

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

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

In respect of:

Pace Commodity Brokers Pvt. Ltd.

SEBI Registration No: INZ000037932

In the matter of National Spot Exchange Limited (NSEL)

A. BACKGROUND

1. Pace Commodity Brokers Pvt. Ltd. ("**Pace**" / "**Noticee**") is registered with Securities and Exchange Board of India ("**SEBI**") as a stock broker bearing SEBI registration no. INZ000037932. The Noticee was earlier a member of National Spot Exchange Limited ("**NSEL**").
2. The present proceedings originate from the enquiry report dated June 27, 2019 ("**DA Report**"), submitted by the Designated Authority ("**DA**") in terms of regulation 27 of the SEBI (Intermediaries) Regulations, 2008 ("**Intermediaries Regulations**") as it stood at the relevant point of time prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, *w.e.f.* January 21, 2021. The DA, based on findings recorded in the said DA Report, recommended that the registration of the Noticee as a broker may be cancelled.

B. SHOW CAUSE NOTICE, REPLY AND HEARING

3. Pursuant to the DA Report, a post enquiry show cause notice dated July 16, 2019 and September 20, 2019 (“**SCN**”) was issued to the Noticee, alongwith copies of (i) the aforesaid DA Report; (ii) Finance Ministry letter dated December 30, 2014 to Forwards Market Commission (“**FMC**”); (iii) Hon’ble Bombay HC’s order in criminal bail application no. 1263 of 2014 in Jignesh Prakash Shah vs. State of Maharashtra dated August 22, 2014.
4. While the aforesaid proceedings were pending, SEBI passed five separate orders rejecting the applications filed by five other entities for registration as commodity brokers in NSEL matter during February, 2019. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon’ble Securities Appellate Tribunal (“**Hon’ble SAT**”). The Hon’ble SAT *vide* its common order in the matter of Geofin Comtrade Ltd. And Ors. vs. SEBI (Appeal no. 214 of 2019) dated June 09, 2022 (“**June 2022 SAT Order**”), remanded the aforesaid SEBI orders to decide these matters afresh within six months from the date of the said order. While remanding the aforesaid SEBI orders, the Hon’ble SAT *inter alia* held as under:

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

5. In light of the June 2022 SAT Order, it was felt necessary to furnish certain additional documents/material to the Noticee and grant an opportunity of personal hearing, before concluding the present proceedings. Accordingly, a supplementary SCN dated February 27, 2023 (“**SSCN**”) was served on the Noticee along with the following documents:

- (i) Copy of SEBI complaint dated September 24, 2018 filed with Economic Offences Wing (“**EoW**”);
- (ii) Copy of FIR dated September 28, 2018 filed by SEBI under section 154 of Criminal Procedure Code, 1973 (“**CrPC**”); and
- (iii) Amended Schedule II of Intermediaries Regulations.

6. *Vide* letters dated June 25, 2022, November 28, 2023 and December 05, 2023, the Noticee submitted its reply on merits. The replies are summarized below:

6.1 SUBMISSION 1: THERE HAS BEEN AN INORDINATE DELAY IN THE INITIATION OF PROCEEDINGS BY SEBI

- (i) Present SCN is issued after a gap of more than 10 years for the alleged paired trades executed in the year 2009.
- (ii) Reliance is placed on order passed by Hon’ble SAT in the matter of Ashok Shivalal Rupani & Anr. vs. SEBI dated August 22, 2019.

6.2 SUBMISSION 2: SEBI DOES NOT HAVE JURISDICTION FOR COMMENCEMENT OF PROCEEDINGS

- (i) All the commodities derivative brokers were required to obtain a "Unique Member Code" from the FMC which was carrying out regular inspections of the said brokers. Therefore, the insinuation that the commodities derivative brokers were not regulated by the FMC is factually incorrect. In view thereof,

at the relevant time, SEBI was not the regulator of the NSEL. Therefore, SEBI ought not to initiate any action under regulation 23 of the Intermediaries Regulations.

- (ii) On November 20, 2015, the Ministry of Finance directed SEBI not to exercise any "regulatory function" in respect of NSEL. On February 11, 2016, review meeting of special teams of secretaries which was set up by the GoI to examine violation of NSEL, decided that SEBI should take action against defaulting brokers. On April 29, 2016, the Hon'ble Finance Minister informed the Lok Sabha that directions had been given to SEBI to examine and take action against defaulting brokers. Noticee is not a defaulter. SEBI has not taken any action against the defaulting brokers and proceedings are relentlessly being pursued against non-defaulting brokers. No action has also been taken against insurance companies, auditors, banks etc.

6.3 SUBMISSION 3: ALL RELEVANT MATERIAL HAS NOT BEEN PROVIDED

- (i) *Vide* its preliminary submissions, Noticee had *inter alia* requested for the inspection of relevant details/ data and documents that is vital to the present proceedings. However, no response was received for the same. In absence of relevant, vital and material information and documents, Noticee is not in a position to present facts of the case in detail/comprehensive manner.
- (ii) On perusal of orders passed dated August 30, 2018, June 06, 2018 and September 03, 2018 in respect of Anand Rathi Commodities Limited, Geofin Comtrade Limited, India Infoline Commodities Limited, Motilal Oswal Commodities Broker Private Ltd., and Philip Commodities India Pvt. Ltd., it is observed that proper response was furnished on each point raised and large numbers of documents were provided to them. Hence, it is requested that similar approach may be adopted in the present case.

6.4 SUBMISSION 4: HEARING OPPORTUNITY WAS NOT PROVIDED BY THE DA

- (i) There was no exemption / prohibition for grant of personal hearing by the DA under the Intermediaries Regulations. Hon'ble SC has consistently held that principles of natural justice must be applied in the unoccupied interstices of the statute unless there is a clear mandate to the contrary. Thus, Noticee ought to have been granted an opportunity of personal hearing before issuing DA, more particularly when such harsh, extreme and excessive recommendations are made. The hearing held before WTM is in the nature of a post decisional hearing, which admittedly can never cure the lacuna of not granting personal hearing by the DA.
- (ii) *Vide* amendment w. e. f. January 21, 2021, under regulation 25 (6) of the Intermediaries Regulations, it is provided that "*The designated authority shall grant an opportunity of personal hearing and issue or cause to issue a notice scheduling a date for hearing the noticee*".
- (iii) Reliance is placed on the following decisions:
 - (a) Painter v. Liverpool Oil Gas Light Co. [(1836) 3 A & E 433]
 - (b) A.R. Antulay v. R.S. Nayak, [(1988) 2SCC 602]
 - (c) Canara Bank and Ors vs. Shri Debasis Das and Ors [Appeal (Civil) 7539 of 1999]

6.5 SUBMISSION 5: MATTER SHOULD BE REMITTED TO THE DA IN TERMS OF REGULATION 27(3) OF THE INTERMEDIARIES REGULATIONS

- (i) Apart from the SCNs, the Competent Authority is also considering the SSCN through which SEBI complaint letter dated September 24, 2018, FIR dated September 28, 2018 and amended Schedule II of the Intermediaries Regulations was issued to the Noticee. In view of the additional documents relied upon by the Competent Authority and for fair dispensation of justice, it

is requested that the matter be remitted to the DA in terms of regulation 27(3) of the Intermediaries Regulations.

6.6 SUBMISSION 6: ANOMALIES IN THE DA REPORT

- (i) Noticee's trading membership was approved on May 28, 2010 and it was allotted trading member ID 12800. The DA has erroneously considered facts of the case by mentioning that Noticee executed trades from September, 2009 to August, 2013. On this ground alone, the DA Report deserves to be dismissed at the threshold itself.
- (ii) The findings of the DA Report are based on observations of the Hon'ble SC and Hon'ble Bombay HC pertaining to cases of 63 Moons Technologies Ltd. vs. UOI and Jignesh Shah vs. State of Maharashtra. Noticee was not party to the said cases and it is unfair to selectively quote from the said judgements to make any adverse observations against the Noticee. No order or judgment of any court/ authority/ regulator has concluded that Noticee was at all "associated" to the NSEL or that the observations of the said courts/ authorities were "factually relatable" to or "bind" Noticee or that Noticee could be held to be "facilitator" or that its reputation had been tarnished in any manner. Further, In the June 2022 Order, Hon'ble SAT has held that the various orders / judgments / letter / reports relied upon in the DA Report cannot be considered.
- (iii) Reliance has been placed by the DA on the order dated December 04, 2017 passed by Hon'ble Bombay HC in the matter of 63 Moons Technologies Limited & Ors. vs. The Union of India & Ors., however, the said order was quashed by the order dated April 30, 2019 passed by the Hon'ble SC. Hence no reliance ought to be placed on the said order.
- (iv) Reliance has been placed on the interim report dated April 04, 2015 of EoW by the DA. However, the said report has no relevance to Noticee's case and

therefore ought not to be referred to. The observations of other agencies such as EoW and Hon'ble Bombay HC quoted in the DA Report did not have any adverse observations against the Noticee. Noticee is not a defaulting member on NSEL. Similarly, letter dated December 30, 2014 issued by DEA, Ministry of Finance does not make any allegations against the Noticee and does not even advice or suggest that any action ought to be initiated against Noticee or any broker.

- (v) FMC order dated December 17, 2013 does not refer to Noticee's name or trades executed by the Noticee on behalf of the clients. It does not contain any adverse observations or findings. Further, the said FMC order has been challenged by way of Writ Petition Nos. 337, 363 and 370 of 2014 which are pending before the Hon'ble Bombay HC, and therefore the findings are *sub judice*. FMC order records that market participants were kept in dark regarding the unpermitted financing scheme being run on NSEL. This shows that Noticee was not aware and had no association with NSEL.
- (vi) With respect to order in the case of Jermyn Capital LLC vs. SEBI, facts of that case are different and distinguishable from the facts of the present matter and that certain critical interpretations of the law as stated in the said judgment supports Noticee's case. It was correctly held that the elapse of a period of 2 years after such disassociation, the concerned party would be considered to be fit and proper. In the present case, the alleged "association" with the NSEL as a broker of NSEL, ceased to exist since 2013, since the NSEL has been fully shut down for all trading since the year 2013. Therefore, by the same ratio adopted by SEBI in the said case of Jermyn Capital LLC, the proceedings continuing against the Noticee as to whether Noticee is a "fit and proper" person be quashed and set aside.
- (vii) In the DA Report, the criteria for determining a "fit and proper person" as defined under Schedule II of the SEBI Intermediaries Regulations is

reproduced. The same stipulates "*absence of convictions and restraint orders*". Yet the SCNs / DA Report purports to hold that since various Hon'ble courts and authorities have made serious adverse observations against NSEL and alleged paired contracts, and even though the same are only *prima facie* and are yet to be established and since Noticee was associated with the NSEL as a broker of the NSEL, it is not a fit and proper person despite the fact that there is no conviction or restraint order whatsoever against the Noticee.

6.7 SUBMISSION 7: NOTICEE HAD EXERCISED NECESSARY DUE DILIGENCE

- (i) Noticee had executed trades on NSEL platform when at the relevant time around 500 brokers were executing trades through thousands of terminals for lakhs of clients including government companies and organization. Prominent banks were providing clearing bank services for transaction executed on NSEL trading platform. NSEL had appointed globally renowned auditors as their statutory auditors. No adverse remark/ red flags/ allegations are raised against any of the aforesaid entities who were also purported to be closely associated with NSEL and alleged paired contracts. Hence, Noticee's dealing in NSEL trading platform should be considered on similar lines. Further, the trading in alleged paired contracts amounted to about 99% of the total trading in the NSEL as held in the order dated December 04, 2017 of the Hon'ble Bombay HC in Writ Petition No. 2743 of 2014.
- (ii) On August 05, 2011, FMC was appointed as the Designated Agency for NSEL. From September 13, 2011, FMC had issued direction to NSEL to submit fortnightly reports in respect of trading conducted on NSEL platforms. Therefore, it is absurd to allege against the Noticee that it did not maintain requisite standards of reputation, fairness, honesty, integrity and character while executing trades on NSEL platform. There was gross failure of FMC in performing its duties as an apex regulator of commodities market.

- (iii) Noticee has fulfilled all its obligation on buy and sell contracts independently. For all buy and sell contracts, levy of VAT as applicable, warehousing charges and octroi as applicable etc. were recovered and paid by Noticee on each such contract. Thus, no adverse inference of any nature on post trade activities ought to be drawn against the Noticee.
- (iv) Till the passing of the FMC order dated December 17, 2013 by FMC, Noticee had no reason to suspect that the alleged paired contracts were in contravention of provisions of FCRA and the notification issued by Central Government dated June 05, 2007 ("**2007 Exemption Notification**"). Pursuant to passing of the aforesaid order, neither FMC nor any other regulatory authority raised any objection/ warning/ caution that the alleged paired contracts were in contravention to the provisions of FCRA and 2007 Exemption Notification and consequently in violation of SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 ("**Stock Brokers Regulations**") read with Intermediaries Regulations. Thus, it could be reasonably concluded that such alleged paired contracts were in the knowledge of the authorities from the inception of the concept of paired contracts and thus deemed to have been legal, permissible and enforceable since the same was deemed to have fallen within the provision of FCRA and the 2007 Exemption Notification. The allegations of violation of the FCRA can only be made against the NSEL and not against Noticee.
- (v) The reputation of the NSEL got tarnished only post the settlement default that occurred on July 31, 2013. Though there were no official communication from NSEL / FMC / DCA as to the potential risk or violation of any regulatory framework, based on some adverse media reports on print and electronic media about the structure of the product, Noticee had persuaded its clients to discontinue their trades in the alleged paired contracts. Thus, upon slightest hints about possible violations appearing in media, it had promptly taken

cognizance of the potential risk and persuaded its clients to exit from the product.

(vi) Bye law 4.1 of NSEL stipulates that NSEL was under obligation to take permission from FMC for all contracts. Point 5.26 read with bye-law 9.6 of the NSEL bye-laws *inter alia* stipulates that the exchange would act as the legal counter party for transactions as it may specify and that it would also specify transactions for which it would not be the legal counter party. The said bye-law 5.26 also stipulates that if the relevant authority of the exchange concludes that there were "financial transactions", then it would have the authority and discretion to withdraw the exchange as the legal counter party to such transactions. Therefore, all the clients were aware that NSEL itself was substituted as legal counter party to their trades. Further, as per the bye laws and circulars of NSEL, all commodities had to be insured. NSEL had huge insurance policies of about Rs. 4,000 crores. Even the insurance companies would have checked the goods before issuing such large policies. There was no allegation or finding that the goods covered by any of Noticee's contracts were missing. No auction claim was ever made against the Noticee. In NSE and BSE simultaneous transactions are taken in cash and futures segments, hence there was no reason to suspect any red flag in case of alleged paired contracts. Noticee did not lend any money and trades were backed by payment and delivery. The trading platform was anonymous and Noticee was not aware of the counterparty. There was no predetermination of profit between Noticee and the counterparty. Mere perceived violation or non-compliance or deviations from terms / conditions / specifications in a commercial contract and that too after several years from settlement of contractual obligations by all the parties to it, cannot be termed as 'illegal' per se.

(vii) The misconception appears to be that a party has to go to the warehouse, remove the goods and take actual physical possession of the commodity

before he can be permitted to sell the same on the exchange platform. However, NSEL was an exchange and not a "Mandi" or a shop. Goods were dematerialized by depositing them in the NSEL accredited warehouses and were then represented by documents. All settlements and delivery were by way of handing over documents to the buyer. Delivery allocation report was provided by NSEL on regular basis for the contracts executed at NSEL. The buyer could take actual physical delivery or sell the goods and deliver the documents. Thus, the same could not amount to a "short sale" by any stretch of imagination.

- (viii) FMC in its order dated December 17, 2013 has held that market participants like the Noticee were not aware of the fraud undertaken by NSEL and its management. By a GOI Notification dated September 19, 2014, the exemption given to the NSEL was withdrawn. The same did not allege that there was violation of any of the exemption conditions, or that the exemption had automatically lapsed. In fact, by the said notification, the exemption was withdrawn "on the basis of the experience gained" and not because of violation of any of the conditions of exemption.
- (ix) "Calendar spreads" are openly and transparently available and regularly executed by parties in equity and commodities derivatives markets. Such trades are executed on the same exchange, same segment and same market and yet treated as legal by SEBI. Even NCDEX spot exchange (which was also given similar exemption by a Gazette notification) offered contracts with settlement periods exceeding 11 days, however, no action has been taken against it.
- (x) It is not the duty of each broker to independently investigate and assess the legality of the contracts launched. Once the concerned authorities permit the setting up of an exchange and permit open trading, everyone is entitled to assume that such contracts are valid and lawful. For example, no broker can

question the BSE or NSE or MCX or NCDEX as to how or why it lists shares or permits trading in F&O contracts. All brokers assume contracts are legitimately admitted to trading.

6.8 SUBMISSION 8: NOTICEE HAS NO RELATION WITH NSEL EXCEPT AS BROKER / MEMBER

- (i) The SCNs / DA Report has purported to conclude that merely “*..by virtue of being a broker...*” the Noticee had “facilitated” transactions on the NSEL platform and that the same proves that the Noticee had a “close association” with NSEL. *Ex facie* the said finding is absurd and totally belied by the facts and the law.
- (ii) The observation of being connected with NSEL is made ignoring its association with large number of entities with whom it is associated as broker or distributors.
- (iii) The definition of the term “associate” under the Intermediaries Regulations does not apply to the Noticee. Further, even in terms of the definition of the term “associate company” under the Companies Act, 2013, Noticee cannot be termed as an “associate” of the NSEL. Noticee had no direct or indirect relations, contact or association with any defaulting brokers/ clients or any entities involved in the NSEL matter and mere membership of a government recognized exchange and doing some transactions therein cannot be stretched to establish a ‘close association’ with the entity responsible for the alleged violation. Noticee was not on any committee or advisory board of NSEL.

6.9 SUBMISSION 9: RULE OF ESTOPPEL APPLIES

- (i) The extant proceedings are based on the events that occurred in the year 2012-2013 and same would have already been considered by SEBI while granting registration to Noticee on March 28, 2016, therefore the principles of *res judicata* and estoppel would apply.
- (ii) The registration granted by SEBI to Noticee was unconditional and therefore issuance of SCNs tantamount to a review of the earlier decision of granting the registration. SCNs are silent on whether the allegations in the SCNs were known to SEBI at the time of granting registration.

6.10 SUBMISSION 10: NOTICEE'S TURNOVER FROM PAIRED CONTRACTS WAS MINISCULE

- (i) During the relevant period, Noticee's turnover in alleged paired contracts was minuscule in comparison to total turnover in other commodity exchanges. The same was 0.56% in the FY 2010 - 2011, 0.43% in the FY 2011 - 2012, 1.8% in the FY 2012 - 2013 and 4% in the FY 2013 – 2014.
- (ii) Noticee had around 79 clients registered with Noticee in NSEL for carrying out share trading and commodity trading activities at the relevant time (FY 2012-2013) out of which only 49 clients have traded in NSEL in physical contracts including the alleged paired contracts. At the relevant time, Noticee had around 6840 clients registered in MCX.
- (iii) Out of the total clients that traded on NSEL during the relevant period, in the case of 9 clients as on April 27, 2019, an amount totaling to Rs 9.82 crores was receivable from NSEL. These clients have provided an affidavit in respect of the trades carried out by them on the platform of NSEL. Sample affidavits in respect of 7 clients have been attached.

6.11 SUBMISSION 11: NOTICEE IS A FIT AND PROPER PERSON UNDER THE INTERMEDIARIES REGULATIONS

- (i) Noticee is part of the PACE Group which has over 26 years of experience, offices at more than 300 locations in more than 75 cities across India and its customer base is spread over 34 countries. The companies in the group are members of NSE, and BSE in cash, F&O and currency derivative segment. They are also members of MCX and NCDEX. Nationally, PACE is one of the major players in algorithmic trading and commodity arbitrage. It has acquired trading membership of NCDEX, MCX and NSEL. The aforesaid facts by itself speak volume about its well-maintained standards of reputation, fairness, honestly, integrity and character.
- (ii) Definition of “fit and proper person” has very wide amplitude under the Intermediaries Regulations, and SEBI has “wide discretion” in the matter. While SEBI may have substantial discretion, the discretion has to be exercised in accordance with well settled principles of law, and by no stretch of imagination, do the SCNs / DA Report comply with the same.
- (iii) Important criteria provided under Schedule II of Intermediaries Regulations are financial integrity, absence of convictions or civil liabilities, competence, good reputation and character, efficiency and honesty which have been consistently fulfilled by the Noticee throughout. The fact that Noticee was / is a non-defaulting broker is obviously most relevant to the assessment of the “fit and proper” criteria. The fact that Noticee had complied with all trade obligations and had not defaulted on the same could not be simply brushed aside as being irrelevant.
- (iv) NSEL was initially promoted by MCX (a regulated exchange). At the relevant time, MCX and NSEL had common directors and common shareholding. Consequently, MCX was obviously closely associated with the NSEL. No

- proceedings have commenced against MCX, and no orders have been passed holding that MCX is not "fit & proper" person/ entity. Importantly, MCX is even now being permitted by the SEBI to run a national level exchange in the country.
- (v) The parameters to determine fit and proper person status as set out in paragraph 5 of the DA Report are *ex facie* untenable and unsustainable. The same insinuates that a party can be held to be not fit and proper and can be refused to continue to act as a broker and carry on business despite the constitutionally guaranteed right to carry-on trade and business, merely on the specious ground that in the subjective opinion of the SEBI, such party was at some time in the past "associated" with some other party who did not have a good reputation on a *prima facie* basis. Such an interpretation would amount to a totally unfettered power to act indiscriminately, arbitrarily and capriciously.
 - (vi) Whenever SEBI has traced certain wrongdoings taking place in the functioning of recognized exchanges, in those cases, no harsh and fatal directions have been issued against the brokers. For example, in co-location matter, large brokers have been imposed penalty in the range of Rs. 2 lakhs to Rs. 10 lakhs. The punishment imposed by SEBI in similar cases range from just a warning or token punishment for a day to the imposition of a fine. Further, in certain cases where there are repeated offences, registration has been denied. In most of the cases, in spite of the restraint order passed against a person, that person has not been held to be not a "fit and proper person".
 - (vii) Paragraph 3(b)(i) in Schedule II of Intermediaries Regulations *inter alia* stating that a person would be disqualified if a criminal complaint or information u/ s 154 of the CrPC has been filed against such person by SEBI and which is pending was inserted pursuant to SEBI (Intermediaries) (Third Amendment) Regulations, 2021 w.e.f November 17, 2021. Prior to the said amendment,

there was no reference to a criminal complaint. The FIR was registered with MIDC Police Station, Mumbai on September 28, 2018 *i.e.*, prior to the amendment in the said regulation *i.e.*, w.e.f. November 17, 2021. Therefore, the said regulation is not applicable to the Noticee as the cause of action pertains to the year 2010-2013, the enquiry SCN was issued in 2018, FIR was filed in 2018, the present SCNs have been issued in 2019, however, the amendment was carried out in the year 2021 which is after the initiation of present proceedings. The above amounts to retrospective application of the Intermediaries Regulations which is in violation of the principles of natural justice. A delegated legislation cannot be retrospective unless the parent statute contains a power for the same. SEBI cannot keep changing the allegations. Merely because the “fit and proper person” criteria are continuing, SEBI cannot keep reopening the past events and apply new standards to historic events.

- (viii) Weightage given to FIR for determining “fit and proper person” status is in gross violation of law. FIR is a first instance and preliminary document based on one-sided statement of complainant without adjudication of the same. The FIR is against 300 members of NSEL who had participated in trading in the alleged paired contracts. It is illogical to contend that anyone who dealt in the alleged paired contracts as a member of NSEL is not a “fit and proper person”. SEBI cannot rely on its own complaint dated September 24, 2018 pursuant to which FIR dated September 28, 2018 was filed as evidence as the allegations in the FIR are made by SEBI itself. EoW has completed the investigation and total 11 charge sheets have been filed in the matter. However, no charge sheet has been filed against the Noticee. Therefore, no cognizance of FIR ought to be made against the Noticee.
- (ix) A writ petition has been filed in the Hon’ble Bombay HC in the matter of Venkataraman Rajamani vs. SEBI (Writ petition no. 17978 of 2023) and other connected matters. In the said petition, few points in respect of legality of

amended Intermediaries Regulations are also challenged. An order was passed by the Court in the said matter dated July 06, 2023. Hence, the amendment to Intermediaries Regulations is *sub judice*.

- (x) Amendments to Intermediaries Regulations were made without public consultation and without considering its impact on the industry. This is evident from the decision minutes of the SEBI board meeting that took place on September 28, 2021.
- (xi) The amended Intermediaries Regulations are punitive in nature and impinge upon fundamental rights enshrined in the Constitution of India and the basic principle of Indian criminal jurisprudence that an accused is presumed to be innocent until proven guilty. Merely since a complaint has been filed / FIR has been lodged cannot indicate that a person is not a “fit and proper person”. There should be conclusive / valid conviction and not merely allegations.
- (xii) Since Chapter II of Intermediaries Regulations which contains the details of consideration of application and the applicability of “fit and proper” person is not notified, applicability of “fit and proper” person criteria against the Noticee is untenable.
- (xiii) Reliance is placed on the following decisions:
 - (a) Almonds Global Securities Ltd. vs. SEBI (Appeal no. 222 of 2015), passed by Hon’ble SAT dated May 13, 2016;
 - (b) Geeta Lunch Home vs. State of Maharashtra & Ors., passed by Hon’ble Bombay HC dated October 18, 2022.
 - (c) Joindre Commodities Pvt Ltd. vs. SEBI, order passed by Hon’ble SAT dated October 28, 2021.
 - (d) M/ s B. N. Rathie Comtrade Pvt. Ltd. (Appeal No. 282 of 2023), order dated March 24, 2023.

6.12 SUBMISSION 12: PRINCIPLE OF PROPORTIONALITY HAS BEEN IGNORED IN THE PRESENT CASE

- (i) The recommendation of the DA is arbitrary, harsh, inappropriate and without hearing the Noticee is not sustainable on facts and in law.
- (ii) The present approach leads to the miscarriage of justice. The doctrine of proportionality and Wednesbury rule has been consistently applied to ensure that relevant vital and material facts have been taken into consideration and that irrelevant matters are not taken into account. The punishment of being declared unfit is the ultimate punishment that can be imposed upon an intermediary. Reliance is placed on the order dated August 24, 2009 passed by the Hon'ble SC in the matter of Chairman-Cum-Managing Director, Coal India Limited and Anr vs. Mukul Kumar Choudhuri and Others (Civil appeal nos. 5762-63 of 2009).
- (iii) It is a settled law that the punishment should not only be reasonable but must fit the violation for which the entity is sought to be penalized. Reliance is placed on judgments of E.P. Royappa vs. Tamil Nadu [1974(4) SCC 3] and Teri Oat Estates (P. Ltd.) [2004 (2) SCC 130].

6.13 SUBMISSION 13: THE FINDING THAT THERE WAS VIOLATION OF 2007 EXEMPTION NOTIFICATION IS SUB JUDICE BEFORE HON'BLE BOMBAY HC

- (i) NSEL has filed a petition before Hon'ble Bombay HC regarding the SCN issued by the DCA dated April 27, 2012 (Original Ordinary Civil Jurisdiction) (Writ Petition No. 2135 of 2021). *Vide* order dated October 04, 2021, Hon'ble Bombay HC has granted ad-interim relief basis the submissions made by NSEL that proceedings have become stale and that after long lapse of time SEBI is trying to revive the matter. Hence, any violation of 2007 Exemption Notification is itself *sub judice* before the Hon'ble Bombay HC.

6.14 OTHER SUBMISSIONS

- (i) Noticee has traded in alleged paired contracts in proprietary account and also on behalf of its clients. Noticee executed alleged contracts on behalf of the clients under their instructions. No advice presentation or inducement of any nature whatsoever was provided or extended to clients. No funding/financing were given to them. No clients have raised any grievance/complaint against the Noticee.
- (ii) Except earning meagre brokerage on execution of trades for few clients, Noticee has not derived any gain or benefit of any nature.
- (iii) Reliance is placed on the June 2022 Order, wherein the Hon'ble SAT has *inter alia* stated that the impugned order passed cannot be sustained and is quashed. The matter was remanded back to SEBI to decide the matter afresh in the lights of the observations made by the Hon'ble SAT in the said order. Since similar findings as per allegation of SCNs read with DA Report has been quashed by Hon'ble SAT, the SCN issued against the Noticee ought to be disposed of without issuing any directions.
- (iv) Hon'ble SAT has also passed interim order dated October 28, 2021 in the matter of Joindre Commodities Pvt Ltd. where cause of action is similar to the present case. In the said order, Hon'ble SAT has *inter alia* issued direction that effect and operation of the impugned order shall remain stayed during the pendency of the appeal.
- (v) Any adverse direction passed in respect of cancellation of certificate of registration will gravely hamper Noticee's business. As on November 27, 2023, the open position of its clients was approximately around Rs. 494 crores in MCX. Reliance is placed on the order dated October 20, 2023 passed by

SEBI w.r.t Kedia Capital Services Private Limited (*Formerly known as Kedia Commodity Comtrade Private Limited*).

7. Pursuant to the request of the Noticee, an inspection opportunity was granted to the Noticee which was conducted on March 16, 2020, by the authorized representatives (“**ARs**”) of the Noticee. Thereafter, a hearing opportunity was granted to the Noticee before another WTM of SEBI on November 16, 2021 and May 18, 2022, which was availed by it. After the case was allotted to the undersigned, another inspection opportunity was afforded to the Noticee on August 11, 2023. Another hearing opportunity was also granted to the Noticee which was availed by it on December 01, 2023. During the said hearing, the ARs reiterated the submissions made by the Noticee *vide* letters dated June 25, 2022 and November 28, 2023. I note that *vide* its latest submission dated December 05, 2023, Noticee has again requested for a hearing opportunity. In light of the two inspections conducted, the three hearings held and the three submissions filed (including one post hearing submission), I am of the view that principles of natural justice are appropriately satisfied in the present matter.

C. BRIEF HISTORY OF NSEL SCAM

8. Before moving forward to consider the matter on merits, the background facts necessary for the present proceedings are narrated in brief as under:
 - (i) NSEL was incorporated in May 2005 with the 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* the 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. The said notification *inter alia* stated that “*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". 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.

- (ii) 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 buying and selling 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.
- (iii) On February 06, 2012, the erstwhile FMC was appointed by DCA 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.
- (iv) DCA on April 27, 2012 directed NSEL to show cause as to why action should not be initiated against it for violation of the conditions mentioned in the 2007 Exemption Notification.
- (v) Subsequent to the above, NSEL filed a reply. Further, MCA sought comments of FMC on the said replies. MCA also sought certain information from NSEL pursuant to which *vide* its letter dated July 12, 2013, MCA directed NSEL to give an undertaking that:

- a. No further/fresh contracts shall be launched by NSEL until further instructions from the concerned authority; and
 - b. All the existing contracts will be settled on the due dates
- (vi) NSEL issued a circular on July 31, 2013 suspending its spot exchange operations.
- (vii) On August 27, 2013, FMC directed a forensic audit of NSEL by Grant Thornton LLP. Further, the Union of India ordered an inspection of accounts of NSEL and 63 Moons Technologies Ltd. (*earlier FTIL*) under section 209A of the Companies Act. The EoW also registered cases against the directors and key management personnel of the NSEL and 63 Moons (*earlier FTIL*) and against trading members and brokers of NSEL under the provisions of the Indian Penal Code and Maharashtra Protection of Interest of Depositors Act, 1999 ("**MPID Act**").
- (viii) After analyzing the trade data received from NSEL and the forensic audit report submitted by Grant Thornton LLP, the FMC passed Order dated December 17, 2013 in the matter ("**FMC Order**") wherein it *inter alia* observed that Financial Technologies (India) Ltd. is not a fit and proper person to continue to be a shareholder of 2% or more of the paid-up equity capital of MCX. Further, from paragraph 8 of the FMC Order, I note that the DCA *vide* its letter dated April 27, 2012 directed NSEL to explain as to why action should not be initiated against NSEL for violation of the conditions of the 2007 Exemption Notification. In response to the same, NSEL submitted a reply *vide* their letter dated May 29, 2012. DCA, *vide* its letter dated May 31, 2012, sought comments of FMC on the NSEL reply. The FMC, *vide* its letter dated August 02, 2012 to the DCA provided its comments on the two main issues, which are relevant for consideration of the matter at hand, as paraphrased hereunder:

- (a) Short sale by members of the exchange: NSEL did not insist upon ownership of goods before allowing its members to place the sale order. FMC was of the view that all the sale transactions which are not backed by the ownership of goods were in violation of the condition of “*no short sale by the members of the Exchange shall be allowed*” as stated in the 2007 Exemption Notification.
- (b) Contracts in which settlement period goes beyond 11 days: In view of the definition of “forward contract” under FCRA, FMC was of the view that all the contracts traded on NSEL which provide settlement schedule for a period exceeding 11 days are “non-transferable specific delivery contracts”. Thus, even if the 2007 Exemption Notification does not specify the delivery period, NSEL had to settle the delivery for all open positions within a period of 11 days as NSEL was allowed to only trade in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days.
- (ix) On September 19, 2014, Ministry of Finance, Government of India, issued a notification withdrawing the exemption granted to NSEL *vide* the 2007 Exemption Notification.
- (x) From the above, it is clear that NSEL had permitted contracts of various commodities having duration longer than 11 days and these contracts were in contravention of the exemption granted to NSEL. Subsequently, certain entities who were primarily borrowing on the NSEL platform through the modus of trading in the aforesaid “paired contracts” defaulted in fulfilling their payment obligations leading to a huge settlement default of outstanding contracts to the tune of Rs. 5600 Crores.

- (xi) EoW, Mumbai, vide letter dated April 04, 2015, had forwarded an interim report in connection with the investigation conducted by them to identify the role played by the broking houses in the NSEL case. The relevant extracts of the said interim report are as follows:

“IV. Objectives of this investigation into the brokers’ role: A scam of this magnitude would be difficult to continuously occur for 3 years without some of the large brokers’ gross negligence or perhaps active participation.

The actual role of the brokers was:

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

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

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

The higher the trading turnover, the higher revenues for the exchange and the brokers. Therefore, both wanted to increase turnover at the exchange. In light of the foregoing, the objective of EOW in investigating brokers was to inquire whether they had been involved in any wrongdoing connected with trading on NSEL, specifically, to determine whether they participated in

a) Any activities which were detrimental to the investors, NSEL, or third parties. To determine whether they had made false and misleading representations, offered inducement, financing and deliberately made wrongful assertions purely to get brokerage and facilitate NSEL in generating higher volumes.

b) Whether they had any illegitimate personal enrichment, or, there has been knowing dereliction in their duties as clearing and forwarding agents towards the commodities and protect the investors.

c) It was also deemed necessary to ensure that their activities were within the framework of law.

- (xii) Vide the Finance Act, 2015, FMC was merged with SEBI on September 28, 2015 in pursuance thereof SEBI was entrusted with the powers to regulate the trading in commodities futures market. As per the said act, an existing intermediary could continue to buy, sell or deal in commodity derivatives as a commodity broker, if it would make an application for its registration as an intermediary to SEBI within a period of 3 months from the date of merger till the disposal of such application by SEBI. Accordingly, the Noticee on the basis of an application so made by it, was granted SEBI registration number to operate as a stock broker in the securities market. In terms of the said act, FCRA was also repealed with effect from the aforesaid date.
- (xiii) On September 24, 2018, SEBI filed a complaint with EoW to initiate appropriate action against brokers/members of NSEL and other persons in the NSEL matter under sections 20, 21 and other appropriate provisions of the FCRA.
- (xiv) On September 28, 2018, SEBI gave a statement to the police which resulted into a FIR under section 154 of CrPC.
- (xv) It is also pertinent to refer to the judgment of the Hon'ble Supreme Court decided on April 30, 2019, passed in the matter of 63 Moons Technologies

Ltd. (formerly known as Financial Technologies India Ltd.) & Ors. vs. Union of India & Ors. (Civil Appeal No. 4476 of 2019) (2019)18 SCC 401 (“**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.....”

- (xvi) Further, in judgement dated April 22, 2022 passed by the Hon’ble Supreme Court in the matter of The State of Maharashtra vs. 63 Moons Technologies Ltd. (Civil Appeal No. 2748-49 of 2022), 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.”

- (xvii) In the background of the aforesaid discussion pertaining to “paired contracts” as captured in the preceding paragraphs, I now move on to examine whether the Noticee satisfies the “fit and proper person” criteria as laid down in Schedule II of the Intermediaries Regulations.

D. CONSIDERATION OF ISSUES AND FINDINGS

9. I have carefully perused the contents of the DA Report, the SCNs issued to the Noticee, the responses filed by the Noticee and the submissions made during the course of the personal hearing and other documents available on record as shared with the Noticee.
10. I find it appropriate to first deal with the preliminary contentions raised by the Noticee.
11. I have perused the order passed in the matter of Ashok Shivilal Rupani and Anr. (*supra*). On the submission of the Noticee that there has been inordinate delay of 10 years in initiation of proceedings by SEBI, I note that the NSEL scam unfolded in 2013 after which several agencies such as EoW, SFIO, *etc.* conducted investigations into the activities of NSEL. Further, FMC, Hon’ble Bombay HC and Hon’ble SC made important pronouncements relating to different facets of the matter such as whether merger of NSEL with FTIL should be permitted and whether NSEL can be considered as a “financial establishment” under the MPID Act. A large number of brokers had allegedly participated in the illegal contracts at NSEL platform. After the merger of FMC with SEBI on September 28, 2015, some of these brokers applied for registration with SEBI. Thereafter, assessing all the factual circumstances available before SEBI and considering the importance of fulfilling “fit and proper person” criteria by brokers, action was duly initiated against the set of brokers who executed the alleged trades. Thus, in absence of any prejudice caused to the Noticee, I find that the present proceedings do not stand vitiated. Further, I note that after issuance of DA SCN, June 2022 SAT Order was passed by Hon’ble SAT wherein the Hon’ble SAT *inter alia* observed that it will be open to SEBI to rely

upon other material provided such material is given to the Noticee and opportunity is given to rebut the allegations. Further, Hon'ble SAT also observed that it will be open for SEBI to issue supplementary show cause notice to provide such additional material/ documents. The SSCN issued pursuant to the June 2022 SAT Order takes into consideration additional material available on record and SEBI had furnished additional documents/ material to the Noticee in compliance with June 2022 SAT Order. The issuance of SSCN, delivery of SSCN, examining the reply to the SSCN and hearing conducted thereafter, were essential steps in ensuring that principles of natural justice are being met at the cost of prolonging the conclusion of present proceedings. Therefore, I find that the events detailed above necessitated an extended period for concluding the proceedings.

12. The Noticee has contended that at the relevant time, SEBI was not the regulator of NSEL and it should not initiate an action under regulation 23 of Intermediaries Regulations. In this regard, I note that pursuant to the merger of FMC with SEBI, the Noticee had applied for a certificate of registration as a commodity broker and it was granted a certificate of registration by SEBI. Therefore, the Noticee has become a SEBI registered intermediary from the said date. Being a SEBI regulated intermediary, SEBI has the jurisdiction to examine whether the activities of the Noticee in 'paired contracts' for its clients on the NSEL platform violates securities law (including provisions of FCRA) and affects its ability to be considered as a "fit and proper person" under the Intermediaries Regulations. The power of SEBI to investigate / inquire into the alleged violation of FCRA flows from the Finance Act, 2015, which amended the provisions of FCRA. I note that Section 29A(2)(e) of FCRA, as inserted by the Finance Act, 2015, reads as follows:

"29A. Repeal and savings

(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;”

13. I note that the aforesaid provision empowers SEBI to initiate a fresh proceeding with respect to the offences within a period of three years from the date on which FCRA is repealed. Thus, exercising its powers, SEBI has filed a complaint dated September 24, 2018 with EoW, seeking appropriate action under Sections 20 and 21 and other applicable provisions of FCRA against the brokers/members of NSEL, mentioned in the list attached thereto. Pursuant to the SEBI complaint, FIR No. Spl LAC No. 110/18 dated September 28, 2018 under section 154 of the CrPC at the MIDC Police Station, Mumbai was registered requesting it to take lawful action against the same trading members, which were listed in the SEBI complaint to EoW (Noticee's name is listed at serial no. 172). However, the aforesaid proceedings are different from the proceedings before me. The present proceedings pertain to adjudging the 'fit and proper person' status specified in the Stock Broker Regulations and the Intermediaries Regulations in light of the activities undertaken by the Noticee on the NSEL platform and consequent action taken by SEBI. The Noticee is obligated to maintain the "fit and proper person" criteria on a continuous basis and it is well within SEBI's jurisdiction and powers to adjudge the said fit and proper status of the market intermediaries in the interest of securities market. Therefore, I am of the considered view that the preliminary issue pertaining to jurisdiction of SEBI has no force and is accordingly rejected.
14. Further, the Noticee has submitted that it has not been provided with inspection of all relevant material. In this regard, I note that all the relevant documents pertaining to the instant proceedings have already been provided to the Noticee. I note that the Noticee was provided with the following documents in the present proceedings:
- (i) Copy of letter from DEA, Ministry of Finance dated December 30, 2014;
 - (ii) Copy of EoW report;
 - (iii) Copy of SIT email,
 - (iv) Copy of Grant Thornton report and annexures;

- (v) Copy of FMC letter dated January 16, 2015;
- (vi) Copy of SEBI letters dated July 09, 2018 and September 28, 2018;
- (vii) Copy of NSEL complaints dated March 17, 2015 and March 24, 2015;
- (viii) Copy of SEBI complaint dated September 24, 2018 filed with EoW;
- (ix) Copy of FIR dated September 28, 2018 filed by SEBI under section 154 of CrPC; and
- (x) Trade details.

Therefore, I find that all the relevant documents have been duly provided to the Noticee in compliance with the principles of natural justice in conducting the present enquiry proceedings. Hence, I do not agree with the contention of the Noticee.

15. The Noticee has argued that the matter should be remitted to the DA as (i) additional documents have been issued post submission of the DA Report; (ii) DA did not grant personal hearing to the Noticee during the enquiry proceedings. In support of the above, Noticee has relied upon Painter (*supra*), A.R. Antulay (*supra*) and Canara Bank and Ors. (*supra*), which I have perused.

15.1 Regarding (i) above, it is noted that while the instant matter was under consideration, the Hon'ble SAT *vide* the June 2022 SAT Order remitted certain orders pertaining to some other brokers who had also participated in paired contracts on NSEL to SEBI to decide the matter afresh. The Hon'ble SAT left it open to SEBI to rely on other material like EoW charge sheet, complaint letters *etc.*, after providing the same to the appellants therein. In line with the aforesaid order of the Hon'ble SAT, SSCN was issued to the Noticee along with the FIR and complaint. Therefore, present proceedings cannot be considered in violation of Intermediaries Regulations as documents were supplied in compliance with the order of Hon'ble SAT and in order to enable the Noticee to defend itself.

15.2 As regards (ii) above, I note that the DA had issued the show cause notice dated September 24, 2018 under the then existing Regulation 25(1) of the Intermediaries Regulations. Thereafter, the DA Report was submitted on October 16, 2019. The Intermediaries Regulations were amended *vide* the SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021. The amended Regulations now provide that the DA shall grant an opportunity of personal hearing and issue or cause to issue a notice scheduling a date for hearing. Thus, under the then existing Intermediaries Regulations prior to its amendment w.e.f. January 21, 2021, there was no legal requirement for providing the opportunity of personal hearing to the Noticee by the DA as contended by the Noticee. The Intermediaries Regulations require the Competent Authority to grant an opportunity of personal hearing if the DA has recommended cancellation or if the Competent Authority is of the view that it is a fit case for cancellation of certificate. Accordingly, adequate personal hearing opportunities were provided to the Noticee which was availed by it. From the above, I note that there is no defect in the process followed in the present enquiry proceedings.

16. Before moving forward to examine the charges and the evidence available on record, it would be appropriate to take a look at the legal provisions of the SEBI Act, which are relevant in the present case. It is alleged that the Noticee has violated (i) regulation 5(e) of the Stock Brokers Regulations read with Schedule II of Intermediaries Regulations; and (ii) regulation 9(b), 9(f) read with clause A(1), A(2) and A(5) of Schedule II of Stock Brokers Regulations. The same are reproduced below 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.

Stock Brokers 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; and

Liability for action under the Securities and Exchange Board of India (Intermediaries) Regulations, 2008

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;

SCHEDULE II

Code of Conduct for Stock Brokers

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.

Intermediaries Regulations

Schedule II

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-clauses (b) and (c) of clause (2) comply with the 'fit and proper person' criteria.

17. Coming to the merits of the case, I note that after issuance of the SCN, June 2022 SAT Order was passed by Hon'ble SAT wherein it set aside the impugned orders of WTM concerning similar facts and evidence as the present case. I find it appropriate here to briefly delve into the grounds on which the impugned orders of SEBI were set aside by Hon'ble SAT leading to the issuance of SSCN. The grounds are as follows:

- (i) The observations of the Hon'ble Bombay High Court in the matter of 63 Moons vs. Union of India (Writ Petition No. 2743 of 2014 dated December 04, 2017) cannot be relied upon as the said judgement has been set aside in appeal by the Hon'ble Supreme Court in the Merger Petition judgment.
- (ii) The observation from the order dismissing the Writ Petition filed by NSEL against the invocation of the MPID Act in NSEL vs. State of Maharashtra and Ors. (Writ Petition No. 1403 of 2015 dated October 01, 2015), cannot be relied upon, as in a subsequent Writ Petition moved by 63 Moons Technologies Ltd., in Writ Petition No. 1181 of 2018, a Division Bench of the Hon'ble Bombay High Court observed that the *prima facie* observations made in its earlier order were not binding and the same was observed since further investigation was in process at the relevant stage.
- (iii) 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, also cannot be relied upon as such observations were limited to the fact as to whether the bail should be granted or not.
- (iv) Reliance on the SFIO Report 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 which was challenged due to jurisdiction before Hon'ble Bombay High Court. The

Hon'ble Bombay High Court by an order dated January 15, 2020 passed an interim order staying the effect and operation of the impugned order dated July 29, 2019.

- (v) Reliance placed on decisions of the Hon'ble Tribunal in the matter of Jermyn Capital vs. SEBI and Mukesh Babu Securities vs. SEBI is misplaced as decisions in the said matters are distinguishable on facts. Jermyn Capital (*supra*) was held to be in relation to an Interim Order passed by SEBI, and the Hon'ble Tribunal was of the view that 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 (*supra*) was distinguished by the Hon'ble Tribunal on the basis that in the said matter a criminal complaint was filed against the chairman of the company. The Hon'ble Tribunal noted that with respect to the appellants, there is no evidence to show that any proceedings have yet been initiated against the appellants in the matter under consideration.
- (vi) Regarding close association of the appellant with NSEL, forensic report which was made at the behest of SEBI has exonerated the appellant on this charge. This fact has not been considered by the WTM while holding the appellant to be closely connected with NSEL. There is no finding in the impugned cases indicating that the appellants have any control directly or indirectly over NSEL and, therefore, the question as to whether the appellant is a close associate of NSEL has not been considered in the right perspective.
- (vii) In the impugned cases, the application for grant of registration certificate has been rejected without specifying how long the rejection of application would continue. Such rejection cannot continue indefinitely and if an application is rejected, a period should be prescribed within which the broker cannot apply

for grant of a fresh registration certificate but after the expiry of the period he could file such an application.

18. I note that Hon'ble SC in Merger Petition judgment, has *inter alia* held 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 Eseries 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), the proportion of paired contracts as a percentage of total trades amounted to 99% in 2013. I note that the Noticee in its replies has not stated that it had not traded in "paired contracts". In this regard, I note from the EoW report that the Noticee had a client exposure of Rs. 101, 011, 832. In view of the above, transactions on NSEL facilitated by the Noticee, could not have been anything but "paired contracts".
19. Noticee has also submitted that Pace is neither a party to the proceedings / orders / judgments mentioned in the DA Report nor any specific reference has been made to it (*i.e.*, in DEA letter dated December 30, 2014, EoW report dated April 04, 2015, FMC order dated December 17, 2013, decision in 63 Moons Technologies Ltd. (*supra*), decision in Jignesh Shah (*supra*), and Jermyn Capital LLC (*supra*). With respect to the aforesaid DEA letter, EoW letter, FMC order, and decision of 63 Moons Technologies Ltd. (*supra*), the aforesaid have been considered in the present proceedings in order to state that the 'paired contracts' executed on the NSEL platform were in violation of the 2007 Exemption Notification. Therefore, even though the Noticee was not a party to the proceedings which led to the said orders / letters / report, mention of such orders, letters and reports of other authorities are relevant to the proceedings. In relation to the decision of Jermyn Capital LLC (*supra*), considering the findings of Hon'ble SAT with respect to the said decision in the June 2022 SAT Order, I find that the said case is not relevant for consideration in the present matter.

20. The Noticee has submitted that the FMC order has been challenged by way of writ petitions before Hon'ble Bombay HC and therefore it is *sub judice*. The findings therein cannot be held binding. Further, it has also submitted that NSEL has filed a petition before Hon'ble Bombay HC regarding the SCN issued by the DCA dated April 27, 2012 (Original Ordinary Civil Jurisdiction) (Writ Petition No. 2135 of 2021). *Vide* order dated October 04, 2021, Hon'ble Bombay HC has granted ad-interim relief basis the submissions made by NSEL that proceedings have become stale and that after long lapse of time SEBI is trying to revive the matter. Hence, any violation of 2007 Exemption Notification is itself *sub judice* before the Hon'ble Bombay HC. In this regard, I note that no directions have been issued by Hon'ble Bombay HC to SEBI to keep the present proceedings in abeyance. On the other hand, Hon'ble SC in the Merger Petition judgment has commented on the illegal nature of 'paired contracts' as follows:

"55.3. 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 were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA....."

Thus, in my view, this submission of Noticee does not merit any further discussion.

21. The Noticee has also relied upon the order passed by Hon'ble Bombay HC on July 06, 2023, in the matter of Venkataraman Rajamani and Ors. vs. SEBI in a batch of writ petitions to submit that the legality of amended Intermediaries Regulations is under challenge, and therefore, the current proceedings should be kept in abeyance till the disposal of the writ petition. Further, it has relied upon stay granted by Hon'ble SAT in respect of M/s. B.N. Rathi Comtrade Pvt. Ltd. decision dated March 24, 2023, to submit that the current proceedings should be kept in abeyance. In this regard, I

note that Hon'ble Bombay HC or Hon'ble SAT has not issued any directions to SEBI to keep the present proceedings in abeyance. In light of the above, I find that reliance on the aforesaid writ petition / decision does not aid the Noticee.

22. The Noticee has also argued that FIR is a first instance and preliminary document based on one-sided statement of complainant without adjudication of the same and that SEBI cannot rely on its own complaint. Further, the Noticee has submitted that its name is not included in the chargesheet filed pursuant to the FIR. In this regard, I note that the FIR is validly subsisting and has not been challenged, quashed or stayed by any competent court *qua* the Noticee. The disqualifications listed under paragraph 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations are unambiguously clear and no exemptions from such criteria has been provided. 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. As a consequence, once the disqualification is triggered, the "fit and proper person" criteria is open for determination by SEBI. It is, therefore, noted that the disqualification provided in paragraph 3(b)(i) under the amended Schedule II of the Intermediaries Regulations is also triggered *vis-à-vis* the Noticee.
23. The Noticee has submitted that the provision that a person would be disqualified if a criminal complaint or information under section 154 of CrPc is filed against such person by SEBI which is pending was inserted in the Intermediaries Regulations with effect from November 17, 2021. Prior to the said amendment, there was no reference to criminal complaint. The amendment to Schedule II of Intermediaries Regulations came into force from November 17, 2021, which is after the initiation of present proceedings, and therefore, retrospective application of the same would be in gross violation of the principles of natural justice. Hence, the amended criteria cannot be relied on for deciding whether Pace is a "fit and proper person" or not. In this regard, in my view, the amendment of Schedule II of the Intermediaries

Regulations merely encapsulates the criteria in the form of distinctly identifiable parameters, which existed even before the amendment. I note that 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. Therefore, as stated before, even if the Noticee was found to have fulfilled the “fit and proper person” criteria while granting the certificate of registration, 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. Thus, this argument of Noticee is not maintainable.

24. The Noticee has further contended that Chapter II of Intermediaries Regulations has not been notified and thus, applicability of Schedule II is untenable and unsustainable. I note that Noticee has been granted certificate of registration under the Stock Brokers Regulations. Regulation 5 of the Stock Brokers Regulations has been notified and regulation 5(e) of the Stock Brokers Regulations provides that for the purpose of grant of certificate of registration, the applicant has to be a ‘fit and proper person’ in terms of Schedule II of the Intermediaries Regulations. I note that Schedule II of Intermediaries Regulations is relied upon for the purpose of granting certificate of registration under Stock Brokers Regulations. Thus, this argument of Noticee is not tenable.
25. The Noticee has argued that it had no reason to doubt the legality of the contracts traded on NSEL as (i) they were widely traded; (ii) trades of NSEL were being reported to FMC; (iii) NSEL was issuing delivery allocation reports; (iv) NSE’s bye laws *inter alia* stated that it was under obligation to take permission from FMC for all contracts; (v) no money was lent by the Noticee and the trades were backed by payment and delivery; (vi) while executing trades in paired contracts, additional

costs such as sales tax, octroi etc had to be incurred which was not payable in case of borrowing of funds from banks/NBFCs; and (vii) NCDEX offered similar contracts as paired contracts.

26. In this regard, I note that the long leg of the paired transaction involved contracts being settled on a T+25 or T+36 basis, whereas the exemption granted by the DCA permitted NSEL to only offer spot delivery contracts. The 2007 Exemption Notification was available in the public domain and even basic due diligence would have shown that the paired contracts were *per se* in violation of the said notification. Therefore, I am of the view that while participating in such contracts, the Noticee failed to examine the basic nature of the product and also failed in understanding the source of powers relied upon by NSEL for selling such products which other exchanges were not offering. Thus, the Noticee failed to conduct proper and effective due diligence on these aspects of “paired contracts” which were not essentially spot contracts. Hence, the Noticee cannot evade its responsibility by citing that paired contracts were widely traded or that no money was lent by Noticee etc.
27. Noticee’s submission that it had executed trades on instructions of its clients, its turnover in paired contracts was meagre, and that it did not have any relation with NSEL or its management, does not take away the fact that Noticee was required to perform adequate due diligence. The Noticee cannot turn a blind eye on the actions of its clients and claim that it had acted under instructions of its clients, especially when it has earned a brokerage from those trades on NSEL whether the said brokerage or turnover is meagre or not.
28. The Noticee has further argued that Pace was granted registration despite facts being known in public domain of carrying out trades in alleged paired contracts, therefore, having granted registration, SEBI issuing an order for its cancellation as not “fit and proper person” for an allegation well known is contrary to established principles of equity, fairness, justice and estoppel. In this regard, in my view, 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. Pursuant to the grant of registration by SEBI, if 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 when SEBI granted certificate of registration, 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 the instant case, criteria as revised *vide* the amendments in November, 2021. Thus, Noticee's contention that due to estoppel it cannot be held liable for any wrongdoing committed before its registration is rejected.

29. The Noticee has contended that SEBI has not taken any action against the defaulting brokers, insurance companies, auditors, banks etc and proceedings are relentlessly being pursued against non-defaulting brokers. In this regard, I note that proceedings have been proposed and initiated against several entities based on the trades executed by them in the paired contracts on the NSEL platform and the accompanying facts and circumstances of their respective cases, solely relying on the material available on record. Since the Noticee was one such entity that had facilitated the trading in paired contracts on behalf of its clients, the present proceedings have been initiated against it. The extent of the role of the Noticee has been clearly brought out in the SCNs issued to it and as a quasi-judicial authority, the issue before me is to adjudicate the gravity of the allegations in the SCNs and arrive at a finding. Thus, the contention of the Noticee is devoid of any merit.
30. In view of the above, I note that the Noticee has traded in "paired contracts" on behalf of its clients on NSEL. The execution of such paired contracts shows participation of the Noticee in the said scam which raises questions regarding the integrity, honesty, ethical behavior, reputation, fairness and character of the Noticee. I have perused

the orders / judgments cited by the Noticee, namely, Chairman-Cum-Managing Director, Coal India Limited (*supra*), E. P. Royappavs. Tamil Nadu (*supra*), Teri Oat Estates P. Ltd. (*supra*), Almonds Global Securities Ltd. (*supra*), Geeta Lunch Home (*supra*) and Kedia Capital Services Pvt. Ltd. (*supra*).

31. I note that a FIR has been registered with the MIDC Police Station, Mumbai, *inter alia*, against the Noticee on September 28, 2018 and the same is pending as on date and has not been quashed or stayed by any competent court *qua* the Noticee. Since the FIR is still pending for final determination by a Court of competent jurisdiction, the disqualification specified in clause 3(b) under the amended Schedule II of the Intermediaries Regulations stands invoked. The facts and circumstances along with other material available on record clearly leads me to the conclusion that the Noticee has not satisfied the “fit and proper person” criteria specified in Schedule II to the Intermediaries Regulations. I have also taken into consideration an order previously passed by SEBI in the context of similar facts and circumstances, *namely*, Adroit Commodities Services Pvt. Ltd. (order dated September 01, 2023), wherein the registration of the said entity was suspended for 3 months or till the said entity is acquitted by an order of a Court, whichever is later.
32. Considering all of the above, while I find that the Noticee does not satisfy the “fit and proper person” criteria specified in Schedule II of the Intermediaries Regulations, I do not agree with the measure recommended by the DA.

E. ORDER

33. In view of the facts and circumstances of the case and the conclusions arrived at discussed above, I, in exercise of powers conferred upon me under section 12(3) read with section 19 of the SEBI Act and regulation 27 of the Intermediaries Regulations, hereby suspend the certificate of registration of Pace Commodity Brokers Pvt. Ltd. bearing registration no. INZ000037932 for a period of 3 (three) months from the date of this Order or till an order is passed by a Court of competent jurisdiction discharging or acquitting the Noticee, whichever is later.

34. The Noticee shall, after receipt of this Order, immediately inform its existing clients about the aforesaid direction in the paragraph above.
35. The Order shall come into force with the immediate effect.
36. This 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.
37. A copy of this Order shall be served on the Noticee and upon all recognized stock exchanges and depositories.

DATE: December 14, 2023

PLACE: MUMBAI

ANANTH NARAYAN G.

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA