

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.
Almondz Commodities Private Limited	INZ000086834

In the matter of National Spot Exchange Limited

BACKGROUND

1. The present proceedings originate from the Enquiry Report dated March 31, 2020, (hereinafter referred to as the **“Enquiry Report”**), 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, with effect from January 21, 2021, (hereinafter referred to as the **“Intermediaries Regulations”**), wherein the DA, based on various factual findings and observations so recorded in the said Enquiry Report, recommended cancellation of the certificate of registration granted to Almondz Commodities Private Limited (hereinafter referred to as the **“Noticee”**). Pursuant to the same, a Post Enquiry Show Cause Notice dated July 10, 2020, (hereinafter referred to as the **“SCN”**) was issued to the Noticee, along with the copy of the aforesaid Enquiry Report, copy of letter dated December 30, 2014 of Department of Economic Affairs, Ministry of Finance and copy of the decision of the Hon’ble Bombay High Court dated August 22, 2014 in respect of paired contracts offered on the platform provided by the National Spot Exchange Limited (hereinafter referred to as the **“NSEL”**).

2. While the aforesaid proceedings were pending, Securities and Exchange Board of India (hereinafter referred to as the “**SEBI**”) passed five separate orders during February 2019, rejecting the applications filed by five other entities for registration as commodity brokers who were involved in NSEL matter. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon’ble Securities Appellate Tribunal (hereinafter referred to as the “**Hon’ble SAT**”). The Hon’ble SAT, vide its common order dated June 09, 2022 (hereinafter referred to as “**SAT order**”), remanded the aforesaid SEBI orders to SEBI 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.....”

3. Thereafter, the Competent Authority of SEBI allocated the present matter to me for further proceedings. In light of the aforesaid 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, vide Hearing Notice dated November 10, 2022 (hereinafter referred to as the “**Hearing Notice**”), Noticee was provided an opportunity of personal hearing on January 03, 2023 along with certain additional documents/ material. Noticee was also advised to submit its response, if any, in relation to the Hearing Notice. On receipt of the hearing notice, the Noticee submitted its reply vide letter dated December 30, 2022. On the scheduled date of hearing, the authorised representatives of the Noticee appeared on behalf of the Noticee through video conference and made submissions on the lines of the replies submitted earlier. During the course of hearing, certain queries were raised to the Noticee and the Noticee was granted time to submit response to the said queries along with the

post hearing submissions, if any. Accordingly, the Noticee, vide its email dated January 23, 2023, provided its response to the queries.

4. The submissions filed by the Noticee vide its letters dated September 10, 2020, December 30, 2022 and January 23, 2023 are summarized hereunder:
 - (i) The Noticee has been engaged in the business of commodity trading activities for the last fourteen years and the compliance track record of the Noticee is impeccable.
 - (ii) Noticee had a client base of over 3,500 clients and it has always maintained high standards of transparency, integrity, honesty and accountability in all its operations.
 - (iii) The SCN has failed to show the exact and specific role of the Noticee in the alleged scheme. It is submitted that the Noticee was never associated or related with NSEL or the alleged paired contracts.
 - (iv) The SCN and the attached Enquiry report is general and vague in nature for the following reasons.
 - a. The specific provisions which have been violated by the Noticee has no basis.
 - b. The Enquiry Report does not provide any details relating to the allegation against the Noticee and no material including any investigation report was referred to substantiate the allegations.
 - (v) The SCN and the Enquiry Report fails to provide any profound reasoning or backing to concretize the recommendation of the DA and has based the conclusion upon observations of various authorities.
 - (vi) The SCN does not meet the mandatory requirements of a valid Notice as laid down by Hon'ble Supreme Court in various cases.
 - (vii) The principles of natural justice have not been adhered to since certain important documents including the investigation report have not been provided to the Noticee.
 - (viii) SEBI does not have the power and jurisdiction to regulate spot market in India.

- (ix) Action, if any, for the conduct of the Noticee in the spot market should have been dealt by the Department of Consumer Affairs and not by SEBI since, SEBI did not have jurisdiction to initiate proceedings.
- (x) It is submitted that the previous dealings of transactions done by the Noticee before September 2015 are beyond the scrutiny of SEBI since the Regulations issued by SEBI were not applicable till September 28, 2015 in regards to the transactions/dealings in commodities at NSEL.
- (xi) The Ministry of Consumer Affairs does not have any grievance against the Noticee, nor the appropriate regulatory authority at the time when the Noticee was functioning as broker on NSEL, had made any determination as to question the integrity, reputation or character of the Noticee.
- (xii) On perusal of the provisions contained in Section 29A(d) and (e) of the FCRA, it is evident that proceedings for offence under FCRA can be initiated by SEBI under FCRA only and the SCN for the alleged violations committed prior to repeal of FCRA cannot be initiated under SEBI Act and/or Regulations framed thereunder.
- (xiii) In terms of Section 29A of the FCRA, the present proceedings ought to have been initiated under the provisions of FCRA and not under Intermediaries Regulations.
- (xiv) Neither FMC nor has SEBI initiated any action under the repealed FCRA and hence the present proceedings initiated by SEBI under SEBI Act stands non-est.
- (xv) Even the erstwhile Forward Market Commission (hereinafter referred to as the “**FMC**”) lacked jurisdiction to regulate spot/ ready delivery contracts and it was the Government of India which had the regulatory power over NSEL.
- (xvi) The Ministry of Finance, Department of Economic Affairs vide its letter dated November 20, 2015 had advised SEBI not to deal with the matter which were not dealt with by FMC and that since spot market/ ready delivery contracts were not regulated by the FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets
- (xvii) Noticee was not registered with SEBI as an intermediary under the intermediaries Regulations prior to September 28, 2015, therefore Noticee was not amenable to the scrutiny of SEBI and may not be subject to enquiry

proceedings under Regulations 25(1) and 28(1) of the Intermediaries Regulations.

- (xviii) SEBI cannot assume jurisdiction and power to regulate which was absent on the very first place, since FMC lacked jurisdiction over NSEL, a change in the regulatory body by the virtue of a merger cannot in itself create any jurisdiction.
- (xix) It is submitted that the regulations framed by SEBI is not applicable on the Noticee for its conduct prior to September 28, 2015 as no registration was required from SEBI and therefore SEBI does not have the power to either check, regulate or scrutinize and to especially initiate any proceedings under the Intermediaries Regulations.
- (xx) It has not been shown in the SCN as to how the Noticee had participated or facilitated or promoted 'pair contracts' and no material in the Enquiry Report, including any investigation report was referred in the Enquiry Report to substantiate the allegations.
- (xxi) The Noticee was granted the certificate of registration on September 27, 2016 after thorough due diligence that it was a fit and proper person under the Stock Brokers Regulations and hence SEBI is estopped from retracting from its own decision at the time when it has specific knowledge regarding the NSEL scam.
- (xxii) The terms 'fails' and 'contravenes' as stated in Regulation 23 of the Intermediaries Regulations means that the said provision is applicable only when the default is committed by the person after the registration with SEBI, therefore, the fact that Noticee was granted the certificate of registration on September 27, 2016 itself shows that on and till September 27, 2016, the Noticee was a 'fit and proper person' and cannot be held liable for any alleged wrongdoing committed before 2016.
- (xxiii) The observation of the Hon'ble Bombay High Court in the case of *Anand Rathi and others vs. SEBI*, dated October 04, 2018 is in respect of the prospective control or regulatory powers of SEBI on the commodity derivatives brokers and cannot be relied upon in the present case.
- (xxiv) Reliance on the decisions of Hon'ble SAT in the matter of Jermyn Capital and Mukesh Babu Securities is misplaced.

- (xxv) While working as a trading member/ broker at NSEL, it was merely acting on behalf of the clients and solely based on the instructions and directions of the clients and executed long-term/ short-term contracts on the trading platform where order and price matching mechanism was electronic and automated.
- (xxvi) The Noticee was not party to the orders/ reports which have been relied upon by the DA for ascertaining the fit and proper status and hence the observations of the various authorities are *in rem* which do not specifically deal with the conduct of the Noticee.
- (xxvii) The reference to the outstanding amount as stipulated in the Grand Thornton cannot be relied upon to hold the Noticee liable of any allegation of participating/ facilitating trading in paired contracts.
- (xxviii) The Interim Report of the Economic Offence Wing (hereinafter be referred to as the “**EOW**”) contains no specific allegations against the Noticee and therefore cannot be relied upon.
- (xxix) Noticee has not been given cross examination of the author of the FMC report or the Grand Thornton Report or the Interim Report of the EOW in order to determine the veracity of the observations in the report.
- (xxx) The Noticee cannot be held liable for the violations until and unless the clients of the Noticee who may have actually indulged in trading in paired contracts launched by NSEL are also held liable.
- (xxxi) The recommendation of cancellation of the Noticee’s registration certificate would be disproportionate, arbitrary and harsh and would be disastrous for the reputation and goodwill of the Noticee.
- (xxxii) The Noticee’s name is not reflecting in the NSEL Circulars mentioned in the Enquiry Report which mentions the clients and the respective members to which the payout was made and hence these NSEL circulars cannot be used against the Noticee.
- (xxxiii) The reliance on the observation of the Hon’ble Bombay High Court – *Jignesh Prakash Shah vs. State of Maharashtra* (Criminal Bail Application No. 1263 of 2014) is misplaced since the Notice has not been made party to the order and the order was only related to the grant of bail to Mr. Jignesh Shah.

- (xxxiv) The letter dated December 30, 2014, from the Ministry of Finance, made observations against the NSEL and not the Noticee, hence, the Noticee cannot be held liable since it was acting merely as a trading/ clearing member and following instructions of NSEL and clients.
- (xxxv) Noticee while operating at NSEL had been functioning as the agent of NSEL and had been following its respective directions and therefore, it cannot be legally held liable for the actions of its principal, namely NSEL.
- (xxxvi) The shorter period contracts i.e. T+2, T+3 and T+5 settlement and longer period contracts i.e. T+25, T+30 and T+36 settlement were contracts independent of each other and there was no restriction on short term contracts to be sold and long term contracts to be bought.
- (xxxvii) In absence of any evidence showing collusion or malice, merely trading in paired contracts cannot make the Noticee liable.
- (xxxviii) A stock broker cannot be suspicious of the conduct of the exchanges and assume that the contract traded on its platform is illegal.
- (xxxix) As per the Bye laws of NSEL, the alleged paired contracts were introduced by the Board/Management of NSEL with prior concurrence of FMC. The Noticee in normal course was not required to assess the legality of the product introduced by NSEL.
- (xl) The additional documents have been provided along with the hearing Notice after an exorbitant delay and thus the proceedings ought to be set aside.
- (xli) Regulation 27 of the Intermediaries Regulation does not provide for reliance on any other document or information which was not considered by the DA and subsequent to the submission of the Enquiry Report by the DA.
- (xlii) The additional documents, i.e., criminal complaint under Section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “**CrPC**”) by SEBI and the FIR is post-facto justification of the recommendation of the DA and cannot be considered as a valid basis to assess the correctness or as a reason to justify the recommendation of the DA.

- (xlili) By providing the additional documents, the allegations/charges against the Noticee have been effectively changed, as on first instance, Noticee fit and proper status was assessed on 'association with NSEI' whereas after the SAT Order, it is being assessed on Criminal Complaint and FIR.
- (xliv) In case additional documents are considered by the Competent Authority which were never on record or earlier considered by the DA; the same would amount to conducting a review of the Enquiry Report.
- (xlv) The order of SAT dated June 09, 2022 is not applicable to the Noticee since it pertains to an order against five brokers who were not granted the certificate of registration and SEBI was at liberty to consider and apply the amended Intermediaries Regulations and rely on additional documents.
- (xlvi) There is no basis on which it could be said that the Noticee was closely associated with NSEL and that it was a trading member of NSEL and the fact that it had done trade on the platform of NSEL cannot be held against the Noticee.
- (xlvii) The SEBI Regulations cannot be made applicable retrospectively. The amendment of the criteria for fit and proper person laid out in Schedule II of the Intermediaries Regulations took effect from November 17, 2021 which is much after the initiation of the present proceedings. Therefore, any retrospective reliance on such an amendment that took place later in time would be gross violation of law and principles of natural justice.
- (xlviii) The additional documents are only preliminary and prima facie in nature and they do not demonstrate any violation of securities laws by the Noticee.
- (xlix) If reliance is placed on the complaint filed by SEBI or FIR, the same would be in gross violation of the principle that a person/ entity is considered innocent until proven guilty – *Dataram vs. State of Uttar Pradesh* (2018) 3 SCC 22.

CONSIDERATION OF ISSUE AND FINDINGS

5. I have carefully perused the SCN, the Hearing Notice, the Enquiry Report, the replies filed by the Noticee and other material/ information available on record. After considering the allegations made/ charges levelled against the Noticee in the instant matter as spelt out in the SCNs and Hearing Notice, 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 and whether the Certificate of Registration granted to the Noticee should be cancelled, as recommended by the DA or any other action should be taken against the Noticee.
6. Before I proceed to examine the issue *vis-à-vis* the material available on record before me, it would be appropriate to refer to the provisions of law applicable, 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;

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;

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 proceedings have been initiated by the Board against such person and are pending;*
 - (v) *an order of conviction has been passed against such person by a court for any offence involving moral turpitude;*
 - (vi) *any winding up proceedings have been initiated or an order for winding up has been passed against such person;*
 - (vii) *such person has been declared insolvent and not discharged;*
 - (viii) *such person has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force;*
 - (ix) *such person has been categorized as a wilful defaulter;*
 - (x) *such person has been declared a fugitive economic offender; or*
 - (xi) *any other disqualification as may be specified by the Board from time to time.*
- (4) *Where any person has been declared as not 'fit and proper person' by an order of the Board, such a person shall not be eligible to apply for any registration during the period provided in the said order or for a period of five years from the date of effect of the order, if no such period is specified in the order.*
- (5) *At the time of filing of an application for registration as an intermediary, if any notice to show cause has been issued for proceedings under these regulations or under section 11(4) or section 11B of the Act against the applicant or any other person referred in clause (2), then such an application shall not be considered for grant of registration for a period of one year from the date of issuance of such notice or until the conclusion of the proceedings, whichever is earlier.*
- (6) *Any disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub-clause (b) of clause (3), shall not have any bearing on the 'fit and proper person' criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter: Provided that if any person as referred in sub-clause (b) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall replace such person within thirty days from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against the intermediary: Provided further that if any person as referred in sub-clause (c) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall ensure that such person does not exercise any voting rights and that such person divests their holding within six months from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against such intermediary.*
- (7) *The 'fit and proper person' criteria shall be applicable at the time of application of registration and during the continuity of registration and the intermediary shall ensure that the persons as referred in sub-clause s (b) and (c) of clause (2) comply with the 'fit and proper person' criteria."*

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.

7. As noted above, taking cognizance of the order passed by Hon'ble SAT dated June 09, 2022, in NSEL matters, a Hearing Notice dated November 10, 2022 was issued to the Noticee calling upon it to show cause as to why the following information/ material along with the Enquiry Report dated March 31, 2020 should not be considered against it for determining whether the Noticee satisfies 'fit and proper person' criteria as laid down under Schedule II of the Intermediaries Regulations:
- a. SEBI complaint dated September 24, 2018 filed with EOW;
 - b. First Information Report dated September 28, 2018; and
 - c. Amended Schedule II of the Intermediaries Regulations.
8. Noticee has contended that the aforesaid additional documents were provided after an exorbitant delay and that Regulation 27 of the Intermediaries Regulation

does not provide for reliance on any other document or information which was not considered by the DA and that if additional documents are considered by the Competent Authority which were never on record or considered by the DA, the same would amount to conducting review of the Enquiry Report. In this regard, I find it pertinent to refer to the following paragraph of Hon'ble SAT's Order dated June 09, 2022:

“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...”

Accordingly, in compliance of the order of Hon'ble SAT, additional documents were provided to the Noticee. In my view, the same cannot, in any manner, be tantamount to reviewing the Enquiry Report. The submission of the Noticee in this regard is therefore rejected.

9. The Noticee has contended that it was not party to the orders/ reports which have been relied upon by the DA for ascertaining the fit and proper status and hence the observations of the various authorities are *in rem and* do not specifically deal with the conduct of the Noticee. Further, it is submitted that reliance placed on the observation of Hon'ble Bombay High Court in the matter of Jignesh Shah and Orders of Hon'ble SAT in the matter of Jermyn Capital and Mukesh Babu Securities is misplaced and thus the same cannot be relied upon against the Noticee. In this regard, I note that no reliance has been placed on the observations contained in the various orders/reports as highlighted above by the Noticee to determine the fit and proper status of the Noticee and thus, its contentions in this regard do not merit further consideration.
10. Before moving forward to test the fulfilment of the 'fit and proper' person criteria by the Noticee, on the basis of available material including the additional material as detailed at paragraph 7 above, the background facts necessary for the present proceedings are narrated in brief, hereunder:

- a. The Noticee is a commodity derivatives broker registered with SEBI having Registration No. INZ000086834.
- b. NSEL was incorporated in May, 2005 as a Spot Exchange, *inter alia*, as an electronic exchange for trading in commodities. In exercise of powers conferred under Section 27 of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as the "**FCRA**"), the Central Government vide its Notification No. SO 906 (E) dated June 05, 2007 (hereinafter referred to as the "**Exemption Notification**") granted an exemption to all forward contracts of one-day duration for the sale and purchase of commodities traded on the NSEL from operation 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*".
- c. 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 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 the 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.
- d. On February 06, 2012, FMC was appointed by the Department of Consumer Affairs, Government of India as the 'designated agency' as stipulated in one of the conditions specified under the said Exemption Notification, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measures, if needed, to protect investors' interest. FMC had accordingly called for the trade data from NSEL in the specified reporting formats. After analysing the trade data received from NSEL, FMC passed Order No. 4/5/2013-MKT-1/B dated December 17, 2013 in the matter ("**FMC**

Order”) wherein it was, *inter alia*, observed that 55 paired 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*’, specified in the Exemption Notification, was not being complied by NSEL and its members.

11. Noticee has contended that it has not been provided copies of the documents relied upon by SEBI for framing charges against the Noticee. On perusal of the SCN, Enquiry Report and material/ information available on record, I find that Noticee was provided an opportunity to inspect the documents vide letter dated December 07, 2018. Further, all the documents relied upon by SEBI and relevant for levelling charges against the Noticee have been provided to the Noticee vide letter dated July 26, 2019, Enquiry Report, SCN and Hearing Notice. Thus, I find that there is no merit in the contention of the Noticee.
12. I note that FMC was a statutory body set up under the FCRA and its functions were enumerated under section 4 of the Act. FCRA regulated forward contracts in notified goods entered into between the members of a recognised association or through or with any such member. An association recognised under the FCRA was empowered to make rules and bye-laws for the regulation of forward contracts subject to approval of the Central Government/ FMC. Such an association concerned with the regulation and control of business relating to forward contracts was also required to obtain a certificate of registration from FMC, under FCRA. I note that FMC was having jurisdiction only on the associations recognised or registered under the FCRA or any member of such association. NSEL was not an association recognised under section 6 of FCRA nor was it an association registered under section 14A of FCRA, which provided that –

"No association concerned with the regulation and control of business relating to forward contracts shall, after the commencement of the Forward Contracts (Regulation) Amendment Act, 1960 (62 of 1960) carry on such business except under, and in accordance with the conditions of a certificate of registration granted under this Act by the Commission."

13. Section 27 of the FCRA empowered the Central Government to exempt any contract or class of contracts from the operation of all or any of the provisions of the Act. In exercise of the powers conferred under Section 27 of the FCRA, the Central Government, vide the Exemption Notification, had granted exemption to one-day forward contracts traded on NSEL from the operation of all provisions of FCRA, subject to conditions mentioned in the said Exemption Notification. Subsequently, the Central Government has issued notifications on February 06, 2012 and August 06, 2013, in partial modification of this notification dated June 05, 2007, by way of amending or inserting new conditions to the original notification, thereby assigning specific responsibility to FMC with respect to NSEL. Recognised associations were empowered to make rules and bye-laws under FCRA which would be approved by the Central Government/ FMC. However, NSEL was neither a registered nor a recognised association/ Exchange under FCRA and the bye-laws of NSEL were not reviewed or regulated or monitored by any authority.
14. The Noticee has contended that SEBI does not have power and jurisdiction to regulate the Spot Market and the action, if any, for the conduct of the Noticee in the spot market should have been dealt by the Ministry of Consumer Affairs. Further, it is submitted that even FMC lacked jurisdiction to regulate spot/ ready delivery contracts and it was the Government of India which had the regulatory power over NSEL and that the Department of Economic Affairs vide its letter dated November 20, 2015 had advised SEBI not to deal with the matter which were not dealt with by FMC and that since spot market/ ready delivery contracts were not regulated by the FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets. In this regard, without going into the merits of the contention that whether SEBI has the authority to regulate Spot Market or not, I note, that the issue under consideration in the present proceedings is limited to the determination of “*fit and proper*” status of the Noticee under the Intermediaries Regulations. It is a settled position of law that SEBI has statutory authority to determine the “*fit and proper*” status of the intermediaries registered with it. Since the Noticee is an intermediary registered with SEBI, I am of the considered view that SEBI is within its jurisdiction to determine the “*fit and*

proper” status of the Noticee. I note that prior to the merger of FMC with SEBI on September 28, 2015, the Noticee was not required to be registered with either FMC or any other regulatory authority under the FCRA. The Parliament, noticing that the intermediaries dealing with commodities derivatives market were not required to be registered under FCRA and were not under control of any competent authority, rectified the same through the Finance Act, 2015, as notified on May 14, 2015, by bringing them under the regulatory supervision of SEBI. With regard to the aforesaid, the Hon’ble Bombay High Court while dealing with the Writ Petition Nos. 3262, 3266, 3294 and 3295 of 2018 in the matter of *Anand Rath Commodities Limited, Motilal Oswal Commodities Broker Private Limited, Geofin Comtrade Limited and IIFL Commodities Limited vs. SEBI*, vide its Order dated October 04, 2018, observed the following:

“It is not in dispute that prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law including the FCR Act. We find that the said mischief was Noticed by the Parliament. As such, by virtue of the Finance Act, 2015, the said intermediaries dealing with commodity derivatives have been brought under the control of SEBI. We find that the reason as to why by Finance Act, 2015, the said intermediaries were brought under the control of SEBI appears to be that the Parliament found that the activities of intermediaries dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority”.

15. I further note that the provisions in the Finance Act, 2015 effecting the merger of FMC with SEBI in September, 2015 do not, *prima facie*, confer any power on SEBI to take charge, deal, inquire and resolve NSEL settlement crisis that broke out in 2013. Pursuant to repeal of FCRA and dissolution of FMC in terms of Section 131 of Finance Act, 2015, all recognised associations under the FCRA became deemed recognised stock exchanges under the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the “**SCRA**”). NSEL was not a recognised association under FCRA, therefore NSEL falling under the regulatory jurisdiction of SEBI does not arise.
16. I note that pursuant to the merger of FMC with SEBI, a commodity derivatives broker was mandatorily required to obtain a certificate of registration from SEBI

in case it sought to remain associated with the securities market as a commodity derivatives broker. The Finance Act, 2015, *inter alia*, conferred the powers to SEBI to regulate commodity derivatives brokers, 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 which were associated with the commodity derivatives market under the erstwhile FCRA to continue to deal in commodity derivatives as a commodity derivatives broker, provided it made an application of registration to the SEBI within 3 months from September 28, 2015. Accordingly, the Noticee applied for a certificate of registration and was registered as a broker and since then it has been acting as a market intermediary registered with SEBI.

17. The Noticee has further submitted that the present proceedings are *void ab initio* since such proceedings cannot be initiated by SEBI given the mandate of Section 29A(d) and (e) the FCRA. I note that 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. Section 29A of FCRA, as inserted by the Finance Act, 2015 provides as under—

“(1) The Forward Contracts (Regulation) Act, 1952 is hereby repealed.

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

(a)....

(b)....

....

(d) all offences committed, and existing proceedings with respect to offences which may have been committed under the Forward Contracts Act, shall continue to be governed by the provisions of that Act, as if that Act had not been repealed;

(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;

(f) no court shall take cognizance of any offence under the Forward Contracts Act from the date on which that Act is repealed, except as provided in clause (d) and (e);

(g) clause (d), (e), (f) shall not be held to or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal to matters not covered under these sub-sections.”

18. I note that the aforesaid provisions empowered SEBI to initiate a fresh proceeding with respect to the offences within a period of three years from the

date of repeal of FCRA. Thus, pursuant to the merger of FMC with SEBI, SEBI stepped into the shoes of FMC and was well within its powers to initiate proceedings under Chapter V of FCRA i.e., filing of the criminal complaint to the Economic Offences Wing (“EOW”). I note from the complaint dated September 24, 2018 filed by SEBI that EOW was requested to take appropriate action under Sections 20 and 21 and other provisions of FCRA against the brokers/ members of NSEL and other persons mentioned in the complaint. However, it is relevant to mention here that the aforesaid proceedings are different from the proceedings before me.

19. The Noticee has contended that the regulations framed by SEBI are not applicable on the Noticee for its conduct prior to September 28, 2015 and therefore SEBI does not have the power to either check, regulate or scrutinize and to especially initiate any proceedings under the Intermediaries Regulations. I note that the present proceedings pertain to adjudging the ‘fit and proper person’ status specified in the Stock Brokers Regulations and the Intermediaries Regulations in light of the activities undertaken by the Noticee on the NSEL platform and consequent action taken by FMC and SEBI, i.e., filing of the criminal complaint to EOW under Section 154 of the Code of Criminal Procedure, 1973 (“**CrPC**”). I note that in terms of Regulation 5(e) of the Stock Brokers Regulations, every “applicant”/ “stock broker” at the time of seeking registration, and thereafter, throughout the time it holds a valid certificate of registration, has to satisfy the “fit and proper person” criteria specified in Schedule II of the Intermediaries Regulations. I note that the Enquiry Report proceeds on the basis that the past conduct of the Noticee in facilitating access to the “paired contracts” traded on NSEL calls into question the compliance of the Noticee with ‘fit and proper person’ criteria. Further, SEBI while examining the compliance of an applicant, or even a registered intermediary, with the ‘fit and proper person’ criteria can take into consideration not just contravention of the provisions of securities laws, but also the general conduct of the Noticee which may have a bearing on its functioning as a registered intermediary. The ‘fit and proper’ criteria including the amended criteria must be satisfied by the Noticee, at the time of making application of registration under the Stock Brokers Regulations as well as during the continuance of the registration once granted. To consider the

application of the Noticee for the registration as a stock broker, the Noticee is required to satisfy the fit and proper person criteria as well as during the continuance of the registration, and thus, it is well within the jurisdiction and powers of SEBI to adjudge the said 'fit and proper' status of the market intermediaries in the interest of securities market.

20. Before moving forward to consider the matter on merits, it would be appropriate to look at the background of NSEL and understand the nature of the 'paired contracts' that were offered on NSEL which ultimately is the cause/ genesis of the current proceedings.

21. From the perusal of the FMC Order in respect of the 'paired contracts', which were traded on the NSEL platform during the relevant period, I note that the FMC had, *inter alia*, observed that the following conditions stipulated in the Exemption Notification were violated:

a. Short Sale

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

b. Contracts with Settlement Period going beyond 11 days

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

22. In this context, I note that NSEL was granted conditional exemption from the provisions of the FCRA by the Department of Consumer Affairs, Ministry of

Consumer Affairs (hereinafter referred to as the “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 forward contracts 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.

23. It is observed that NSEL was given permission to setup as a spot exchange for trading in commodities. It was essentially meant to only offer forward contracts having one-day duration as per the Exemption Notification. In its order, FMC had observed that the 55 contracts offered for trade on the NSEL were with settlement periods exceeding 11 days and all such contracts traded on the NSEL were in violation of provisions of FCRA. I 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 the FCRA, FMC was of the view that all the contracts traded on the NSEL which provided settlement schedule exceeding 11 days were treated as Non-Transferable Specific Delivery contracts. It is, therefore, seen that even though MCA had stipulated in the Exemption Notification that only contracts of one-day duration were permitted to be offered on the NSEL, the FMC, in its order, relying on the definition of the “forward contract” under FCRA held that the NSEL was allowed to only trade in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days. However, what is beyond doubt is that the 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.

24. 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. vs. Union of India & Others* (Civil Appeal No. 4476 of 2019 decided on April 30, 2019) (hereinafter referred to as the “**merger petition**”), wherein it was, *inter alia*, held that:

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

25. Further, I note that in 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.* (Civil Appeal No. 2748-49 of 2022) (hereinafter referred to as the “**MPID matter**”), the Hon'ble Supreme Court while drawing reference to the representations made by NSEL in respect of the paired contracts, *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.”

26. Thus, I note that the Hon'ble Supreme Court has already described the nature of the 'paired contracts' offered on the 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 held that such transactions come within the definition of 'deposits' under the MPID Act. The Hon'ble Supreme Court in the MPID matter, has extensively referred to the claims made on the website of the NSEL and the contents of the publicity material and other investor resources. The Hon'ble Supreme Court has also observed that NSEL was advertising assured and uniform return of 16% p.a. for the 'paired contracts' traded on its platform where the return offered was same across the commodities. The return remained the same irrespective of the duration of the contract. At Para 45 of the said order, the Hon'ble Supreme Court has also depicted certain examples of 'paired contracts', which offered assured returns. For example, a T+2 and T+25 paired contract in steel had the same offered return as a T+5 and T+35 paired contract in castor oil. The 'paired contracts' were being marketed as an alternative to fixed deposits. In view of the above, I note that the FMC Order and both the judgments of the Hon'ble Supreme Court discuss in detail that, NSEL was permitting short sales, i.e., permitting sellers to offer contract for sale of commodities on its platform without ensuring that requisite amount of commodity is available in the warehouse.
27. The Noticee has contended that it has not been shown in the SCN as to how the Noticee had participated or facilitated or promoted 'paired contracts' and no material in the Enquiry Report, including any investigation report was referred in the Enquiry Report to substantiate the allegations. In so far as the trades of the Noticee on the platform of NSEL is concerned, I note that the details of trades (which were provided by EOW) executed by the Noticee in the paired contracts during the relevant period, were provided to the Noticee vide letter dated February 14, 2020. I note that after perusal of the trade details, the DA in Enquiry Report has also observed that the Noticee executed several buy trades of various commodities of 2, 3 and 5 days' duration and sell trades of 25, 36 and 30 days' duration in corresponding paired contracts of the same commodities on behalf of

its clients. The allegation against the Noticee of participation in paired contracts is corroborated by the data placed before me which was also provided the Noticee. Further, a copy of the Interim Report of EOW, which was submitted to FMC (now merged with SEBI), vide letter dated April 04, 2015 by EOW, containing the investigation conducted by EOW to identify the role played by broking houses in NSEL matter revealed that EOW identified a list of broking houses/ brokers with client exposure and money exposure, who were alleged to have indulged in paired contracts'. It is noted from the said report that the name of the Noticee appeared amongst the list of brokers who had client or money exposure at the time of default and the amount of money exposure mentioned against the name of the Noticee was ₹ 16,97,25,451/- in the said list. The aforesaid facts lead to the conclusion that the Noticee was dealing in the paired contracts during the relevant period.

28. I also note that the NSEL vide its circular dated March 10, 2015 bearing Ref. No. NSEL/C&S/2013/003 had announced a special payout to settle dues of those trading clients with outstanding up to ₹ 2 lakhs and a payment of 50 percent of the outstanding for those investors with exposure between ₹ 2 lakhs and ₹ 10 lakhs. It is noted that the "member wise client wise" details were mentioned under Annexure I to the said Circular. Subsequently, NSEL had issued circular dated December 16, 2014 bearing Ref. No. NSEL/C&S/2014/045 requiring member brokers to furnish information/ particulars as a proof of disbursement to the clients to such brokers to whom such special payout was made. In this regard, I note that NSEL, vide its subsequent Circular dated March 10, 2015 bearing Ref. No. NSEL/C&S/2015/003, while seeking the information of payment to the clients by the brokers, also annexed the details of the special payout made in August 2013 to the brokers. On perusal of the list of the brokers detailed in the said annexure to the Circular dated March 10, 2015, I note that the name of the Noticee appeared in the said list with the mention of total special payout of ₹1,75,68,512/- for its 65 clients. In this regard, the Noticee has contended that neither the receipt of any special payout not reflecting of the name of the Noticee in a list attached to the circular, shows or proves that the Noticee was trading in alleged paired contracts. The Noticee has also contended that shorter period

contracts i.e. contracts having T+2, T+3 or T+25 settlement period and the longer period contracts i.e. T+25, T+30 or T+36 settlement period were independent of each other and to enter into longer period contract there was no requirement to enter into a shorted period contract and further, every trade had a different Order No. and Trade No. In this regard, I find it pertinent to refer to the following observations of Hon'ble Supreme Court in its judgment in respect of the merger petition (*supra*) :

“We have seen 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), 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”. In view of the above, the arguments of the Noticee in this regard are devoid of any substance and liable to be rejected.

29. The Noticee has contested reliance on the reports authored by the Grant Thornton, EOW and FMC and submitted that it has not been provided a cross-examination of the authors of the said reports. I note that the Noticee has not shown any specific prejudice that may have been caused to it in the absence of cross examination. Moreover, the Noticee has not spelt out reasons or the basis for doubting the veracity of the said reports. Thus, I find the plea for cross examination to be merely an evasive tactic adopted by the Noticee.
30. The Noticee has contended that mere trading on the platform of NSEL is not *per se* illegal and that the products/ contracts launched on the NSEL platform were introduced by the Board of NSEL in concurrence with the FMC, and that since the Noticee came under the regulatory remit of NSEL, it had no suspicion about the internal working of the NSEL and the legal validity of the products introduced

on the trading platform. Noticee has further contended that while working as a trading member/ broker at NSEL, it was merely acting as an agent of the clients and NSEL, and that solely based on the instructions and directions of the clients did it enter into any trades on the platform of NSEL. The Noticee has also submitted that it cannot be held liable for the violations until and unless its clients who may have actually indulged in trading in paired contracts launched by NSEL are also held liable. In this regard, I note that the said contention of the Noticee has to be seen in light of the fact that the 'paired contracts' have been held to be in violation of the 2007 Exemption Notification by the Hon'ble Supreme Court. Thus, as understood in light of the above observations of the Hon'ble Supreme Court, the nature of the transactions being carried out on the NSEL platform was simply "financing", whereby fixed returns (e.g. 16%) were being given by one party to the other. The same was apparent on a bare perusal of the "paired contracts" executed on the NSEL platform. Considering the above, I do not find any merit in the argument of the Noticee that it was not aware of the nature of transactions being carried out on the NSEL platform. Further, any argument that it cannot be held liable for the violations until its clients are also held liable or the argument that the clients demanded such access to the 'paired contracts' 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.

31. The Noticee has also submitted that the interim report of EOW contains no specific allegation against the Noticee. In this regard, I note that the Interim EOW report has been relied by DA only to demonstrate the involvement of the Noticee in facilitating the trading in paired contracts, even without the EOW report there is sufficient material on record to establish that the Noticee had indeed facilitated the trading in the 'paired contracts'.
32. Considering the deliberations and discussions recorded above and the submissions of the Noticee, the moot question is whether the Noticee facilitated transactions in 'paired contracts' for its clients under a bonafide belief that such transactions 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 far removed from the spot trading in commodities which was permitted on NSEL's platform. Further, as stated above, NSEL itself was advertising such contracts as an alternative to fixed deposits and an annualized return of about 16% was offered 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.

33. 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 further 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 trappings of a financial product which offered fixed and assured returns, as has been already observed by the Hon'ble Supreme Court in the *State of Maharashtra vs. 63 Moons Technologies Ltd.* The Noticee was expected to do due diligence on the products which it offered for trading to its clients. An assumption as to the legality of 'paired contracts' clearly shows that the Noticee failed to do adequate due diligence. The Notification regarding approval of contracts permitted on NSEL was in public domain. Thus, I find that Noticee failed to perform basic due diligence of the contracts offered vis-a-vis the conditions specified in the aforesaid Notification.
34. I note that for the clients, the face of NSEL and the 'paired contracts' was the Noticee itself and the 'paired contracts' could not have been executed without the actions and facilitation of the Noticee. The execution of the trades in 'paired contracts' by the Noticee shows the participation of the Noticee in the said scheme perpetrated by NSEL to facilitate trading in 'paired contracts' that were not permitted under the Exemption Notification and were purely financial contracts promising assured returns under the garb of spot trading in commodities. Therefore, the Noticee by its conduct and as a member of NSEL has acted as an instrument of NSEL in promoting and dealing in 'paired contracts' which were in the nature of financing transactions (as held by the Hon'ble

Supreme Court of India referred *supra*). The Noticee, by providing access for taking exposure to 'paired contracts' has exposed its clients to the risk involved in trading in a product that did not have regulatory approval, thereby raising doubts on the competence of the Noticee to act as a registered Securities Market intermediary. Thus, I am of the view that the trading activities of the Noticee in 'paired contracts' for its clients on the NSEL platform have serious ingredients jeopardizing the reputation, competence, fairness, honesty, integrity and character of the Noticee in the Securities Market.

35. Having established 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 read with the Hearing Notice. It is noted that the main allegation against the Noticee, as levelled in the SCN, is that by facilitating the trading in 'paired contracts' on NSEL platform during the relevant period as a Trading Member/ Clearing Member, 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's Complaint dated September 24, 2018 and FIR dated September 28, 2018 as provided to the Noticee vide Hearing Notice, further alleged that in light of the aforesaid documents as well as observations against the Noticee in the Enquiry Report, the Noticee is not a 'fit and proper person' for holding the certificate of registration. I note that 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 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.

36. In order to continue as a SEBI registered intermediary, the Noticee is, *inter alia*, required to satisfy the conditions of eligibility, which included 'fit and proper person' criteria. The above condition to be a fit and proper person is a preliminary condition applicable at the time of seeking registration. 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 were 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;"

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

37. From the records, I note that SEBI has filed a complaint with EOW Mumbai on September 24, 2018, against brokers who facilitated access to '*paired contracts*' traded on NSEL, including the Noticee. On the basis of this complaint, FIR dated September 28, 2018, was registered with the MIDC Police Station, Mumbai, against the Noticee and a chargesheet in the said matter has also been filed in the matter by EOW. I note that the Noticee is holding a certificate of registration 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 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. The scope of the instant proceeding is not to analyse 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 manifestly goes against the Noticee. The fact that is undeniably clear before me is that the involvement of the Noticee in trading/ facilitation of trading in 'paired contracts' on NSEL is certainly a conduct which was not permitted by the Exemption Notification nor by any of the applicable provisions of the FCRA and therefore, such a conduct, as has been displayed by the Noticee in its trading on NSEL platform, is detrimental to the interest of the Securities Market.
39. As discussed above, the Noticee has facilitated its clients to trade in 'paired contracts'. As the paired contracts were violative of the conditions stipulated in the Exemption Notification, a complaint was filed by SEBI with EOW on September 24, 2018, against the brokers who participated/ facilitated access to 'paired contracts' traded on NSEL, including the Noticee within the time limit, as specified under section 29A(2)(e) of the FCRA. On the basis of the said complaint of SEBI, FIR dated September 28, 2018 was registered with MIDC Police Station, Mumbai. Pursuant to the same, basis the material available on record, I note that a chargesheet has also been filed in the matter by EOW in the matter on December 2, 2022 before the Special MPID Court, Mumbai. I note that the name of the Noticee is reflected in the said chargesheet.
40. Noticee has contended that SEBI Regulations cannot be made applicable retrospectively and that the amendment of the criteria for fit and proper person laid out in Schedule II of the Intermediaries Regulations took effect from November 17, 2021 which is much after the initiation of the present proceedings. It is pertinent to note that the criteria of '*fit and proper person*', is an ongoing requirement throughout the period during which the Noticee remains operational in the Securities Market as a registered intermediary. In case, pursuant to the grant of registration by SEBI, any evidence comes to the notice of SEBI that casts a doubt on the integrity, reputation and character of the registered intermediary, SEBI is well within its powers to examine the '*fit and proper person*' status of such entity based on various parameters. Therefore, even if the Noticee was

found to have fulfilled the '*fit and proper person*' criteria when SEBI granted it 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 person*' criteria changes, the Noticee will be required to comply with the revised criteria, and in the instant case, criteria as revised vide the amendment in November, 2021. It is noted that parameters provided under Clause 3(b) of the amended criteria of Schedule II of the Intermediaries Regulations lays down a list of disqualifications which includes a pending chargesheet filed against an entity by an enforcement agency. In the present matter, vide chargesheet dated December 2, 2022, EOW has filed a chargesheet against the Noticee for violation of Section 21 of the FCRA. It is neither the case of the Noticee that the said chargesheet is either stayed or quashed by any competent court *qua* the Noticee or otherwise. In the absence of the above discussed factors, I am not inclined to accept the submissions put forth by the noticee in this context. It is, therefore, noted that the Noticee attracts the disqualification provided in Clause 3(b)(ii) of the Schedule II of the Intermediaries Regulations.

41. At this juncture, I deem it apposite to deal with the submission of the Noticee that SEBI cannot take into consideration its own FIR/ complaint when the police authorities themselves have not found any wrongdoing after a detailed investigation. As regard taking the FIR into consideration in the present matter, I note that being a '*fit and proper*' person is a continuing '*eligibility criteria*'/ statutory requirement, which must be satisfied by the Noticee including the amended criteria, at all times. I am of the considered view that the due presumption on the constitutional and legal validity of the said amended Schedule II of the Intermediaries Regulations holds the field which is binding upon SEBI, and arguments to the contrary are not maintainable. Therefore, looking holistically, I find that the conduct of the Noticee is detrimental to the Securities Market, being not in conformity with the applicable code of conduct. Given the above, I am constrained to conclude that the Noticee facilitated its clients to access a product, which was not permitted to trade. The same raises serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the product itself. By failing to disassociate itself from,

and continuing to facilitate participation in the said paired contracts, the Noticee failed to act with due diligence.

42. The Noticee has also submitted that it was under an expectation that the products launched by the Exchange are legal and hence there was no reason for the Noticee to question the legality of such product launched by NSEL. In this regard, I am of the view that, the principle of '*ignorantia juris non excusat*' or '*ignorantia legis neminem excusat*' or '*ignorance of law is no excuse*' becomes applicable in the situation, since trading in 'paired contracts' was in violation of the Exemption Notification and ignorance of the conditions of the said Exemption Notification cannot be claimed. As held by the Hon'ble Supreme Court, the 'paired contracts' were nothing but financing transactions which were portrayed as spot contracts in commodities. Therefore, giving go-by to the terms of the 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. 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 Broker Regulations read with the provisions of Schedule II of the Intermediaries Regulations.
43. In the context of Securities Market, I note that the role of a registered intermediary including a broker is not only sensitive and predominantly fiduciary in nature but also demands from it honesty, transparency, fairness and integrity which are essentially the hallmarks of such market intermediaries. Given the fact that one of the avowed objects of the SEBI Act is the protection of interest of investors apart from promotion and development of the Securities Market, the legislature through enactment, empowers SEBI to grant registration to several class of entities including brokers, which are not only required to act as an intermediary simplicitor, i.e., a bridge or a connector between the markets and investors, but also have a very important role to play in creating an ecosystem of trust and

fairness so as to provide a fair and secure market to the investors and any deviation from the above noted objective could have a cascading adverse impact on the development of the Securities Market and interests of investors. Thus, undisputedly a broker is obligated to act in a transparent manner and comply with all applicable regulatory requirements which are in the best interests of its clients and which will uphold the integrity of the Securities Market.

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

Consideration of DA's recommendation:

45. The DA in the Enquiry Report, after determining that the Noticee is not "fit and proper", has recommended that the certificate of registration of the Noticee be cancelled.
46. As discussed in the preceding paragraphs, the facts and circumstances in the instant matter lead to the conclusion that the Noticee is not a "fit and proper" person. Once an entity has been declared to be not "fit and proper", in the interest of securities market, it should not be allowed to continue to act as an intermediary till the time it does not regain its "fit and proper" status. In this context, it is pertinent to mention that in several scenarios, a defect which is the reason for

holding an intermediary not “fit and proper” is curable at the hands of the intermediary, while in certain scenarios, it is not.

47. In the present case, the Noticee has been found to be not “fit and proper” for the reason that its conduct, integrity and reputation has been found wanting because of the Noticee’s involvement in trading of “paired contracts” on the NSEL platform and also for the reason that in that regard, a chargesheet has been filed by EOW and the name of the Noticee is appearing in the said chargesheet.
48. Schedule II of the Intermediaries Regulations, in clause 4 provides that “*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*”. This clause, in my view, covers scenarios of ‘cancelation’ or ‘suspension’ of the certificate of registration of the intermediary.
49. Thus, the Intermediaries Regulations envisage deeming time limit (of 5 years) or specification of a time limit by the deciding authority, within which the intermediary can cure the defects which led to determination of its status, if the same can be done at its end. The said specification of period also serves as a reformatory direction against the intermediary.
50. Considering the above, in the instant case, having held that the Noticee is not “fit and proper”, the question for determination is what would be the appropriate direction in the given facts and circumstances. In my view, “suspension” of the certificate of registration of the Noticee would serve the desired purpose, as envisaged under the Intermediaries Regulations, of keeping the Noticee out of the securities market for the specified period after which the Noticee would be eligible to resume its business.
51. Given the fact that the transactions in paired contracts facilitated by the Noticee pertain to the period 2009-13, I am of the considered view that a direction of

suspension of certificate of registration of the Noticee for a period of six (6) months or till the time the Noticee is discharged or acquitted by a Court in relation to the chargesheet filed by EOW, whichever is later, would be proportionate and more appropriate in the present case.

ORDER

52. In view of the foregoing discussions and deliberations, I, 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 Intermediaries Regulations, hereby suspend the certificate of registration (bearing no. INZ000086834) of the Noticee viz. *Almondz Commodities Private Limited* as a commodities derivatives broker, for a period of six (6) months from the date of this Order or till the Noticee is discharged or acquitted by a Court in relation to the chargesheet filed by EOW, whichever is later.
53. The Noticee shall, after receipt of this order, immediately inform its existing clients, if any, about the aforesaid direction.
54. This Order shall come into force with immediate effect.
55. The above Order is without prejudice to the proceedings pending in pursuance of the chargesheet filed by EOW in the matter of trading on NSEL and/or any proceedings pending before any authority in respect of similar matter concerning the Noticee or other relevant persons.
56. A copy of this order shall be served upon the Noticee and the recognized Market Infrastructure Institutions for necessary compliance.

Sd/-

Place: Mumbai

Date: December 04 , 2023

**AMARJEET SINGH
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**