

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.
Omkam Commodities Pvt. Ltd.	INZ000066637

In the matter of National Spot Exchange Ltd. (“NSEL”)

BACKGROUND

1. The present proceedings emanate from the Enquiry Report dated July 31, 2019 submitted in respect of Omkam Commodities Pvt. Ltd. (hereinafter referred to as “**Omkam Commodities Pvt. Ltd. / Noticee**”) by the Designated Authority (hereinafter referred to as the “**DA**”) in terms of Regulation 27 of the SEBI (Intermediaries) Regulations, 2008 (hereinafter referred as “**Intermediaries Regulations**”), as it stood prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021. The DA, based on various factual findings and observations so recorded in the said Enquiry Report, has recommended that the Certificate of Registration of Noticee as a commodities derivatives broker may be cancelled.
2. After considering the Enquiry Report, a Post Enquiry Show Cause Notice dated September 17, 2019 (hereinafter referred to as “**SCN**”) enclosing therewith the Enquiry Report of the DA was issued to the Noticee under Regulation 28(1) of the Intermediaries Regulations (as applicable at the relevant time) calling upon it to show cause as to why the action of

cancellation of Certificate of Registration as recommended by the DA or any other action, as deemed fit by the Competent Authority, under Regulation 28(2) of the Intermediaries Regulations (as applicable at the relevant time) should not be taken against it. The SCN further required the *Noticee* to submit its reply, if any, within 21 days of receipt of the same. The SCN was duly served upon the *Noticee*.

3. While proceedings in the present matter were ongoing, SEBI passed five separate orders during February 2019 rejecting the applications filed by five other entities seeking registration as commodities brokers. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**Hon'ble SAT**"). The Hon'ble SAT vide its common order dated June 09, 2022, remanded the aforesaid 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* directed 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..."

4. In light of the aforesaid order of Hon'ble SAT and certain other subsequent orders passed by the Hon'ble SAT in similar line of cases, it was felt necessary to furnish certain additional documents/material to the *Noticee* before concluding the present proceedings. Accordingly, SEBI vide a Supplementary Show Cause Notice dated March 29, 2023 (hereinafter referred to as the "**SSCN**") (SCN and SSCN are collectively referred to as "**SCNs**") provided certain additional documents/ material to the *Noticee* and

advised it to submit its reply/ comments/ clarifications, if any, within 15 days of receipt of the SSCN.

5. I note from the records that the Noticee has submitted replies dated December 10, 2019, May 08, 2023 and November 17, 2023 to the SCNs. Subsequently, in compliance with the principles of natural justice, a personal hearing was granted on November 01, 2023. The Noticee also submitted post hearing submissions dated October 19, 2023. The summary of the written and oral submissions made on behalf of the Noticee are summarized hereunder:
- a. *It was NSEL which introduced the concept of “paired contracts” and not the broker members of NSEL. The Noticee, as a broker, had no role or responsibility in physical verification of stock. The stock verification in NSEL’s warehouse was to be conducted by the concerned department of NSEL and/or an agency appointed by NSEL.*
 - b. *It was submitted that there was no investor grievance or complaint lodged against the Noticee in respect of the transactions undertaken at NSEL.*
 - c. *Noticee submitted that its gross turnover at NSEL was only Rs. 7.75 crore.*
 - d. *It was also submitted that there was no other allegation against the Noticee other than that it had facilitated transactions on NSEL which at that point in time was a recognized spot exchange.*

CONSIDERATION OF ISSUES AND FINDINGS

6. I have carefully considered the Enquiry Report and the SCNs issued to the Noticee, other materials/information available in the public domain and those made available to the Noticee. I note that the only question that arises for consideration in the present matter is whether the Noticee satisfies the ‘fit and proper person’ criteria as laid down under Schedule II of the Intermediaries Regulations and if not, then 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. It may be pointed out that Regulation 27 of the Intermediaries Regulations was amended with effect from January 21, 2021, pursuant to which the procedure for action on receipt

of the recommendation of the DA (provided under Regulation 28 prior to the amendment) was incorporated in the amended Regulation 27. Thus, these proceedings are being considered under the amended Regulation 27 of the Intermediaries Regulations.

7. I note that the present matter in hand is different from 5 cases remanded back to SEBI by the Hon'ble SAT vide its order dated June 9, 2022, as in the extant matter the Noticee is already holding a Certificate of Registration whereas in those 5 cases, the entities had filed applications seeking Certificate of Registration.
8. Before moving on to consider the principal issue, it would be appropriate to examine the preliminary issues raised by the Noticee challenging the initiation of the present proceeding.

The transactions on which the SCN was based on had taken place during the period, 2009 – 2013, and the Certificate of Registration was granted in 2016. So, the Noticee had already satisfied the 'fit and proper' criteria."

9. It is noted that prior to the merger of FMC with SEBI on September 28, 2015, the Noticee was required to be a member of an association recognised by the Central Government under Section 6 of the FCRA, and was not required to be registered with either FMC or any other regulatory authority under the FCRA. Consequently, by way of the Finance Act, 2015, the intermediaries dealing in the commodity derivatives market were brought under the regulatory purview 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 Rathi Commodities Ltd., Motilal Oswal Commodities Broker Private Ltd., Geofin Comtrade Ltd. and IIFL Commodities Ltd. 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”.

10. It is noted that Section 29A of the FCRA, as inserted by the Finance Act, 2015, *inter alia*, provided:

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

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

(a)....

(b)....

(c)....

(d)....

(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.”

11. It is noted that the aforesaid provision empowered SEBI to initiate fresh proceedings with respect to offences under the FCRA within a period of three years from the date of repeal of the FCRA. Thus, pursuant to the merger of FMC with SEBI, SEBI stepped into the shoes of FMC and had powers to initiate proceedings under Chapter V of FCRA. In exercise thereof, SEBI filed a criminal complaint dated September 24, 2018 with the Economic Offence Wing, Maharashtra Police (“**EOW**”). It is noted from the said complaint that EOW was requested to take appropriate action under Sections 20 and 21 and

other provisions of the FCRA against the brokers/ members of NSEL, and other persons mentioned in the complaint.

12. It is stated that the aforesaid proceedings are different from the present proceedings. The present proceedings pertain to adjudging the 'fit and proper person' status specified in the Stock Broker Regulations and the Intermediaries Regulations in light of the activities undertaken by the Noticee on the NSEL platform. This is an examination to consider the status of the Noticee since it is an intermediary.
13. The above account clearly brings out the distinct actions initiated by SEBI under the FCRA on one hand and under the SEBI Act/provisions of securities laws on the other. It has been contended by the Noticee that since the transactions happened between 2009 and 2013, and the Certificate of Registration was granted, the 'fit and proper' condition had already been satisfied by the Noticee.
14. It needs no reiteration that FMC merged with SEBI only in 2015. Certain facts related to the NSEL issue was still emerging while SEBI was carrying out the process of giving registration to various erstwhile commodity derivatives brokers under the Stock Brokers Regulations, as was mandated under the FCRA. That being the case, it would not be appropriate to assume that a sort of estoppel had come into effect as regards the NSEL case, just because the transactions pertained to the period, 2009 – 2013, while the Certificate of Registration was granted in February 2016 with effect from December 18, 2015. The Noticee is obligated to maintain the fit and proper person criteria on a continuous basis, and it is well within SEBI's jurisdiction and powers to adjudge the said fit and proper status of the market intermediaries in the interest of securities market.

The amended provisions of the Intermediaries Regulations, as annexed to the SSCN, would not be applicable to the Noticee.

15. As already brought out, the 'fit and proper' criteria, must be met by a Stock Broker at all times. This includes the amended criteria as finding mention in Schedule II of the Intermediaries Regulations. It is stated that no finding has been arrived at by any competent court, as yet, to impeach the constitutional and legal validity of the said amendment. That being the case, it shall be

presumed that the said provision was valid, and arguments in respect to its inapplicability were without merit.

16. It is reiterated that the '*fit and proper*' criteria is not a condition that has to be met by a registered Stock Broker only at the time of registration, but rather something which remains a persisting obligation, so long as the Stock Broker continues to remain a registered intermediary on the rolls of SEBI.

All documents had not been provided by SEBI to the Noticee.

17. The Noticee has additionally claimed that it had not been provided with necessary documents to give a comprehensive reply in respect of the allegations made in the SCNs. In this regard, it is noted that after the issuance of Post-enquiry SCN, the Noticee was granted an opportunity for inspection of documents as requested. Additionally, following documents had been served along with the Post-enquiry SCN: (i) SEBI Complaint dated September 24, 2018; (ii) FIR dated September 24, 2018 and (iii) amended Schedule II of the Intermediaries Regulations. So, it is evident that SEBI has all along endeavored to provide all the relied/relevant documents to the Noticee. Therefore, the claim of the Noticee that it did not have the necessary documents to give a comprehensive and detailed reply is not sustainable.
18. Before I proceed to examine the charges on merit vis-à-vis the material available on record, it would be appropriate to refer to the relevant provisions of law, which are alleged to have been violated by the *Noticee* and/or are referred to in the present proceedings. The same are reproduced below for facility of reference:

SEBI ACT, 1992

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

12.(3) The Board may, by order, suspend or cancel a Certificate of Registration in such manner as may be determined by Regulations:

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

STOCK BROKERS REGULATIONS, 1992

Consideration of application for grant of registration.

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

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

Conditions of registration.

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

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

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

Schedule II

Code of Conduct for Stock Brokers [Regulation 9]

A. General.

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

Liability for action under the Enquiry Proceeding Regulations.

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

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

INTERMEDIARIES REGULATIONS, 2008

SCHEDULE II

(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.*

19. Before moving forward to consider the matter on merits and decide whether the Noticee fulfilled the '*fit and proper person*' criteria, 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 genesis of the entire proceedings. While undertaking this exercise, without independently recording any findings on the nature of the contracts that were entered on the NSEL platform or commenting on the actions of any entity which is not a party to the present proceedings, I have relied on the observations made by other authorities including the Hon'ble Supreme Court, wherever appropriate.

NSEL and the Nature of '*paired contracts*'.

20. NSEL was incorporated in 2005 as an electronic platform for spot trading of commodities. On June 5, 2007, the Ministry of Consumer Affairs ("**MCA**"), Government of India, issued a Notification no. SO906(E) under Section 27 of the FCRA granting conditional exemption from the provisions of that Act for (i) forward contracts, and (ii) for sale and purchase of commodities, of one-day duration traded on NSEL. The conditions *inter alia* placed an absolute bar on short sales and stipulated that all outstanding positions at the end of the day must result in delivery. It was also stipulated that all information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency. The spot exchange was envisaged as a platform for providing transparent and secure trading in commodities with a view to boost the agriculture sector in the country. NSEL commenced operations in October 2008.
21. In September 2009, NSEL introduced, on its platform, the concept of '*paired contracts*', which involved buying and selling the same commodity through two different contracts at two different prices wherein investors could buy a short duration settlement contract and sell a long duration settlement contract

or vice versa, with the same counterparty at the same time. In other words, the '*paired contract*' involved *two simultaneous transactions being undertaken at the same time with the same counterparty – one being a purchase transaction (settling at T+2 or T+3) and the other being a sale transaction (settling at T+25 or T+36), at different prices on the platform of NSEL*. The transactions were structured in a manner that buyer of the short duration contract always ended up making profits.

22. On February 6, 2012, the Department of Consumer Affairs, Government of India, vide Gazette Notification S.O. 228(E) partially amended the Notification dated June 5, 2007, to the effect that "*all information or returns relating to the trade as and when asked for shall be provided to the Central Government or FMC*".
23. Thereafter, MCA on April 27, 2012 directed NSEL to show cause as to why action should not be initiated against it for the following alleged contraventions:
 - a) Permitting short sale of commodities: NSEL had not made it mandatory for the seller to actually deposit goods in the warehouse before he took a short position through a member of the exchange, The Exchange had no stock check facility which validated the member position. The exchange allowed trading on the exchange platform without verifying whether the seller member had the stocks with him or not.
 - b) Contracts made available by NSEL were for periods exceeding 11 days.
24. Subsequent to this, MCA vide its letter dated July 12, 2013, directed NSEL to give an undertaking that:
 - a) No further/fresh contracts shall be launched by NSEL until further instructions from concerned authority; and
 - b) All the existing contracts will be settled on the due dates.
25. Thereafter, FMC vide an Order No.4/5/2013-MKT-1/B dated December 17, 2013 ("**FMC Order**"), observed that: "55 contracts offered for trade on NSEL were with settlement periods exceeding 11 days and all such contracts traded on NSEL were in violation of provisions of FCRA" and "the condition of 'no short sale by members of the exchange shall be allowed' was not being met by NSEL".

26. Further, in the above mentioned Order, FMC *inter alia* held that the contracts traded on NSEL violated the following conditions stipulated in the aforesaid Notification no. SO906(E) dated June 5, 2007, that granted permission to NSEL to offer spot trading in commodities:

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.

b) Contracts with Settlement Period going beyond 11 days

Some of the contracts offered for trade on NSEL had settlement periods exceeding 11 days and such contracts were “*non-transferable specific delivery*” contracts under the FCRA. As per the provisions of 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 a settlement schedule for a period exceeding 11 days were not allowed under the aforesaid Notification.

27. From the above, it is clear that NSEL was initially set up as a spot exchange for trading in commodities. It was essentially meant to only offer forward contracts having one-day duration. I note from the FMC Order that FMC had observed that 55 contracts offered for trade on NSEL were with settlement periods exceeding 11 days and all such contracts traded on NSEL were in violation of provisions of FCRA. I further note from the FMC Order that under the FCRA, a “*forward contract*” is defined as a “*contract for delivery of goods and which is not a ready delivery contract*”. A ‘*ready delivery contract*’ is defined as “*a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days*”. Given the said definition contained in FCRA, FMC was of the view that all the contracts traded on NSEL which provided settlement schedule exceeding 11 days were treated as *Non-Transferable Specific Delivery contracts*.

28. It is therefore noted that even though MCA had stipulated in the exemption Notification that only contracts of one-day duration were permitted to be

offered on NSEL, FMC, in its Order, relying on the definition of “*forward contract*” under FCRA, had held that NSEL was allowed to trade only in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days. Therefore, even going by the interpretation adopted by FMC, it becomes clear that the 55 contracts having duration longer than 11 days, which were permitted by NSEL, were *ex facie* in contravention of the exemption granted to NSEL. It is pertinent to note that all the 15 contracts that were publicized by NSEL, which are captured in the Hon’ble Supreme Court’s Judgement *in the matter of NSEL* and the extracts of which are quoted in the next paragraph, were for durations exceeding 11 days.

29. Now, while considering the additional material that has been brought on record, I note that the Hon’ble Supreme Court has extensively commented on the nature of the ‘*paired contracts*’ traded on NSEL in its two judgments. The said observations are captured below:

a) The Two-Judge Bench of the Hon’ble Supreme Court in the course of determining the validity of the amalgamation order in the matter of 63 Moons had observed as under:

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

b) The Hon’ble Supreme Court in the MPID matter has drawn reference to the presentations made by NSEL in respect of the ‘*paired contracts*’ and has observed as under:

“44. ... NSEL in the course of its brochures has held out representations about the trading and investment opportunities available for:

- a) corporate clients*
- b) high net worth individuals; and*
- c) retail investors*

45. Under the head of “contract specifications”, the following representation has been held out:

Commodity	Duration	Investment (lacs.)	Yield
Castor Seed	T+3 & T+36	7.5 -9	16%
Castor Oil	T+5 & T+30	7-9	16%
Cotton Wash Oil	T+2 & T+25	10	16%
Paddy	T+2 & T+25	3.5-4.5	16%
Steel	T+2 & T+25	4.5-5	16%
Raw Wool	T+2 & T+25	3.5-4	16%
Wool Top	T+2 & T+25	1.8-2	16%
Crude Soybean Oil	T+2 & T+25	3.3.-3.5	16%
Soya DOC	T+2 & T+25	1.7-2.0	16%
Refined Mustard Oil	T+2 & T+25	6.5	16%
Refined Soybean Oil	T+2 & T+25	6.5	16%
Refined Sunflower Oil	T+2 & T+25	6.5	16%
RBD Palmolein Oil	T+2 & T+25	6.5	16%
Sugar	T+2 & T+25	3.0	16%
Maize	T+2 & T+25	3.0	16%

The above representation specifies:

- (i) Commodities;
- (ii) Duration of trades;
- (iii) Investment; and
- (iv) Yield.

For example, in the case of castor seeds, NSEL held out a buy contract (T+3) and sale contract (T+36), in which the yield is stated to be 16%. Moreover, NSEL represented that:

Opportunities

- Traders can trade and lock their return
- Trader has to buy in near settlement contract and sell in far settlement contract simultaneously
- Price for both settlements available
- Exchange provides counterparty guarantee risk
- No basis risk, No link with future contracts

While describing the features of —trading opportunity, NSEL represented that:

Features of Trading Opportunity:

- T+2 and T+25 contract offers unique trading opportunity to traders
- Trader purchases T+2 contract and simultaneously sells T+25 contract
- Pay-in obligation is on T+2 while Pay-out of the funds will be on T+25. Entire settlement cycle is of 35-37 days
- Price differential between the two settlement dates i.e premium if annualized offers interest rate of about 16%
- Income arising out of such trades are treated as Business Income

While comparing the investment opportunities of bank fixed deposits with trading opportunities at NSEL, NSEL represented that:

Comparison

- Bank FD 9.25% for 390 days; NSEL Trading Opportunity 16%;
- Bank FD minimum duration 390 days; NSEL Trade duration 35-55 days, depending on the contract
- Traders have an option of rolling over their position as per their convenience

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

30. From the above, it is noted that the Hon'ble Supreme Court has already commented on the nature of the '*paired contracts*' offered on the NSEL platform. In the merger petition (**63 Moons Technologies Ltd. vs. UOI**), the Hon'ble Supreme Court has held that these contracts were in the nature of financing transactions. Further, in the MPID matter (**The State of Maharashtra vs. 63 Moons Technologies Ltd.**), it was held that such transactions come within the definition of '*deposits*' under the MPID Act.
31. I note that the Hon'ble Supreme Court, in the MPID matter, had extensively referred to the claims made on the website of NSEL and the contents of the publicity material and other investor resources. In this regard, from the data provided in the table above, it can be seen that NSEL was publicizing a uniform return of 16% p.a. on the '*paired contracts*' traded on its platform. The return offered was the same across commodities. The return remained the same irrespective of the duration of the contract. For example, return offered on a T+2 & T+25 paired contract in steel was same as the return offered on T+ 2 & T + 35 paired contract in castor oil. It is thus noted that the '*paired contracts*' were being projected as an alternative to fixed deposits.
32. I note that the FMC Order, the EOW compliant and the abovementioned two judgments of the Hon'ble Supreme Court have extensively dealt with the issue of NSEL permitting short sales, i.e. permitting sellers to offer contract for sale of commodities on its platform without ensuring that requisite quantity of commodity was available in the warehouse. It is further noted from the Hon'ble Supreme Court's Order in the MPID matter that an overwhelming majority of the sale leg of the '*paired contracts*' which were executed were short sales i.e. commodities to back such sales were not available at the designated warehouses of NSEL. However, I note that it was primarily the responsibility of NSEL, and not the brokers, to ensure that there was adequate collateral against sell orders posted on its platform. I am therefore not going to delve any deeper on this issue.
33. I shall now proceed to look into the issue of violation of the third condition mentioned in the exemption Notification i.e. the compulsory delivery of outstanding position at the end of the day. In this regard, I take note of the observations made in this respect by various authorities. I note that the FMC

Order records that “NSEL Board allowed launching of paired back-to-back contracts on its exchange platform comprising a short-term buy contract (T+2 settlement) and a long-term sell contract (T+25 settlement) with predetermined price and profit for the buyer and seller, which violated the very concept of spot market of commodities and the transactions ultimately were in the nature of financial transactions.” Further, it has already been stated in the preceding part of this Order that the Hon’ble Supreme Court has held ‘paired contracts’ to be in the nature of financing transactions. I thus note that the ‘paired contracts’ offered by NSEL, which were by design structured in a manner that resulted in no delivery of commodities, have already been found by authorities including the Hon’ble Supreme Court to be in blatant violation of the conditions prescribed in the exemption Notification issued by MCA.

34. Further, I note from the records that SEBI has filed a complaint dated September 24, 2018, against brokers who facilitated access to ‘paired contracts’ traded on NSEL, including the Noticee, with EOW. On the basis of this complaint, an FIR dated September 28, 2018 was filed against the Noticee with EOW.
35. The above observations essentially lead to the question as to whether the Noticee should have been aware that the ‘paired contracts’ offered by NSEL, rather than being spot contracts in commodities, were actually an entirely different product which was far removed from the spot trading, as such ‘paired contracts’ did not result in compulsory delivery of commodities. As stated in the table above, NSEL itself was publicizing such contracts as an alternative to fixed deposits and the return offered was 16% across all commodities irrespective of the nature of the contract or the duration. Further, these contracts were structured in a manner which ensured that the buyer always made pre-determined profits.
36. It is an undisputed fact that there was a settlement default at NSEL and unsuspecting investors suffered losses of more than Rs. 5600 Crore. In this context, the question that needs to be considered is whether there were enough red flags to alert a reasonable person that what was being offered was not spot contract in commodities but rather a financial product offering

fixed returns, which should have made him act in a more circumspect manner when the “*paired contracts*” were first offered by NSEL. I note that during the period when “*paired contracts*” were offered by NSEL (2009 -2013), the policy repo rate ranged from 4.75 % to 8% whereas NSEL, in its own publicity material, was promising an ‘*assured return*’ of 16%. Contracts were structured in a manner where the buy side always made a profit. The return across commodities, as highlighted in the table above, were the same irrespective of the duration of the contract. These are apart from the other *ex facie* deviations from the exemption notification that “*paired contracts*” suffered from.

37. I therefore find that the writings on the wall were quite visible and there were enough red flags for a reasonable person to come to conclude that what was being offered as paired contracts on NSEL were not spot contracts in commodities. However, there are sufficient evidences establishing that the Noticee had indulged in / facilitated paired contracts. It is noted that the gross turnover of Noticee to “paired contracts” traded on NSEL was Rs. 7.75 crore.
38. Having reviewed all the material on record, I am constrained to conclude that the Noticee, presumably driven by its desire to earn brokerage, provided a platform for its clients to access a product which raised serious questions on the ability of the Noticee to conduct proper and effective due diligence regarding the product itself. The lure of extra yield proved to be an irresistible bait. The Noticee should have been more careful while offering such a product to its clients.

Fit and Proper Person’ Criteria

39. Regulation 5(e) of the SEBI (Stock Brokers) Regulations, 1992 (“Stock Brokers Regulations”) provides that for the purpose of grant of Certificate of Registration, the applicant has to be a fit and proper person in terms of Schedule II of the Intermediaries Regulations. I note that the ‘*fit and proper person*’ criteria, specified in Schedule II of the Intermediaries Regulations, was amended vide SEBI (Intermediaries) (Third Amendment) Regulations, 2021, and the amended provision is quoted earlier in this order.

40. I note that post the amendment carried out in 2021, the '*fit and proper person*' criteria now has both a 'principle based criteria' and a 'rule based criteria', as opposed to the earlier criteria which was 'purely principle based'. I further note that '*fit and proper person*' criteria is a requirement that has to be satisfied by an intermediary throughout the time it holds a valid Certificate of Registration with SEBI. The Noticee was, therefore, required to comply with the revised criteria post the amendments carried out in 2021. I note that paragraph 3(b) of the amended criteria lays down a list of disqualifications which includes, under paragraph 3(b)(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.*"
41. As already stated above, a criminal complaint has been filed by SEBI before the EOW against the Noticee. 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 against the trading members, including the Noticee, which were listed in the SEBI complaint to EOW. It is, therefore, noted that the Noticee attracts the disqualification provided in paragraph 3(b)(i). Further, the act of Noticee in offering access to '*paired contracts*' also seriously calls into question the integrity, honesty and lack of ethical behavior on the part of the Noticee.
42. These contracts, as stated earlier, were *ex facie* offered in violation of the exemption Notification issued by MCA and far removed from the spot contracts in commodities which were permitted to be traded on NSEL. The '*paired contracts*' were nothing but financing transactions masquerading as spot contracts in commodities. It has already been held above that there were enough red flags for a reasonable person to infer that what was being offered as "*paired contracts*" on NSEL was not spot contracts in commodities and that the Noticee, presumably driven by its desire to earn brokerage, provided a platform for its clients to access a product which raised serious questions on the Noticee's ability to conduct proper and effective due diligence regarding the product itself.

43. In view of the above, I hold that the Noticee failed to comply with the '*fit and proper person*' criteria specified in Schedule II of the Intermediaries Regulations on continuous basis.
44. I note that the DA has recommended for cancellation of Certificate of Registration of the Noticee as a commodities derivatives broker. However, considering the role of the Noticee in the entire events surrounding the paired contracts, I am of the opinion that the suspension of Certificate of Registration for a period of 3 months from the date of this order or till the disposal of abovementioned FIR filed with EOW, whichever is later, would be commensurate with the findings made against the Noticee in this Order.

ORDER

45. 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. **INZ000066637**) of **Omkam Commodities Pvt. Ltd.**, as a commodities derivatives broker, for a period of three (3) months from the date of this Order or till the disposal of FIR filed with EOW, whichever is later.
46. The *Noticee* shall, after receipt of this order, immediately inform its existing clients, if any, about the direction in paragraph 45 above.
47. Notwithstanding the direction at paragraph 45 above, the *Noticee* shall allow its existing clients, if any, to withdraw or transfer their securities or funds held in its custody, within 15 days from the date of this order.
48. The Order shall come into force with immediate effect.
49. A copy of this order shall be served upon the Noticee and the recognized Market Infrastructure Institutions for necessary compliance.

DATE: December 21, 2023

ASHWANI BHATIA

PLACE: MUMBAI

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA