

**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:**

| <b>Sl. No</b> | <b>NAME</b>                            | <b>SEBI Registration No</b> |
|---------------|----------------------------------------|-----------------------------|
| <b>1.</b>     | <b>Alpha Commodity Private Limited</b> | <b>INZ000033238</b>         |

**In the matter of National Spot Exchange Limited (NSEL)**

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**BACKGROUND**

1. Alpha Commodity Private Limited (hereinafter referred to as “**ACPL**”/ “**Noticee**”) was registered with Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) as a stock broker bearing SEBI registration no. INZ000033238. ACPL was earlier a member of National Spot Exchange Limited (hereinafter referred to as “**NSEL**”).
2. The present proceedings originate from the enquiry report dated May 29, 2020 (hereinafter referred to as “**DA Report**”), submitted by the Designated Authority (hereinafter referred to as “**DA**”) in terms of regulation 27 of the SEBI (Intermediaries) Regulations, 2008 (hereinafter referred to as “**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 ACPL as a stock broker may be cancelled.

**SHOW CAUSE NOTICE, REPLY AND HEARING:**

3. Pursuant to the DA Report, a post enquiry show cause notice dated July 10, 2020 (hereinafter referred to as “**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 (hereinafter referred to as “**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. In response to the SCN, the Noticee filed a reply dated December 14, 2020 and additional written submission dated December 15, 2021.
4. After considering all material / documents available on record including Noticee’s reply, Designated Member / Whole Time Member (hereinafter referred to as “**DM**” / “**WTM**”) vide order dated April 29, 2022 (hereinafter referred to as “**April 2022 SEBI Order**”) held that Noticee was not a ‘fit and proper’ person and thereby cancelled Noticee’s certificate of registration as commodity derivatives broker. Aggrieved by the said April 2022 SEBI order, Noticee preferred an appeal before the Hon’ble Securities Appellate Tribunal (hereinafter be referred to as “**Hon’ble SAT**”).
5. While the aforesaid enquiry 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 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 said 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.....”*

6. In the appeal filed by Noticee, Hon’ble SAT vide its order dated July 29, 2022 had remanded the matter back to SEBI to decide the matter afresh in terms of direction given in aforesaid June 2022 SAT order.

**SUPPLEMENTARY SCN:**

7. 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 (hereinafter referred to as “**SSCN**”) was served on the Noticee along with the following documents:
  - 7.1. Copy of SEBI complaint dated September 24, 2018 filed with Economic Offences Wing (hereinafter referred to as “**EOW**”);
  - 7.2. Copy of FIR dated September 28, 2018 filed by SEBI under section 154 of Criminal Procedure Code, 1973 (hereinafter referred to as “**CrPC**”);
  - 7.3. Amended Schedule II of Intermediaries Regulations; and
  - 7.4. Copy of chargesheet dated December 02, 2022.

### **HEARING:**

8. Vide letter dated March 21, 2023, Noticee submitted reply to the SSCN and stated that their earlier reply submitted in the matter be also consider in the present proceeding. In line with the principles of natural justice, an opportunity of personal hearing was granted to the Noticee on June 20, 2023 through video conferencing. The Authorized Representatives (hereinafter referred to as "**ARs**") of the Noticee appeared online before me on June 20, 2023 and reiterated the reply dated March 21, 2023 and earlier submission made by the Noticee. During the course of hearing, the ARs submitted that Noticee had already surrendered its registration to Exchange and same is approved by SEBI and placed reliance on SEBI order dated June 16, 2023 in respect of Sharekhan Commodities Private Limited. Subsequent to the hearing, Noticee submitted additional submission dated June 20, 2023 and July 10, 2023.

### **REPLY AND WRITTEN SUBMISSION:**

9. The reply / written submissions / additional submissions filed by the Noticee dated December 14, 2020, December 15, 2021, March 21, 2023, June 20, 2023 and July 10, 2023 are summarized hereunder:
  - 9.1. Noticee vide letter dated March 21, 2023 had reiterated its earlier replies dated December 14, 2020 and December 15, 2021 and stated that, the same may be considered in this present enquiry proceedings.
  - 9.2. Noticee denied the allegation levelled against it in SCN and SSCN.
  - 9.3. Noticee has requested SEBI to provide relied upon documents, which have not been provided to Noticee till date. The DA enquiry report is based on irrelevant documents available in public domain, which have no bearing on the case of the Noticee. Hence, the principles of natural justice had not been adhered to while conducting the enquiry proceedings.
  - 9.4. SCN barred by Limitation: The action initiated by SEBI is barred by limitation since the SCN dated September 25, 2018 was issued in haste and in a vague manner and could not be contemplated as a proper complete SCN and the subsequent Notices issued were much later in time and after expiry of the limitation.

- 9.5. As per the finding of the DA, no irregularity was involved in appointment of DA by the Whole Time Member of SEBI instead of by the Executive Director of SEBI (as mandated by Intermediaries Regulations). The said finding is completely misconceived and legally untenable. The powers delegated to SEBI officers under the SEBI (Delegation of Powers) Order, 2015 cannot be in derogation of delegation of power which have been delegated under the SEBI Regulations. The delegation of powers under the SEBI Regulations will become redundant if it is interpreted that the SEBI (Delegation of Powers) Order, 2015 will supersede/ override all the delegation of powers given under the securities laws including SEBI Regulations. While taking the above position, the Enquiry report relied upon Section 3(2) of the SEBI (Delegation of Powers) Order, 2015 in terms whereof the powers and functions delegated to any member or officer of the Board or authority under the Order can be exercised by any officer or authority higher in grade or rank or position to him.
- 9.6. The applicability of Intermediaries Regulations for the purpose of conducting the enquiry proceedings in the instant case is patently wrong and perverse. As per the SCN, the Noticee has allegedly participated in/ facilitated the execution of paired contracts at the trading platform of NSEL when it was governed by the rules, regulations, bye laws of NSEL and also by the provisions of Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as “**FCRA**”) and the provisions of the SEBI Act and its regulations were not applicable to the Noticee for trading at the NSEL at the relevant time.
- 9.7. Under Section 29A(2)(e) of the FCRA, SEBI could initiate prosecution proceedings for alleged violation of FCRA but could not have initiated enquiry proceedings under the SEBI (Intermediaries) Regulations, 2008. Noticee cannot be held liable for acts under Intermediaries Regulations as the said Regulations are applicable to the Intermediaries registered with SEBI and the Noticee was not a SEBI registered intermediary at the relevant time.
- 9.8. According to the Ministry of Finance letter dated November 20, 2015, *“SEBI is not expected to deal with matters which were not dealt with by the erstwhile FMC ... It is farther clarified that since spot markets/ ready delivery contracts were not*

*being regulated by the FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets". As per the said letter SEBI is not expected to take upon itself any regulatory function with respect to spot markets/ ready delivery contracts. The enquiry proceedings in question pertain to the activities of the Noticee at spot market (NSEL) are also prohibited as per the said letter of Ministry of Finance.*

9.9. DA has erroneously concluded that the Noticee is not a fit and proper person for holding the Certification of Registration as a stock broker, given the close association of the Noticee with NSEL and paired contracts. In the instant case, there is no allegation that any of the directors or KMP of the Noticee is having any close association with anyone against whom CBI or any other intelligence agencies have initiated prosecution proceedings. Hence, the reliance placed by the DA in the matters of *Jermyn Capital LLC vs. SEBI* is completely wrong and without any basis. In the instant case, the SCN does not allege that the Chairman/ Whole Time Director/ Managing Director of the Noticee is involved in any criminal case which affects their reputation and thereby making Noticee as not a fit and proper person for acting as intermediary. Hence, the reliance placed by the DA in *Mukesh Babu vs. SEBI* is perverse and without application of mind.

9.10. A broker operating on the stock exchange cannot be treated as a close associate of a stock exchange, unless there is a common ownership, management or control. Since paired contracts were a product of NSEL in which the investors could trade, the same cannot be viewed as a person or entity enjoying good or bad reputation.

9.11. As regards to violation of regulation 5(e) of the Broker Regulations pertaining to the fit and proper criteria, the Noticee has already been granted the certificate of registration under Registration No. INZ000033238 and hence, the said provision is not applicable. Regulation 5 provides for the matters which may be taken into account by SEBI while considering the application for grant of registration to any applicant. On the issuance of Certificate of Registration, the Noticee was confirmed to be "fit and proper person" by SEBI and the enquiry to that effect was already completed. Any further enquiry to examine fit and proper

criteria of the Noticee can be undertaken based on acts or omissions subsequent to the registration and not prior to the registration.

- 9.12. The DA has failed to appreciate that the paired contracts were introduced by NSEL with the approval of its Board. The Noticee as a member of NSEL had no other option but to trade in such contracts by observing the business rules and regulations of NSEL. There is no allegation whatsoever that the Noticee has committed any breach of the business rules and regulations of NSEL as applicable to the trading in paired contracts.
- 9.13. The observations of the Hon'ble Supreme Court of India 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, do not hold precedential value as they do not form part of the *ratio decidendi* and they do not arise from the question which fell for consideration before the Hon'ble Supreme Court.
- 9.14. DA has set out certain observations made by Courts and certain authorities including EOW which were not pertaining to the Noticee. Further, the said proceedings were either sub-judice or the Noticee was not privy to said proceedings. Adverse observations made by Apex Court / GOI against NSEL and paired contracts has no relation with the Noticee as the Noticee was neither a party to the said proceedings nor the observations were directed against the Noticee.
- 9.15. There are no specific charges made against Noticee in the EOW interim report. The Noticee had traded in/ facilitated the paired contracts as a member of NSEL in accordance with the business rules and regulations of NSEL and as on the date of closure of business of NSEL, there were no pay out obligation as on September 19, 2013 and the Noticee was not a defaulting member.
- 9.16. Bombay High Court vide its Order dated August 22, 2019 in the matter of *63 Moons' Technologies Ltd v. State of Maharashtra* has held that the paired contracts were not financial transactions but were trades in commodity as per regulations and bye laws of NSEL. The Hon'ble High Court has over ruled its earlier Order dated October 1, 2015. Hence, the EOW case and Serious Fraud

Investigation Office (hereinafter referred to as "**SFIO**") Report, so far as they allege that the paired contracts were financial transactions have become redundant and infructuous.

- 9.17. It is not clear how the observations of the agencies and Courts on the role of NSEL or the mismanagement of NSEL by its promoters/ key managerial personnel can have any bearing on the Noticee's criteria as a fit and proper person.
- 9.18. That the clients who dealt through the Noticee were duly registered clients with proper KYC, Member Client Agreement and other relevant documents signed and executed by the Client as per the system of NSEL. All the trades were carried out as per NSEL system from time to time. The Contract notes were issued to the Clients as per the formats and the terms and conditions and bye laws of NSEL.
- 9.19. Various brochures/pamphlets/presentations on NSEL Products were provided solely by NSEL through their systems, website and emails.
- 9.20. NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for paired contracts and hence there was no reason for the Noticee to question the legality of such product launched by NSEL.
- 9.21. Out of around 5000 registered clients, the Noticee executed trades only for few clients who had approached it at their own instance. The Noticee hardly earned any profits, earning brokerage of barely Rs. 5,01,260/- for trades executed during 2009 to 2013.
- 9.22. The complaint with EOW, the FIR or the charge sheet filed with the EOW are based on the action / opinion against NSEL and its promoters and not on the basis of Noticee activities, which are exclusively for their clients only.
- 9.23. The complaint with EOW and the FIR was filed before the decision of the SAT and that needs to be relooked on the basis of fresh evidence.
- 9.24. The action taken by SEBI / Ministry of Finance have taken against NSEL and its promoters for its alleged irregularities. Noticee being the broker have carry on day to day activities of executing trades on the floor of the exchange on behalf of clients.

- 9.25. Noticee is not in any manner related to the NSEL or their irregular activities committed by NSEL. Therefore, Noticee is fit and proper person under Intermediaries Regulation, 2008 and is eligible to be registered as a commodity broker.
- 9.26. There are no other actions/ penalties that have been levied on Noticee and hence Noticee application has to be examined independently of the general findings and decided on the basis of the merits of application.
- 9.27. Noticee has surrendered its registration as a commodity broker vide Application dated February 09, 2021 and the same has been approved by SEBI on September 02, 2021. The said confirmation was communicated to Noticee by MCX vide its letter dated December 08, 2021. Hence, Noticee cease to be a commodity broker as on December 08, 2021. In this regard, Noticee placed reliance on SEBI Order dated June 16, 2023 passed in the matter of Sharekhan Commodities Private Limited wherein the SCNs issued to entity was disposed of without any directions.
- 9.28. Writ Petition (L) No.18094 of 2023 and No.18080 of 2023 has been filed before the Hon'ble Bombay High Court inter alia challenging the constitutional validity of Clauses 3(a), 3(b)(i), 3(b)(II), 3(b)(iii), 3(b)(iv), 3(b)(vi) (part), 3(b)(viii) and 6 of Schedule II of Intermediaries Regulations and any consequential actions taken by SEBI pursuant to and relying upon the said Provisions. In view of the same, Noticee request to keep the present proceedings in abeyance.

#### **CONSIDERATION OF ISSUE AND FINDINGS:**

10. I have carefully perused the SCN, SSCN, Enquiry Report, replies submitted by the Noticee and other materials/information as available in the public domain. After considering the allegations levelled against the Noticee in the instant matter as brought out in the SCN / SSCN, the issue which arises for consideration in the present proceedings is ***“whether the Noticee satisfies the ‘fit and proper person’ criteria as laid down under Schedule II of the Intermediaries Regulations”***.

11. Before going forward into the merit of the case, it would be appropriate at this stage to refer to the relevant provisions of the laws, 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:

**THE SEBI ACT, 1992**

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

*Section 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.*

**THE STOCK BROKERS REGULATIONS, 1992**

***Consideration of application for grant of registration.***

*Regulation 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.***

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

- (b) he shall abide by the rules, regulations and bye-laws of the stock exchange which are applicable to him;*
- (f) he shall at all times abide by the Code of Conduct as specified in Schedule II*

***SCHEDULE II***

***Securities and Exchange Board of India (Stock Brokers and Subbrokers) Regulations, 1992***

***CODE OF CONDUCT FOR STOCK BROKERS [Regulation 9]***

***A. General.***

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

- (2) *Exercise of due skill and care: A stock-broker shall act with due skill, care and diligence in the conduct of all his business.*
- (5) *Compliance with statutory requirements: A stock-broker shall abide by all the provisions of the Act and the rules, regulations issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him.*

***Liability for action under the Enquiry Proceeding Regulations.***

*Regulation 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;*

**THE 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**

**Regulation 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 subregulation may be considered.*

**Order.**

*Regulation 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.*

**BRIEF HISTORY OF NSEL SCAM:**

12. Before moving forward to consider the matter on merits, the background facts necessary for the present proceedings are narrated in brief as under:

12.1. 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 notification dated June 05, 2007 (hereinafter referred to as “**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.

- 12.2. 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.
- 12.3. On February 06, 2012, the erstwhile FMC was appointed by the Department of Consumer Affairs, Government of India, (hereinafter referred to as "**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.
- 12.4. 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.
- 12.5. Subsequent to the above, NSEL filed a reply. Further, Ministry of Corporate Affairs (hereinafter referred to as "**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:
- 12.5.1. No further/fresh contracts shall be launched by NSEL until further instructions from the concerned authority; and
- 12.5.2. All the existing contracts will be settled on the due dates
- 12.6. NSEL issued a circular on July 31, 2013 suspending its spot exchange operations.

- 12.7. 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 Financial Technologies (India) Ltd {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 (hereinafter referred to as “**MPID Act**”).
- 12.8. 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 (hereinafter referred to as “**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:
- 12.8.1. 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.
- 12.8.2. 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.

12.9. On September 19, 2014, Ministry of Finance, Government of India, issued a notification withdrawing the exemption granted to NSEL *vide* the 2007 Exemption Notification.

12.10. 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.

12.11. 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.*

12.12. *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.

- 12.13. 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 of FCRA and other appropriate provisions of the FCRA.
- 12.14. On September 28, 2018, SEBI gave a statement to the police which resulted into a FIR under Section 154 of CrPC.
- 12.15. 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 (hereinafter referred to as "**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....."*

- 12.16. 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.”*

12.17. 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.

13. Before dealing with the aforesaid issue, it would be appropriate to briefly delve to the list of events which leads to the initiation of Enquiry Proceeding. 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. It is true that the trades and actions pertain to the period from 2009 to 2013. However, the jurisdiction was conferred on SEBI

only on September 28, 2015. Based on an assessment of 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 including Noticee who executed the alleged trades. Pursuant to the said action, DA submitted Enquiry Report dated May 29, 2020. Subsequently, a post enquiry SCN dated July 10, 2020 was issued to the Noticee. Thereafter, considering all material / documents available on record including Noticee’s reply, then DM / WTM vide April 2022 SEBI Order held that Noticee was not a ‘fit and proper’ person and thereby cancelled Noticee’s certificate of registration as commodity derivatives broker. Aggrieved by the said April 2022 SEBI order, Noticee preferred an appeal before the Hon’ble SAT. While the Noticee’s appeal was pending before Hon’ble SAT, in a similar matter, Hon’ble SAT passed June 2022 SAT Order wherein it set aside the impugned orders of WTM concerning similar facts and evidence as the present case. Subsequently, Noticee’s appeal was remanded back to SEBI to decide the matter afresh in terms of direction given June 2022 SAT order.

14. Now, 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:

- 14.1. 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 judgment has been set aside in appeal by the Hon’ble Supreme Court in the Merger Petition judgment.
- 14.2. 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.

- 14.3. The observations in the bail rejection order dated August 22, 2014, passed by the Hon'ble Bombay High Court in the matter of Jignesh Prakash Shah vs. The State of Maharashtra, cannot also be relied upon as such observations were limited to the fact as to whether the bail should be granted or not.
- 14.4. 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.
- 14.5. 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 was held to be in relation to an Interim Order passed by SEBI, and the Hon'ble Tribunal was of the view that the criteria for passing an ad interim order are based on a different criterion, namely *prima facie* case, the balance of convenience and irreparable injury which are distinct and different while considering an application for grant of certificate of registration. The decision in the matter of Mukesh Babu Securities was distinguished by the Hon'ble Tribunal on the basis that in the 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.
- 14.6. 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.

14.7. 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.

14.8. The SSCN issued pursuant to the June 2022 SAT Order takes into consideration additional material available on record.

**PRELIMINARY CONTENTIONS RAISED BY THE NOTICEE:**

15. Before dealing with the issue of determination of “*fit and proper criteria*”, I now find it appropriate to first deal with the preliminary contentions raised by the Noticee:

16. **Contention No.1:** The Noticee has submitted that the enquiry report has been prepared based on irrelevant documents available in public domain and further, the Noticee has not been provided with the documents which have been relied upon by SEBI. In this regard, I note that Noticee has been provided with the documents that have been relied upon while issuing the SCN vide letters dated July 26, 2019 and February 26, 2020. Such documents include copies of FMC order dated December 17, 2013, Grant Thornton Report, Report of the Economic Offences Wing, Gazette Notification No. SO 906(E) dated June 05, 2007, copy of Finance Act, 2015, data pertaining to Noticee’s trades in the paired contract on NSEL etc. It is also noted that vide post Enquiry SCN dated July 10, 2020, Noticee was provided with additional material such as letter dated December 30, 2014 and Order dated August 22, 2014 of the Hon’ble High Court of Bombay in the criminal bail application of *Jignesh Prakash Shah vs. State of Maharashtra*. It is further noted that vide SSCN dated February 02, 2023 Noticee was provided with copies of SEBI complaint dated September 24, 2018 filed with EOW, FIR dated September 28, 2018 filed by SEBI,

charge sheet dated December 02, 2022 filed by EOW. Therefore, I find that all the material / relevant documents have been duly provided to the Noticee in compliance with the principles of natural justice in the conducting present enquiry proceedings. Hence, the contention of the Noticee's devoid any merit.

17. **Contention No.2:** The Noticee has submitted that the present proceedings are barred by limitation as SCN dated September 25, 2018 issued by SEBI was in haste and vague and could not be considered as a proper complete SCN and subsequent notices were issued after expiry of limitation. In this regard, I note that SEBI can initiate proceedings under FCRA within a period of 3 years from the date of repeal of FCRA which expire on September 27, 2018. I note that the first SCN was issued by SEBI on September 25, 2018. Hence, I find that the SCN was issued well within the prescribed limitation period and a bare perusal of the SCN, show that the material based on which allegation was made and the consequent violation have been duly mentioned therein. The allegations made in the SCN were also precise and unambiguous. Hence, the contention of the Noticee is not tenable.
18. **Contention No.3:** The Noticee submitted that the appointment of DA by Whole Time Member of SEBI instead of Executive Director leads to a situation where the SEBI (Delegation of Powers) Order, 2015 supersedes/ overrides the delegation of powers given under the securities laws including SEBI Regulations. In this regard, I note that Section 3(2) of the SEBI (Delegation of Powers) Order, 2015 specifically provides that, "*The powers and functions delegated to any member or officer of the Board or authority under the Order can be exercised by any officer or authority higher in grade or rank or position to him*". Further, regulation 24 (2) of Intermediaries Regulations provides for appointment of DA by the Executive Director. Here, it would be relevant to refer to the Hon'ble SAT order dated July 27, 2023 in Misc Appeal no. 940 of 2023 (SEBI Vs. Punit Goenka & Ors), wherein the Hon'ble SAT finds that "*..under Clause 3(2) of the Order of 2019, the power and functions delegated to any member or officer of the Board or authority could be exercised by any officer or authority, higher in grade or rank or position...*" Thus, I find that Hon'ble SAT is also in consonance

with SEBI stand's that powers and functions delegated to any officer of the Board can be exercised by any officer, higher in grade or rank or position to him. Further, it is well established that interpretation of a statutory provision must be so construed in such a way, if possible, any absurdity and mischief may be avoided. Hence, both the provisions can be reconciled with each other and mischief, if any, may be avoided, if it is interpreted that the appointment of DA can be done by the Executive Director or authority higher in grade or rank or position to the Executive Director. Hence, the said contention of the Noticee does not hold any merit.

19. **Contention No.4:** Noticee submitted that as per the SCN, it has allegedly participated in / facilitated the execution of paired contracts at NSEL platform. It was not governed by SEBI Rules and regulations and Intermediaries Regulations is not applicable to the Noticee. Hence, rather than initiating enquiry proceedings under Intermediaries Regulation, SEBI could have only initiated prosecution proceedings under Section 29A(2)(e) of FCRA. Noticee further submitted that as per the mandate of the letter dated November 20, 2015 of the Ministry of Finance, SEBI is not supposed to deal with the matter in question pertaining to the members of NSEL which was not taken up by the erstwhile FMC. In this regard, I note that:

19.1. The Finance Act, 2015, recognized the said fact and also that the commodity derivative brokers should be regulated by SEBI. Considering the same, it was made mandatory for all commodity derivative brokers, who wished to continue their activities, to apply for registration with SEBI within a period of 3 months' from September 28, 2015. Thus, by virtue of the provisions of the Finance Act, 2015, all those entities, who were functioning as commodity derivatives brokers, after having made their application within 3 months from September 28, 2015, were under the supervision and control of SEBI like any other intermediary holding a certificate of registration.

19.2. The Noticee had applied for a certificate of registration as a broker and was granted a certificate of registration by SEBI with effect from July 11, 2016. Therefore, the Noticee had become a SEBI registered intermediary from the said date and falls under the definitions of a "stock broker" and an "intermediary".

Being a SEBI regulated intermediary, SEBI has the jurisdiction to examine whether the activities of the Noticee in “paired contracts” for its clients on the NSEL platform affects its ability to be considered as a “fit and proper person”.

19.3. Hence, the jurisdiction of SEBI upon the Noticee has been conferred upon by the enactment of the Finance Act, 2015. Post the merger of FMC with SEBI and due to Finance Act, 2015, the liabilities of the Noticee with respect to all the omissions and commissions done earlier while dealing with commodity derivatives continued to be subject to the jurisdiction of SEBI.

19.4. Further, by virtue of initiating enquiry proceeding under Intermediaries Regulation, SEBI in effect is determining the violations of its Intermediaries Regulations (i.e. determination of ‘fit and proper’ person criteria) and not of any regulations / bye laws of NSEL.

19.5. The letter dated November 20, 2015 was an administrative letter issued by Department of Economic Affairs at the time of merger of FMC with SEBI wherein administrative actions to be taken by SEBI with respect to NSEL issue was clarified. The aforesaid letter made it clear that SEBI is not expected to take any regulatory action with respect to spot markets / ready delivery contracts which were not being regulated by FMC. But the said letter did not prevent, SEBI from proceeding under the Intermediaries Regulations. It is observed that the issue involved in the extant matter is neither related to spot markets / ready delivery contracts, rather the issue under consideration is whether the Noticee who had participated in the execution of impugned trades on NSEL trading platform, satisfies the criteria of ‘fit and proper’ person, as defined under Intermediaries Regulations.

19.6. In view of above, the said contentions of Noticee is untenable.

20. **Contention No.5:** Noticee submitted that with regard to violation of regulation 5(e) of the Broker Regulations pertaining to the fit and proper criteria, the Noticee has already been granted the certificate of registration and was confirmed as "fit and proper person". Hence, the said provision is not applicable. In this regard, I note that:

20.1. The criteria for fit and proper person which has to be complied by registered intermediary is provided under Schedule II of the Intermediaries Regulations. In terms of Regulation 9(f) of Broker Regulations, one of the conditions of registration is that stock broker shall at all times abide by the Code of Conduct as specified in Schedule II of Broker Regulations. In terms of Cause A(5) of Code of Conduct as specified in Schedule II of Broker Regulations, “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”. Thus, Regulation 5(e) read with regulation 9(f) and Clause A(5) of Code of Conduct as specified in Schedule II of Broker Regulations mandate that fit and proper criteria are not just an eligibility criteria that need to be satisfied when an entity seeks registration with SEBI, but also a continuous requirement that has to be complied with as long as the entity is registered with SEBI / continue to hold certification of registration from SEBI.

20.2. Even if the Noticee was found to have fulfilled the ‘fit and proper person’ criteria while granting the certificate of registration, in 2016, the fit and proper status of such an intermediary can still be assessed 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.

20.3. Pursuant to the grant of registration by SEBI to intermediary, 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 including the parameters provided under Schedule II of the Intermediaries Regulations.

20.4. In view of above, I do not find any merit in the said contentions of Noticee.

21. **Contention No.6:** Noticee requested that in view of the writ petition filed before the Hon’ble Bombay High Court *inter alia* challenging the constitutional validity of Clauses of Schedule II of Intermediaries Regulations, the present proceedings may

be kept in in abeyance till the disposal of said writ petitions. In this regard, I note that:

- 21.1. Noticee has neither filed any writ petition nor is party to the said filed writ petitions.
- 21.2. The writ petitions were filed challenging SEBI notice dated 19.06.2023 issued to the associated main broker firms not commodity broker, seeking the compliance of said associated main broker firms with Clause 6 of Schedule II of Intermediaries Regulations.
- 21.3. Hon'ble Bombay High Court vide order dated July 06, 2023 had stayed the compliance requirements of paragraph 4 of the notice 19.06.2023.
- 21.4. Hon'ble Bombay High Court has not granted any stay in the present enquiry proceedings.
- 21.5. In view of the above, I do not accede to request of the Noticee.

22. **Contention No.7:** The Noticee has submitted that it had surrendered its registration as a commodity broker vide Application dated February 09, 2021 and the same has been approved by SEBI on September 02, 2021. The said confirmation was communicated to Noticee by MCX vide its letter dated December 08, 2021. Hence, Noticee cease to be a commodity broker as on December 08, 2021. In this regard, a confirmation was sought from MCX as well as NCDEX. MCX vide email dated August 31, 2023 stated that the said surrender is a segmental surrender for the Noticee in MCX. NCDEX vide email dated August 30, 2023 stated that it had received surrender application of the Noticee on December 15, 2020 and said surrender application was not accepted by NCDEX and was kept on hold due to pending enquiry proceeding in NSEL matter. Hence, in view of the foregoing, I find that Noticee's surrender was only segmental surrender and only ceased to be a member of MCX. However, the Noticee certificate of registration in NCDEX is still in force and Noticee is still continuing as member of NCDEX. Hence, the surrender application of Noticee was not accepted by SEBI in toto and Noticee is still continuing / acting as a commodity stock broker in securities market.

23. Further, Noticee had placed reliance on SEBI order dated June 16, 2023 in respect of Sharekhan Commodities Private Limited (hereinafter referred to as "**Sharekhan**"). In this regard, upon perusal of said SEBI order, I find that Sharekhan's application for surrender of certificate of registration was approved by SEBI on May 29, 2018 i.e. prior to the initiation of enquiry proceedings against Sharekhan, whereas Noticee submitted its surrender application during the pendency of present enquiry proceedings and the said surrender application was not accepted by SEBI in toto. Hence, Noticee's case is different from that of Sharekhan matter. Thus, the reliance placed by the Noticee's in Sharekhan order is erroneous.

#### **CONTENTIONS ON MERITS :**

24. Having now dealt with the preliminary contentions of Noticee, I now proceed to examine whether the Noticee satisfies the "*fit and proper person*" criteria as laid down in Schedule II of the Intermediaries Regulations.

25. In view of the aforesaid findings of the Hon'ble SAT vide its order dated June 09, 2022 mentioned at paragraph 14 above, the material, evidence, documents and cases referred in April 2022 SEBI order viz. (i) observations of Hon'ble Bombay High Court in order dated August 22, 2014 in Criminal bail application of Jignesh Prakash Shah vs. State of Maharashtra; (ii) observations of Hon'ble Bombay High Court in order dated December 04, 2017 in the matter of 63 Moons Technologies vs. UOI and Ors; (iii) observations of Hon'ble Bombay High Court in order dated October 01, 2015 in the matter of NSEL vs. State of Maharashtra; (iv) Hon'ble SAT's order in Jermyn Capital LLC vs. SEBI and Mukesh Babu Securities Ltd vs. SEBI; (v) observations in SFIO Report; are not relevant for consideration in the present matter. Hence, any submission made by the Noticee in respect of these material, evidence, documents and cases does not require any deliberation in present matter.

26. It is noted that the Noticee has admitted and not disputed that it has dealt in paired contracts. The Noticee submitted that out of 5000 registered clients, the Noticee

executed trades at NSEL platform only for few clients who had approached it at their own instance and earned a brokerage of Rs. 5,01,260/- for trades executed during 2009 to 2013. I find the said argument does not help the Noticee as while determining “fit and proper person” criteria under Intermediaries Regulations, SEBI can take into account acts committed prior to granting registration. Further, I find it relevant to refer to the finding of Hon'ble SC in Merger Petition, wherein it *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. 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 facilitated by the Noticee, could not have been anything but “paired contracts”.

27. The Noticee submitted that NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for paired contracts and hence there was no reason for the Noticee to question the legality of such product launched by NSEL. In this regard, it is noted 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 NSEL was functioning in complete public knowledge and was permitted to provide the trading platform for paired contracts.

28. It is a matter of record that 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. I note that the Noticee is listed at serial no. 24 in the said list. 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. I note that pursuant to the said FIR, 11 separate final report forms under section 173 of CrPC were filed in the Special Court under MPID Act, Sessions Court, Mumbai. The 11<sup>th</sup> final report form titled "Chargesheet No. 11 (Final)" dated January 19, 2023 at page no.43 contains the name of the Noticee. Further, 2 directors of the Noticee, are also included in the said chargesheet. The said chargesheet was provided to the Noticee along with the SSCN. Thus, Noticee's argument that the FIR or the charge sheet filed are based on the action / opinion against NSEL and its promoters and not on the basis of Noticee activities, are not sustainable in light of the chargesheets filed pursuant to the detailed investigation conducted by the police which includes the name of the Noticee.
29. Further, I note that pursuant to the complaints filed against the Noticee, chargesheets have been filed by the police after investigating the offence stated in the FIR. In accordance with clause 3(b)(i) of Schedule II of Intermediaries Regulations, the pendency of a chargesheet filed against a person by any enforcement agency in matters concerning economic offence is sufficient to disqualify a person from being considered as a "fit and proper person".
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. The Noticee has also attracted clause 3(b)(ii) of Schedule II to the Intermediaries Regulations which states that pendency of a chargesheet against a person is a ground that SEBI may take into consideration for determining whether any person is a “fit and proper person”.

31. 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. However, I note that the Noticee had surrendered its certificate of registration vide application dated February 09, 2021, which shows that the Noticee does not intend to continue to hold its registration.

**ORDER:**

32. 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 cancel the certificate of registration (bearing registration no. INZ000033238) of Alpha Commodity Private Limited.
33. The Noticee shall, after receipt of this order, immediately inform its existing clients about the aforesaid direction in paragraph 32 above.
34. Notwithstanding the direction at paragraph 32 above, the Noticee shall allow its existing clients to withdraw or transfer their securities or funds held in its custody, within 30 days from the date of this order. In case of failure of any clients to withdraw or transfer their securities or funds within the said 30 days, the Noticee shall transfer the funds and securities of such clients to another broker within a period of next 15 days thereon, under advise to the said clients.

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: AUGUST 31, 2023**

**PLACE: MUMBAI**

-Sd-

**ANANTH NARAYAN G.**

**WHOLE TIME MEMBER**

**SECURITIES AND EXCHANGE BOARD OF INDIA**