QJA/VS/MIRSD/DOP/28313/2023-24

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Section 12(3) of the Securities and Exchange Board of India Act, 1992 read with Regulation 27 of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008

In respect of

Name of the Noticee	SEBI Registration No.
NDA Commodity Brokers Private Limited	**INZ000035638**

In the matter of National Spot Exchange Limited (NSEL)

BACKGROUND

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

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

"30. In view of the facts and circumstances of the case and material placed before the Designated Authority, I am of the view that the Noticee is not a fit and proper person in terms of Regulation 5(e) of the Stock Brokers Regulations read with Schedule II of the Intermediaries Regulations. Therefore, in terms of Regulation 27 of the Intermediaries Regulations, I recommend that the registration of the Noticee, i.e. M/s NDA Commodity Brokers Pvt. Ltd., Stock Broker, SEBI Registration No., INZ000035638 as a commodity derivatives broker be cancelled in the interest of the securities market."

3. After considering the Enquiry Report, a Post Enquiry Show Cause Notice dated September 18, 2019 (hereinafter referred to as "**SCN**") enclosing therewith the Enquiry Report of the DA was issued to the Noticee under Regulation 28(1) of the Intermediaries Regulations (as applicable at the relevant time) calling upon it to show cause as to why the action recommended by the DA or any other action should not be taken against it, as deemed fit by the Competent Authority under Regulation 28(2) of the Intermediaries Regulations. The SCN further required the Noticee to submit its reply, if any, within 21 days of receipt of the same. In response to the said SCN, the Noticee vide letter dated December 05, 2019 filed its reply. Pursuant to the same, the Noticee was granted an opportunity of hearing on March 12, 2020 before the then Competent Authority, i.e., Whole Time Member (hereinafter referred to as the **"WTM"**) of the Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"). Further, vide its letter dated March 06, 2020, the Noticee made request for adjourning the personal hearing in the matter which was acceded to by the competent authority.

4. While proceedings in the present matter were ongoing, SEBI passed five separate orders during February 2019 rejecting the applications filed by five other entities for registration as commodity brokers. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**Hon'ble SAT**"). The Hon'ble SAT vide its common order dated June 9, 2022, remanded the aforesaid orders

to SEBI to decide these matters afresh within six months from the date of the said 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……"*

5. Subsequently, due to administrative reasons, the competent authority of SEBI, reallocated cases and transferred the present matter to the undersigned for further proceedings.

6. In light of the aforesaid order of Hon'ble SAT and certain other subsequent orders passed by the Hon'ble SAT in similar set of cases from time to time, it was felt necessary to furnish certain additional documents/material to the Noticee before concluding the present proceedings. Accordingly, a notice of hearing dated November 11, 2022 scheduling personal hearing on December 21, 2022 was sent to the Noticee. In light of the aforesaid order of Hon'ble SAT, certain additional documents/material (as indicated in the hearing notice) were provided to the Noticee with the hearing Notice and Noticee was advised to file its reply, if any, in respect of the additional documents/information/facts before or on the date of hearing. Vide the aforesaid hearing notice, the Noticee was also informed that the additional documents/information/facts will be considered by the Competent Authority along with the Enquiry Report.

7. On the scheduled date of hearing, Advocate, Ms. Suruchi Mittal and Chartered Accountant, Mr. Ashutosh Gupta, appeared on behalf of the Noticee through video conferencing and made submissions in line with the replies of the Noticee on record. During the course of hearing, the Noticee was advised to furnish certain information/documents which was provided by the Noticee vide its letter dated January 05, 2023.

8. The written submissions filed by the Noticee vide letters dated December 05, 2019, January 05, 2023 and the oral submissions made during the course of the personal hearing held on December 21, 2022, are summarized hereunder:

   8.1. The Noticee denies all the allegations contained in the Enquiry Report and additional information contained in the SCN;

   8.2. The Noticee was registered as a broker of NSEL after four years of starting operation of the exchange and after two years of trading in Non E Series contracts which were within the full knowledge of the Central Government and Forward Markets Commission (**FMC**). Trading in Non E Series contracts commenced at NSEL from September 2009 while the Noticee took the membership in October 2011. No red flags were raised by any authority during that time.

   8.3. Noticee had 145 registered clients in NSEL, out of which only 11 clients traded in these Non E Series Contracts. The clients had approached the Noticee to do trade in Non E Series Contracts and traded in those contracts. Only 11 clients on 7 days during a period of about 2 years have traded in these contracts which with no stretch of imagination can be the basis for declaring the Noticee 'not fit and proper person.'

   8.4. Noticee has made investment of ₹14.5 lacs and brokerage earned has been to the tune of ₹84,354/- which is not even sufficient to cover running expenses of the segment. Noticee is the victim rather than the culprit as being wrongly alleged.

8.5. No investor complaints are pending against the Noticee.

8.6. The inference drawn in the SCN that the Noticee as a broker had participated/facilitated in the paired contracts and thereby the Noticee had been closely associated with NSEL and paired contracts, is erroneous and is not based on the facts.

8.7. The Noticee after referring to the excerpts of the letter dated December 30, 2014 of the Department of Economic Affairs (DEA) and highlighting the observation of the Hon'ble Supreme Court in the matter of 63 Moons Technologies Ltd. has *inter alia* stated the following.

8.7.1. Letter of DEA has agreed with the observation of FMC that NSEL has violated the two conditions of exemption granted to it under Section 27 of FCRA making NSEL liable for action.

8.7.2. The aforesaid letter of DEA had noted violation by NSEL on the basis of observations of FMC and special team of Secretaries. The observations of the FMC were never made known to the public by FMC or Central Government to caution the Noticee or other members of NSEL for not entering into the alleged paired contracts.

8.7.3. DEA has agreed with the recommendation of FMC about violation by NSEL after taking views of law Ministry. The special team of Secretaries had expertise of various experts available to them. Still it took long time for DEA and special team of Secretaries to come to the conclusion. The Noticee neither had the expertise nor the occasion or competence to examine the legality about the activities or contracts offered by NSEL, thus it cannot be held liable for any illegality on part of NSEL, merely because it had traded in very small fraction of alleged contracts (0.000001%) offered by NSEL.

8.7.4. Hon'ble Supreme Court has observed that 46% of the turnover of NSEL was made up of such paired contracts and there is no doubt that these contracts were in breach of exemption granted to NSEL.

8.7.5. Paired contracts were in existence for about two years before Noticee took membership of NSEL. Till the time the Noticee availed membership of NSEL, neither any regulator or authority nor the exchange had issued any circular prohibiting trading in the alleged paired contracts and that the same was in violation of any law applicable.

8.7.6. Noticee has dealt into contracts which were being offered by NSEL only on insistence of its 11 clients out of 145 clients and only on 7 days out of about 5-year long period when the alleged contracts were traded on exchange. It was always presumed that the contracts being offered by the exchange were in compliance with all the regulatory requirements.

8.7.7. The Noticee had no reason to either doubt the legality or eligibility of NSEL for the said trades. It is matter of normal course that unless something new or surrounding suspicion, a broker cannot be expected to question the exchange about the legality of the products offered by exchange when it is happening under the watchful eyes of Central Government and Regulators for two years. A broker cannot ask for modification in any product/contract offered by exchange as it is always presumed that the product/contract being offered by exchange have all the legalities in place and due approval of regulator wherever required have been obtained. If subsequently any illegality or non-approval is observed in any product, only the exchange introducing such product/contract should be held responsible and brokers cannot be held responsible for trading in such product/contract.

8.7.8. DEA rightly pointed out that NSEL is liable for the violations committed by NSEL. Thus, the Noticee cannot be held responsible for any violations committed by NSEL.

8.7.9. Hon'ble Supreme Court has observed that NSEL has violated the exemptions granted to it and thus the Noticee cannot be held responsible for any violation committed by NSEL as it had never the competency nor the occasion to examine the legality of the product being offered by NSEL.

8.8. The Noticee cannot be said to be closely associated with NSEL as the contracts were already available for two years before the Noticee took membership of NSEL and only 11 clients traded in these contracts. No proprietary trade has been done by the Noticee in these contracts.

8.9. The Noticee is in compliance with all the criteria to be 'fit and proper' as per the then existing schedule II of the Intermediaries Regulations. It fulfills all the criteria of financial soundness, fitness and probity as provided under the Intermediaries regulations.

8.10. The adverse observations made by several authorities and courts are admitted to not have attained finality and harsh step of recommending cancellation of certificate of Noticee in view of the alleged observations which have not attained finality and which even do not go into the specific role of Noticee would be gross injustice to the Noticee. There was no promotion or inducement offered by Noticee or benefits received from the alleged transactions which can support the allegation of facilitation of clients to trade on NSEL platform.

8.11. As per the Grant Thronton Report, Noticee has payout obligation to the extent of ₹9,17,081 which includes ₹ 7,50,000 on account of collateral security deposit with NSEL at the time of taking membership and balance of ₹ 1,67,081 was the margin money deposited by one client for

outstanding position for the trades carried out in the paired contract by one client only.

8.12. It is submitted that for the following reasons none of the parameters used by EOW to suggest involvement of brokers in NSEL is applicable to the Noticee:

8.12.1. It was not the large broker as its total turnover was even less than 0.000001% which cannot be termed as large broker.

8.12.2. These contracts were actively trading under the watchful eyes of the Regulator (FMC) and Central Government for more than 2 years before the Noticee took the membership of NSEL. Only 11 clients had traded in these contracts and only on 7 days during the period of two years. It has not lured any of its client to participate in these trades.

8.12.3. It has made investment of ₹ 14.5 lakhs and earned brokerage to the tune of ₹ 84, 354 and thus there is no case to suggest that the Noticee enriched itself through these trades.

8.12.4. It has not financed any of its clients for these trades and the suggestion that it got additional revenue by financing investors is not applicable to the Noticee.

8.12.5. Total turnover of the Noticee in these paired contract was only ₹ 94, 87, 980 which is not even 1,34,000 part of the turnover in these contracts in NSEL. By no stretch of imagination, it can be said that the Noticee got motivated to do more turnover to get sharing in transaction charges or in warehouse charges or have benefited from or compensated by the sellers or defaulters as mentioned by EOW.

8.13. The DA has observed that the close relationship of the Noticee with NSEL in effect has seriously put questions on the reputation, belief in competence, fairness, honesty, integrity and character of the Noticee in the securities market. This view of the DA does not stand in light of the discussions/information provided in the preceding paragraphs.

8.14. The Noticee has also submitted a tabular presentation of the trading behavior of its clients to demonstrate that it had not promoted the trading in paired contracts in the NSEL. The association of the Noticee with NSEL was contractual and neither willful nor deliberate and the Noticee had no mala fide intention to do more trade to get more brokerage. It has facilitated the trade because it is merely the registered broker of that exchange as the clients cannot do trade directly do trade directly in exchange without facilitated by any of the commodity brokers.

8.15. The DA has recommended strictest or harsh punishment of recommending cancellation of certificate of registration of Noticee which could deteriorate the goodwill of the Noticee in the market.

8.16. Noticee has also provided letters from its 11 clients which are addressed to the DA, *inter alia* stating that the clients had approached the Noticee for trade in Non-E Series contracts on the basis of their own information and study. The clients had invested their own money for margin requirement for trades executed in all Non-E Series contracts and the Noticee had not lured them for any investment for profit in NSEL. It is also stated in the letters that the clients do not have any complaint/dispute or grievance with the Noticee.

8.17. Vide its letter dated January 05, 2023, the Noticee has provided the information which was sought during the personal hearing. In the said letter, it is also submitted that the additional documents/information/ facts mentioned in the letter dated November 11, 2022 cannot be made part of the said SCN and any change would require a fresh show cause notice to be issued. It is also submitted that the Noticee has not been made accused in the charge sheet filed by the investigating agency on the complaint of SEBI which goes to show the honesty and integrity of the Noticee.

8.18. Noticee has not been supplied with copy of order dated December 17, 2013 of FMC which is referred in the SCN. A complete order is necessary

for proper understanding and reply to the allegations being made. Further, not providing copy of all the documents and orders relied upon in the SCN is violation of regulation 25(2) and (3) of the Intermediaries Regulations and the SCN is void and in violation of regulations.

8.19. The Noticee has also submitted that any change of amendment to the definition of 'fit and proper person criteria' shall be effective from the date of amendment. Amendment made in 2021 cannot be applied to show cause notice issued in 2018 for the events prior to it.

CONSIDERATION OF ISSUES AND FINDINGS

9. I have carefully perused the Enquiry Report dated August 28, 2019, SCN, the replies dated December 05, 2019, January 05, 2023 and the oral submissions made by the Noticee during the personal hearing held on December 21, 2022 and other materials/information as available in the public domain and also made available to the Noticee. After considering the allegations and the charges levelled against the Noticee in the instant matter as spelt out in the SCN, the limited issue which arises for my consideration in the present proceedings is whether the Noticee satisfies the '*fit and proper person*' criteria as laid down under Schedule II of the Intermediaries Regulations.

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

SEBI ACT, 1992

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

12(3) The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations:

Provided that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard.

STOCK BROKERS REGULATIONS, 1992

Consideration of application for grant of registration.

5. The Board shall take into account for considering the grant of a certificate, all matters relating to trading, settling or dealing in securities and in particular the following, namely, whether the applicant,

(e) is a fit and proper person based on the criteria specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008

Conditions of registration.

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

(b) he shall abide by the rules, regulations and bye-laws of the stock exchange which are applicable to him;

(f) he shall at all times abide by the Code of Conduct as specified in Schedule II

SCHEDULE II

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

CODE OF CONDUCT FOR STOCK BROKERS [Regulation 9]

A. General.

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

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

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

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

Liability for action under the Enquiry Proceeding Regulations.

27. A stock broker shall be liable for any action as specified in Chapter V of the Securities and Exchange Board of India (Intermediaries)Regulations, 2008 including suspension or cancellation of his certificate of registration as a stock broker, if he —

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

INTERMEDIARIES REGULATIONS, 2008

SCHEDULE II

SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008

[See regulation 7]

(1) The applicant or intermediary shall meet the criteria, as provided in the respective regulations applicable to such an applicant or intermediary including:

(a) the competence and capability in terms of infrastructure and manpower requirements; and
(b) the financial soundness, which includes meeting the net worth requirements.

(2) The 'fit and proper person' criteria shall apply to the following persons:

(a) the applicant or the intermediary;
(b) the principal officer, the directors or managing partners, the compliance officer and the key management persons by whatever name called; and
(c) the promoters or persons holding controlling interest or persons exercising control over the applicant or intermediary, directly or indirectly:
Provided that in case of an unlisted applicant or intermediary, any person holding twenty percent or more voting rights, irrespective of whether they hold controlling interest or exercise control, shall be required to fulfil the 'fit and proper person' criteria.

Explanation *–For the purpose of this sub-clause, the expressions "controlling interest" and "control" in case of an applicant or intermediary, shall be construed with reference to the respective regulations applicable to the applicant or intermediary.*

(3) For the purpose of determining as to whether any person is a 'fit and proper person', the Board may take into account any criteria as it deems fit, including but not limited to the following:

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

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

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

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

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

(iv) recovery proceeding s have been initiated by the Board against such person and are pending;

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

(vi) any winding up proceedings have been initiated or an order for winding up has been passed against such person;

(vii) such person has been declared insolvent and not discharged;

(viii) such person has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force;

(ix) such person has been categorized as a wilful defaulter;

(x) such person has been declared a fugitive economic offender; or

(xi) any other disqualification as may be specified by the Board from time to time.

(4) Where any person has been declared as not 'fit and proper person' by an order of the Board, such a person shall not be eligible to apply for any registration during the period provided in the said order or for a period of five years from the date of effect of the order, if no such period is specified in the order.

(5) At the time of filing of an application for registration as an intermediary, if any notice to show cause has been issued for proceedings under these regulations or under section 11(4) or section 11B of the Act against the applicant or any other person referred in clause (2), then such an application shall not be considered for grant of registration for a period of one year from the date of issuance of such notice or until the conclusion of the proceedings, whichever is earlier.

(6) Any disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub -clause (b) of clause (3), shall not have any bearing on the 'fit and proper person' criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter:

Provided that if any person as referred in sub-clause (b) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall replace such person within thirty days from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against the intermediary:

Provided further that if any person as referred in sub -clause (c) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall ensure that such person does not exercise any voting rights and that such person divests their holding within six months from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against such intermediary.

(7) The 'fit and proper person' criteria shall be applicable at the time of application of registration and during the continuity of registration and the intermediary shall ensure that the persons as referred in sub -clause s (b) and (c) of clause (2) comply with the 'fit and proper person' criteria."

Recommendation of action

26. (1) After considering the material available on record and the reply, if any, the designated authority may by way of a report, recommend the following measures, –

(i) disposing of the proceedings without any adverse action;

(ii) cancellation of the certificate of registration;

(iii) suspension of the certificate of registration for a specified period;

(iv) prohibition of the noticee from taking up any new assignment or contract or launching a new scheme for such the period as may be specified;

(v) debarment of an officer of the noticee from being employed or associated with any registered intermediary or other person associated with the securities market for such period as may be specified;

(vi) debarment of a branch or an office of the noticee from carrying out activities for such period as may be specified;

(vii) issuance of a regulatory censure to the noticee:

Provided that in respect of the same certificate of registration, not more than five regulatory censures under these regulations may be recommended to be issued, thereafter, the action as detailed in clause (ii) to (vi) of this sub-regulation may be considered.

Order.

27. (5) After considering the facts and circumstances of the case, material on record and the written submission, if any, the competent authority shall endeavor to pass an appropriate order within one hundred and twenty days from the date of receipt of submissions under sub-regulation (2) or the date of personal hearing, whichever is later.

11. Before coming to the merits of the case, it is relevant to deal with the contention of the Noticee that it has not been supplied with copy of order dated December 17, 2013 of FMC which is referred in the SCN. As per the Notice, not providing copy of all the documents and orders relied upon in the SCN is violation of regulation 25(2) and (3) of the Intermediaries Regulations and the SCN is void and in violation of regulations. In this regard, I note that the same contention was raised by the Noticee before the DA also. In response to which the DA vide its letter dated August 06, 2019 had provided the said order to the Noticee. It was also informed that the said order is available on the website. I note that pursuant to the issuance of SCN, additional material like SEBI complaint letter

dated September 24, 2018, FIR dated September 24, 2018 registered with EOW and amended Schedule II of the Intermediaries Regulations has also been provided to the Noticee along with the Notice of Hearing dated November 11, 2022. Further, the Noticee has not brought out any material indicating if any prejudice has been caused to it for not providing any specific document. Thus, all the relevant and relied upon documents pertaining to the instant proceedings have already been provided to the Noticee and for the same reason, Noticee's contention is without any merit and is accordingly rejected.

12. I note that prior to the merger of FMC with SEBI (w.e.f. September 28, 2015), the Noticee was not required to be registered with either FMC or any other regulatory authority under the FCRA or any other regulation to be a commodity derivatives broker. However, after the merger of FMC with SEBI, a commodity derivatives broker is required to mandatorily have a certification of registration from SEBI in case it is desirous to remain associated with the Securities Market as a commodity derivatives broker. It is seen that the Finance Act, 2015 (as notified on May 14, 2015) conferred the power of regulation over intermediaries dealing in commodity derivatives to SEBI and also mandated regulation of commodity derivatives brokers by SEBI, which included their registration as commodity derivatives broker with SEBI. In this regard, vide Section 131B of the Finance Act, 2015, a transitory period of 3 months was provided to all the intermediaries who were associated with commodity derivatives market under the erstwhile FCRA but did not require a registration certificate earlier, to continue to deal in commodity derivatives as a commodity derivatives broker, provided it made an application of registration to SEBI within 3 months from September 28, 2015. Accordingly, the Noticee applied for a certificate of registration and was subsequently registered as a broker and since then it has been acting as a market intermediary registered with the SEBI.

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

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

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

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

13.3. Amended Schedule II of the Intermediaries Regulations.

14. In this regard, I find it appropriate to summarize to list the grounds on which the SEBI orders were set aside by the Hon'ble SAT, which consequently led to issuance of the aforesaid documents, along with the hearing notice, to the Noticee in the present matter:

14.1. The observations of the Hon'ble Bombay High Court in the matter of *63 Moons vs. Union of India*[1] cannot be relied upon as the said judgment has been set aside in appeal[2] by the Hon'ble Supreme Court vide judgment dated April 30, 2019.

14.2. The observation from the Order dismissing the Writ Petition filed by NSEL against the invocation of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (for short "**MPID Act**") (***NSEL vs. State of Maharashtra***[3]) cannot be relied upon, as

[1] Writ Petition No. 2743 of 2014, Also available at - https://indiankanoon.org/doc/66704740/
[2] (2019) 18 SCC 401, Also available at - https://indiankanoon.org/doc/169098295/
[3] Writ Petition No. 1403 of 2015, Also available at - https://bombayhighcourt.nic.in/generatenewauth.php?bhcpar=cGF0aD0uL3dyaXRlcmVhZGRhdGEvZGF0YS9qdWRnZW1lbnRzLzIwMTUvJmZuYW1lPUNSV1AxNDAzMTUucGRmJnNtZmxhZz1OJnJqdWRkYXRlPSZ1cGxvYWRkdD0wMS8xMC8yMDE1JnNwYXNzcGhyYXNlPTA5MDIyMzEyMzU0Ng==

in a subsequent Writ Petition[4] moved by 63 Moons, a Division Bench of the Hon'ble Bombay High Court has allowed the prayer and held that NSEL is not a financial establishment and therefore the provisions of the MPID Act are not applicable. The Division Bench also observed that the *prima facie* observations made by the single bench while dismissing NSEL petition could not be relied upon as they were preliminary observations and such observations do not foreclose the issue about the applicability of the provisions of the MPID Act. The Hon'ble Tribunal, I note, was of the opinion that *prima facie* observations cannot be utilized to judge the reputation, character or integrity of NSEL.

14.3. The observations in the bail rejection order dated August 22, 2014, passed by the Hon'ble Bombay High Court in the matter of ***Jignesh Prakash Shah vs. The State of Maharashtra***[5], 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.

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

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

[4] MANU/MH/2309/2019, Also available at - https://indiankanoon.org/doc/178307788/
[5] Criminal Bail Application No.1263 Of 2014, Also available at -http://www.nationalspotexchange.com/HC-order.pdf

14.6. Reliance placed on decisions of the Hon'ble Tribunal in the matter of ***Jermyn Capital vs. SEBI***[6] and ***Mukesh Babu Securities vs. SEBI***[7] is misplaced as decisions in the said matters are distinguishable on facts. Jermyn Capital was held to be in relation to an Interim Order passed by SEBI, and the Tribunal was of the view that the criteria for passing an Ad Interim Order are based on a different criterion, namely *prima facie* case, the balance of convenience and irreparable injury which are distinct and different while considering an application for grant of Certificate of Registration. The decision in the matter of *Mukesh Babu Securities* was distinguished by the Hon'ble Tribunal on the basis that in the matter a criminal complaint was filed against the Chairman of the Company. The Hon'ble Tribunal noted that there is no evidence to show that any proceedings have yet been initiated against the appellants in the matter under consideration.

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

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

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

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

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

order could be sustained. The Hon'ble Tribunal, taking into consideration the submissions made on behalf of SEBI, held that:

> *"It will be open to the WTM to rely upon other material such as the complaint letters of NSEL, EOW report, EOW charge sheet, etc. provided such copies are provided to the brokers and opportunity is given to rebut the allegations. Such additional documents relied upon by the respondent should form part of the show cause notice for which purpose, it will be open to the WTM to issue a supplementary show cause notice. It will also be open to SEBI if it considers necessary, to conduct an independent enquiry proceeding against the connected entities and persons associated with the brokers against whom evidence is available."*

16. Before moving forward to consider the matter on merits and test the compliance of the Noticee with the *'fit and proper person'* criteria, on the basis of the additional material that has been brought on record post Hon'ble SAT's order (as detailed at paragraph 13 above), the background facts necessary for the present proceedings are narrated in brief, hereunder:

    16.1. The Noticee, NDA Commodity Brokers Private Limited, is a commodity broker registered with SEBI.

    16.2. NSEL was incorporated in May 2005 as a Spot Exchange *inter alia* with a purpose of developing an electronic Spot Exchange for trading in commodities. In exercise of powers conferred under Section 27 of the FCRA, the Central Government vide its 2007 Exemption Notification, granted an exemption to all forward contracts of one-day duration for the sale and purchase of commodities traded on NSEL from operations of the provisions of the FCRA subject to certain conditions, *inter alia* including "*no short sale by the members of the exchange shall be allowed*" and "*all outstanding positions of the trades at the end of the day shall result in delivery*".

    16.3. In October 2008, NSEL commenced operations providing an electronic trading platform to its participants for spot trading of commodities, such

as bullion, agricultural produce, metals, etc. It is observed that NSEL had introduced the concept of '*paired contracts*' in September 2009 which allowed buy and sell in same commodity through two different contracts at two different prices on the exchange platform wherein the investors could buy a short duration contract and sell a long duration contract and vice versa at the same time and at a pre-determined price. The trades for the Buy contract (T+2 / T+3) and the Sell contract (T+25/ T+36) used to happen on NSEL on the same day at same time and at different prices, involving the same counterparties. The transactions were structured in a manner that buyer of the short duration contract always ended up making profits.

16.4. On February 06, 2012, the erstwhile FMC was appointed by the Department of Consumer Affairs, Government of India as the 'designated agency' as stipulated in one of the conditions prescribed under the said 2007 Exemption Notification, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measure, if needed, to protect investors' interest. The FMC had accordingly called for the trade data from different Spot Exchanges, including NSEL in the prescribed reporting formats. After analyzing the trade data received from NSEL, the FMC passed Order No. 4/5/2013-MKT-1/B dated December 17, 2013 wherein it was *inter alia* observed that 55 contracts offered for trade on the NSEL platform were in violation of the relevant provisions of the FCRA and that the condition of '*no short sale by members of the exchange shall be allowed*' was being not complied with by the NSEL and its members. FMC further observed that the '*paired contracts*' offered for trading in NSEL platform were in violation of the provisions of the FCRA and also in violations of the conditions specified by the Government of India in its 2007 Exemption Notification, while granting exemption to the one day forward contract for sale and purchase of commodities traded on NSEL, from the purview of FCRA.

17. From the perusal of the FMC Order in respect of the '*paired contracts*', which were traded on NSEL platform during the relevant period, I note that the FMC

had, *inter alia*, observed that the following conditions stipulated in the 2007 Exemption Notification were violated:

a. <u>Short Sale</u>

NSEL had not made it mandatory for the seller to deposit goods in its warehouse before taking a sell position. Hence, the condition of "*no short sale by members of the NSEL shall be allowed*" was not being met by NSEL and its trading/clearing members who traded in the '*paired contracts'* during the relevant period.

b. <u>Contracts with Settlement Period going beyond 11 days</u>

Some of the contracts offered for trade on NSEL had settlement periods exceeding 11 days and therefore, such contracts were "*non-transferable specific delivery*" contracts under the FCRA. As per the FCRA, the "*ready delivery contracts*" were required to be settled within 11 days of the trade and hence, the contracts traded on NSEL, which provided settlement schedule for a period exceeding 11 days were not allowed and were in violation of 2007 Exemption Notification.

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

trading in commodities with a view to boost the agriculture sector in the country. Thereafter, NSEL commenced operations in October 2008.

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

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

20. It is therefore, clear that NSEL was given permission to setup as a spot exchange for trading in commodities. It was essentially meant to only offer forward contracts having one-day duration as per 2007 Exemption Notification. I note from the FMC Order that FMC had observed that the 55 contracts offered for trade on NSEL were with settlement periods exceeding 11 days and all such

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

21. At this stage, it is also pertinent to refer to the judgment of the Hon'ble Supreme Court of India passed in the matter of *63 Moons Technologies Ltd. (formerly* known *as Financial Technologies India Ltd.) & Ors. v. Union of India & Others*[8] (hereinafter referred to as the **"merger petition"**), wherein it *inter alia* held that:

> "*There is no doubt that such Paired Contracts were, in fact, financing transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA".*

[8] (2019)18 SCC 401. Also available at https://indiankanoon.org/doc/169098295/

22. It is further pertinent to refer to the judgment dated April 22, 2022 passed by the Hon'ble Supreme Court in the matter of *The State of Maharashtra vs. 63 Moons Technologies Ltd.*[9] (hereinafter referred to as "**MPID matter**"), wherein the Hon'ble Supreme Court while drawing reference to the presentations made by NSEL in respect of the '*paired contracts*' has *inter alia* held that:

> *"The above representation indicates that 'paired contracts' were designed as a unique trading opportunity by NSEL under which a trader would, for instance, purchase a T+2 contract (with a pay-in obligation on T+2) and would simultaneously sell a T+25 contract (with a pay-out of funds on T+25). The price differential between the two settlement dates was represented to offer an annualized return of about 16%. NSEL categorically represented that all trades were backed by collaterals in the form of stocks and its management activities included selection, accreditation, quality testing, fumigation and insurance.* ***Therefore, NSEL represented that on receiving money and commodities, the members would receive assured returns and a service.*** *Though NSEL has been receiving deposits, it has failed to provide services as promised against the deposits and has failed return the deposits on demand. Therefore, the State of Maharashtra was justified in issuing the attachment notifications under Section 4 of the MPID Act." (emphasis supplied)*

23. I, therefore, note that the Hon'ble Supreme Court has already commented on the nature of the '*paired contracts*' offered on NSEL platform. In the merger petition (*63 Moons Technologies Ltd. vs. UOI*), it was held that these contracts were in the nature of financing transactions. In the MPID matter (*The State of Maharashtra vs. 63 Moons Technologies Ltd.*), the Hon'ble Supreme Court has held that such transactions come within the definition of '*deposits*' under the MPID Act.

24. It is further noted that the Hon'ble Supreme Court in the MPID matter, had extensively referred to the claims made on the website of NSEL and the

[9] Civil Appeal No. 2748-49 of 2022. Also available at https://indiankanoon.org/doc/184205229/

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

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

26. Considering the deliberations and discussions recorded above, it essentially leads to the moot question as to whether the Noticee while facilitating such transactions for its clients was under the *bonafide* belief that the *'paired contracts'* were actually spot contracts in commodities. Or, can it be said that the very fact that '*paired contracts'* were offered meant that NSEL was offering contracts which were not resulting in compulsory delivery and, therefore, the Noticee should have been aware that such a product was altogether different from the spot trading in commodities which was permitted on NSEL's platform. Further, NSEL itself was advertising such contracts as an alternative to fixed deposits and the return offered was 16% across all commodities irrespective of the nature of the contract or the duration. Also, these contracts were structured in a manner which ensured that the buyer always made pre-determined profits.

27. In the undeniable background that there was a settlement default at NSEL, it is clear that there were enough red flags which should have alerted the Noticee when these products were first offered by NSEL. With the material on record, it is clear that any prudent person (including the Noticee) would have come to the conclusion that what was being offered were not spot contracts in commodities and rather had a trappings of a financial product which offered fixed and assured returns, as the Hon'ble Supreme Court has already held.

28. On perusal of the replies submitted by the Noticee, I note that it has vehemently submitted that it has dealt into the "non E-series contracts" which were being offered by NSEL only on insistence of its 11 clients out of 145 clients and only on 7 days out of about 5-year long period when the alleged contracts were traded on exchange. It is also submitted that the total turnover of the Noticee in these contracts was only ₹ 94,87,980 which was not even 0.000001% of the turnover of NSEL in these contracts. The Noticee has also submitted letters from its 11 clients which were addressed to the DA, *inter alia,* stating that the clients had approached the Noticee for trade in Non-E Series contracts on the basis of their own information and study. The clients had invested their own money for margin requirement for trades executed in all Non-E Series contracts and the Noticee had not lured them for any investment for profit in NSEL.

29. In this regard, I find it pertinent to refer to the observations of Hon'ble Supreme Court in its judgment in respect of the merger petition (supra) that "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." Thus, it is clear that on NSEL (other than E-series contracts), only paired contracts were being traded (as high as 99% noted by the Hon'ble Supreme Court). It is not the Noticee's case that the transactions facilitated by it for its clients were E-series contracts. Accordingly, by inference, transactions

on NSEL, which the Noticee has admitted to have facilitated for its clients, could not have been anything but “paired contracts”.

30. It is further noted that during the hearing conducted on December 21, 2022, the Noticee was, inter alia, asked to confirm whether it had done any trades in paired contracts on NSEL platform during the period from September 2009 to July 2013 either in propriety account or on behalf of clients. In response, the Noticee, vide its post hearing submissions dated January 05, 2023, had submitted that it had done trades in non E-series contracts on NSEL platform on behalf of its clients and provided their details.

31. Thus, it is an undisputed fact that the Noticee has indulged into trading in non E-series contracts which as per Hon’ble Supreme Court’s observations, were also known as ‘paired contracts’, on behalf of its clients. Since it is an admitted position that the Noticee has dealt in the ‘paired contracts’, the quantum of such dealings is irrelevant for the present proceedings.

32. Having noted that the Noticee has traded in *‘paired contracts’* for its clients, I now proceed to examine the allegations levelled against the Noticee in the SCN. It is noted that the main allegation against the Noticee*,* as levelled in the SCN, is that by facilitating in the trading in *‘paired contracts’* on NSEL platform during the relevant period as a Trading Member/Clearing Member, the Noticee has, *prima facie*, violated the conditions stipulated in the 2007 Exemption Notification and consequently also the provisions of the FCRA. Therefore, it was alleged in the SCN that the continuance of the registration of the Noticee as a broker is detrimental to the interest of the Securities Market and the Noticee is no longer a ‘*fit and proper person*’ for holding the certificate of registration as a broker in the Securities Market, which is one of the conditions for continuance of registration as specified in regulation 5(e) of the Stock Brokers Regulations read with Schedule II of the Intermediaries Regulations as applicable at the relevant time. Subsequently, SEBI, on the basis of certain

documents/material (such as SEBI Complaint dated September 24, 2018 and FIR dated September 28, 2018, etc.) as provided to the Noticee with the hearing Notice dated November 11, 2022, further alleged that in light of the aforesaid documents filed against the Noticee by SEBI as well as observations/ findings against the Noticee in the Enquiry Report dated May 16, 2019, the Noticee is no longer a *'fit and proper person'* for holding the Certificate of Registration being in violation of regulation 5(e) of the Stock Brokers Regulations read with Schedule II of the Intermediaries Regulations. I further note that the '*fit and proper person*' criteria specified in Schedule II of the SEBI (Intermediaries) Regulations, 2008, was amended vide SEBI (Intermediaries) (Third Amendment) Regulations, 2021 with effect from November 17, 2021.

33. The Noticee has mainly contended that 'paired contracts' were in existence for about two years before it took membership of NSEL. It is submitted that neither any Regulator / authority nor the exchange had issued any circular concerning the illegality of the paired contracts and prohibiting its trading. The Noticee has also submitted that it had no reason to either doubt the legality or eligibility of NSEL for the said trades. As per the Noticee, it is a matter of normal course that unless there is something new or surrounding suspicion, a broker cannot be expected to question the exchange about the legality of the products offered by the exchange. If subsequently any illegality or non-approval is observed in any product, only the exchange introducing such product/contract should be held responsible and brokers cannot be held responsible for trading in such product/contract.

34. In this regard, as discussed above, the noticee has admittedly traded in '*paired contracts*' or 'non-E-series' contracts on behalf of its clients. The noticee, as a commodity derivatives broker, represented the face of NSEL to the investors. The execution of the trades in '*paired contracts*' by the noticee shows the involvement of the noticee in the said scheme perpetrated by NSEL to provide its platform for trading in '*paired contracts*' that were not permitted under the

2007 Exemption Notification and were purely financial contracts promising assured returns and were advertised as such by NSEL, as observed by the Hon'ble Apex Court, under the garb of spot trading in commodities. The noticee, by providing a platform for taking exposure to '*paired contracts*' 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 NSEL platform have serious ingredients jeopardizing the reputation, belief in competence, fairness, honesty, integrity and character of the Noticee in the Securities Market.

35. The noticee has contended that it traded in '*paired contracts*' at the behest of its clients and it cannot be said to be closely associated with NSEL as the contracts were already available for two years before the Noticee took membership of NSEL. Further, no proprietary trade has been done by the Noticee in these contracts and no investor complaints are pending against the Noticee. In this regard, I note that the scope of the instant proceeding is not to analyze the actual impact and consequences of the conduct of the noticee but to examine as to whether or not, the noticee has acted in a manner expected of a market intermediary and the answer to the same is clearly against the noticee. As regards its submission that it was not closely associated with NSEL and the '*paired contracts*' were introduced by NSEL, it cannot be denied that the involvement of the noticee in facilitation of trading in '*paired contracts*' on the NSEL is certainly a conduct which was neither permitted by the 2007 Exemption Notification nor by any of the applicable provisions of the FCRA and therefore, a conduct similar to that displayed by the noticee in its trading on the NSEL platform would be detrimental to the interest of the Securities Market. I also note that the present proceedings are not based on Noticee's relationship with NSEL as a trading member. Factors such as pendency of FIR, noticee

having traded/ facilitated trading in paired contracts (which were found to be in violation of the 2007 Exemption Notification by the Hon'ble Supreme Court), and other material have been taken into account in the present proceedings. In view of the above, the Noticee's contentions in this regard are rejected.

36. Noticee has contended that it was in compliance with all the criteria to be 'fit and proper' as per the then existing schedule II of the Intermediaries Regulations. It fulfills all the criteria of financial soundness, fitness and probity as provided under the then existing Intermediaries regulations. Noticee has further argued that any change of amendment to the definition of 'fit and proper person criteria' shall be effective from the date of amendment and the amendment made in 2021 cannot be applied to show cause notice which was issued in 2018 for events prior to it.

37. In this context, as noted above, the Noticee is holding a Certificate of Registration granted by SEBI. In order to continue to hold such Certificate of Registration from SEBI, the Noticee is also required to satisfy the conditions of eligibility, which *inter alia* included, continuance of its status as a 'fit and proper person'. The above condition to be a fit and proper person is not a onetime condition applicable only at the time of seeking registration. Rather, the provisions governing the criteria show that this is a condition which each and every registered intermediary is required to fulfil on a continuous basis as long as the entity remains associated with the Securities Market as a registered intermediary.

38. Therefore, the criteria of '*fit and proper person'*, is an ongoing requirement throughout the period during which the Noticee remains operational in the Securities Market as a registered intermediary. In case, pursuant to the grant of registration by SEBI, any evidence comes to the notice of SEBI that casts a doubt on the integrity, reputation and character of the registered intermediary, SEBI is well within the powers to examine the '*fit and proper*' status of such

entity based on various parameters. Therefore, even if the Noticee was found to have fulfilled the '*fit and proper person*' criteria while granting the Certificate of Registration, in 2016, such an intermediary can still be assessed on being *fit and proper* at a later date. 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, *inter alia*, includes the following:

(3) For the purpose of determining as to whether any person is a 'fit and proper person', the Board may take into account any criteria as it deems fit, including but not limited to the following:

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

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

39. Thus, the Noticee has 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 based on the same. In this regard it is pertinent to note that the said FIR 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.

40. In view of the above observations and the finding that the Noticee had facilitated the trading in these *'paired contracts'* on NSEL, I hold that by virtue of the Noticee*'s* role in facilitating the trading in *'paired contracts'* on NSEL platform during the relevant period as a Trading Member/Clearing Member, the

Noticee has violated the conditions of the 2007 Exemption Notification and also the provisions of the FCRA. Further, as noted above, the Noticee has also attracted disqualifications under point 3(b)(i) of Schedule II and the act of Noticee in offering access to *'paired contracts'*, as detailed above, also seriously calls into question the integrity, honesty and lack of ethical behavior on its part. These contracts, as stated earlier, were *ex facie* offered in violation of the 2007 Exemption Notification issued by MCA and different from the spot contracts in commodities which were permitted to be traded on NSEL. The *'paired contracts'* were nothing but financing transactions which were portrayed as spot contracts in commodities. Therefore, giving go-by to the terms of the 2007 Exemption Notification and attempting to camouflage the nature of the transactions brings into question, the appropriateness and suitability of the continuance of the registration of the Noticee, as a broker. I note that the Noticee has also submitted letters from its 11 clients *inter alia* stating that they had approached the Noticee for trading in paired contracts on the basis of their own information and invested their own money for margin requirement. In this regard, I am of the view that any argument on the lines that the clients demanded such access to the '*paired contracts'* as contended by the Noticee also does not lessen the diligence required to be performed by any reasonable or prudent person including the *Noticee*, which cannot rely upon such client requests. Clearly, the actions of the *Noticee* have been detrimental to the interest of the Securities Market and accordingly the Noticee can no longer be called a '*fit and proper person*' for holding the Certificate of Registration as a broker in the Securities Market, which is one of the conditions for continuance of registration as specified in regulation 5(e) of the Stock Brokers Regulations read with the provisions of Schedule II of the Intermediaries Regulations.

41. In the context of Securities Market, I note that the role of a registered intermediary including a broker is not only sensitive and predominantly fiduciary in nature but also demands from it honesty, transparency, fairness

and integrity which are essentially the hallmarks of such market intermediaries. Given the fact that one of the avowed objects of the SEBI Act is the protection of interests of investors apart from promotion and development of the Securities Market, the legislature through enactment, empowers SEBI to grant registration to several class of entities including brokers, which are not only required to act as an intermediary *simplicitor* i.e., a bridge or a connector between the markets and investors, but also 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.

42. It is a trite law that when provisions of law prescribe certain acts to be done in a particular manner, the same is required to be honored in letter and spirit. Law does not provide any exception to anyone to perform such acts as per his whims and fancies that is not permissible under an extant legal framework. Therefore, if an exemption is granted in respect of all forward contracts of one-day duration for the sale and purchase of commodities traded on NSEL from operations of the provisions of the FCRA subject to compliance with certain conditions then it is obligatory on the part of a market intermediary to execute forward contracts of one-day duration only, subject to strict compliance with the said conditions.

43. Noticee has contended that none of the parameters used by EOW indicating the involvement of brokers in NSEL case are applicable on it. It is contended that it has made an investment of ₹14.5 lakhs for getting membership of NSEL and earned brokerage to the tune of ₹84, 354 in three years which was not even sufficient to cover the running expenses of the Noticee. It is also

contended that it has not financed any of its clients to suggest that it enriched itself through these trades at the behest of its clients and got additional revenue. Further, it is submitted that total turnover of the Noticee in these paired contracts was only ₹ 94,87,980 which is not even 1,34,000th part of the turnover in these contracts in NSEL. Thus, as argued, the Noticee cannot be said to be motivated to do more turnover to get sharing in transaction charges or in warehouse charges or have benefitted from or compensated by the sellers or defaulters. The Noticee has also highlighted the trading behavior of its clients to demonstrate that it had not promoted the trading in paired contracts in the NSEL.

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

45. Having examined and dealt with all the contentions raised by the Noticee in the preceding paragraphs, I concur with the recommendation made by the DA. At this juncture, I also note that necessity of specifying a period of time as stipulated by the SAT Order, after which the applicant may become eligible to seek registration does not arise in this order (unlike in the case of entities whose application seeking registration as an intermediary is pending)

while dealing with an entity holding a certificate of registration which is recommended to be cancelled, as this forum cannot presume whether such entity would wish 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 applicable provisions.

ORDER

46. In view of the foregoing discussions and deliberations, in exercise of powers conferred upon me under Section 12 (3) and Section 19 of the SEBI Act, 1992 read with regulation 27 of the SEBI (Intermediaries) Regulations and upon considering the gravity of the violations committed by the Noticee i.e. NDA Commodity Brokers Private Limited, its Certificate of Registration (bearing No. INZ000035638), is hereby cancelled.

47. The Noticee shall, after receipt of this order, immediately inform its existing clients, if any, about the aforesaid direction in paragraph 46 above.

48. Notwithstanding the direction at paragraph 46 above, the Noticee shall allow its existing clients, if any, to withdraw or transfer their securities or funds held in its custody, within 15 days from the date of this order. In case of failure of any clients to withdraw or transfer their securities or funds within the said 15 days, the Noticee shall transfer the funds and securities of such clients to another broker within a period of next 15 days therefrom, under advise to the said clients.

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

50. It is clarified that in view of the amendment made *w.e.f.* January 21, 2021 in the Intermediaries Regulations, 2008, powers that were exercised under regulation 28 of the Intermediaries Regulations, 2008 are now being exercised under regulation 27 of the Intermediaries Regulations, 2008. It is also noted that the above Order is without prejudice to the criminal complaint filed by SEBI

in NSEL matter and/or any proceedings pending before any authority in respect of similar matter concerning the Noticee or other relevant persons.

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

Sd/-

DATE: JULY 26, 2023 **V. S. SUNDARESAN**

PLACE: MUMBAI **EXECUTIVE DIRECTOR**

SECURITIES AND EXCHANGE BOARD OF INDIA