

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

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

---

In respect of –

Excel Commodity and Derivative Private Limited

[Registration No. INZ000045633]

In the matter of National Spot Exchange Limited

---

**BACKGROUND**

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

*in delivery and that all information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency”.*

3. In September 2009, NSEL 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’, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measure, if needed, to protect investors’ interest. The FMC had accordingly, *inter alia*, called for the trade data from NSEL in the prescribed reporting formats. After analysing 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 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.
5. On perusal of the FMC Order, I note that the FMC had, *inter alia*, observed that the following conditions stipulated in the 2007 Exemption Notification were violated by NSEL:

- a. **Short Sale**

NSEL had not made it mandatory for the seller to deposit goods in its warehouse before taking a sell position. Hence, the condition of “*no short sale by members of the 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 NSEL organised trading in ‘*paired contracts*’ in violation of the 2007 Exemption Notification. It was also alleged that the Trading Members and Clearing members of the NSEL facilitated trading in such paired contracts which were in alleged violation of the 2007 Exemption Notification. Thus, by facilitating trading in paired contracts, such entities, allegedly, had acted in a manner detrimental to the interest of the securities market.
7. As per the information available with SEBI, the Noticee, being a Trading Member and Clearing member of the NSEL, facilitated trading in paired contracts on the platform of NSEL in alleged violation of the provisions of Regulation 9(b) and 9(f) read with Clauses A(1), A(2) and A(5) of Schedule II of the Stock Broker Regulations. Based on this information, SEBI was *prima facie* satisfied that there were sufficient grounds to enquire into whether the Noticee, is a ‘*fit and proper person*’ to continue to hold certificate of registration as Trading and Clearing Member in terms of Regulation 5(e) of the Stock Broker Regulations read with Regulation 27(iv) of the Stock Broker Regulations read with Schedule II of the Intermediaries Regulations.

**ENQUIRY BY DESIGNATED AUTHORITY**

8. A Designated Authority (hereinafter referred to as “**DA**”) was appointed by SEBI vide order dated September 21, 2018 to conduct an enquiry against the Noticee and submit a report and make recommendation in terms of Regulation 27 of the

Intermediaries Regulations (as applicable at the relevant time) in respect of the violations alleged to have been committed by the Noticee mentioned at para 7 above.

9. After conducting the enquiry as envisaged under Regulation 25 of the Intermediaries Regulations, the DA submitted an Enquiry Report dated June 26, 2019 (hereinafter referred to as the **“Enquiry Report”**) which, *inter alia*, observed and recommended as under:

*“In view of the facts and circumstances of the case and material available on records, it is determined that the Noticee is not a fit and proper person in terms of Regulation 5(e) of the Stock Broker Regulations read with Schedule II of the Intermediaries Regulations. Therefore, in terms of Regulation 27 of the Intermediaries Regulations, it is recommended that the certificate of registration of the Noticee, i.e. Excel Commodity & Derivative Pvt. Ltd., registered as a Stock Broker (SEBI Registration No INZ000045633) may be cancelled in the interest of the securities market.”*

## **POST ENQUIRY PROCEEDINGS**

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

10. After considering the Enquiry Report, a post-enquiry Show Cause Notice dated September 11, 2019 ( hereinafter referred to as the **“SCN”**) was issued to the Noticee under Regulation 28(1) of the Intermediaries Regulations (as applicable at the relevant time) enclosing therewith (a) copy of the Enquiry Report, (b) copy of the letter dated December 30, 2014 of the Department of Economic Affairs (DEA), Ministry of Finance; and (c) a copy of the order dated August 22, 2014 passed by the Hon’ble Bombay High Court in Criminal Bail Application No. 1263 of 2014 in the case of *Jignesh Prakash Shah Vs. The State of Maharashtra*. The SCN was issued to the Noticee calling upon it, as to why action as recommended by the DA including any other action as deemed fit should not be taken against the Noticee, by the Competent Authority. The Noticee, vide letter dated October 24, 2019, filed its reply which is summarized hereunder:

- (i) The finding of the DA is erroneous, contrary to the facts and law, arbitrary and without any basis as the SCN issued, did not provide any details of

actions/ instances which constituted the alleged violation of Stock Broker Regulations;

- (ii) The enquiry report has been prepared based on wrong assumption that the Noticee has been provided with the documents relied upon by SEBI while the fact is that no such documents whatsoever were ever provided to the Noticee and consequently principles of natural justice had not been adhered to while conducting the enquiry proceedings. The documents which were available in public domain were provided to the Noticee, however, case specific documents have not been provided to the Noticee till date;
- (iii) The DA has been appointed by the Whole Time Member (hereinafter referred to as “**WTM**”) in the present matter, which is not in accordance with Regulation 24(2) of the Intermediaries Regulations, which stipulates that the DA has to be appointed by the Executive Director. The Intermediaries Regulations require satisfaction of a particular authority and thus, the same authority must exercise the given discretion. The delegation of powers under SEBI Regulations will become redundant if the Securities and Exchange Board of India (Delegation of Powers) Order, 2015 (hereinafter referred to as the “**DOP Order**”) supersedes/ overrides delegation of power under SEBI Regulations. The Intermediaries Regulations were amended in November 2017 to vest the power of appointment of DA to Executive Director, which earlier vested with the WTM and the said amendment will prevail over the DOP Order, 2015;
- (iv) The DA has erroneously observed that the Noticee is not entitled to WTM's order so as to ascertain whether the WTM has applied his mind independently to the material placed before him while appointing the DA;
- (v) The finding of the DA as regards the applicability of Intermediaries Regulations is not tenable as the SEBI Act and Regulations thereunder were not applicable to the Noticee for trading at NSEL at the relevant time;
- (vi) In view of the provisions in Section 29A (2)(e) of the FCRA, SEBI could only initiate prosecution proceedings against the members of NSEL for alleged violation of FCRA and cannot initiate the enquiry proceedings under the Intermediaries Regulations, which are attracted when an intermediary allegedly violates any of the conditions of the Certificate of Registration or

any of the provisions of the Securities laws and the regulations framed thereunder. The present proceedings under the Intermediaries Regulations do not fall within the purview of aforesaid section 29A(2)(e). The commodity brokers were brought under the jurisdiction of SEBI with effect from September 29, 2015 and prior to that, the SEBI regulations were not applicable to the members of NSEL;

- (vii) The DA has not provided any answer to the Noticee's contention that the SEBI Regulations cannot be made applicable retrospectively. The DA has relied upon the case of ***Jermyn Capital LLC Vs. SEBI***<sup>1</sup> (hereinafter referred to as "**Jermyn case**") wherein the Hon'ble SAT has held that SEBI Regulations apply upon all intermediaries but the issue in the said case did not pertain to retrospective application of SEBI Regulations;
- (viii) The DA has not paid heed to the objection of the Noticee that SEBI has no jurisdiction over spot market, for which, reliance has been placed on the letter dated November 20, 2015 of the Ministry of Finance wherein it had been stated that SEBI is not expected to deal with matters not dealt with by FMC and since spot market was not dealt with by FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets;
- (ix) The reliance on the decision in the Jermyn case to establish close connection with NSEL is misplaced as in the said case the Hon'ble Tribunal had found close associations between the entities/ persons considering their close business and personal relations. In the instant matter, no such facts are available and a member of stock exchange or a person holding a certificate of registration from SEBI as an intermediary cannot be construed as having close association with the exchange or SEBI merely on the basis of being a member or intermediary;
- (x) The Hon'ble Bombay High Court, vide its order dated August 22, 2019, has clearly held that the paired contracts were not financial transactions but were trades in commodity as per regulations and bye laws of NSEL;
- (xi) Even if a member of NSEL is found guilty of violating provisions of the FCRA, the said member may be appropriately penalized under the FCRA and declaring such member as not fit and proper as an intermediary is not

---

<sup>1</sup> Appeal No. 26 of 2006 decided on September 06, 2006

necessary and thus, the recommendation of the DA is harsh and disproportionate;

- (xii) There are no specific charges against the Noticee in the interim EOW Report. The Noticee had traded in/ facilitated the paired contracts as a member, in accordance with the business rules of NSEL. On the date of closure, there was a pay out of obligation of ₹1,78,15,343.11/-;
- (xiii) The DA has not dealt with/ given due consideration to the following contentions, namely:
  - a) Clients who dealt through the Noticee were duly registered clients with proper KYC, Member Client Agreement, etc.;
  - b) All trades were carried out as per NSEL system from time to time and the contract notes were issued to the clients as per the formats and the terms and conditions and bye laws of NSEL;
  - c) No brochures/ pamphlets/ presentations on NSEL Products were issued or provided to its clients by the Noticee;
  - d) NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for paired contracts and thus, there was no reason for the Noticee to question the legality of the product launched by NSEL;
  - e) The Noticee executed trades for 54 clients who had approached the Noticee on their own. The number of clients itself shows that the Noticee neither marketed the product nor had the intent to do so. The Noticee earned brokerage of merely ₹1,52,560/- and there have been no complaints against the Noticee;
- (xiv) The DEA, Government of India's letter dated December 30, 2014 (provided to the Noticee with the SCN) has no relevance as the said letter only advises FMC to take action against NSEL and is silent as regards the activities of the members of NSEL. Further no reliance can be placed on **63 Moons Technologies Ltd. vs. UOI** as the said judgment has no relevance as regards the role of members of the NSEL.

11. Pursuant to the same, in the interest of justice, an opportunity of personal hearing was granted to the Noticee, before the Whole Time Member of SEBI on

November 25, 2019, which was adjourned on the request of the Noticee and was rescheduled to December 10, 2019.

12. 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 who were involved 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 common order dated June 9, 2022 (hereinafter referred to as the "**SAT order**"), remanded the aforesaid orders to SEBI to decide these matters afresh within six months from the date of the said SAT order. While remanding the aforesaid SEBI orders, the Hon'ble SAT, *inter alia*, held as under:

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

13. During the pendency of the proceedings, due to administrative reasons, the competent authority of SEBI, reallocated cases and transferred the present matter to the undersigned on August 11, 2022 for further proceedings.
14. In the light of the aforesaid SAT Order and certain other orders passed by the Hon'ble SAT in similar set of cases, it was felt necessary to furnish certain additional documents/material to the Noticee before concluding the present proceedings. Accordingly, a supplementary show cause notice (hereinafter referred to as "**SSCN**") dated October 12, 2022 enclosing therewith a copy of the SEBI Complaint dated September 24, 2018 filed with EoW, Mumbai, a copy of the First Information Report



(hereinafter referred to as “**FIR**”) dated September 28, 2018 and a copy of the amended Schedule II of the Intermediaries Regulations was issued to the Noticee and the Noticee was granted 15 days’ time to file its reply, if any from the date of receipt of the said SSCN. Further, hearing in the matter was also scheduled on November 2, 2022 which was rescheduled to December 13, 2022, on request of the Noticee. Meanwhile, vide its letter dated November 17, 2022, the Noticee filed its reply to the SSCN. The reply dated November 17, 2022 is summarised as under:

- i. The reply to the SSCN may be read with reply dated October 24, 2019 filed by the Noticee;
- ii. It is paradoxical that although SEBI is not empowered to inquire/ investigate the offences under FCRA, it has assumed power to declare the Noticee as not fit and proper on the basis of its own complaint/ FIR alleging violation of FCRA;
- iii. The FIR is first instance of reporting of complaint lodged with the police which is a preliminary document based on one-sided statements without any adjudication and thus, no reliance can be placed on any FIR, particularly an FIR which has been filed by SEBI itself. Any such reliance, to the Noticee’s detriment, ought to be declared as unlawful;
- iv. The Intermediaries Regulations were amended with effect from November 17, 2021 and any retrospective reliance on the same would be in gross violation of principles of natural justice.

15. On the scheduled date of hearing, i.e., December 13, 2022, the Noticee was represented by Advocate Kunal Kataria and Advocate Aparna Wagle (Authorized Representatives), who reiterated the submissions made by the Noticee earlier. Further, as requested, one week’s time was granted to the Noticee to make additional submissions, if any. Accordingly, vide letter dated December 19, 2022, the Noticee, reiterated its earlier submissions and made additional submissions in the matter which are summarized as under:

- (i) SAT order dated June 9, 2022, *inter alia*, required the Whole Time Member of SEBI to consider documents such as EOW Chargesheet, complaint letters given by NSEL, etc., to reach the conclusion about the reputation, integrity and character of the Noticee but no such determination has been made as to whether the documents forwarded to the Noticee would lead to any conclusive finding as regard the reputation etc. of the Noticee;

- (ii) The Hon'ble Supreme Court in its judgment dated April 22, 2022 in the matter of State of Maharashtra Vs. 63 Moons Technologies Limited has held that "*The two-judge Bench of this Court took note of the modus operandi through which the trading members were duped by a conspiracy hatched by a few trading members along with NSEL*" and considering the above, even the Apex Court has held that the controversy in question was devised by a few trading members along with NSEL;
- (iii) The observations in the DA's Enquiry Report have to be seen in light of the following observations of Hon'ble SAT made in its order dated June 9, 2022:
  - a) Reliance cannot be placed on the decisions in the matter of Jermyn case and **Mukesh Babu Securities Vs. SEBI**;
  - b) Adverse observations about NSEL in the FMC Order cannot be imputed upon the brokers in absence of any finding that the brokers had direct or indirect control over NSEL;
  - c) No reliance can be placed on the decision of the Hon'ble Bombay High Court in the matter of **63 Moons Technologies Limited Vs. Union of India** dated December 04, 2017 as the same has been set aside by the Hon'ble Supreme Court in its decision dated April 30, 2019;
  - d) EOW report cannot be relied upon as the appellants in the order dated June 9, 2022 were not given an opportunity to rebut the same;
  - e) The bail order passed by the Hon'ble Bombay High Court in the matter of **Jignesh Prakash Shah Vs. The State of Maharashtra** cannot be relied upon as a bail order is passed on a completely different parameters and cannot be used to judge integrity, reputation or character of the applicant.
- (iv) Reliance is placed on the order passed by the Whole Time Member in the matter of Anand Rathi Commodities Limited (Dated November 29, 2022) to submit that a similar direction of suspension for a period of three months or till acquittal of the Noticee, whichever is earlier, would be commensurate in the present matter.

## CONSIDERATION OF ISSUES AND FINDINGS

16. I have carefully perused the post enquiry SCN, SSCN along with all the documents attached therewith, the replies submitted by the Noticee, the oral submissions made by the Noticee during the course of the personal hearing along with the material/

information available on record. After considering the allegations made/ charges levelled against the Noticee in the instant case, I note that the only issue that arises for consideration in the present proceedings is whether the Noticee satisfies the '*fit and proper person*' criteria as laid down under Schedule II of the Intermediaries Regulations.

17. Before considering the issue on its merits, I note that the SCN dated September 11, 2019 called upon the Noticee to show cause as to why action as recommended by the DA, including passing of appropriate direction should not be taken against the Noticee in terms of Regulation 28 of the Intermediaries Regulations. I note that by the amendments made to Intermediaries Regulations on January 21, 2021, Regulation 27 which dealt with recommendations for actions which could be made by DA in case of default, has been substituted and Regulation 28, which dealt with procedure for action on receipt of the recommendation from DA, has been omitted and these matters now stand governed by the Regulations 26 and 27, respectively. In the present case, I note that prior to the aforesaid amendment, procedure for conduct of enquiry proceedings before DA and Competent Authority (CA) was provided under Regulations 25 to 28 of the Intermediaries Regulations wherein Regulation 25 dealt with issue of SCN by the DA, Regulation 26 dealt with reply of SCN by the Noticee, Regulation 27 dealt with recommendation for actions which could be made by the DA and Regulation 28 dealt with conduct of proceedings before the CA, like issue of SCN, hearing and passing of final order. After the aforesaid amendment, Regulation 25, as substituted, deals with holding of enquiry proceedings before DA, Regulation 26 deals with recommendation for actions which can be made by the DA and Regulation 27 deals with conduct of enquiry proceedings before the CA and passing of order by the CA. Thus, the proceedings before CA which were earlier governed by the provisions of Regulation 28 are now governed by the provisions of Regulation 27 with certain modifications. Therefore, the new Regulation 27 is regarded having force continuously (by virtue of pre-existing Regulation 28) and the modification or changes are treated as amendment coming into force with effect from the date of enforcement of new Regulation 27, i.e., January 21, 2021. Accordingly, I note that the present proceedings can be concluded under the amended provisions of the Intermediaries Regulations and for the violations

committed by the Noticee, directions under Regulation 27 of the Intermediaries Regulations can be issued.

18. The Noticee has argued that in terms of Section 29A(2)(e) of the FCRA, SEBI could only initiate prosecution proceedings against the members of NSEL and not proceed under the Intermediaries Regulations. The Noticee has further submitted that a trading member may be held liable under provisions of FCRA for violations pertaining to FCRA and the member need not be declared as not '*fit and proper person*' under the Intermediaries Regulations. In this regard, I note that SEBI had filed a complaint dated September 24, 2018 with the concerned police authorities for initiating appropriate action for the violations of the provisions of FCRA alleged to have been committed by the Noticee. I also note from the records that on the basis of the said complaint of SEBI, a FIR dated September 28, 2018 was registered with MIDC Police Station. In the background of these facts, it is pertinent to see the scope and scheme of Section 29A(2)(e) of the FCRA which is reproduced as under for ease of reference:

***“29A. Repeal and savings. — (1) The Forward Contracts (Regulation) Act, 1952 (74 of 1952) is hereby repealed.***

***(2) On and from the date of repeal of Forward Contracts Act—***

***(e) a fresh proceeding related to an offence under the Forward Contracts Act, may be initiated by the Security Board under that Act within a period of three years from the date on which that Act is repealed and be proceeded with as if that Act had not been repealed;”***

19. A bare perusal of the aforesaid provision would reveal that it is an enabling provision which enables SEBI to initiate fresh proceedings within a period of three years from the date on which the FCRA is repealed. As stated above, SEBI has filed complaint, *inter alia*, against the Noticee within the stipulated period as specified in the FCRA. Accordingly, I note that SEBI has taken appropriate steps for the alleged violation of the provisions of the FCRA and, the contention that the SEBI's regulations were not applicable prior to September 29, 2015 is misplaced as Section 29A(2)(e) of the FCRA mandates SEBI to initiate appropriate proceedings within the given timeframe for the offences committed under the FCRA.
20. Further, as stated above, the present proceedings pertain to examination of the '*fit and proper*' person status of the Noticee under the Intermediaries Regulations and it

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

21. Prior to moving forward with considering the said issue as stated at para 16 above, it is pertinent to refer to the common order dated June 09, 2022<sup>2</sup> passed by the Hon'ble SAT which is also referred in the preceding paragraph 12. The Hon'ble SAT, while setting aside and remanding the earlier WTM Orders passed during February 2019, had made the following observations (relevant to the present case as well):

- (a) Observations of the Bombay High Court in the matter of *63 Moons vs. Union of India*<sup>3</sup> cannot be relied upon as the said judgement has been set aside in appeal<sup>4</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>5</sup>) cannot be relied upon, as in a subsequent Writ Petition<sup>6</sup> moved by 63 Moons, a Division Bench of the Hon'ble Bombay High Court has held that NSEL is not a financial establishment and therefore, the provisions of the MPID Act are not applicable. The prima facie observations cannot be the basis to judge the reputation, character or integrity of NSEL.
- (c) Observations in the bail rejection order dated August 22, 2014, passed by the Hon'ble Bombay High Court in the matter of ***Jignesh Prakash Shah vs. The State of Maharashtra***, cannot also be relied upon as the observations made in a bail order were limited to the fact as to whether the bail should be granted or not.
- (d) Reliance placed on decisions of the Hon'ble Tribunal in the matter of ***Jermyn Capital vs. SEBI***<sup>7</sup> and ***Mukesh Babu Securities vs. SEBI***<sup>8</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

---

<sup>2</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 Rathii Commodities Ltd Vs. SEBI and Appeal No. 288 of 2019 Anand Rathii Commodities Ltd Vs. SEBI

<sup>3</sup> Writ Petition No. 2743 of 2014

<sup>4</sup> Civil Appeal No. 4467 of 2019

<sup>5</sup> Writ Petition No. 1403 of 2015

<sup>6</sup> Writ Petition No. 1181 of 2018

<sup>7</sup> Appeal No. 26 of 2006 decided on September 06, 2006

<sup>8</sup> Appeal No. 53 of 2007 decided on December 10, 2007

view that the criteria for passing an Ad Interim Order are based on a different criterion, namely prima facie case, the balance of convenience and irreparable injury which are distinct and different while considering an application for grant of Certificate of Registration. The decision in the matter of *Mukesh Babu Securities* was of a criminal complaint filed against the Chairman of the Company. The Tribunal noted that there is no evidence to show that any proceedings have yet been initiated against the appellants in the matter under consideration.

- (e) Reputation of the applicant cannot be lightly considered based on observations which are not directly related to the applicant.
- (f) SEBI Order does not state for how long the rejection of application will continue. The Hon'ble Tribunal was of the view that the rejection cannot continue indefinitely, and in such cases, a time period should be provided during which the applicant will become ineligible to seek fresh registration.
- (g) Grant Thornton Forensic report does not find any close connection between the applicant and 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."

22. As noted above, taking cognizance of the order passed by the Hon'ble SAT on June 09, 2022 (*supra*), a SSCN dated October 12, 2022 was issued to the Noticee calling upon the Noticee to show cause as to why the following information/material along with the Enquiry Report dated June 26, 2019 should not be considered against it for determining whether the Noticee satisfies 'fit and proper person' criteria as laid down under Schedule II of the Intermediaries Regulations:

- a) SEBI complaint dated September 24, 2018 filed with Economic Offence Wing ('EOW');
- b) First Information Report ('FIR') dated September 28, 2018; and

c) Schedule II of the Intermediaries Regulations (Amended with effect from November 17, 2021).

23. 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 has been brought on record, it would be appropriate to look at the background and understand the nature of the '*paired contracts*' that were offered on the NSEL – which ultimately is the cause / genesis of the current proceedings. While undertaking this exercise, I will not be independently recording any findings on the nature of the contracts that were entered on 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 in the matters of **63 Moons Technologies Ltd. vs. UOI**<sup>9</sup> (hereinafter referred to as the “**merger petition**”) and **The State of Maharashtra Vs. 63 Moons Technologies Ltd**<sup>10</sup> (hereinafter referred to as the “**MPID Matter**”), wherever appropriate.

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

24. 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. 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 with respect to (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. Thereafter, NSEL commenced operations in October 2008.

25. As noted from the FMC order, NSEL introduced, on its platform, the concept of '*paired contracts*', in September 2009, which involved buying and selling the same

---

<sup>9</sup> Civil Appeal no. 4476 of 2019

<sup>10</sup> Civil Appeal No. 2748-49 of 2022

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 such a manner that buyer of the short duration contract always ended up making profits.

26. As mentioned at para 4 above, FMC, after analysing the trade data as received from NSEL, vide order No. 4/5/2013-MKT/B dated December 17, 2013 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".
27. Further, in the above mentioned Order, FMC, *inter alia*, held that the contracts traded on NSEL have violated certain conditions stipulated in the 2007 Exemption Notification, which 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"*.
28. It is clear 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 2007 Exemption Notification. I note from the FMC Order<sup>11</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*

---

<sup>11</sup> Order No. 4/5/2013-MKT-1/B dated December 17, 2013



*immediately or within such period not exceeding eleven days*". Given the said definition as contained in FCRA, I note that FMC was of the view that all the contracts traded on NSEL which provided settlement schedule exceeding 11 days were treated as Non-Transferable Specific Delivery contracts.

29. Therefore, it is noted that even though it was stipulated in the 2007 Exemption Notification that, only contracts of one-day duration were permitted to be offered on NSEL, FMC, in its Order, relying on the definition of "*forward contract*" under FCRA held that, NSEL was allowed to trade only in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days. I note the observation in the FMC order that NSEL had permitted 55 contracts of various commodities having duration longer than 11 days and these contracts were, *ex facie*, in contravention to the exemption granted to NSEL. It is pertinent to note that all the 55 contracts that were advertised by NSEL, and which are captured in the Hon'ble Supreme Court's Judgement in the matter of MPID matter, were for durations exceeding 11 days.

30. I note that the Hon'ble Supreme Court in the matters of NSEL has also extensively commented on the nature of the 'paired contracts' traded on NSEL. The said observations made by the Hon'ble Supreme Court are as under:

a. the Two-Judge Bench of the Hon'ble Supreme Court in the course of determining the validity of the amalgamation order in the matter of merger petition, vide judgment dated April 30, 2019, had observed as under:

*"55. We have seen that neither FTIL nor NSEL has denied the fact that 'paired contracts' in commodities were going on, and by April to July, 2013, 99% (and excluding E-series contracts), at least 46% of the turnover of NSEL was made up of such 'paired contracts'. **There is no doubt that such 'paired contracts' were, in fact, financing transactions which are distinct from the sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL and the FCRA.**" (emphasis supplied)*

b. 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)

31. 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.
32. 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, NSEL was advertising an annualized return of about 16% p.a. for the 'paired contracts' traded on its platform. The return offered was the same across commodities. The return remained the same irrespective of the duration of the contract. For example, a T+2 & 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.

33. In view of the above, I note that the FMC Order and both the judgments of the Hon'ble Supreme Court discuss in detail that, NSEL was permitting short sales, i.e., permitting sellers to offer contract for sale of commodities on its platform without ensuring that requisite amount of commodity is available in the warehouse. As noted above, the Hon'ble Apex Court in the merger petition has held that these contracts were in the nature of financing transactions. Further, the Hon'ble Supreme Court in the MPID matter has held that the overwhelming majority of the sale leg of the '*paired contracts*' which were executed were naked short sales i.e. the commodities to back such sales were not available at the designated warehouses of NSEL.
34. At this juncture, in light of the above observations of the Hon'ble Supreme Court, I note that submission of the Noticee that the Hon'ble Bombay Court, vide its decision dated August 22, 2019, has clearly held that the paired contracts were not financial transactions is misplaced. It is also pertinent to note that the decision of the Hon'ble Bombay High Court which has been relied upon in the matter by the Noticee was overruled by the Hon'ble Apex Court in the MPID matter and thus, the submission of the Noticee in this regards is not tenable in law.
35. As regards the Noticee's submission that the merger petition has no relevance with respect to the role of the members of NSEL, I note that the said decision of the Hon'ble Supreme Court has been relied upon in the present proceedings to explain the nature of the paired contracts which were being traded on the NSEL platform and not to draw any adverse inference against the Noticee. Thus, even though the merger petition has no relevance as regard the role of members of NSEL, it is still relevant for explaining the nature of '*paired contracts*'. Similarly, the submissions of the Noticee as regards the irrelevancy of the DEA, Government of India letter dated December 30, 2014 and the FMC order, are also not tenable as the said documents have also been relied upon in the present proceedings to only explain the nature of the paired contracts. Accordingly, the submissions of the Noticee are not tenable.

### **Objections raised by the Noticee:**

36. The Noticee has submitted that the appointment of the DA in the present matter is bad in law as the same was done by the Whole Time Member and not the Executive Director, as is required under the Intermediaries Regulations. In this regard, I note that Section 3(2) of the Securities and Exchange Board of India (Delegation of Powers) Order, 2015 specifically provides that, "*The powers and functions delegated to any member or officer of the Board or authority under the Order can be exercised by any officer or authority higher in grade or rank or position to him*". Thus, in presence of a valid delegation conferred upon by the statute, I find that the Noticee's challenge to the appointment of DA by the Whole Time Member of SEBI, who is an authority higher in grade to the Executive Director of SEBI, is devoid of merit. Further, the Noticee has also argued that the aforesaid stance as regard the appointment of DA is not valid in view of Section 3(1) of the DOP Order to submit that said order cannot be in derogation of powers/ functions specified under the Intermediaries Regulations. From the submissions of the Noticee, it appears to be a bald assertion without substantiation as to how the same is in derogation of the functions/ powers specified under the Intermediaries. While the Intermediaries Regulations provide for appointment of DA by an Executive Director, the same, when read along with the aforementioned Section 3(2) of the DOP Order, empower the Whole Time Member also to make the appointment. Accordingly, the submissions of the Noticee in this regard are rejected.

37. The Noticee has further submitted that the DA has not provided the Noticee with the WTM order so as to ascertain whether the WTM has applied in his mind independently to the material placed before the WTM. In this regard, I am of the view that the understanding of the Noticee in asking for the WTM order appointing the DA is misplaced. Since the appointment of DA by the WTM is not a judicial or quasi-judicial order, the WTM is not required to record reasons in detail and pass a specific order. In this regard, I deem it fit to rely upon the decision of the Hon'ble Delhi High Court in the matter of **Amit Jain Vs. SEBI**<sup>12</sup> wherein the Hon'ble Court has observed as under:

*"...The contention that the Whole Time Member was required to give reasons and pass an order is unmerited. There is no such requirement under the Rules. Further,*

---

<sup>12</sup> W.P.(C) 8394/2014, Decided on July 09, 2018

*an opinion to be formed is also not a judicial or quasi judicial order, which would require the Whole Time Member to articulate his reasons in detail....”*

Accordingly, the request of the Noticee seeking a specific order passed by the WTM is misplaced and is therefore, rejected.

38. The Noticee has also submitted that the Hon’ble Supreme Court in the MPID matter has held that *“The two-judge Bench of this Court took note of the modus operandi through which the trading members were duped by a conspiracy hatched by a few trading members along with NSEL”* and considering the above, even the Apex Court has held that the controversy in question was devised by a few trading members along with NSEL. I have perused the decision of the Hon’ble Supreme Court relied upon by the Noticee and I note that the quoted excerpt refers to the decision of the Hon’ble Supreme Court in the merger petition. In this regard, I am of the view that quoted excerpt cannot be used to draw a conclusion that the brokers trading on NSEL platform were not at fault and further the reliance placed by the Noticee does not prove that the Noticee was duped by the other trading members. Accordingly, I am not inclined to accept the contention of the Noticee in this regard.
39. The Noticee has further submitted that SEBI does not have the jurisdiction to deal with the Spot Market in terms of letter dated November 20, 2015 of the Ministry of Finance. Since spot markets/ ready delivery contracts were not being regulated by the FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets. Accordingly, the merger of FMC with SEBI cannot empower SEBI to regulate the Spot Market. In this regard, without going into the merits of the contention that whether SEBI has the authority to regulate Spot Market or not, I note, that the issue under consideration in the present proceedings is limited to the determination of fit and proper status of the Noticee under the Intermediaries Regulations. It is a settled position of law that SEBI has statutory authority to determine the fit and proper status of the intermediaries registered with it. Since the Noticee is an intermediary registered with SEBI, I am of the view that SEBI is within its jurisdiction to determine the fit and proper status of the Noticee. Thus, the submission of the Noticee, in this regards, is not tenable.

40. The Noticee has also argued that it has not been provided with all the documents which have been relied upon while issuing the notice and the same amounts to violation of the principle of natural justice. The Noticee has submitted that only those documents have been provided to the Noticee which were available in public domain and case specific documents have not been provided to the Noticee. In this regard, I note that vide letter dated January 16, 2019, the Noticee was provided with the relevant material such as the extract of the Grant Thornton report, FMC order etc., by the DA. The Noticee has not specified as to what case specific documents have not been provided to the Noticee which has caused prejudice to the it. Vide letter dated January 16, 2019, SCN dated September 11, 2019 and SSCN dated October 12, 2022, the Noticee has been provided with the relevant and relied upon documents and therefore, I am of the view that the principles of natural justice have been duly complied with in the matter and the Noticee's contention with regard to non-supply of relevant documents in the matter is not tenable.

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

41. Now, I would be proceeding to deal with the 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) 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 not limited to the following:*

*(a) integrity, honesty, ethical behaviour, reputation, fairness and character of the person;*

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

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

*(ii) charge sheet has been filed against such person by any enforcement agency in matters concerning economic offences and is pending;*

*(iii) an order of restraint, prohibition or debarment has been passed against such person by the Board or any other regulatory authority or enforcement agency in any matter concerning securities laws or financial markets and such order is in force;*

*(iv) recovery 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.*

42. I note that Regulation 5(e) of the Broker Regulations provides that for the purpose of grant of Certificate of Registration, the applicant has to be a '*fit and proper person*' in terms of Schedule II of the Intermediaries Regulations. I further note that the '*fit and proper person*' criteria specified in Schedule II of the Intermediaries Regulations, 2008 was amended vide SEBI (Intermediaries) (Third Amendment) Regulations, 2021 with effect from November 17, 2021.
43. From the records, I note that SEBI has filed a complaint with EOW Mumbai on September 24, 2018, against brokers who facilitated access to '*paired contracts*' traded on NSEL, including the Noticee. On the basis of this complaint, FIR dated September 28, 2018, was registered with the MIDC Police Station, Mumbai, against the Noticee. I note from the records that the Noticee is holding a certificate of registration No. INZ000045633. In order to continue to hold such Certificate of Registration from SEBI, the Noticee is also required to satisfy the conditions of eligibility, which, *inter alia*, included, continuance of its status as a '*fit and proper person*'. The above condition to be fit and proper person is not a onetime condition applicable only at the time of seeking registration. Rather, the provisions governing the criteria show that this is a condition which each and every registered intermediary is required to fulfil on a continuous basis as long as the entity remains associated with the Securities Market as a registered intermediary.
44. In this context, I note that the Noticee, vide its reply dated October 24, 2019 had, *inter alia*, submitted that '*...the Noticee executed trades only for 54 clients who had approached it at their own instance...*'. The Noticee in the said reply has further stated that "*...The Noticee earned brokerage of barely Rs. 152560/-...*". Further, on perusal of the Enquiry Report, it is noted that as per the Grant Thornton report, NSEL had a pay-out obligation to the extent of ₹1,93,02,384/- towards the Noticee, and as per the interim EOW Report, the Noticee had money exposure to the tune of ₹1,99,18,023. It is also observed from the Enquiry Report and the NSEL circular dated March 10, 2015 that NSEL had made a special pay-out amounting to ₹18,43,852/- to the Noticee. In view of the above, I am of the view that it is not in dispute that the Noticee was, in fact, involved in facilitating the trading in the alleged '*paired contracts*' on NSEL Platform.

45. 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 Hon'ble Supreme Court (*supra*), these contracts, were *ex facie* offered in violation of the 2007 Exemption Notification and were not spot contracts in commodities which were permitted to be traded on NSEL. The '*paired contracts*' were nothing but financing transactions masquerading as spot contracts in commodities. The execution of the trades in '*paired contracts*' were not permitted under the 2007 Exemption Notification and were purely financial contracts promising assured returns under the garb of spot trading in commodities, as observed by FMC in its Order. Therefore, the Noticee by its conduct and as a member of NSEL has facilitated trading in '*paired contracts*' which were in the nature of financing transaction, as held by the Hon'ble Supreme Court. The Noticee, by providing access for taking exposure to '*paired contracts*' has exposed its clients to the risk involved in trading in a product that did not have regulatory approval and thereby raising doubts on the competence of the Noticee to act as a registered Securities Market intermediary. Thus, I am of the view that the trading activities of the Noticee in '*paired contracts*' for its clients and for itself on 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.

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

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

47. As discussed above, the Noticee has facilitated its clients to trade in '*paired contracts*'. As the paired contracts were violative of the conditions stipulated in the 2007 Exemption Notification, 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 under section 29A(2)(e) of the FCRA. On the basis of the said complaint of SEBI, FIR dated September 28, 2018 was registered with MIDC Police Station, Mumbai and the same are subsisting. I note that the name of the Noticee is reflected in the complaint and the FIR. I also note that the copies of the said complaint and the FIR were provided to the Noticee along with the SSCN dated October 12, 2022.

48. It is pertinent to note that the criteria of '*fit and proper person*', is an ongoing requirement throughout the period during which the Noticee remains operational in the Securities Market as a registered intermediary. In case, pursuant to the grant of registration by SEBI, any evidence comes to the notice of SEBI that casts a doubt on the integrity, reputation and character of the registered intermediary, SEBI is well within its powers to examine the '*fit and proper person*' status of such entity based on various parameters. It is noted that parameters provided under Clause 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations lays down a list of disqualifications which includes a pending criminal complaint or information under Section 154 of CrPC filed against such an entity by the Board. It is, therefore, noted that the Noticee attracts the disqualification provided in Clause 3(b)(i) of the Schedule II of the Intermediaries Regulations.

49. At this juncture, I deem it apposite to deal with the submission of the Noticee that SEBI cannot assume power to declare the Noticee as not '*fit and proper*' person on the basis of its own complaint/ FIR and that since an FIR is first instance of reporting a complaint without any adjudication, any adverse reliance on an FIR, particularly an FIR filed by SEBI itself would be unlawful. As regard usage of FIR as evidence in the present matter, I note that being a '*fit and proper*' person is a continuing '*eligibility criteria*'/ statutory requirement, which must be satisfied by the Noticee including the amended criteria, at all times. I am of the considered view that the due presumption on the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field which is binding upon SEBI, and arguments to the contrary are not maintainable.

50. The Noticee has also submitted that the fit and proper criteria was amended with effect from November 17, 2021, i.e., after initiation of the proceedings against the

Noticee and thus cannot be applied retrospectively. In this regard, as noted above, the '*fit and proper*' person criteria, being a continuing requirement under the Intermediaries Regulations ought to be complied with at all times as long as an entity desires to remain associated with the securities market as a registered intermediary. The present proceedings intend to examine the '*fit and proper person*' status of the Noticee as per the Intermediaries Regulations. Therefore, I am of the view that the Noticee must satisfy the fit and proper person criteria as it exists on date and accordingly, I do not find any merit in the argument of the Noticee.

51. Therefore, looking holistically, I find that the conduct of the Noticee is detrimental to the Securities Market, being not in conformity with the applicable code of conduct. I, 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 was in violation of the 2007 Exemption Notification, raises serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the product itself. By failing to disassociate itself from, and continuing to facilitate participation in the said paired contracts, the Noticee failed to act with due diligence.

52. Furthermore, as mentioned in paragraph 48 above, the Noticee has also earned disqualification under Clause 3(b)(i) of the amended Schedule II of the Intermediaries Regulations on account of the complaint filed by SEBI and the FIR registered against the Noticee. In this regard it is pertinent to note that the said FIR is subsisting and has not been challenged, quashed or stayed by any competent court qua the Noticee. In this context, as observed above, I note that being a '*fit and proper person*' is a continuing 'eligibility criteria' which must be satisfied by the Noticee including the amended criteria, at all times.

53. The Noticee has also submitted that NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for '*paired contracts*' and hence there was no reason for the Noticee to question the legality of such

product launched by NSEL. In this regard, I am of the view that, the principle of '*ignorantia juris non excusat*' or '*ignorantia legis neminem excusat*' or '*ignorance of law is no excuse*' becomes applicable in the situation, since trading in 'paired contracts' was in violation of the 2007 Exemption Notification and ignorance of the conditions of the said 2007 Exemption Notification cannot be claimed. As held by the Hon'ble Supreme Court, the 'paired contracts' were nothing but financing transactions which were portrayed as spot contracts in commodities. Therefore, giving go-by to the terms of the 2007 Exemption Notification and attempting to camouflage the nature of the transactions brings into question of appropriateness and suitability of the continuance of the registration of the Noticee as a broker. Equally, any argument deflecting the responsibility to NSEL is misplaced and hereby rejected, as the primary onus of diligence enjoined on an intermediary, which diligence any reasonable or prudent person would also perform, has not been undertaken by the Noticee. 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 Broker Regulations read with the provisions of Schedule II of the Intermediaries Regulations.

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

obligated to act in a transparent manner and comply with all applicable regulatory requirements which are in the best interests of its clients and which will uphold the integrity of the Securities Market.

55. I am also aware that SEBI has passed certain orders<sup>13</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 cases, as in the extant matter the Noticee is already holding a Certificate of Registration whereas in those cases, the entities had filed applications seeking certificate of registration. As already noted above at paragraph 43, '*fit and proper person*' criteria is a continuing requirement under the Intermediaries Regulations which the Noticee ought to comply with at all times so long it desires to remain associated with the Securities Market as a registered intermediary. Further, I note that the Hon'ble SAT in its order dated June 09, 2022 (pertaining to entities whose application for registration was rejected) has observed that the period for which the noticees cannot apply for registration needs to be specified by SEBI. Having noted the aforesaid observation of the Hon'ble SAT, I am of the view that since the recommendation in the present matter is of cancellation and not of rejection of the application, the necessity of specifying a period of time may not arise in this order (as in the case of entities desiring to be registered as market intermediaries) 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.

---

<sup>13</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.



56. The limited scope of the present proceedings is to see whether the indulgence, engagement and promotion of such activities could be held to be beneficial to the development of Securities Market or the same contain elements that are potentially dangerous and detrimental to the interest, integrity, safety and security of the Securities Market. In this respect, the undisputed fact, as recorded in the FMC order and Orders of the Hon'ble Supreme Court (as mentioned supra), that the scheme of 'paired contracts' traded on the NSEL ultimately has caused loss to the market which itself casts serious aspersion on the conduct, integrity and reputation of, *inter alia*, the Noticee who 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.

57. Further, as per findings recorded above, the Noticee also attracts the disqualification provided in Clause 3(b)(i) under the amended Schedule II of the Intermediaries Regulations in view of the complaint filed by SEBI and the pending FIR against the Noticee which is subsisting/pending as on date. Further, it is also not the case of the Noticee that said FIR filed is either stayed or quashed by any competent court qua the Noticee or otherwise. In view of the above, I hold that the Noticee does not satisfy the '*fit and proper person*' criteria specified in Schedule II of the Intermediaries Regulations and hence, the continuance of the Noticee as a registered broker will be detrimental to the interest of the Securities Market. Therefore, activities of the Noticee, as discussed in the preceding paragraphs, as a registered broker cannot be condoned and deserve appropriate measure to prevent such wrong doings recurring to the detriment of the interest of the Securities Market.

58. In view of the above, I concur with the recommendation made by the DA, i.e., registration of the Noticee, Excel Commodity & Derivative Private Limited, registered as a Stock Broker may be cancelled.

## **ORDER**

59. I, therefore, in exercise of powers conferred under Section 12(3) and Section 19 of the SEBI Act, 1992 read with Regulation 27 of the Intermediaries Regulations, 2008 cancel the Certificate of Registration (bearing no. INZ000045633) of the Noticee viz. Excel Commodity and Derivative Private Limited.

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

61. Notwithstanding the direction at paragraph 59 above, the Noticee shall allow its existing clients, if any to withdraw or transfer their securities or funds held in its custody, within 15 days from the date of this order. In case of failure of any clients to withdraw or transfer their securities or funds within the said 15 days, the Noticee shall transfer the funds and securities of such clients to another broker registered with SEBI within a period of next 15 days thereon, under advice to the said clients.

62. This Order shall come into force with immediate effect.

63. 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.

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

**DATE: SEPTEMBER 28, 2023**

**PLACE: MUMBAI**

**Sd/-**

**S.V. MURALI DHAR RAO**

**EXECUTIVE DIRECTOR**

**SECURITIES AND EXCHANGE BOARD OF INDIA**