

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTION 12(3) AND SECTION 19 OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATION 27 OF SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008

In respect of –

Suresh Rathi Commodities Private Limited

[Registration No. INZ000025732]

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

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) initiated enquiry proceedings against **Suresh Rathi Commodities Private Limited** (hereinafter be referred to as “**Noticee**”), registered with SEBI as a commodity derivatives broker under the SEBI (Stock Brokers) Regulations, 1992 (hereinafter be referred to as the “**Stock Broker Regulations**”), for the alleged violations of Regulations 5(e), 9(b) and 9(f) read with Clause A(1), A(2) and A(5) of Schedule II of the Stock Broker Regulations read with Schedule II of the SEBI (Intermediaries) Regulations, 2008 (hereinafter be referred to as “**Intermediaries Regulations**”).
2. The Noticee was a Trading and Clearing Member of the National Spot Exchange Limited (hereinafter be referred to as “**NSEL**”), which was incorporated in May, 2005 as a spot exchange for trading in commodities. NSEL organised trading in commodities after it was granted exemption from certain provisions of the Forward Contracts (Regulation) Act, 1952 (hereinafter be referred to as, “**FCRA**”) by the Department of Consumer Affairs of the Ministry of Consumer Affairs, Food and Public Distribution, Government of India, vide Gazette Notification No. SO 906(E) dated June 05, 2007 (hereinafter referred to as “**2007 Exemption Notification**”), in exercise of powers conferred under Section 27 of FCRA subject

to certain conditions which, *inter alia*, included “*no short sale by members of the exchange shall be allowed; that all outstanding positions of the trade at the end of the day shall result in delivery and 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*”.

3. In September 2009, NSEL introduced the concept of '*paired contracts*', i.e., buying and selling the same commodity through two different contracts at two different prices on its platform wherein investors could buy a short duration settlement contract and sell a long duration settlement contract and vice versa at the same time. It entailed occurrence of Buy Trades (T+2 / T+3) and Sell Trades (T+25 / T+36) on the same day at different prices on the platform of NSEL.
4. On February 6, 2012, the erstwhile Forward Markets Commission (hereinafter referred to as “**FMC**”) was appointed by the Department of Consumer Affairs, Government of India as the ‘designated agency’, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measure, if needed, to protect investors’ interest. FMC had accordingly, *inter alia*, called for the trade data from NSEL in the prescribed reporting formats. After analysing the trade data received from NSEL, 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 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 NSEL and its members. FMC further observed that the ‘*paired contracts*’ offered for trading in 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. Hence, NSEL organised trading in ‘*paired contracts*’ which were in violation of the 2007 Exemption Notification, as observed by FMC. Further, the Trading Members and Clearing members of NSEL also facilitated and/or participated in trading in such paired contracts.

5. On perusal of the FMC Order, I note that the FMC had, *inter alia*, observed that the following conditions stipulated in the 2007 Exemption Notification were violated by NSEL:

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 exchange 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 under the aforesaid Notification.

6. Hence, it was alleged that NSEL organised trading in ‘*paired contracts*’ in violation of the 2007 Exemption Notification. It was also alleged that the Trading Members and Clearing members of the NSEL facilitated and/or participated in trading in such paired contracts which were in alleged violation of the 2007 Exemption Notification. Thus, by participating in / facilitating trading in paired contracts, such entities, allegedly, had acted in a manner detrimental to the interest of the securities market.
7. As per the information available with SEBI, the Noticee, being a Trading Member and Clearing member of NSEL, participated in / facilitated trading in paired contracts on the platform of NSEL in alleged violation of the provisions of Regulation 9(b) and 9(f) read with Clauses A(1), A(2) and A(5) of Schedule II of the Stock Broker Regulations. Based on this information, SEBI was, *prima facie*, satisfied that there were sufficient grounds to enquire into whether the Noticee, is a ‘*fit and proper person*’ to continue to hold certificate of registration as Trading and Clearing

Member in terms of Regulation 5(e) of the Stock Broker Regulations read with Regulation 27(iv) of the Stock Broker Regulations read with Schedule II of the Intermediaries Regulations.

ENQUIRY BY DESIGNATED AUTHORITY

8. A Designated Authority (hereinafter referred to as “**DA**”) was appointed by SEBI vide order dated September 21, 2018 to conduct an enquiry against the Noticee and submit a report and make recommendation/s in terms of Regulation 27 of the Intermediaries Regulations (as applicable at the relevant time) in respect of the violations alleged to have been committed by the Noticee mentioned at para 6 above.
9. After conducting the enquiry as envisaged under Regulation 25 of the Intermediaries Regulations, the DA submitted an Enquiry Report dated December 16, 2020 (hereinafter referred to as the “**Enquiry Report**”) wherein, *inter alia*, the following was observed and recommended

“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., Suresh Rathi Commodities Pvt. Ltd. [Registration No. INZ000025732] as a commodities derivatives broker may be cancelled.”

POST ENQUIRY PROCEEDINGS:

Show Cause Notice, Reply and Personal Hearing

10. After considering the Enquiry Report, a post-enquiry Show Cause Notice dated January 15, 2021 (hereinafter referred to as the “**SCN**”) was issued to the Noticee under Regulation 28(1) of the Intermediaries Regulations (as applicable at the relevant time) enclosing therewith (a) copy of the Enquiry Report, (b) copy of the letter dated December 30, 2014 of the Department of Economic Affairs (DEA) Ministry of Finance and (c) a copy of the order dated August 22, 2014 passed by

the Hon'ble Bombay High Court in Criminal Bail Application No. 1263 of 2014 in the case of *Jignesh Prakash Shah Vs. The State of Maharashtra*. The SCN was issued to the Noticee calling upon it to show cause as to why action as recommended by the DA including any other action as deemed fit should not be taken against the Noticee, by the Competent Authority.

11. The Noticee, vide letter dated March 11, 2021, filed its reply and made the following submissions:

- (i) The reply dated March 11, 2021 may be read in conjunction with Noticee's earlier replies dated October 27, 2018 and August 5, 2019;
- (ii) The finding of the DA is erroneous, contrary to the facts and law, arbitrary and without any basis as the SCN issued, did not provide any details of actions/ instances which constituted the alleged violation of Stock Broker Regulations;
- (iii) The enquiry report has been prepared based on wrong assumption that the Noticee has been provided with the documents relied upon by SEBI while the fact is that no such documents whatsoever were ever provided to the Noticee and consequently principles of natural justice had not been adhered to while conducting the enquiry proceedings. The documents which were available in public domain were provided to the Noticee, however, case specific documents have not been provided to the Noticee till date;
- (iv) The DA has been appointed by the Whole Time Member in the present matter, which is not in accordance with regulation 24(2) of the Intermediaries Regulations, which stipulates that the DA has to be appointed by the Executive Director. The Intermediaries Regulations require satisfaction of a particular authority and thus, the same authority must exercise the given discretion. The delegation of powers under SEBI Regulations will become redundant if the Securities and Exchange Board of India (Delegation of Powers) Order, 2015 (hereinafter referred to as the "**DOP Order**") supersedes/ overrides delegation of power under SEBI Regulations. The Intermediaries Regulations were amended in November, 2017 to vest the power of appointment of DA to Executive Director, which earlier vested with the

Whole Time Member and the said amendment will prevail over the DOP Order, 2015;

- (v) The finding of the DA as regards the applicability of Intermediaries Regulations is not tenable as the SEBI Act and Regulations thereunder were not applicable to the Noticee for trading at NSEL at the relevant time;
- (vi) In view of the provisions in Section 29A (2)(e) of the FCRA, SEBI could only initiate prosecution proceedings against the members of NSEL for alleged violation of FCRA and cannot initiate the enquiry proceedings under the Intermediaries Regulations, which are attracted when an intermediary allegedly violates any of the conditions of the Certificate of Registration or any of the provisions of the Securities laws and the regulations framed thereunder. The present proceedings under the Intermediaries Regulations do not fall within the purview of aforesaid section 29A(2)(e).
- (vii) The DA has not provided any answer to the Noticee's contention that the SEBI Regulations cannot be made applicable retrospectively. The DA has relied upon the case of **Jermyn Capital LLC Vs. SEBI** wherein the Hon'ble SAT has held that SEBI Regulations apply upon all intermediaries but the issue in the said case did not pertain to retrospective application of SEBI Regulations;
- (viii) The DA has not paid heed to the objection of the Noticee that SEBI has no jurisdiction over spot market, for which, reliance has been placed on the letter dated November 20, 2015 of the Ministry of Finance wherein it had been stated that SEBI is not expected to deal with matters not dealt by FMC and since spot market was not dealt with by FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets;
- (ix) The reliance on the decisions of **Jermyn Capital LLC Vs. SEBI** and **Mukesh Babu Securities Vs. SEBI** to establish close connection with NSEL is misplaced as in the instant case there is no allegation of any of the directors/ key managerial persons of the Noticee having any close association with anyone against whom CBI or any other intelligence agencies have initiated prosecution proceedings. Further, the show cause notice also does not allege that the Chairman/ Whole Time Director/ managing Director of the Noticee are involved in any criminal case which

affects their reputation and thereby makes the Noticee not a 'fit and proper' person. Based on the aforesaid decisions but without any material on record, the DA has drawn a wrong conclusion that the integrity, reputation or character of the Noticee is questionable;

- (x) A member of a stock exchange cannot be construed as having close association with the exchange merely on the basis of being a member. If such analogy is stretched any further, then entities which promoted NSEL, i.e., MCX/ 63 Moons Technologies Limited would be deemed to be having close relations with NSEL and would have to be consequently declared not fit and proper;
- (xi) The documents such as FMC Order dated December 17, 2013, decision of the Hon'ble Bombay High Court in the matter of 63 Moons' Technologies, interim EOW Report, copy of order dated April 30, 2019 passed by the Hon'ble Supreme Court, etc., were never provided to the Noticee and therefore, reliance on the same by the DA is in violation of principles of natural justice;
- (xii) The letter dated December 30, 2014 pertains to Ministry of Finance's observations against NSEL and there is nothing specific against the Noticee. The order date August 22, 2014 is not applicable upon the Noticee as the Noticee was not privy to the said proceedings and was not arrayed as a party therein;
- (xiii) FMC Order dated December 17, 2013 has found fault with operations of NSEL for launching of paired contracts and the role of its promoters/ key managerial personnel. Neither the Noticee was a party to the said order, nor the Court had considered the role/activities of the Noticee as a member of NSEL;
- (xiv) There are no specific charges against the Noticee in the interim EOW report and as on July 31, 2013, an amount of ₹39,36,85,323.15 was due and receivable to the clients of the Noticee for trades and contracts executed on their behalf at NSEL;
- (xv) The DA has erroneously observed that the Noticee allowed itself to become an instrument of NSEL by promoting trading in paired contracts. The said observation is perverse as the paired contracts were introduced by NSEL

with the approval of its Board and as a member of NSEL, the Noticee had no other option but to trade in such contracts by observing the business rules of NSEL. There is no allegation that the Noticee has breached business rules and regulations of NSEL as applicable;

- (xvi) NSEL had always presented to the public/ brokers that the paired contracts were legal and permissible contracts as per 2007 Exemption Notification;
- (xvii) The DA has erred in holding that the Noticee ought to have conducted due diligence before entering into the paired contracts on behalf of its clients as it was not within the power of a broker to question the legality of any trading, which was the duty of Central Government/ FMC;
- (xviii) The order dated April 30, 2019 passed by the Hon'ble Supreme Court has observed that the paired contracts of NSEL were in breach of exemption granted to NSEL but the said judgment has no relevance as regards the role of members of NSEL/ Noticee is concerned. Thus, it is incorrect to suggest that because the Noticee has traded in paired contracts, it was closely associated with NSEL;
- (xix) Pursuant to the interim order of the Hon'ble Mumbai High Court in ***Moonish Rangari and Others Vs. Union of India***, the SFIO investigation is without any jurisdiction and hence cannot be relied upon to draw any adverse inference;
- (xx) A broker operating on a stock exchange cannot be treated as a close associate of a stock exchange unless there is a common ownership, management or control;
- (xxi) The Hon'ble Bombay High Court vide its order dated August 22, 2019 has clearly held that the paired contracts were not financial transactions but were trades in commodity as per regulations and bye laws of NSEL;
- (xxii) The DA has not dealt with/ given due consideration to the following contentions, namely:
 - a) Clients who dealt through the Noticee were duly registered clients with proper KYC, Member Client Agreement, etc.;
 - b) All trades were carried out as per NSEL system from time to time and the contract notes were issued to the clients as per the formats and the terms and conditions and bye laws of NSEL;

- c) No brochures/ pamphlets/ presentations on NSEL Products were issued or provided to its clients by the Noticee;
 - d) NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for paired contracts and thus, there was no reason for the Noticee to question the legality of the product launched by NSEL;
 - e) NSEL was incorporated in 2005 and the alleged paired contracts were launched in 2007. However, the Noticee became a member of NSEL in October 2008 and by that time the paired contracts were already being widely traded in the market. In this background, certain clients of the Noticee requested it to allow them to invest in the said product and after carrying out due diligence of the product on the basis of inquiries with NSEL officials, fellow brokers and their clients, and in absence of any adverse reasons, the Noticee allowed some clients, who approached the Noticee on their own instance to trade in the paired contracts;
 - f) The Noticee earned brokerage of barely ₹23,71,637/- pertaining to the activities conducted only during 2011-2014. There have been no complaints or grievances or allegations of any violation of any regulation against the Noticee;
 - g) Upon the slightest hint about possible violations of any regulatory framework, the Noticee took cognizance of the risk, educated and persuaded its clients to exit from the product;
- (xxiii) The SCN dated January 15, 2021 has alleged that the Noticee being a member of NSEL allegedly violated 2007 Exemption Notification as well as regulations 9(b) and 9(f) read with Clauses A(1), (2) and (5) of Schedule II of the Stock Broker Regulations but it is noted that the DA has not given any finding on the aforesaid violations. In the absence of any finality of guilt on the violation of aforementioned provisions, the DA has observed that by trading in paired contracts, the Noticee can be viewed as having close association with NSEL and consequently not a fit and proper person. Based on such a flawed finding alone, the DA has recommended cancellation of certificate of the Noticee which is not tenable in law.

12. While the extant proceedings were ongoing, SEBI passed five separate orders during February, 2019, rejecting the applications filed by five other entities for registration as commodity brokers who were involved in NSEL matter. 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 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 SAT 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...."

13. Subsequently, in August 2022, the present matter was allocated to the undersigned. In light of the aforesaid SAT Order and certain other orders passed by the Hon'ble SAT in similar set of cases, it was felt necessary to furnish certain additional documents/material to the Noticee before concluding the present proceedings. Accordingly, a supplementary show cause notice (hereinafter referred to as "**SSCN**") dated October 12, 2022 enclosing therewith a copy of the SEBI Complaint dated September 24, 2018 filed with EOW, Mumbai, a copy of the FIR dated September 28, 2018 and a copy of the amended Schedule II of the Intermediaries Regulations was issued to the Noticee and the Noticee was granted 15 days' time to file its reply, if any, from the date of receipt of the said SSCN. I note from the material available on record that the Noticee, vide letter dated October 27, 2022, filed its reply to the SSCN and made the following submissions:

- i. The reply to the SSCN may be read with reply dated October 27, 2018 filed by the Noticee;
- ii. The SSCN appears to be a futile attempt to better and improvise the contentions and allegations levied against the Noticee in light of the order dated June 9, 2022 passed by the Hon'ble SAT without any material substance against the Noticee. It is imperative to state that SEBI has attempted to rely upon certain material which was already available with SEBI throughout and was also available in the public domain;
- iii. It is paradoxical that although SEBI is not empowered to inquire/ investigate the offences under FCRA, it has assumed power to declare the Noticee as not fit and proper on the basis of its own complaint/ FIR alleging violation of FCRA;
- iv. In view of Section 29A(2)(e), SEBI could have brought the alleged violations of FCRA to the notice of concerned police authorities which has been done by the complaint filed by SEBI and therefore SEBI cannot justify the initiation of enquiry proceedings on the pretext of violation of section 29A(2)(e) of FCRA;
- v. FIR is only the first instance of reporting of a complaint that is lodged with police and is a preliminary one sided statement of the complaint without any adjudication and thus, any adverse reliance on the FIR would be in gross violation of law and could cause grave prejudice to the Noticee and thus no reliance can be placed on an FIR, particularly an FIR filed by SEBI itself;
- vi. The amendment to Schedule II of the Intermediaries Regulations took effect from November 17, 2021, i.e., much after the initiation of the proceedings against the Noticee. Thus, the said law, if applied retrospectively, would be in gross violation of principles of natural justice.

14. In compliance with the principles of natural justice, an opportunity of personal hearing was granted to the Noticee before me on December 7, 2022 through video conferencing and the Noticee vide letter dated December 3, 2022 confirmed its presence for the said hearing.

15. On the date of hearing, the Noticee was represented by Mr. Lalit Mudra, Director of the Noticee, Advocate Kunal Kataria and Advocate Aparna Waghle, Authorised Representatives of the Noticee, who reiterated the submissions made by the

Noticee vide its earlier replies. Further, as requested, one week's time was granted to the Noticee to make additional submissions, if any. Accordingly, vide email December 13, 2022, the Noticee, made additional submissions in the matter which are summarized as under:

- (i) SAT order dated June 9, 2022, *inter alia*, required the Whole Time Member of SEBI to consider documents such as EOW Chargesheet, complaint letters given by NSEL, etc., to reach the conclusion about the reputation, integrity and character of the Noticee but no such determination has been made as to whether the documents forwarded to the Noticee would lead to any conclusive finding as regard the reputation etc. of the Noticee;
- (ii) Schedule II of the Intermediaries Regulations was amended with effect from November 17, 2021 which is much after the Noticee was granted the Certificate of Registration and the proceedings were initiated against the Noticee. It is a trite law that a delegated legislation cannot be retrospective unless the parent statute provides for the same and no such provision is there under the SEBI Act to make a retrospective amendment to the Intermediaries Regulations;
- (iii) The Hon'ble Supreme Court in its judgment dated April 22, 2022 in the matter of State of Maharashtra Vs. 63 Moons Technologies Limited has held that "*The two-judge Bench of this Court took note of the modus operandi through which the trading members were duped by a conspiracy hatched by a few trading members along with NSEL*" and considering the above, even the Apex Court has held that the controversy in question was devised by a few trading members along with NSEL;
- (iv) The observations in the DA's Enquiry Report have to be seen in light of observations of Hon'ble SAT vide its order dated June 9, 2022:
 - a) Reliance cannot be placed on the decisions in the matter of Jermyn Capital LLC Vs. SEBI and Mukesh Babu Securities Vs. SEBI;
 - b) Adverse observations about NSEL in the FMC Order cannot be imputed upon the brokers in absence of any finding that the brokers had direct or indirect control over NSEL;

- c) No reliance can be placed on the decision of the Hon'ble Bombay High Court in the matter of 63 Moons Technologies as the same has been set aside by the Hon'ble Supreme Court in its decision dated April 30, 2019;
 - d) EOW report cannot be relied upon as the appellants in the order dated June 9, 2022 were not given an opportunity to rebut the same;
 - e) The bail rejection order passed by the Hon'ble Bombay High Court in the matter of Jignesh Prakash Shah Vs. The State of Maharashtra cannot be relied upon as a bail order is passed on a completely different parameters and cannot be used to judge integrity, reputation or character of the applicant.
- (v) Reliance is placed on the order passed by the Whole Time Member in the matter of Anand Rathi Commodities Limited (Dated November 29, 2022) to submit that a similar direction of suspension for a period of three months or till acquittal of the Noticee, whichever is earlier, would be commensurate in the present matter.

CONSIDERATION OF ISSUES AND FINDINGS

16. I have carefully perused the post enquiry SCN, SSCN along with all the documents attached therewith, the replies submitted by the Noticee, the oral submissions made by the Authorised Representatives of the Noticee and Mr Lalit Mudra, Director of the Noticee during the course of the personal hearing along with all the other material/ information available on record. After considering the allegations made/ charges levelled against the Noticee in the instant case, I note that the only issue that arises for 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.

17. Before considering the issue stated at para 15 above, it is pertinent to refer to the common order dated June 09, 2022¹ passed by the Hon'ble SAT which is also referred in the preceding para 11. The Hon'ble SAT, while setting aside and

¹ Appeal No. 214 of 2019 Geofin Comtrade Ltd Vs. SEBI, Appeal No. 217 of 2019 Philip Commodities India Pvt. Ltd Vs. SEBI, Appeal No. 218 of 2019 IIFL Commodities Ltd Vs. SEBI, Appeal No. 288 of 2019 Anand Rathi Commodities Ltd Vs. SEBI and Appeal No. 288 of 2019 Anand Rathi Commodities Ltd Vs. SEBI

remanding the earlier WTM Orders passed during February 2019, had made the following observations (relevant to the present case as well):

- (a) Observations of the 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 appeal³ by the Hon'ble Supreme Court vide judgment dated April 30, 2019.
- (b) 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 ("MPID Act") (*NSEL vs. State of Maharashtra*⁴) cannot be relied upon, as in a subsequent Writ Petition⁵ moved by 63 Moons, a Division Bench of the Hon'ble Bombay High Court has held that NSEL is not a financial establishment and therefore, the provisions of the MPID Act are not applicable. The prima facie observations cannot be the basis to judge the reputation, character or integrity of NSEL.
- (c) 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***, 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.
- (d) Reliance placed on decisions of the Hon'ble Tribunal in the matter of ***Jermyn Capital vs. SEBI***⁶ and ***Mukesh Babu Securities vs. SEBI***⁷ 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 of a criminal complaint filed against the Chairman of the Company. The Tribunal noted that there is no evidence to show that any

² Writ Petition No. 2743 of 2014

³ Civil Appeal No. 4467 of 2019

⁴ Writ Petition No. 1403 of 2015

⁵ Writ Petition No. 1181 of 2018

⁶ Appeal No. 26 of 2006 decided on September 06, 2006

⁷ Appeal No. 53 of 2007 decided on December 10, 2007

proceedings have yet been initiated against the appellants in the matter under consideration.

- (e) Reputation of the applicant cannot be lightly considered based on observations which are not directly related to the applicant.
- (f) 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.
- (g) Grant Thornton Forensic report does not find any close connection between the applicant and NSEL. This is overlooked by SEBI.
- (h) With respect to the additional material available, the Hon'ble SAT observed 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."

18. As noted above, taking cognizance of the order passed by the Hon'ble SAT on June 09, 2022 (referred supra), a SSCN dated October 12, 2022 was issued to the Noticee calling upon the Noticee to show cause as to why the following information/material along with the Enquiry Report dated December 16, 2020 should not be considered against it for determining whether the Noticee satisfies 'fit and proper person' criteria as laid down under Schedule II of the Intermediaries Regulations:

- a) SEBI complaint dated September 24, 2018 filed with Economic Offence Wing ('EOW');
- b) First Information Report ('FIR') dated September 28, 2018; and
- c) Schedule II of the Intermediaries Regulations (Amended with effect from November 17, 2021).

19. In order 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 material that has been brought on record, it would be appropriate to look at the background and understand the nature of the *'paired contracts'* that were offered on NSEL – which ultimately is the cause / genesis of the current proceedings. While undertaking this exercise, I will not be independently recording any findings on the nature of the contracts that were entered on NSEL platform or commenting on the actions of any entity which is not a party to the present proceedings. I will, however, be relying on the observations made by other authorities including the Hon'ble Supreme Court, in the matters of **63 Moons Technologies Ltd. vs. UOI**⁸ (hereinafter referred to as the “merger petition”) and **The State of Maharashtra Vs. 63 Moons Technologies Ltd**⁹ (hereinafter referred to as the “MPID Matter”), wherever appropriate.

Transactions in the nature of 'paired contracts' on NSEL:

20. The spot exchanges were envisaged as platforms for providing transparent and secure trading in commodities with a view to boost the agriculture sector in the country. NSEL was incorporated in 2005 as an electronic exchange for spot trading of commodities and vide the 2007 Exemption Notification, a conditional exemption with respect to (i) forward contracts, (ii) for sale and purchase of commodities, of one-day duration traded on NSEL was granted to NSEL.
21. As noted from the FMC order, NSEL introduced, on its platform, the concept of *'paired contracts'*, in September 2009, which involved buying and selling the same commodity through two different contracts at two different prices wherein investors could buy a short duration settlement contract and sell a long duration settlement contract or vice versa, with the same counterparty at the same time. The transactions were structured in such a manner that buyer of the short duration contract always ended up making profits.

⁸ Civil Appeal no. 4476 of 2019

⁹ Civil Appeal No. 2748-49 of 2022

22. It is noted that even though it was 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 trade only in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days. I note the observation in the FMC order that NSEL had permitted 55 contracts of various commodities having duration longer than 11 days and these contracts were, *ex facie*, in contravention to the exemption granted to NSEL. It is pertinent to note that all the 55 contracts that were advertised by NSEL, and which are captured in the Hon’ble Supreme Court’s Judgement in the matter of MPID Matter, were for durations exceeding 11 days.
23. Hon’ble Supreme Court in the matters of NSEL has also extensively commented on the nature of the ‘paired contracts’ traded on NSEL. The said observations made by the Hon’ble Supreme Court are as under:
- a. The Two-Judge Bench of the Hon’ble Supreme Court in the course of determining the validity of the amalgamation order in the merger petition, vide judgment dated April 30, 2019, had observed as under:
- “55. We have seen that neither FTIL nor NSEL has denied the fact that ‘paired contracts’ in commodities were going on, and by April to July, 2013, 99% (and excluding E-series contracts), at least 46% of the turnover of NSEL was made up of such ‘paired contracts’. **There is no doubt that such ‘paired contracts’ were, in fact, financing transactions which are distinct from the sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL and the FCRA.” (emphasis supplied)***
- b. Hon’ble Supreme Court in the MPID matter vide judgement dated April 22, 2022, has drawn reference to the presentations made by NSEL in respect of the ‘paired contracts’. Upon analysing the presentations made, Hon’ble Supreme Court has observed 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)

24. 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, the Hon'ble Supreme Court held that these contracts were in the nature of financing transactions. In the MPID matter (*The State of Maharashtra vs. 63 Moons Technologies Ltd.*), the Hon'ble Supreme Court has held that such transactions come within the definition of 'deposits' under the MPID Act.
25. 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. As seen from the order of the Hon'ble Supreme Court, NSEL was advertising an annualized return of about 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 and T+25 paired contract in steel had the same offered return as a T+ 2 and T + 35 paired contract in castor oil. The 'paired contracts', it is noted, were being marketed as an alternative to fixed deposits.

26. In view of the above, I note that the FMC Order and both the judgments of the Hon'ble Supreme Court discuss in detail that, NSEL was 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. As noted above, the Hon'ble Apex Court in the merger petition has held that these contracts were in the nature of financing transactions. Further, the Hon'ble Supreme Court in the MPID matter has held that the overwhelming majority of the sale leg of the 'paired contracts' which were executed were naked short sales i.e. the commodities to back such sales were not available at the designated warehouses of NSEL.
27. At this juncture, in light of the above observations of the Hon'ble Supreme Court, I note that submission of the Noticee that the Hon'ble Bombay Court, vide its decision dated August 22, 2019, has clearly held that the paired contracts were not financial transactions is misplaced. It is also pertinent to note that the decision of the Hon'ble Bombay High Court which has been relied upon in the matter by the Noticee was overruled by the Hon'ble Apex Court in the MPID matter and thus, the submission of the Noticee in this regards is not tenable in law.
28. As observed by the Hon'ble Supreme Court, the paired contracts were in contravention of the provisions of FCRA and the 2007 Exemption Notification, and the DA, by relying upon the trade details of the Noticee has observed that the Noticee, by failing to disassociate itself from, and continuing to facilitate participation in the said paired contracts, failed to act with due diligence.

Objections raised by the Noticee:

29. The Noticee has submitted that SEBI does not have the jurisdiction to deal with the Spot Market in terms of letter dated November 20, 2015 of the Ministry of Finance. In this regard, without going into the merits of the contention whether SEBI has the authority to regulate Spot Market or not, I note, that the issue under 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 of law that SEBI has the statutory authority to determine the fit and proper

status of the intermediaries registered with it. Since the Noticee is an intermediary registered with SEBI, I am of the view that SEBI is within its jurisdiction to determine the fit and proper status of the Noticee.

30. Further, the Noticee has also argued that in terms of Section 29A(2)(e) of the FCRA, SEBI could only initiate prosecution proceedings against the members of NSEL and not proceed under the Intermediaries Regulations. In this regard, I note that 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. 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;”

31. 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 filed complaint, *inter alia*, 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 and, the contention that transactions done by the Noticee prior to September, 2015 are beyond the regulatory ambit of SEBI is 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.

32. Further, as stated above, the present proceedings pertain to examination of the 'fit and proper' person status of the Noticee under the Intermediaries Regulations and it is a settled position of law that as a statutory body, SEBI is well within its regulatory purview to examine the 'fit and proper' person status of the intermediaries registered with SEBI. Accordingly, the submission of the Noticee as regard maintenance of the present proceedings under the Intermediaries Regulations is also without merit.

33. The Noticee has also submitted that the DA has not given any finding on the alleged violations pertaining to regulations 9(b) and 9(f) read with Clauses A(1), (2) and (5) of Schedule II of the Stock Broker Regulations. The said submission is factually incorrect as the DA, in para 45 of the Enquiry Report has, *inter alia*, noted as under

"...It also acted in complete disregard to the code of conduct requiring it to exercise due skill, care and diligence in the conduct of its business and did not comply with the applicable statutory requirements thereby violating the provisions of clause A(1), A(2) and A(5) of Schedule II read with Regulations 9(b) and 9(f) of the Broker Regulations"

(emphasis supplied)

Accordingly, I note that the Noticee's contention is without merit.

34. The Noticee has further submitted that the appointment of the DA in the present matter is bad in law as the same was done by the Whole Time Member and not the Executive Director, as is required 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 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, in presence of a valid delegation conferred upon by the statute, I find that the Noticee's challenge to the appointment of DA by the Whole Time Member of SEBI, who is an authority higher in grade to the Executive Director of SEBI, is devoid of any merit. The Noticee has also argued that

appointment of DA by Whole Time Member would be in derogation of the SEBI Regulations and the DOP Order cannot override/ supersede the SEBI Regulations. In this regard, I am of the view that there is no such alleged overriding/ supersession, as claimed by the Noticee. The DOP Order read with the Intermediaries Regulations, empowers the Executive Directors or the Whole Time Members to appoint a DA. Accordingly, the contention of the Noticee is devoid of merit.

35. The Noticee has also submitted that the Hon'ble Supreme Court in its judgment dated April 22, 2022 in the matter of **State of Maharashtra Vs. 63 Moons Technologies Limited**¹⁰ has held that "*The two-judge Bench of this Court took note of the modus operandi through which the trading members were duped by a conspiracy hatched by a few trading members along with NSEL*" and considering the above, even the Apex Court has held that the controversy in question was devised by a few trading members along with NSEL. I have perused the decision of the Hon'ble Supreme Court relied upon by the Noticee and I note that the quoted excerpt refers to the decision of the Hon'ble Supreme Court in the merger petition. In this regard, I am of the view that quoted excerpt cannot be used to draw a conclusion that the brokers trading on NSEL platform were not at fault and further the reliance placed by the Noticee does not prove that the Noticee was duped by the other trading members. Accordingly, I am not inclined to accept the contention of the Noticee in this regard.
36. The Noticee has also submitted that it has not been provided with documents which have been relied upon while issuing the notice, such as FMC Order, Grant Thornton Report, etc. In this regard, I have perused the material available on record and I find the said submission of the Noticee to be misplaced as vide letters dated June 26, 2019, July 11, 2020 and SSCN dated October 12, 2022 and email dated June 18, 2020, the Noticee was provided with the relevant and relied upon documents including trade details of the Noticee in the matter. Therefore, the

¹⁰ State of Maharashtra Vs. 63 Moons Technologies Limited, Civil Appeal Nos. 2748-49 of 2022 and 2750-51 of 2022, MANU/SC/0534/2022

Noticee's contention with regard to non-supply of relevant documents in misplaced.

Fit and proper person criteria:

37. At this juncture, it would be appropriate to take a look at the relevant provisions of the SEBI Act, Stock Broker Regulations and the Intermediaries Regulations (as they exist on date) which are reproduced as under for reference:

SEBI Act

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.

Broker Regulations

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

Liability for action under the Enquiry Proceeding Regulations.

27. *A stock broker or a sub-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 or a sub-broker, as the case may be, if he—*

(i)

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

SCHEDULE II
Securities and Exchange Board of India (Stock 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.*

(3) *....*

(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.”*

Securities and Exchange Board of India (Intermediaries) Regulations:
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 fulfill 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 (2of 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 proceedings 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.

38. I note that regulation 5(e) of the Stock Broker 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.

39. From the records, I note that SEBI has filed a complaint with EOW Mumbai on September 24, 2018, against brokers who facilitated access to '*paired contracts*' traded on NSEL, including the Noticee. On the basis of this complaint, FIR dated September 28, 2018, was registered with the MIDC Police Station, Mumbai, against the Noticee and a chargesheet in the said matter has also been filed in

the matter by EOW. I note that the Noticee is holding a certificate of registration No. INZ000025732 granted by SEBI on March 30, 2016. 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 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.

40. I deem it apposite to refer to the replies dated October 27, 2018 and December 7, 2022 (submitted vide email dated December 13, 2022) along with the Enquiry Report submitted by the DA. Vide reply dated October 27, 2018, the Noticee has, *inter alia*, submitted that “...It is pertinent to note that the Noticee was trading in the paired contracts on behalf of its clients as the said contracts were the contracts specified by the Board of NSEL for trading on the exchange...”. Further, the Noticee, vide its reply dated December 7, 2022 has submitted that “...We submit that we have not traded in propriety account but have traded on behalf of client on NSEL platform but not traded in paired contracts on NSEL. Since the same pertains to the period 2011-2014, the said record is no longer available with us. The total outstanding clients were majority of individuals being about 128 individuals and about 31 companies/ HUFs etc. The amount receivable from NSEL as on date is about approximately Rs. 30 Crores. The Noticee earned a brokerage of Rs. 23,71,637/- during the period 2011-2014 as specified in our Reply dated March 11, 2021”. Furthermore, the Enquiry Report has also noted that as under:

“Further from the trading details of the Noticee, I note that the trades were such that two legs of trades were executed for the same commodity on the same day within few seconds / minutes, whereby one leg of trade being a buy trade involving T+1, T+2, T+3 or T+5 settlement cycle and the other leg of the trade being sell trade involving T+25, T+30, T+34 or T+36 settlement cycle. For

example, on August 22, 2012, the Noticee purchased 1 unit of CASTKADI3 for an amount of Rs. 2,943.75 at 11:58:32, and sold 1 unit of CASTKADI36 for Rs. 3,014.25 at 11:58:42. Further, on the same date, i.e. August 22, 2012, Noticee bought 299 units of CASTKADI3 for Rs. 8,80,181.25 at 15:22:12 and sold 299 units Rs. 9,01,260.75 at 15:22:31.

Client Member Name	Trading Member Name	Trading Date and Time	Sell (S)/ Buy (B)	Quantity	Trade Value (in Rs.)	Scrip Code
SURESH RATHI COMMODITIE S PVT LTD	SURESH RATHI COMMODITIE S PVT LTD	2012-08-22 11:58:32	B	1	2943.75	CASTKADI3
SURESH RATHI COMMODITIE S PVT LTD	SURESH RATHI COMMODITIE S PVT LTD	2012-08-22 11:58:42	S	1	3014.25	CASTKADI36
SURESH RATHI COMMODITIE S PVT LTD	SURESH RATHI COMMODITIE S PVT LTD	2012-08-22 15:22:12	B	299	880181.25	CASTKADI3
SURESH RATHI COMMODITIE S PVT LTD	SURESH RATHI COMMODITIE S PVT LTD	2012-08-22 15:22:31	S	299	901260.75	CASTKADI36

In this regard, referring to the NSEL Circular Nos. NSEL/TRD/2009/125 and NSEL/TRD/2009/127 both dated September 19, 2009, it is noted that the contract symbols CASTKADI3 and CASTKADI36 refer to the trading in Castor Seed Traders' Ex-Kadi (T+3) and (T+36) Contracts, respectively. From the same, it is noted that the Noticee was simultaneously executing trades in short term buy contract (T+3 – i.e. 3 days settlement) and a long term sell contracts (T+36 – i.e. 36 days settlement). Thus, the conditions of no short sale and compulsory delivery of outstanding position at the end of the day as stipulated

in the Notification dated June 05, 2007 were not compiled. I note that such trades were clearly in the nature of 'Paired Contracts'..."

On perusal of the submissions made by the Noticee and the observations made in the Enquiry Report, it is clear that the Noticee has, in fact, indulged in trading in the 'paired contracts' for its clients and also traded in its proprietary account. I note that although the Noticee has submitted that it has not traded in its proprietary account but, as noted from the Enquiry Report, the Noticee has executed trades in paired contracts from its proprietary account and the Noticee has failed to rebut the observations made and specific trade details reproduced in the Enquiry Report, as noted in the table above.

41. I note that the act of the Noticee in offering access to 'paired contracts' by facilitating trading in such contracts, seriously calls into question, the integrity, honesty and lack of ethical behaviour on part of the Noticee. As recorded in the FMC order and the judgments of the Hon'ble Supreme Court (mentioned supra), these contracts, were offered in violation of the 2007 Exemption Notification and were not spot contracts in commodities which were permitted to be traded on NSEL. The 'paired contracts' were nothing but financing transactions masquerading as spot contracts in commodities. The execution of the trades in 'paired contracts' were not permitted under the 2007 Exemption Notification and were purely financial contracts promising assured returns under the garb of spot trading in commodities, as observed by FMC in its Order. Therefore, the Noticee by its conduct and as a member of NSEL has facilitated trading in 'paired contracts' which were in the nature of financing transactions as held by the Hon'ble Supreme Court. 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 and thereby raising doubts on the competence of the Noticee 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 and for itself on NSEL platform have serious ingredients amounting to jeopardizing the reputation, belief in competence, fairness, honesty, integrity and character of the Noticee in the Securities Market.

42. I further note that Clause 3(b) of Schedule II of the amended Intermediaries Regulations lays down a list of disqualifications which includes the following:

- 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;*

43. As discussed above, the Noticee has facilitated its clients to trade in 'paired contracts' and also indulged in executing proprietary trades in the 'paired contracts'. As the paired contracts were violative of the conditions stipulated in the 2007 Exemption Notification, a complaint was filed by SEBI with EOW on September 24, 2018, against the brokers who participated/ facilitated access to 'paired contracts' traded on NSEL, including the Noticee within the time limit, as specified under section 29A(2)(e) of the FCRA. On the basis of the said complaint of SEBI, FIR dated September 28, 2018 was registered with MIDC Police Station, Mumbai. Pursuant to the same, basis the material available on record, I note that a chargesheet has also been filed in the matter by EOW in the matter on December 2, 2022 before the Special MPID Court, Mumbai. I note that the name of the Noticee is reflected in the said chargesheet.

44. It is pertinent to note that 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. 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 its powers to examine the '*fit and proper person*' status of such entity based on various parameters. Further, as and when the '*fit and proper person*' criteria changes, the Noticee will be required to comply with the revised criteria, and in the instant case, criteria as revised vide the amendment in November, 2021. It is noted that parameters provided under Clause 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations lays down a list

of disqualifications which includes a pending chargesheet filed against an entity by an enforcement agency. In the present matter, vide chargesheet dated December 2, 2022, EOW has filed a chargesheet against the Noticee for violation of Section 21 of the FCRA. It is, therefore, noted that the Noticee attracts the disqualification provided in Clause 3(b)(ii) of the Schedule II of the Intermediaries Regulations.

45. At this juncture, I deem it apposite to deal with the submission of the Noticee that SEBI cannot be permitted to use its own FIR as evidence in a proceeding and that since an FIR is a first instance of reporting of complaint, reliance on the same would be in gross violation of the principles of natural justice. As regard usage of FIR as evidence in the present matter, I note that being a '*fit and proper*' person is a continuing '*eligibility criteria*' statutory requirement, which must be satisfied by the Noticee including the amended criteria, at all times. I am of the considered view that the due presumption on the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field which is binding upon SEBI, and arguments to the contrary are not maintainable.
46. Therefore, looking holistically, I find that the conduct of the Noticee is detrimental to the Securities Market, being not in conformity with the applicable code of conduct. I note that there were enough red flags for a reasonable person to come to the conclusion that what was being offered as '*paired contracts*' on NSEL were not spot contracts in commodities. Given the above, I am constrained to conclude that the Noticee provided a platform for its clients to access a product and also indulged in proprietary trading in the said product, which was not permitted to trade, raised serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the product itself. By failing to disassociate itself from, and continuing to facilitate participation in the said paired contracts, the Noticee failed to act with due diligence.
47. Furthermore, as mentioned in paragraph 42 above, the Noticee has also earned disqualification under Clause 3(b)(ii) of the amended Schedule II of the Intermediaries Regulations on account of the chargesheet filed by EOW against

the Noticee. In this regard it is pertinent to note that the said chargesheet is validly subsisting and has not been challenged, quashed or stayed by any competent court *qua* the Noticee. In this context, as observed above, I note that being a '*fit and proper person*' is a continuing 'eligibility criteria' which must be satisfied by the Noticee including the amended criteria, at all times.

48. The Noticee has also submitted that it was under an expectation that the products launched by the Exchange are legal and hence there was no reason for the Noticee to question the legality of such product launched by NSEL. In this regard, I am of the view that, the principle of '*ignorantia juris non excusat*' or '*ignorantia legis neminem excusat*' or '*ignorance of law is no excuse*' becomes applicable in the situation, since trading in 'paired contracts' was in violation of the 2007 Exemption Notification and ignorance of the conditions of the said 2007 Exemption Notification cannot be claimed. As held by the Hon'ble Supreme Court, 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 of appropriateness and suitability of the continuance of the registration of the Noticee as a broker. Clearly, the actions of the Noticee has have been 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 Broker Regulations read with the provisions of Schedule II of the Intermediaries Regulations.

49. 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 interest 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 have 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 and 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.

50. I am also aware that SEBI has passed certain orders¹¹ in the related NSEL matters where the noticees therein have been debarred from making a fresh application seeking registration for a specified period from the date of the said order or till acquittal of the said noticees by Courts pursuant to the charge sheet and FIR filed by/with EOW, whichever is earlier. I find that present matter at hand is different from that of those cases, as in the extant matter the Noticee is already holding a Certificate of Registration whereas in those cases, the entities had filed applications seeking certificate of registration. As already noted above at paragraph 42, '*fit and proper person*' criteria is a continuing requirement under the Intermediaries Regulations which the Noticee ought to comply with at all times so long it desires to remain associated with the Securities Market as a registered intermediary. Further, I note that the Hon'ble SAT in its order dated June 09, 2022 (pertaining to entities whose application for registration was rejected) has observed that the period for which the noticees cannot apply for registration needs to be specified by SEBI. Having noted the aforesaid observation of the Hon'ble SAT, I am of the view that since the recommendation in the present matter is of cancellation and not of rejection of the application, the necessity of specifying a

¹¹ Orders dated November 29, 2022 in respect of Motilal Oswal Commodities Brokers Pvt. Ltd.(at https://www.sebi.gov.in/enforcement/orders/nov-2022/order-in-respect-of-motilal-oswal-commodities-broker-pvt-ltd-_65602.html), Anand Rathi Commodities Ltd.(at https://www.sebi.gov.in/enforcement/orders/nov-2022/order-in-the-matter-of-anand-rathi-commodities-ltd-_65604.html), Geofin Comtrade Limited (previously known as Geojit Comtrade Limited) (at https://www.sebi.gov.in/enforcement/orders/nov-2022/order-in-the-matter-of-geofin-comtrade-limited-previously-known-as-geojit-comtrade-limited_65597.html), India Infoline Commodities Ltd.(at https://www.sebi.gov.in/enforcement/orders/nov-2022/order-in-the-matter-of-india-infoline-commodities-ltd-_65595.html) and Phillip Commodities India Pvt. Ltd. (at https://www.sebi.gov.in/enforcement/orders/nov-2022/order-in-the-matter-of-phillip-commodities-india-pvt-ltd-_65593.html) in the matter of NSEL.

period of time may not arise in this order (as in the case of entities desiring to be registered as market intermediaries) as I cannot presume whether such entity wishes to reapply to be a market intermediary or not. If it chooses to do so, it will have to be assessed at such point of time if it is fit and proper as per the applicable regulations.

51. Given the above discussions and deliberations, I conclude that the act of the Noticee in providing access to its clients to participate in a product and also indulging in proprietary trades in the said product, which was not permitted to trade raises serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the said product itself presumably, driven by its desire to earn brokerage and / or profit. Further, as per findings recorded in earlier paragraphs, the Noticee also attracts the disqualification provided in Clause 3(b)(ii) under the amended Schedule II of the Intermediaries Regulations in view of the chargesheet filed against the Noticee which is validly pending as on date. Further, it is also not the case of the Noticee that said chargesheet is either stayed or quashed by any competent court *qua* the Noticee or otherwise. In view of the above, I hold that the Noticee does not satisfy the '*fit and proper person*' criteria specified in Schedule II of the Intermediaries Regulations and hence, the continuance of the Noticee as a registered broker will be detrimental to the interest of the Securities Market. Therefore, such activities of the Noticee as a registered broker cannot be condoned and deserve appropriate measure to prevent such wrong doings recurring to the detriment of the interest of the Securities Market.

52. In view of the above, I concur with the recommendation made by the DA.

ORDER

53. I, therefore, in exercise of powers conferred under Section 12(3) and Section 19 of the SEBI Act, 1992 read with Regulation 27 of the Intermediaries Regulations, 2008 cancel the Certificate of Registration (bearing no. INZ000025732) of the Noticee viz. Suresh Rathi Commodities Private Limited.

54. The Noticee shall, after receipt of this order, immediately inform its existing clients, if any, about the aforesaid direction in paragraph 53 above.
55. Notwithstanding the direction at paragraph 53 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 registered with SEBI within a period of next 15 days thereon, under advice to the said clients.
56. This Order shall come into force with immediate effect.
57. The above Order is without prejudice to the proceedings pending in pursuance of the chargesheet filed by EOW in the matter of trading on NSEL and/or any proceedings pending before any authority in respect of similar matter concerning the Noticee or other relevant persons.
58. A copy of this order shall be served upon the Noticee and the recognized Market Infrastructure Institutions for necessary compliance.

Sd/-

DATE: AUGUST 25, 2023
PLACE: MUMBAI

S.V. MURALI DHAR RAO
EXECUTIVE DIRECTOR
SECURITIES AND EXCHANGE BOARD OF INDIA