-day forward contracts to be traded on its exchange platform. As noted in the SCN, the condition of 'no short-sell' and 'compulsory delivery of outstanding position at the end of the day' stipulated in the notification were violated by NSEL. NSEL*

Board allowed launching of paired back-to-back contracts on its exchange platform comprising a short-term buy contract (T+2 settlement) and a long-term sell contract (T+25 settlement) with predetermined price and profit for the buyer and seller, which violated the very concept of spot market of commodities and the transactions ultimately were in the nature of financial transactions." (emphasis supplied)

29. It is, therefore, clear that 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. I note from the FMC Order that FMC had observed that the 55 contracts offered for trade on NSEL were with settlement periods exceeding 11 days and all such contracts traded on NSEL were in violation of provisions of FCRA. I further note from the FMC Order that under 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 FCRA, FMC was of the view that all the contracts traded on NSEL which provided settlement schedule exceeding 11 days were treated as *Non-Transferable Specific Delivery contracts*. It is, therefore, noted that even though MCA had stipulated in the 2007 Exemption Notification that only contracts of one-day duration were permitted to be offered on NSEL, FMC, in its Order, relying on the definition of "*forward contract*" under FCRA held that NSEL was allowed to only trade in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days. Therefore, even going by the interpretation adopted by FMC, what is beyond doubt is that NSEL had permitted 55 contracts of various commodities having duration longer than 11 days and these contracts were *ex facie* 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 in the matter of *63 Moons Technologies Ltd. (formerly known as*

Financial Technologies India Ltd.) & Ors. v. Union of India & Others[9] (hereinafter referred to as the **"merger petition"**), wherein it *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. It is further pertinent to refer to the judgment dated April 22, 2022 passed by the Hon'ble Supreme Court in the matter of *The State of Maharashtra vs. 63 Moons Technologies Ltd.*[10] (hereinafter referred to as "**MPID matter**"), which overruled the Hon'ble Bombay High Court Order dated August 22, 2019 which has been relied upon by the Noticee to argue that paired contracts were not financial transactions but were trades in commodities as per regulations and bye laws of NSEL. In the said MPID matter, Hon'ble Supreme Court, while drawing reference to the presentations made by NSEL in respect of the '*paired contracts*', has, *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.* ***Therefore, NSEL represented that on receiving money and commodities, the members would receive assured returns and a service.*** *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." (emphasis supplied)*

[9] (2019)18 SCC 401. Also available at https://indiankanoon.org/doc/169098295/
[10] Civil Appeal No. 2748-49 of 2022. Also available at https://indiankanoon.org/doc/184205229/

32. I, therefore, note that the Hon'ble Supreme Court has already commented on the nature of the '*paired contracts*' offered on 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 has held that such transactions come within the definition of '*deposits*' under the MPID Act.

33. It is further noted that the Hon'ble Supreme Court in the MPID matter, had extensively referred to the claims made on the website of NSEL and the contents of the publicity material and other investor resources. In this regard, it can be noted that NSEL was advertising a uniform return of 16% p.a. for the '*paired contracts*' traded on its platform. The return offered was the same across commodities. The return remained the same irrespective of the duration of the contract. For example, a T+2 & T+25 paired contract in steel had the same offered return as a T+ 2 & T + 35 paired contract in castor oil. The *'paired contracts'*, it is noted, were being marketed as an alternative to fixed deposits.

34. I note that the FMC Order and both judgments of the Hon'ble Supreme Court go into abundant detail regarding NSEL permitting short sales i.e., permitting sellers to offer contract for sale of commodities on its platform without ensuring that requisite amount of commodity is available in the warehouse. It is further noted from the judgment of the Hon'ble Supreme Court in the MPID matter that the overwhelming majority of the sale leg of the '*paired contracts*' which were executed were short sales and naked short sales - that the commodities to back such sales were not available at the designated warehouses of NSEL.

35. Considering the deliberations and discussions recorded above, it essentially leads to the moot question as to whether the Noticee while facilitating such transactions for its clients was under the *bonafide* belief that the *'paired contracts'* were actually spot contracts in commodities. Or, can it be said that the very fact that '*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 altogether different from the spot trading in commodities, which was permitted on NSEL's platform. Further, as stated above, NSEL itself was advertising such contracts as an

alternative to fixed deposits and the return offered was 16% across all commodities irrespective of the nature of the contract or the duration. Also, these contracts were structured in a manner which ensured that the buyer always made pre-determined profits.

36. 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. With the material on record, it is further clear that any prudent person (including the Noticee) would have come to the conclusion that what was being offered were not spot contracts in commodities and rather had trappings of a financial product which offered fixed and assured returns, as the Hon'ble Supreme Court has already held.

37. In the background of the discussion on 'paired contract' in the preceding paragraphs, I now proceed to examine whether the Noticee satisfies the 'fit and proper' person criteria, as laid down under Schedule II of the Intermediaries Regulations.

38. In this context, I note that the Noticee in its reply dated February 25, 2020 has submitted that out of around 159 registered clients with it in the commodity broking, it had executed trades only for 64 clients who had approached it at their own instance. The Noticee earned brokerage of ₹ 38,28,440 and NSEL had payout obligations of ₹ 23,98,20,993 towards it. I also note that the DA in the Enquiry Report has observed that Noticee was due to receive ₹84,30,610 (under special payout to settle dues of those trading clients from NSEL. It is pertinent to note that the Noticee has on many occasions submitted that the it had executed transactions in the paired contracts in accordance with the relevant NSEL Bye-laws and its business rules. Thus, there is ample evidence to demonstrate that the Noticee had facilitated trading in the paired contracts on the NSEL platform on behalf of its clients.

39. Having noted that the Noticee has traded in *'paired contracts'* for its clients, I now proceed to examine the allegations levelled against the Noticee in the SCN. It is noted that the main allegation against the Noticee, as levelled in the SCN, is that by facilitating the trading in *'paired contracts'* on NSEL platform during the relevant period as a Trading Member/Clearing Member, the Noticee has violated the conditions stipulated in the 2007 Exemption Notification and

consequently also the provisions of the FCRA. Therefore, it was alleged in the SCN that 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. In this context, the Noticee in its submissions has, inter alia, submitted that the paired contracts were introduced and approved by NSEL and the Noticee as a member of NSEL had no other option but to trade in such contracts by observing the business rules and regulations of NSEL. Thus, it has been argued that the observation that the Noticee as commodity broker allowed itself to become an instrument of NSEL in promoting trading in paired contracts among its clients is erroneous.

40. With respect to the above arguments of the Noticee, I note that the Noticee, as a broker and as a member of NSEL, represented NSEL to the regular investors. The execution of the trades in *'paired contracts'* by the Noticee shows the participation of the Noticee in the scheme perpetrated by NSEL to provide its platform for trading in *'paired contract'* that were not permitted under the 2007 Exemption Notification and were purely financial contracts promising assured returns under the garb of spot trading in commodities. Therefore, the Noticee by its conduct and as a member of NSEL has acted as an instrument of NSEL 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*). Further, the Noticee has also vehemently submitted that it was not closely associated with NSEL. In this regard, I note that the present proceedings are not based on Noticee's relationship with NSEL as a trading member. Factors such as pendency of FIR, Noticee having traded/ facilitated trading 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 in the present proceedings. The Noticee, 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. Thus, I am of the view that the trading activities of the Noticee in *'paired contracts'* for

its clients on NSEL platform have serious ingredients amounting jeopardizing the reputation, belief in competence, fairness, honesty, integrity and character of the Noticee in the Securities Market.

41. The Noticee has also submitted that DA's reliance on the interim report of EOW is erroneous and misplaced and there are no specific charges made against the Noticee in the interim report. In this regard, I note that the Interim EOW report has been relied by DA only to demonstrate the involvement of the Noticee in facilitating the trading in paired contracts. Even without the EOW report there is sufficient material on record to establish that the Noticee had indeed facilitated the trading in the 'paired contracts'. Accordingly, I find no merit in the Noticee's contentions in this regard.

42. I also note that , SEBI, on the strength of certain documents/material (such as SEBI Complaint dated September 24, 2018 and FIR dated September 28, 2018, etc.) as provided to the Noticee with the hearing notice dated November 11, 2022, further alleged that in light of the aforesaid documents filed against the Noticee by SEBI as well as observations/ findings against the Noticee in the Enquiry Report dated August 28, 2019, the Noticee is no longer 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 Schedule II of the Intermediaries Regulations. 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 Intermediaries Regulations, 2008, was amended vide SEBI(Intermediaries)(Third Amendment) Regulations, 2021 with effect from November 17, 2021.

43. 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 granted by SEBI. In order to continue to hold such 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 onetime condition applicable only at the time of seeking registration. Rather, 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 and 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. I therefore find no merit in the said submission of the Noticee. In case, pursuant to the grant of registration by SEBI, any evidence comes to the notice of SEBI that casts a doubt on the integrity, reputation and character of the registered intermediary, SEBI is well within the powers to examine the '*fit and proper*' status of such entity based on various parameters. Therefore, even if the Noticee was found to have fulfilled the '*fit and proper person*' criteria while granting the Certificate of Registration, in 2016, such an intermediary can still be assessed on being *fit and proper* at a later date. The Noticee's contention that SEBI was fully aware of the NSEL scam while granting registration to the Noticee and thus would be estopped from retracting from its own decision of granting it the said registration certificate is also misplaced as 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. Furthermore, as and when the '*fit and proper'* criteria changes, the Noticee will be required to comply with the revised criteria, and in this instance, criteria were revised vide the amendment in November 2021, particularly when the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field even till date. 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;

44. In this regard, the Noticee has submitted that a FIR is only the first instance of reporting of a complaint that is lodged with the police and only a preliminary document based on the one-sided statement(s) of the complainant without any adjudication of the same and such an FIR is far from being equivalent to a final determination, thus, no reliance can be placed on any FIR particularly an FIR which has been filed by SEBI itself. In relation to this submission, I note that an FIR has been registered with the MIDC Police Station, Mumbai, *inter alia,* against the Noticee on September 28, 2018 and the same is pending as on date and is subsisting and 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.

45. In view of the above observations and the finding that the Noticee had facilitated the trading in these *'paired contracts'* on NSEL, I hold that by virtue of the Noticee*'s* participation/ facilitating in the trading in *'paired contracts'* on NSEL platform during the relevant period as a Trading Member/Clearing Member, the Noticee has violated the conditions of the 2007 Exemption Notification and also the provisions of FCRA. Further, as noted above, the Noticee has also attracted disqualifications under point 3(b)(i) of Schedule II and the act of Noticee in offering access to *'paired contracts'*, as detailed above, also seriously calls into question the integrity, honesty and lack of ethical behavior on its part. These contracts, as stated earlier, were *ex facie* offered in violation of the 2007 Exemption Notification issued by MCA and were different from the spot contracts in commodities which were permitted to be traded on NSEL. The *'paired contracts'* were nothing but financing transactions which were portrayed as spot contracts in commodities. Therefore, giving go-by to the terms of the 2007 Exemption Notification and attempting to camouflage the nature of the

transactions brings into question, the appropriateness and suitability of the continuance of the registration of the Noticee, as a broker. Noticee has submitted affidavits from its 37 clients *inter alia* stating that they had approached the Noticee for trading in paired contracts on the basis of their own information and invested their own money. In this regard, I note that any argument on the lines that the clients approached the Noticee and demanded such access to the '*paired contracts'* does not lessen the diligence required to be performed by any reasonable or prudent person including the *Noticee*, which cannot rely upon such client requests. Clearly, the actions of the *Noticee* have been and could be detrimental to the interest of the Securities Market and accordingly the Noticee can no longer be called 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 the provisions of Schedule II of the Intermediaries Regulations.

46. In the context of Securities Market, I note that the role of a registered intermediary including a broker is not only sensitive and predominantly fiduciary in nature but also demands from it honesty, transparency, fairness and integrity which are essentially the hallmarks of such market intermediaries. Given the fact that one of the avowed objects of the SEBI Act is the protection of interests of investors apart from promotion and development of the Securities Market, the legislature through enactment, empowers SEBI to grant registration to several class of entities including brokers, which are not only required to act as an intermediary *simplicitor* i.e., a bridge or a connector between the markets and investors, but also has a very important role to play in creating an ecosystem of trust and fairness so as to provide a fair and secure market to the investors as any deviation from the above noted objective could have a cascading adverse impact on the development of the Securities Market and interests of investors. Thus, undisputedly, a broker is obligated to act in a transparent manner and comply with all applicable regulatory requirements which are in the best interests of its clients and which will uphold the integrity of the Securities Market.

47. It is a trite law that when provisions of law prescribe certain acts to be done in a particular manner, the same is required to be honored in letter and spirit. Law

does not provide any exception to anyone to perform such acts as per his whims and fancies that is not permissible under an extant legal framework. 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.

48. It further needs appreciation that the issue under consideration is not to gauge the profit/loss incurred or likely to be incurred by an individual, but the limited scope of the present proceedings is to see whether the indulgence, engagement and promotion of such activities could be held to be beneficial to the development of Securities Market or the same contain elements that are potentially dangerous and detrimental to the interest, integrity, safety and security of the Securities Market. In this respect, the undisputed fact that the scheme of '*paired contracts'* traded on NSEL ultimately has caused loss to the market to the extent of ₹ 5,500 Crore itself casts serious aspersion on the conduct, integrity and reputation of, *inter alia*, the Noticee who participated in or facilitated such '*paired contracts'* and therefore, its continuing role in the Securities Market cannot be viewed as good and congenial for the interest of the investors or of the Securities Market.

49. Having examined and dealt with the contentions raised by the Noticee in the preceding paragraphs, I concur with the recommendation made by the DA.

ORDER

50. In view of the foregoing discussions and deliberations, in exercise of powers conferred upon me under Section 12 (3) and Section 19 of the SEBI Act, 1992 read with regulation 27 of the Intermediaries Regulations, 2008 and upon considering the gravity of the violations committed by the Noticee viz. Padmakshi Commodities Private Limited, the Certificate of Registration (bearing No. INZ000017738) of the Noticee, is hereby cancelled.

51. The Noticee shall, after receipt of this order, immediately inform its existing clients, if any, about the aforesaid direction in paragraph 50 above.

52. Notwithstanding the direction at paragraph 50 above, the Noticee shall allow its existing clients, if any, to withdraw or transfer their securities or funds held in its

custody, within 15 days from the date of this order. In case of failure of any clients to withdraw or transfer their securities or funds within the said 15 days, the Noticee shall transfer the funds and securities of such clients to another broker within a period of next 15 days therefrom, under advise to the said clients.

53. The Order shall come into force with immediate effect.

54. It is clarified that in view of the amendment made *w.e.f.* January 21, 2021 in the Intermediaries Regulations, 2008, powers that were exercised under regulation 28 of the Intermediaries Regulations, 2008 are now being exercised under regulation 27 of the Intermediaries Regulations, 2008. It is also noted that the above Order is without prejudice to the criminal complaint filed by SEBI in NSEL matter and/or any proceedings pending before any authority in respect of similar matter concerning the Noticee or other relevant persons.

55. A copy of this order shall be served upon the Noticee and the recognized Market Infrastructure Institutions for necessary compliance.

Sd/-

DATE: AUGUST 9, 2023
PLACE: MUMBAI

V. S. SUNDARESAN
EXECUTIVE DIRECTOR
SECURITIES AND EXCHANGE BOARD OF INDIA