

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

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

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In respect of –

JM Financial Commtrade Limited  
[Registration No. INZ000045230]

In the matter of National Spot Exchange Limited

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BACKGROUND

1. Securities and Exchange Board of India (hereinafter be referred to as, the “**SEBI**”) initiated enquiry proceedings against JM Financial Commtrade Limited (hereinafter be referred to as, the “**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) Schedule II of the Stock Broker Regulations read with Schedule II of the SEBI (Intermediaries) Regulations, 2008 (hereinafter be referred to as, the “**Intermediaries Regulations**”).
2. The Noticee was a Trading and Clearing Member of the National Spot Exchange Limited (hereinafter be referred to as, the “**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 provisions of Forward Contracts (Regulation) Act, 1952 (hereinafter be referred to as, the “**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, in exercise of powers conferred by the 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 allegedly 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 06, 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' as stipulated in one of the conditions prescribed under the said 2007 Exemption Notification, authorizing it to collect the trade data from the 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 the NSEL in the prescribed reporting formats. After analyzing the trade data received from the 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 the NSEL platform were in violation of the provisions of the FCRA and also in violation of the conditions specified by the Government of India in its 2007 Exemption Notification, while granting exemptions to the one day forwards contract for sale and purchase of commodities traded on the NSEL, from the purview of the FCRA.
5. On perusal of the FMC Order in respect of the 'paired contracts', which were traded on the NSEL platform during the relevant period, I note that the FMC had inter alia, observed that the following conditions stipulated in the 2007 Exemption Notification were violated:

a. **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 the NSEL and its trading/clearing members who traded in the paired contracts during the relevant period.

b. **Contracts with Settlement Period going beyond 11 days**

Some of the contracts offered for trade on NSEL had settlement periods exceeding 11 days and therefore, such contracts were “*non-transferable specific delivery*” contracts under the FCRA. As per the FCRA, the “*ready delivery contracts*” were required to be settled within 11 days of the trade and hence, the contracts traded on the NSEL which provided settlement schedule for a period exceeding 11 days were not allowed under the aforesaid Notification.

6. Hence, it was alleged that the NSEL organised trading in ‘*paired contracts*’ in violation of the Notification SO 906(E) dated June 05, 2007 issued under Section 27 of the FCRA. 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 Notification dated June 05, 2007 issued under the FCRA. 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 information available with SEBI, the Noticee, being a Trading and Clearing member of the 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 the 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, was ‘*fit and proper*’ 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 communique dated September 24, 2018 to conduct an enquiry against the Noticee and submit a report and make recommendation/s in compliance with Regulation 27 of the Intermediaries Regulations. The DA, accordingly, issued a Show Cause Notice dated September 26, 2018 (hereinafter referred to as “Enquiry SCN”) to the Noticee under Regulation 25(1) of the Intermediaries Regulations (as applicable at the relevant time) calling upon it to show cause as to why appropriate recommendation should not be made against it under Regulation 27 of the Intermediaries Regulations (as applicable at that time) read with Section 12(3) of the SEBI Act for the alleged violation of the provisions of Regulation 9(b) and 9(f) read with Clauses A(1), A(2) and A(5) of the Schedule II of the Stock Broker Regulations and being not a ‘fit and proper person’ for holding the certificate of registration as trading / clearing member in terms of Regulation 5(e) read with Regulation 27(iv) of the Broker Regulations read with Schedule II of the Intermediaries Regulations.
9. The Noticee replied to the Enquiry SCN vide letter dated October 9, 2018 requesting the DA to grant an extension of 90 days from the date of the letter for submitting a reply in the matter. Vide email dated October 16, 2018, additional time up to November 9, 2018 was granted to the Noticee to submit its reply. Vide letter dated November 9, 2018, the Noticee made its submissions towards the SCN. Vide letter dated March 25, 2019, copies of all documents relied upon by the DA were forwarded to the Noticee. It is pertinent to note that, the Noticee was also advised to submit its additional reply, if any, on or before April 20, 2019. Vide letter dated April 20, 2019, the Noticee submitted its reply.
10. Upon completion of the enquiry, the DA submitted an Enquiry Report dated June 28, 2019 (“Enquiry Report”) to the Competent Authority, inter alia, observing as under:

*“61. In view of the facts and circumstances of the case and the 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 Stock Broker Regulations and 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. JM Financial Commtrade Limited [INZ000045230] as a commodities derivatives broker may be cancelled.*

## **POST ENQUIRY PROCEEDINGS**

### **Show Cause Notice, Reply and Personal Hearing**

11. After considering the Enquiry Report, a post-enquiry Show Cause Notice dated September 11, 2019 ("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 as to why action as recommended by the DA including any other action should not be taken against, as deemed fit, by the Competent Authority.
12. The Noticee replied to the said SCN vide its letter dated December 16, 2019, January 10, 2020, February 18, 2020 and made the following submissions:
  - (i) The SCN including the Enquiry Report of the DA does not fall within the scope and purview of the provisions of the Intermediaries Regulations including that of Regulations 23 and 24 of the Intermediaries Regulations, which themselves are *void ab initio* and is not in consonance with the provisions of Chapter V of the Intermediaries Regulations, and hence these proceedings against us deserve to be dropped forthwith, being bad in law.
  - (ii) The Noticee submitted that they were not a 'Stock Broker' or an 'Intermediary' as defined in the Securities Laws prior to their registration as Stock Broker on 29.04.2016 and there is no stipulation in the Brokers Regulations to apply the provisions of Brokers Regulations retrospectively; further, the trades executed on NSEL were not in the nature of 'Securities';
  - (iii) The Noticee submitted that NSEL was not a Stock Exchange as said by FMC/SEBI and as defined in the Securities Laws. NSEL is neither registered nor a recognised association/Exchange under FCRA, 1952. It has never been regulated by any regulator. Trades executed by them on their behalf and on behalf of their clients on NSEL do not fall within the ambit of Securities

Contracts (Regulation) Act, 1956 and hence beyond the regulatory purview of SEBI.

- (iv) The Noticee submitted that they have not been provided any “basis of findings” or the “material relied upon for those findings’ by the Ministry of Finance, Department of Economic Affairs in its letter dated 30.12.2014. The Hon’ble Supreme Court in its order dated 30.04.2019 and the Hon’ble Bombay High Court in its order dated 22.08.2014 as stated in the SCN have made certain observations against FTIL/NSEL. In view of the seriousness of the allegations in SCN, they requested to furnish the specific information/violations alleged, if any, against them by the authorities/ Hon’ble Courts referred at paragraphs 2.a, 2.b and 2.c of SCN, so as to enable them to furnish their reply. In this regard, the Noticee has placed reliance on *Canara Bank & Ors. Vs. Debasis Das & Ors. (2003) 4 SCC 557*.
- (v) The SCN does not bring out the details of ‘financing transactions’ alleged to have been carried out by them, the names of entities with whom they are alleged to have entered into ‘financing transactions’, amounts financed with dates of financing etc.
- (vi) The Noticee submitted that document enclosed by SEBI in support of the observations alleged against them at para 2 a) of SCN (i.e. on page number marked as 1 of 3) is incomplete. They have not been provided with a copy of the letter dated 19.06.2014 from the Department of Economic Affairs, Ministry of Finance which has been referred and stated to have been enclosed with the letter dated 30.12.2014.
- (vii) The Noticee submitted that that vide its letter dated 30.12.2014, the Department of Economic Affairs, Ministry of Finance has advised FMC (now SEBI) to take action against NSEL and not against them. Reliance is placed on the order passed by Hon’ble SAT on 30.09.2013 in the matter of *Vidhya Finvest Limited, Kolkata and Others V/s SEBI*.
- (viii) The Noticee submitted that as they had carried out their transactions on NSEL as per market mechanism and in accordance with the bye laws of NSEL, the proceedings initiated against them deserves to be disposed of without any action.

- (ix) The Noticee submitted that they were admitted as 'Trading cum Clearing Member' by NSEL on 05.01.2012 i.e. about 5 years after the Notification was issued by the Government of India on 5.06.2007. Thus, the aforesaid conditions which were imposed by the Government of India on NSEL and mentioned by SEBI in the SCN also existed for 5 years. Consequently, they had no role whatsoever in commencing or carrying out/facilitating any activity(ies) by NSEL in violation.
- (x) The Noticee further submitted that, nowhere in the Supreme Court order dated 30.04.2019 it is stated that they as a 'Trading cum Clearing Member' on NSEL, were aware of and/or were party to the scam perpetrated by NSEL. On the contrary, FMC (Now SEBI), vide its order dated 17.12.2013, has already confirmed that they were the victims of NSEL fraud. Further, the trades on NSEL trading platform were by way of an anonymous order matching mechanism in which, while executing trades, the counterparties did not know the identity of each other. The Noticee submitted that the FMC order does not mention their name anywhere.
- (xi) The Noticee denied the allegation of their carrying out any 'financing transactions' or 'paired trades' on NSEL.
- (xii) The Noticee stated that the promoters of NSEL were Financial Technologies (India) Limited (now known as '63 Moons') and NAFED under the Ministry of Agriculture and Farmers' Welfare, Government of India and no action has been taken against NAFED or any of the aforesaid authorities in the NSEL matter despite their association with NSEL and despite them facilitating activities of NSEL.
- (xiii) The Noticee submitted that mere undertaking the trades on the trading platform of NSEL in the ordinary course of business as a 'Trading cum Clearing Member' cannot be considered as a ground for close association with NSEL and paired contracts as alleged, being bad in law. Hence, the SCN issued to them deserves to be disposed of without any adverse action against them.
- (xiv) The Noticee submitted that their clients and their selves are yet to receive crores of Rupees from NSEL not because of having/not having their 'own legal team' or 'full knowledge how the market operates' but owing to a

scam perpetrated by NSEL as brought out by FMC in its order dated 17.12.2013.

- (xv) The Noticee submitted that against the Bombay High Court Order dated 22.08.2014, a Special Leave Petition was filed in Supreme Court on 17.11.2014 challenging the order of the High Court. The observation made by the High Court in its order dated 22.08.2014 shall not stand in the way at any point of time.
- (xvi) The Noticee were enrolled as a trading cum clearing member with NSEL on 05.01.2012 and the NSEL scam surfaced in the year 2013 i.e., after over a year, and considering the fact that the time taken by the authorities in determining the legalities of the transactions on NSEL, no fault or violation can be attributed to them based on their trading on NSEL trading platform or merely based on the observations of the Hon'ble Bombay High Court, about having a 'legal team'.
- (xvii) The provisions of Regulation 28(1) of the Intermediaries Regulations wrt procedure for action on receipt of the recommendation do not provide for the Designated Member to traverse beyond the report of the Designated Authority. Besides, in terms of the Regulation 28 (1) of the Intermediaries Regulations, the Designated Member herself/himself is required to independently consider the report of the Designated Authority and not rely on the 'observations' of authorities contained in the SCN, other than the Designated Authority. Further, the Noticee has stated that the contents of first 3 pages of SCN were beyond the scope of Intermediaries Regulations.
- (xviii) The Noticee submitted that as a SEBI Registered stock broker they have never participated in/facilitated in paired contract as alleged in SCN. Since the whole SCN including the aforesaid information/ materials in the form of observations by various Courts/Authorities that they had participated in/facilitated in paired contracts transacted on NSEL, is based on an assumption that the same was done in their capacity "as a Broker" is incorrect, the SCN issued to them deserves to be disposed of without any adverse action against them.
- (xix) The Noticee submitted that any action against them alleging and inferring their association with NSEL in the normal course of business, before



taking any action against NSEL, is bad in law. In this regard, reliance is placed on the order passed by Hon'ble SAT on 19.06.2012 in the matter of *Newtworth Stock Broking Ltd. Vs SEBI*.

(xx) The Noticee submitted that alleged serious questions on their reputation/competence/character/integrity having bearing on their fit and proper status thereby declaring them 'not fit and proper' as contemplated in SCN, without similarly questioning NSEL and without declaring NSEL as 'not fit and proper', is bad in law. The Noticee has placed reliance on the Order dated 30.09.2013 by the Hon'ble SAT in the matter of *Vidhya Finvest Limited and Others V/s SEBI*.

(xxi) The Noticee further submitted that that the SCN issued u/r 28(1) of the Intermediaries Regulations as well as the Enquiry Report do not specify as to which provision(s) of which of the Securities Law(s) has been violated by them. The SCN issued to them does not specify as to which rules, regulations and bye-laws have not been abided by them or which provisions of Code of Conduct as specified in schedule II, have not been abided by them. Non-stipulation of the specific provision(s) of the securities laws which have been alleged to have been violated by them in SCN has led to impairment of their ability to defend this matter effectively and adequately.

(xxii) The Noticee also note that para 35 of the Enquiry Report has unequivocally confirmed that there are no allegations of violation of FCRA by them. Paragraph 52 of the Enquiry Report confirms that the allegation against them 'pertain to their association with NSEL trading platform for participation in/facilitation of paired trades in violation of Notification of 05.06.2007'. In view of the confirmation at paragraph 35 of the Enquiry Report, their alleged association with NSEL, for its failure to comply with the exemption granted to it under FCRA, in their normal course of business, cannot be held against them. Consequently, the SCN deserves to be disposed of without any action against them.

(xxiii) The Noticee submitted that since their name does not appear in the documents such as FMC Order dated 17.12.2013, Grant Thornton Report etc., the Enquiry Report has erred in relying upon the said document in issuing Supplementary Show Cause Notice date 12.02.2019 to them.

- (xxiv) The Noticee submitted that the allegations in the SCN including the Enquiry Report issued to them refer to certain transactions during the years 2009 to 2013, i.e. about 5-10 years old. Despite their request to the DA, they have not been furnished the requisite details and information of trades and details of clients for whom they had 'allegedly participated and/or facilitated' in entering into such paired contracts on the platform of NSEL along with requisite documents so as to enable them to furnish the specific details and their replies thereto. In this regard, the Noticee has placed reliance on *State of Punjab v. Chaman Lal Goyal reported in (1995) 2 SCC 570*.
- (xxv) The Noticee submitted that SEBI, only after duly satisfying itself had granted the certificate of registration as Stock Broker to them and confirmed to them vide its letter dated 29.04.2016. Thus, before granting them the certificate of registration, SEBI had already satisfied itself that they were a 'fit and proper' person based on the criteria specified in Schedule II of the Intermediaries Regulations and also after taking into account all details/material available with SEBI with regard to NSEL matter.
- (xxvi) The Noticee submitted that earlier, proceedings were initiated against them vide the DA-SCN, inter alia, referring to FCRA without specifying as to which provisions/section of FCRA has been violated by them. Now, para 35 of the Enquiry Report has confirmed that there are no allegations of violation of FCRA by them. FCRA was repealed on 29.09.2015, the period of 3 years stipulated vide Finance Act, 2015 has ended on 28.09.2018 and no violation of FCRA is alleged against them. Consequently, on these grounds alone, these proceedings initiated against them are void ab initio.
- (xxvii) The Noticee submitted that SEBI had established a 'close association' of Jermyn Capital LLC by virtue of commonalities such as common directors, common shareholders, common names and control over it by entities against whom pursuant to investigation SEBI had already taken debarment etc. actions. As against this, NSEL had no such commonality with or control over them, nor the SCN makes any such allegation. There is no material/evidence to even remotely suggested they have any commonality with, or control upon them by NSEL and vice versa.

- (xxviii) The Enquiry Report has also erred in ignoring the fact that the FMC/SEBI, vide its order dated 17.12.2013, had already concluded that they being one of the market participants were the victims of the NSEL fraud and concealment by NSEL and there are no findings in the said FMC/SEBI order whereby it can be held that they had “close association” with NSEL. Further, the Enquiry Report has also erred in not taking into consideration that there was no association between them and NSEL in terms of the definition of the word ‘associate’ defined in the Intermediaries Regulations.
- (xxix) The Noticee submitted that vide the order dated 23.06.2009, the Whole Time Member of SEBI laid down the principle that the persons and entities, who had bad reputation and thereby contaminated the reputation of the applicant/intermediary, if no more remain associated with the applicant/Intermediary, the basis of the charge of not being a ‘fit and proper person’ no more survives and, therefore, the proceedings related to ‘fit and proper criteria’ become infructuous. It was further held that even after the person severs the association, there should be a moratorium period of 2 years i.e. till expiry of two years from the cessation of association between the persons/entities and the applicant/intermediary.
- (xxx) They submitted that more than 6 years have now elapsed from the date of cessation of their alleged association with NSEL. To summarize, there is no material in the SCN to support the alleged ‘close association’ with NSEL.
- (xxxi) The Noticee submitted that there were serious criminal charges and charges of gross financial irregularities against Mukesh Babu, the Chairman and Managing Director of ‘Mukesh Babu Securities Ltd., registered with SEBI as a Stock Broker in the matter of *Mukesh Babu Securities Ltd. v SEBI*, which is not present in their case.
- (xxxii) The Noticee stated that the interim report of the Economic Offence Wing was in connection with the complaint under FCRA and SFIO report was in connection with the failure of NSEL in complying with the conditions of exemption granted to it under the provision of FCRA, whereas para 35 of the Enquiry Report has already confirmed that there are no allegations of violation of FCRA by them.

- (xxxiii) The Noticee submitted that they never promised or offered assurances to their clients of fixed returns or Vyaj Badla or that the trades are ready Forward Trades, as inferred in the Enquiry Report. They further submitted that the very nature of any transaction does not support such business model and the allegation. Thus, the inference drawn is incorrect. They requested to provide the cross examination of those persons whose statements are relied against them in these allegations.
- (xxxiv) With regard to comment that 'No physical delivery of commodities was ever taken by clients of the Noticee', the Noticee submitted that it is the prerogative of clients to take physical delivery of commodities to their own warehouse. The same practice is prevailing even in Multi Commodity Exchange of India Ltd. (MCX) and National Commodity & Derivatives Exchange Limited (NCDEX) also.
- (xxxv) The Noticee additionally submitted specifically pertaining to the paired contracts as follows:
- a. NSEL had an anonymous trading system which followed an electronic matching system. Consequently, the counterparties to the contract could not be selected and were not known at the time of entering into the contract. Further, the T+2/3 trade may be matched against a particular (unknown) counterparty; and the T+23/25 trade may be matched against another (unknown) counterparty. The fact of entering into 'paired contracts' on NSEL was mentioned on NSEL's website and was also widespread as more particularly mentioned below. Knowledge that 'paired contracts were being entered into on NSEL platform was in the public domain and was known to everyone, including the Government, the FMC, etc. The 'paired trades' were in the nature of "arbitrage trades" which are very common in the securities markets. In fact, most of the turnover of NSEL was in such paired contracts only, yet no objection of any kind was raised by anyone to the same.
  - b. Huge quantities of trading in 'paired contracts' was carried out openly by hundreds of members over thousands of computerized trading terminals all over India, for lakhs of clients on a daily basis. The same was not at

all surreptitious or concealed. Yet, no authority questioned the legitimacy or validity of any such paired contracts.

- c. Private and public sector banks who were providing clearing services for settlement on NSEL, including for paired contracts, or even the Auditors of NSEL never raised any objection that paired contracts were illegal or in violation of the said 2007 Notification or the FCRA.
- d. FMC was monitoring the trading on NSEL and was calling for data and details from NSEL from time to time. NSEL was submitting regular reports of the trading, delivery and settlement data to the FMC, and the FMC, being a designated agency, was aware of paired contracts being traded on the NSEL but did not raise any objections. In fact, FMC, by its letter dated 28.1.2011, pursuant to some complaint, directed NSEL to give FMC details of trades and commodity stocks in their warehouses for castor seeds, and asked for details of trades settled without physical delivery. The same proves that FMC was fully aware even at that time that trades were being settled without physical delivery. FMC was also collecting the trade data from the NSEL. Yet, it raised no objections or allegations about the trading on NSEL being in violation of the 2007 Notification or the FCRA as now alleged in the SCN.
- e. The FMC Order expressly states that on 22.2.2012 itself the FMC had analysed trade data from NSEL and sought clarifications from NSEL. However, it did not then raise any allegation about the trading on NSEL being in violation of the 2007 Notification or the FCRA, nor did it put a stop to the paired contracts, nor did it even caution the members or public against entering into paired contracts.
- f. NSEL, like all exchanges, prescribed the contract parameters and the features of contracts. Members, including JMFCL had no role or say in this. Bye-Law 4.1 of the NSEL expressly mandated that “The Exchange shall before commencement of any contract obtain prior concurrence of the Commission” (i.e. FMC). The Bye-laws have always been on the website of the NSEL and in the public domain. Neither the FMC nor SEBI nor anyone else has alleged that NSEL violated Bye law 4.1.

- g. Several persons were already members before they commenced trading on NSEL platform in February 2012. Even thereafter, 'paired contracts' continued to be traded openly and in significant numbers on NSEL. All these were despite the fact that NSEL's circulars relating to/referring to such paired contracts were on the website of NSEL.
- h. Therefore, at the relevant time, they had no reason to believe that there was anything wrong or irregular in the trading in paired contracts on NSEL. In fact, by permitting such trading to continue openly and unquestioned for years together and in increasing numbers, despite having full knowledge of the said trading and despite having the power to put a stop to them, if they were improper or impermissible, the Central Government, FMC and all other concerned authorities held out to the world at large that such trading was in order and in due compliance of all requirements. The same also amounts to a clear estoppel and it cannot now be contended to the contrary. Alternatively, the same amounts to a waiver of any alleged contravention of the 2007 Notification terms and conditions.
- i. In the circumstances, even assuming (while denying) that 'paired contracts' were in contravention of the conditions of the 2007 Notification, the noticee stated that they were not aware of the same and did not have any reason to believe that it was so. In fact, for the reasons as aforesaid, they had bonafide belief that these contracts were legal, permissible, in full compliance with all requirements, and were being duly monitored by the FMC. Therefore, such trading, which was in accordance with the rules, bye-laws, circulars and systems of NSEL and was permitted by the FMC, was bona fide and in good faith and the same cannot render the noticee as not being a 'fit and proper' person.

13. While the extant 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 in the 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

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 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.....”*

14. Thereafter, in August 2022, the present matter was allocated to me. In the light of the aforesaid SAT Order 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, vide letters dated October 04, 2022 and November 02, 2022 and email dated December 7, 2022, certain additional documents were provided to the Noticee and the Noticee was requested to file its reply, if any, within 15 days of receipt of the said letters. In response to the said letters, the Noticee, vide its letters dated October 25, 2022, December 02, 2022, December 05, 2022, December 28, 2022, made the following submissions:

- (i) The noticee objected to the furnishing of additional documents, i.e., copies of SFIO Complaint, FIR filed by SEBI and Schedule II to amended SEBI (Intermediaries) Regulations, 2008 stating that it was not in consonance with principles of natural justice.
- (ii) The noticee submitted that while SEBI itself has filed the FIR, SEBI proceeding against it on the basis of such FIR is absolutely in violation of the principles of Natural Justice, vitiated and unlawful.
- (iii) They submitted that the provisions referred in the amended schedule II to SEBI (Intermediaries Regulations) 2008 forwarded to them have come into effect on and from 17.11.2021 and the same cannot be made applicable retrospectively.
- (iv) They also submitted that the copies of complete documents relating to SFIO Complaint and FIR have not been provided thereby denying them opportunity

to rebut the allegations. Furthermore, the 6 months' timeline directed by Hon'ble SAT to decide this matter in this manner got over on 08.12.2022.

- (v) SCN issued under the provisions of Regulation 28(1) of SEBI (Intermediaries) Regulations, 2008 is invalid without any such law being in force on date, as on date Regulation 28(1) and 28(2) of SEBI (Intermediaries) Regulations, 2008 do not exist.
- (vi) The proceedings deserve to be disposed of forthwith without any action against the noticee, owing to the inordinate delay. That the FIR /complaint was filed by SEBI on 28.09.2018, and FIR was forwarded to them on 02.11.2022 /24.11.2022 i.e. over 7 years after the Forward Contracts (Regulation) Act, 1952 was repealed and over 4 years after the last date i.e. 28.09.2018 by which SEBI could have initiated action against the noticee and also since the Forward Contracts (Regulation) Act, 1952 has been repealed with effect from 29.09.2015, these proceedings are *void ab initio* and deserve to be disposed of forthwith without any action against the noticees. In any case, any delay on the part of concerned authorities including SEBI, ought not be held against the noticee. The noticee referred to appeal no. 102 of 2019 - *Sanjay Jethalal Soni and Others Vs SEBI* wherein the Hon'ble Securities Appellate Tribunal observed that

*"13. As a result, without going into the question of res judicata or estoppel raised by the appellants we are of the opinion that on account of the inordinate delay in initiating the proceedings, the impugned penalty order cannot be sustained".*

- (vii) The proceedings deserve to be disposed of forthwith without any action due to the provisions of Clause 4 to Schedule II to SEBI (Intermediaries) Regulations, 2008. The amended schedule II to SEBI (Intermediaries Regulations) 2008 have come into effect on and from 17.11.2021 and there is no provision to apply them retrospectively.

Further, the noticee submitted that Clause 4 to Schedule II to SEBI (Intermediaries) Regulations, 2008 which reads as under: *"(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.”*

Therefore, assuming but not admitting that even if there were any violations committed by them in having rendered service to investors on NSEL, they ought to have undergone actions by SEBI or any authority prior to 2015, which meant that their ineligibility to reapply for registration would have got over in 2020. The delay in initiating action has thus caused serious continued bias and prejudice against them.

- (viii) The SCN read with subsequent letters/correspondence to SCN are self-contradictory. Although the events during 2009-2013 are being considered to determine violation, the provisions of law that existed during such period are ignored. SFIO complaint dated 15/2/2019 and FIR dated 28/09/2019 are being considered; but amended Schedule II to SEBI (Intermediaries) Regulations, 2008 which came into existence on 17/11/2021 are being considered. This again shows that proceedings are vitiated and prejudiced.
- (ix) Since, there is no adverse order against the noticee, the ratio laid down by the Whole Time Member of SEBI vide his order dated 23.06.2009 in the matter of Jermyn Capital LLC is squarely applicable to the facts and circumstances of our matter. Thus, vide the aforesaid order dated 23.06.2009, the Whole Time Member of SEBI has laid down the principle that the persons and entities, who had bad reputation and thereby contaminated the reputation of the applicant/intermediary, if no more remain associated with the applicant/ intermediary, the basis of the charge of not being a ‘fit and proper person’ no more survives and, therefore, the proceedings related to ‘fit and proper criteria’ become infructuous. More than 9 years have now elapsed from the date of cessation of those factors i.e trades on NSEL platform, as against 2 years’ moratorium stipulated by the Whole Time Member, SEBI in his aforesaid order dated 23.06.2009.
- (x) The Noticee became an intermediary on and from 29.04.2016, and there is no provision in law to apply Brokers Regulations or Intermediaries Regulations retrospectively, hence, no allegations can be made without specifying any specific provision of law alleged to have been violated pertain to the period prior to August 2013. There is no material in the SCN which demonstrates their failure to comply with any condition under which they were granted the Certificate of

Registration as a Stock Broker by SEBI on or after 29.04.2016. Thus, these proceedings do not fulfil the pre-requisites stipulated in Regulation 23 of the SEBI (Intermediaries) Regulations, 2008.

15. Thereafter, in compliance with the principles of natural justice, an opportunity of personal hearing was granted to the Noticee before me on January 04, 2023. On the date of hearing, the Noticee was represented by Mr. Prithviraj Harshad Bhagat, Advocate and Mr. Nirav Gandhi, Director, (Authorised Representatives) who reiterated the submissions made by the Noticee vide its letters dated December 28, 2022. Further, as requested, time till January 25, 2023 was granted to the Noticee to make additional submissions, if any. Accordingly, vide letter dated January 25, 2023, the Noticee, while reiterating its previous submissions, made additional submissions in the matter which are summarized as under:

- (i) The Competent Authority clarified in the 'Record of proceedings' dated 06.01.2023, that the present proceeding is conducted under Regulation 27 of the SEBI (Intermediaries) Regulations, 2008. The noticee submitted that the SCN having been issued under the erstwhile provisions of Regulation 28(1) of SEBI (Intermediaries) Regulations, 2008 without any such law being in force on date is wholly unsustainable, vitiated, without any legal foundation and is bad in law.

He referred to *Kolhapur Canesugar Works Ltd. vs Union Of India*, the Hon'ble Supreme Court of India in its order dated 1 February, 2000, also refer (2000) 2 SCC 536, wherein it was ordered as under:

*"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the*

*position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.”*

(Emphasis supplied)

- (ii) The allegations in the SCN and all subsequent documents refer to certain transactions during the years 2009 to 2013, i.e., about 9-13 years old. Also, FMC was merged with SEBI with effect from September 28, 2015, i.e. more than 7 years ago. The SCN was issued on 11.09.2019. Thereafter several documents were issued in several tranches.
  - a. Show Cause Notice no. SEBI/HO/EFD1/MIRSD/NSEL-ENQ/DRA2/66/19-20/21960/1/2019 dated 11.09.2019 under Regulation 28(1) of the SEBI (Intermediaries) Regulations, 2008.
  - b. Hearing held before the then Whole Time Member, SEBI on 17.12.2019.
  - c. Letter no. SEBI/HO/EFD1/EFD1\_DRA2/P/OW/2022/ 0000051122 / 3 dated October 04, 2022.
  - d. Letter no. SEBI/HO/EFD1/EFD\_1DRA2/P/OW/2022/55714/12 dated November 02, 2022 read with email dated 24.11.2022.
- (iii) In view of the inordinate delay that is involved, these proceedings deserve to be disposed of forthwith without any adverse order/ action against the noticee, as decided by Hon'ble SAT and Supreme Court.
- (iv) Hon'ble SAT vide its order dated June 09, 2022 had scheduled timeline for passing the Order and the direction of Hon'ble SAT is binding on the Competent Authority. These proceedings deserve to be disposed of without any adverse action against us owing to the fact that such timeline is over and SEBI has not issued such order.

In support of the same, they relied upon the decision of Hon'ble SAT dated 06.01.2023 in appeal no. 1044 of 2022 in *IFGL Refractories Limited Vs SEBI*

in which while, inter alia, quashing the impugned order of the Adjudicating Officer, SEBI, SAT observed as under:

*While disposing off quasi-judicial matters, the AO is bound by the decision of the appellate Tribunal. The principle of judicial discipline requires that the order of the Tribunal should be followed unreservedly by the AO.*

## **CONSIDERATION OF ISSUES AND FINDINGS**

- 16.** I have carefully perused the post enquiry SCN including the Enquiry Report issued to the Noticee, the replies submitted by the Noticee along with all the other material / information available in public domain and also made available to the Noticee vide letters dated October 04, 2022 and November 02, 2022 and email dated December 7, 2022. 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.** However, before moving forward with considering the said issue, it is pertinent to refer to the common order dated June 09, 2022<sup>1</sup> passed by the Hon'ble SAT also referred in the preceding paragraph no. 13. The Hon'ble SAT, while setting aside the earlier WTM Orders, had made the following observations (relevant to the present case as well) remanding the matters to SEBI:
- (a) Observations of the Bombay High Court in the matter of *63 Moons vs. Union of India*<sup>2</sup> cannot be relied upon as the said judgement has been set aside in appeal<sup>3</sup> 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*<sup>4</sup>) cannot be relied upon, as in a subsequent Writ Petition<sup>5</sup> moved by 63 Moons, a Division

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<sup>1</sup> 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

<sup>2</sup> Writ Petition No. 2743 of 2014

<sup>3</sup> Civil Appeal No. 4467 of 2019

<sup>4</sup> Writ Petition No. 1403 of 2015

<sup>5</sup> Writ Petition No. 1181 of 2018

Bench of the 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 the NSEL petition could not be relied upon as they were preliminary observations and such observation does 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 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**<sup>6</sup> and **Mukesh Babu Securities vs. SEBI**<sup>7</sup> 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 Tribunal noted that there is no evidence to show that any 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) The 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.

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<sup>6</sup> Appeal No. 26 of 2006 decided on September 06, 2006

<sup>7</sup> Appeal No. 53 of 2007 decided on December 10, 2007

- (g) Grant Thornton Forensic report commissioned by SEBI does not find any close connection between the applicant and the 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. In view of the above, the following additional documents were provided to the Noticee in the present case in hand:

- (a) Copy of the SFIO Complaint dated May 15, 2019 filed before the Court of Special Judge at Greater Mumbai, and
- (b) Copy of the FIR dated September 28, 2018 filed by SEBI against 300 trading members of NSEL.
- (c) Copy of the amended Schedule II of the Intermediaries Regulations.

19. Before considering 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 have 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 the exchange – 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 the 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, wherever appropriate.

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

20. NSEL was incorporated in 2005 as an electronic exchange for spot trading of commodities. On June 5, 2007, the Ministry of Consumer Affairs ("MCA"),

Government of India, issued a Notification SO 906(E) under Section 27 of the FCRA granting conditional exemption from the provisions of that Act for (i) forward contracts, (ii) for sale and purchase of commodities, of one-day duration traded on NSEL. The conditions, inter alia, placed an absolute bar on short sales and stipulated that all outstanding positions at the end of the day must 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.

21. As evident 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. In other words, the 'paired contract' involved two simultaneous transactions being undertaken at the same time with the same counterparty—one being a purchase transaction (settling at T+2 or T+3) and the other being a sale transaction (settling at T+25 or T+36), at different prices on the platform of NSEL. The transactions were structured in a manner that buyer of the short duration contract always ended up making profits.
22. Thereafter, FMC, vide an order No. 4/5/2013-MKT/B dated December 17, 2013 ("FMC Order") observed that: "55 contracts offered for trade on NSEL were with settlement period exceeding 11 days and all such contracts traded on NSEL were in violation of provisions of FCRA" and "the condition of 'no short sale by members of the exchange shall be allowed' was not being met by NSEL".
23. Further, in the above mentioned Order, FMC, *inter alia*, held that the contracts traded on NSEL violated the following conditions stipulated in the MCA Notification SO906(E) dated June 5, 2007, that granted permission to NSEL to offer spot trading in commodities 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”.*

- 24.** It is, therefore, clear that from the order of FMC 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 the Notification dated June 05, 2007. I note from the FMC Order that FMC had observed<sup>8</sup> 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 the provisions of FCRA. I further note from the FMC Order that under the FCRA, a *“forward contract”* is defined as a *“contract for delivery of goods and which is not a ready delivery contract”*. A *‘ready delivery contract’* is defined as *“a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days”*. Given the said definition contained in FCRA, FMC, I note, 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.
- 25.** Therefore, it is noted that even though MCA had stipulated in the exemption Notification in 2007 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. 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 of the exemption granted to NSEL. It is pertinent to note that all the 15 contracts that were advertised by NSEL, and which are captured in the Hon’ble Supreme Court’s Judgement in the matter of *The State of Maharashtra Vs. 63 Moons Technologies Ltd*<sup>9</sup>, were for durations exceeding 11 days.

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<sup>8</sup> Order No. 4/5/2013-MKT-1/B dated December 17, 2013

<sup>9</sup> Civil Appeal No. 2748-49 of 2022



26. I note that the Hon'ble Supreme Court in the matter of NSEL (supra) has also extensively commented on the nature of the 'paired contracts' traded on NSEL. The said observations by:

- a. the Two-Judge Bench of the Hon'ble Supreme Court in the course of determining the validity of the amalgamation order in the matter of 63 Moons (supra) 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. the 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, the 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)*

27. I, therefore, note that the Hon'ble Supreme Court has already commented on the nature of the 'paired contracts' offered on the NSEL platform. In the case of 63 Moons Technologies Ltd. vs. UOI, 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.

28. 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 the NSEL and the contents of the publicity material and other investor resources. As seen from the order of the Hon'ble Supreme Court, the 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.
29. I note that the FMC Order and both the judgments of the Hon'ble Supreme Court discuss in detail, the 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 judgement 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 naked short sales i.e. the commodities to back such sales were not available at the designated warehouses of the NSEL.
30. In addition, I note that Economic Offences Wing, Mumbai, vide letter 789 dated April 04, 2015, had forwarded an interim report for the investigation conducted to identify role played by broking houses in NSEL Case (EOW C.R. No. 89/2013). EOW, in its report, had mentioned that a settlement obligation amounting to Rs. 54,03,59,38,793/- was due on the date of closure of business of NSEL. Of this, the obligation outstanding against the Noticee as per the EOW report was Rs. 83,60,56,632/-. Relevant extracts of the report are as follows:

***"IV. Objectives of this investigation into the brokers' role:***

*A scam of this magnitude would be difficult to continuously occur for 3 years without some of the large brokers' gross negligence or perhaps active participation.*

*The actual role of the brokers was:*

- To bring in investors to invest in 'pair trades' promising them assured returns and the investors got about 13-16% p.a. for investing in the commodity*
- The sellers got finance at 18-20 or more % by pledging their commodity in NSEL warehouses*

*They got brokerage from investors on the NSEL platform, and those brokers who had their NBFCs got additional revenue by financing investors for investing on NSEL.*

*Though the matter is still under investigation, brokers have also received back from exchange certain charges collected from investors such as transaction fees, delivery and warehousing charges, etc. It is suspected that these are indirect motivation incentives for brokers to generate huge volumes. It is also possible that brokers may have benefitted from or compensated by the sellers or defaulters.*

*The higher the trading turnover, the higher revenues for the exchange and the brokers. Therefore, both wanted to increase turnover at the exchange.*

*In light of the foregoing, the objective of EOW in investigating brokers was to inquire whether they had been involved in any wrongdoing connected with trading on NSEL. Specifically to determine whether they participated in:*

- a) Any activities which were detrimental to the investors, NSEL, or third parties. To determine whether they had made false and misleading representations, offered inducement, financing and deliberately made wrongful assertions purely to get brokerage and facilitate NSEL in generating higher volumes.*
- b) Whether they had any illegitimate personal enrichment, or, there has been knowing dereliction in their duties as clearing and forwarding agents towards the commodities and protect the investors.*
- c) It was also deemed necessary to ensure that their activities were within the framework of law."*

#### **Preliminary objections raised by the Noticee:**

- 31.** The Noticee has submitted that the impugned transactions pertain to period 2009, for which Notice (from the DA) came to be issued, after inordinate delay of 9 years, in 2018 and now post issuance of said Notice, at this second stage post submission of Enquiry Report, documents were still being provided in bits and pieces, and in instalments. It was stated that the same vitiates the whole proceedings, and was also in gross violations of principles of natural justice and fair play. I note that FMC, the regulator of the commodity derivatives market, under powers conferred upon it vide Notification 228(E) dated February 06, 2012, had called for trade data from the NSEL with respect to the trades being executed on its platform. On analysis of data received from NSEL, FMC observed that, *“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”* and *“the condition of ‘no short sale by members of the exchange shall be allowed’ was not being met by NSEL”*. Subsequently, FMC, while dealing with the facts relating to mismanagement and poor governance of NSEL, in its order No.4/5/2013-MKT-1/B dated December 17, 2013, inter alia, observed that the conditions laid down in the Government Notification dated June 07, 2007 had been contravened by NSEL. Thereafter, in the Union Budget for the FY 2015-16 it was announced that FMC would be merged with SEBI. The Finance Act, 2015, provided that *any person dealing in commodity derivatives prior to the aforesaid merger of FMC with SEBI may continue to do so provided they have made an application for registration with SEBI within a period of three months from the date of such merger*. The merger of FMC and SEBI took effect only on September 28, 2015. The transactions on the platform of NSEL were examined by various authorities including FMC, Courts, EOW, SFIO, etc., which *prima facie* found them to be illegal.
- 32.** It is pertinent to mention here that the enquiry proceedings were initiated by SEBI by appointing the DA vide communique dated September 24, 2018 and the Enquiry SCN was issued to the Noticee on September 26, 2018. Vide letter dated November 9, 2018, the Noticee made its submissions towards the SCN. Vide letter dated March 25, 2019, copies of all documents relied upon by the DA were forwarded to the Noticee. Vide letter dated April 20, 2019, the Noticee submitted its reply. Thereafter, on considering the facts and circumstances of the case, the DA had submitted an

Enquiry Report dated June 28, 2019. Based on the recommendations made in the Enquiry Report, a post enquiry SCN September 11, 2019 was issued. Thereafter, hearing was granted before the Competent Authority on December 17, 2019. Vide letter dated January 10, 2020 and February 18, 2020, the Noticee submitted its reply. While the said proceedings were ongoing, as mentioned in preceding paragraphs No. 13 and 17 above, the Hon'ble SAT passed an order dated June 09, 2022 in similar set of facts. Thereafter, in August 2022, the present matter was allocated to me. Based on the observations made by the Hon'ble SAT in the order dated June 09, 2022, additional documents, as available with me were provided to the Noticee vide letters dated October 04, 2022 and November 02, 2022 and email dated December 7, 2022. In view of the above, the submission of delay in initiating action against the Noticee is not tenable.

33. The Noticee has contended that the action by SEBI should have been completed within the timeline stipulated by Hon'ble SAT in its order dated June 09, 2022. However, it may be noted that such timeline was specifically given for the entities that were in appeal before the Hon'ble SAT.
34. Here, I would like to place reliance on the observations made by the Hon'ble Supreme Court in the matter of *Adjudicating Officer, SEBI Vs. Bhavesh Pabari*<sup>10</sup> wherein the Hon'ble Supreme Court, while dealing with the issue of delay in issuance of the show cause notice by the Adjudicating Officer, has observed that,

*".... There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. **What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default / statute, prejudice caused, whether the third - party rights had been created etc.....**"*

35. Further, I would like to rely upon the judgment of Hon'ble SAT in the case of *Ravi Mohan & Ors. vs. SEBI*<sup>11</sup> wherein it was observed that : -

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<sup>10</sup> Civil Appeal No. 11311 of 2013 order dated February 28, 2019

<sup>11</sup> Appeal No. 97 of 2014 decided on December 16, 2015

*“.....Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no.114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there is no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice.....”*

- 36.** Further, the Noticee has submitted that the observations by the various courts / authorities is against NSEL and the Noticee's name is not appearing anywhere in the said order citing any adverse observation against them. Here, it is pertinent to mention that the said orders and reports of the authorities have been considered in the present proceedings in order to state that the 'paired contracts' executed on the NSEL platform were in violation of the Government Notification dated June 05, 2007. Therefore, even though the Noticee's name does not form part of these orders and proceedings of other authorities, mention of such orders and reports of other authorities with respect to the establishment of paired contracts being in violation of the said notification is of importance in the present proceedings.
- 37.** The Noticee has submitted that the cases referred to in the Enquiry Report viz. SAT Order in *Jermyn Capital LLC Vs. SEBI* and *Mukesh Babu Securities Ltd Vs. SEBI* and the order of the Bombay High Court in *Jignesh Prakash Shah Vs. State of Maharashtra* being adversely treated by the Hon'ble SAT in its order dated June 09, 2022 will not be applicable. In view of the observations of the Hon'ble SAT with respect to the said orders, I do not wish to place any reliance on the said orders while dealing with the issue in the present case.
- 38.** The Noticee has contended that documents provided by SEBI in support of the observations alleged against them in the SCN is incomplete. In this regard, I note that all documents relied upon by SEBI was provided to the Noticee in the instant case.

39. I note that the Noticee has traded in 'paired contracts'. As the paired contracts were violative of the conditions stipulated in the Government Notification dated June 05, 2007, a complaint was filed by SEBI with Economic Offences Wing, Mumbai (EOW) on September 24, 2018, against the brokers who participated/facilitated access to 'paired contracts' traded on NSEL, including the Noticee within time limit as specified in the aforesaid provision of the Finance Act, 2015. On the basis of the said complaint of SEBI, an FIR dated September 28, 2018 was registered with MIDC police station, Mumbai. I note that the name of the Noticee is reflected in the complaint and the FIR. I also note that the alleged violations committed by the Noticee had also led to initiation of enquiry proceedings against the Noticee by SEBI.

### **Fit and proper person criteria**

40. Now, I would be proceeding to deal with the main issue in hand in the present case which is whether the Noticee satisfies the '*fit and proper person*' criteria laid down under Schedule II of the Intermediaries Regulations. Before moving forward, it would be appropriate to take a look at the relevant provision of the SEBI Act, 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 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.***

***(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.”***

***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 no 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 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.*

41. I note that regulation 5(e) of the 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.

42. From the records, I note that SEBI has filed a complaint with EOW Mumbai dated September 24, 2018, against brokers who facilitated access to '*paired contracts*' traded on NSEL, including the Noticee. On the basis of this complaint, an FIR dated September 28, 2018, was registered against the Noticee. I note that the Noticee is holding a certificate of registration No. INZ000045230 granted by SEBI on April 29, 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 a fit and proper 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.
43. In this regard, I note that the Noticee has admitted the fact that the clients of the Noticee had indulged in paired contract traded on the NSEL platform which in turn is an admission of facilitating paired contracts by it. 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 the part of the Noticee. As recorded in the FMC order and the judgements of the Supreme Court, these contracts, as stated earlier, were *ex facie* offered in violation of the exemption Notification issued by MCA and far removed from the 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 the NSEL, has dealt in 'paired contracts' which were held to be in the nature of financing transaction 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 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 on the 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.

**44.** The Noticee has submitted 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 Noticee was granted a certificate of registration and/or initiation of the present proceedings. I am unable to accept such contention. It is noted that paragraph 3(b) of the amended criteria 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;*

**45.** The Noticee has further submitted that the Noticee was registered with SEBI as a ‘Stock Broker’ of a recognized Stock Exchange with effect from 29.04.2016, only after SEBI had satisfied itself that the notice was a ‘fit and proper person’ and therefore, there is no provision in law to apply Brokers Regulations or Intermediaries Regulations retrospectively. It is the case of the Noticee that the Intermediaries Regulations would not apply to it for the period when the transactions alleged to be in the nature of paired contracts were executed by it on the NSEL platform, whereas the Noticee has been granted a certificate of registration by SEBI only on 29.04.2016. The Noticee has stated that as a SEBI registered Broker, it has not carried out any paired contracts.

**46.** I note that, as mentioned in the preceding paragraphs, before merger of FMC with SEBI, the Noticee was functioning as a member of recognized commodity derivative exchanges and was not required to be registered with either FMC or any other regulatory authority under the FCRA. The Finance Act, 2015, recognized the said fact and also that the commodity derivative brokers should be regulated by

SEBI. Considering the same, it was made mandatory for all commodity derivative brokers, who wished to continue their activities, to apply for registration with SEBI within a period of 3 months from September 28, 2015. Thus, all the commodity derivative brokers, who applied to SEBI and whose application was in process, were allowed to carry on their functions as commodity derivative brokers till the disposal of their respective application. Thus, by virtue of provisions of Finance Act, 2015, all those entities, who were functioning as commodity derivatives brokers, after having made their application within 3 months from September 28, 2015, were under the supervision and control of SEBI like any other intermediary holding a certificate of registration. Thus, it is an admitted position that prior to the date of merger of FMC with SEBI (i.e., September 28, 2015), the Noticee was not required to be registered under the FCRA or any other regulation to be a commodity derivatives broker. However, I note that pursuant to the merger of FMC with SEBI, the Noticee had applied for a certificate of registration as a commodity broker and was granted a certificate of registration by SEBI on 29.04.2016. Therefore, the Noticee has become a SEBI registered intermediary from the said date and falls under the definitions of a 'stock broker' and an 'intermediary' under the SCRA. Being a SEBI regulated intermediary, SEBI has the jurisdiction to examine whether the activities of the Noticee in 'paired contracts' for its clients on the NSEL platform affects its ability to be considered "fit and proper person".

47. In addition to the above, I find it relevant to refer to observations of the order dated October 04, 2018 of the Hon'ble Bombay High Court in *Anand Rathi Commodities Limited v. SEBI (W.P. (L) no. 3262 of 2018)* wherein it was argued that the alleged deeds or misdeeds prior to September 29, 2015 by the petitioners who were acting as commodity brokers are beyond the jurisdiction of SEBI. The said argument was rejected by the Court and while interpreting Section 28A of the Finance Act, 2015, the Court observed as under:

*"It is not in dispute that prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law including the FCR Act. We find that the said mischief was noticed by*

*the Parliament. As such, by virtue of the Finance Act, 2015, **the said intermediaries dealing with commodity derivatives have been brought under the control of SEBI**. We find that the reason as to why by Finance Act, 2015, the said intermediaries were brought under the control of SEBI appears to be that the Parliament found that the activities of intermediaries dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority.*

48. I note from the available records that the Noticee has facilitated its clients to trade in 'paired contracts'. The Noticee has even admitted that it had executed trades on the NSEL platform in paired contracts. As the paired contracts were violative of the conditions stipulated in the Government Notification dated June 05, 2007, a complaint was filed by SEBI with Economic Offences Wing, Mumbai (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 in the aforementioned provision of the Finance Act, 2015. On the basis of the said complaint of SEBI, FIR dated September 28, 2018 was registered with MIDC Police Station, Mumbai. I note that the name of the Noticee is reflected in the complaint and the FIR. Infact, I also note that the name of the Noticee appears in the recent chargesheet from EOW dated January 19, 2023 where he has been named as "accused". However, it may be noted that such chargesheet is not being relied upon in the instant proceedings. Instead, the instant proceedings is based on the complaint filed by SEBI with respect to which an FIR dated September 28, 2018 was registered that is detailed above.

49. 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, the 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 when SEBI granted Certificate of Registration in May 25, 2016, such an intermediary can still be assessed on being fit and proper at a later date. 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 as revised vide the amendments in November 2021. It is noted that parameters provided under paragraph 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations lays down a list of disqualifications which includes a criminal complaint or information under section 154 of Code of Criminal Procedure filed against such an entity by the Board and which is pending. It is, therefore, noted that the Noticee attracts the disqualification provided in paragraph 3(b) (i) of the Schedule II of the Intermediaries Regulations.

**50.** Therefore, looking holistically I find that the said conduct of the Noticee is detrimental to the Securities Market being not in conformity with the applicable code of conduct. I, therefore, note that there were enough red flags for a reasonable person to come to conclude 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 which raised serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the product itself.

**51.** Furthermore, as mentioned above, the Noticee has also earned disqualification under 3(b) (i) of the amended Schedule II of the Intermediaries Regulations on account of an FIR filed by SEBI. In this regard it is pertinent to note that the said FIR was filed by SEBI on September 28, 2018 and 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. I am of the considered view that the due presumption on the constitutional and legal validity of the said amendment Schedule II hold the field which are binding upon me, and arguments, to the contrary are not maintainable.

**52.** Here it is pertinent to note that the principle of '*ignorantia juris non excusat*' or '*ignorantia legis neminem excusat*' or '*ignorance of law is no excuse*' also 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 Exemption Notification cannot be claimed. The 'paired contracts' were nothing but financing transactions which were portrayed as spot contracts in commodities. Therefore, giving go-bye to the terms of the 2007 Exemption Notification and providing a facility to execute paired contracts brings into question appropriateness and suitability of the continuance of the registration of the Noticee as a broker. Clearly, the actions of the Noticee has 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 Brokers Regulations read with the provisions of Schedule II of the Intermediaries Regulations.

**53.** 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 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.



**54.** I am also aware that recently SEBI has passed 5 separate orders<sup>12</sup> 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 Noticee 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 5 cases as in the extant matter the Noticee is already holding a Certificate of Registration whereas in those 5 cases, the entities had filed applications seeking certificate of registration. Therefore, I am of the measured opinion that the present case stands at a different footing than that of those 5 cases where the applications for grant of certificate of registration were pending at the time of passing those orders whereas in the extant matter the Noticee is already having registration with SEBI. As noted above '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. Necessity of specifying a period of time may also not arise in this order (as did arise in the case of entities desiring to be registered as market intermediaries) when dealing with an entity holding a certificate of registration which is cancelled as this forum 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 extant and applicable regulations.

**55.** The limited scope of the present proceedings is to see whether the indulgence, engagement and facilitation of paired contracts 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 recorded in FMC order

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<sup>12</sup> 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](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](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](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](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](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.

and Hon'ble SC order that the scheme of 'paired contracts' traded on the NSEL ultimately has caused loss to the market to the extent of INR 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.

**56.** Given the above discussions and deliberations, I am constrained to conclude that the Noticee provided access to its clients to participate in a product which raises serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the said product itself. Further, as per findings recorded above, the Noticee also attracts the disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations insofar as SEBI has filed an FIR against the Noticee under section 154 of Cr. P C with EOW, Mumbai and the same is validly subsisting/pending as on date. Further, it is also not the case of the Noticee that said FIR filed by SEBI 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 broker will be detrimental to the interest of the Securities Market. Therefore, such activities on the part of the Noticee who is a registered broker now, cannot be condoned and deserve appropriate remedial measure to prevent such wrong doings from recurring to the detriment of the interest of the Securities Market.

## **ORDER**

**57.** 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 and upon considering the gravity of the violations committed by the Noticee viz. JM Financial Commtrade Ltd., Certificate of Registration (bearing no. INZ000045230) of the Noticee i.e. JM Financial Commtrade Ltd., is hereby cancelled.

**58.** The Noticee shall, after receipt of this order, immediately inform its existing clients, if any, about the aforesaid direction in paragraph 57 above.

**59.** Notwithstanding the direction at paragraph 57 above,

- a. 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 thereon, under advise to the said clients.
- b. The Noticee shall square off open positions, if any, within 30 days from the date of this order.

**60.** This Order shall come into force with immediate effect.

**61.** It is clarified that in view of the amendment made w.e.f. January 21, 2021 in the Intermediaries Regulations, 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 the NSEL matter and/or any proceedings pending before any authority in respect of similar matter concerning the Noticee or other relevant persons.

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

**Date: March 31, 2023**

**Place: Mumbai**

**Dr. ANITHA ANOOP**  
**CHIEF GENERAL MANAGER**  
**SECURITIES AND EXCHANGE BOARD OF INDIA**