

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:

Airan Commodities Pvt. Ltd.

SEBI Registration No: INZ000078934

In the matter of National Spot Exchange Limited (NSEL)

A. BACKGROUND

1. Airan Commodities Pvt. Ltd. ("**Airan**")/"**Noticee**") is registered with Securities and Exchange Board of India ("**SEBI**") as a stock broker bearing SEBI registration no. INZ000078934. The Noticee was earlier a member of National Spot Exchange Limited ("**NSEL**").
2. The present proceedings originate from the enquiry report dated January 31, 2020 ("**DA Report**"), submitted by the Designated Authority ("**DA**") in terms of regulation 27 of the SEBI (Intermediaries) Regulations, 2008 ("**Intermediaries Regulations**") as it stood at the relevant point of time prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021. The DA, based on findings recorded in the said DA Report, recommended that the registration of the Noticee as a broker may be cancelled.

B. SHOW CAUSE NOTICE, REPLY AND HEARING

3. Pursuant to the DA Report, a post enquiry show cause notice dated February 25, 2020 ("**SCN**") was issued to the Noticee, alongwith copies of (i) the aforesaid DA Report; (ii) Finance Ministry letter dated December 30, 2014 to Forwards Market Commission ("**FMC**"); (iii) Hon'ble Bombay HC's order in criminal bail application no. 1263 of 2014 in Jignesh Prakash Shah vs. State of Maharashtra dated August 22, 2014.
4. While the aforesaid proceedings were pending, SEBI passed five separate orders rejecting the applications filed by five other entities for registration as commodity brokers in NSEL matter during February, 2019. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal ("**Hon'ble SAT**"). The Hon'ble SAT *vide* its common order in the matter of Geofin Comtrade Ltd. And Ors. vs. SEBI (Appeal no. 214 of 2019) dated June 09, 2022 ("**June 2022 SAT Order**"), remanded the aforesaid SEBI orders to decide these matters afresh within six months from the date of the said order. While remanding the aforesaid SEBI orders, the Hon'ble SAT *inter alia* held as under:

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

5. In light of the June 2022 SAT Order, it was felt necessary to furnish certain additional documents/material to the Noticee and grant an opportunity of personal hearing,

before concluding the present proceedings. Accordingly, a supplementary SCN dated February 27, 2023 (“**SSCN**”) was served on the Noticee along with the following documents:

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

6. *Vide* email dated April 29, 2023, the Noticee submitted its reply. The reply is summarized below:

6.1 CONTENTION 1: THE WTM DOES NOT HAVE POWER TO APPOINT THE DA

- (i) The DA while holding that WTM has power to appoint DA as per section 3(2) of SEBI (Delegation of Powers) Order, 2015 has completely ignored another relevant provision contained in section 3(1) of the said order.
- (ii) The said section states that the delegation of power in the order is in addition to and not in derogation of powers specified under securities laws. General principle of law is that general law will not override special law unless the general statute has a non-obstante clause giving it an overriding effect. SEBI (Delegation of Powers) Order, 2015 does not have any such non-obstante clause. Regulation 24 of the Intermediaries Regulations was amended on November 21, 2017 to vest the power of appointing DA to the ED, which power in the present case was exercised by the WTM. This amendment will prevail over any other provisions contrary to it (*i.e.*, this amendment will prevail over the SEBI (Delegation of Powers) Order, 2015 under which the DA has been appointed by the WTM).

6.2 CONTENTION 2: SEBI COULD NOT HAVE INITIATED ENQUIRY PROCEEDINGS UNDER THE INTERMEDIARIES REGULATIONS

- (i) SEBI Act and regulations therein were never applicable to paired contracts traded by Airan on NSEL at the relevant time. As per section 29A(2)(e) of FCRA, SEBI could initiate prosecution proceedings against NSEL members for alleged violation of FCRA within 3 years from the date FCRA was repealed but could not initiate enquiry proceedings under the Intermediaries Regulations which are attracted when an intermediary allegedly violates any conditions of registration certificate or any provisions of securities laws. Provisions of FCRA do not fall within “securities laws” as laid down in regulation 2(1)(k) of Intermediaries Regulations. DA has given erroneous finding that SEBI is statutorily empowered to initiate proceeding to determine whether Airan is a “fit and proper person” or not, when it was governed by FCRA, NSEL’s bye-laws, regulations *etc.* FCRA does not contemplate declaring an entity as not “fit and proper” person as an intermediary under SEBI regulations.
- (ii) In order to justify applicability of SEBI Regulations, DA has wrongly relied upon the case of Jermyn Capital LLC vs. SEBI. The said case referred to the applicability of SEBI Regulations in general and there was no issue pertaining to applicability of SEBI regulations retrospectively.
- (iii) The Ministry of Finance *vide* letter dated November 20, 2015 had advised that SEBI is not expected to deal with matters which were not dealt by erstwhile FMC. Further, it was clarified that since spot markets/ready delivery contracts were not being regulated by FMC, SEBI is not expected to take upon itself any regulatory function with regard to such markets. FMC had not dealt with/initiated any action against the brokers for trading in paired contracts at NSEL, hence, as per the mandate of the letter, SEBI could never have dealt with the matter pertaining to NSEL members which was not taken

up by FMC. Thus, the present enquiry proceedings are beyond the regulatory framework of SEBI as per the aforesaid letter. The said letter is in consonance with the provisions of Finance Act, 2015 under which SEBI has been given the jurisdiction over the commodities market only and not spot markets.

6.3 CONTENTION 3: SCN AND DA REPORT ARE NOT IN ACCORDANCE WITH PRINCIPLES OF NATURAL JUSTICE DUE TO RELIANCE ON IRRELEVANT DOCUMENTS

- (i) The SCN is bereft of any details of actions/instances which amount to alleged violation of SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 ("**Brokers Regulations**") or Intermediaries Regulations.
- (ii) DA's reliance on FMC Order is misplaced as neither Airan was a party to the FMC order nor any of the trades in paired contracts were a matter of consideration before FMC. The SCN is devoid of details as to how the FMC order may be related to any of Airan's trades.
- (iii) The DA Report has considered irrelevant documents available in public domain which have no relevance on the case made out against Airan.
- (iv) **Reliance on order of Jermyn Capital LLC vs. SEBI:** DA has wrongly relied upon the case of Jermyn Capital LLC vs. SEBI to show that close association with any person who does not enjoy good reputation is good enough to determine that the person in question is not "fit and proper". In the said case, Jermyn Capital LLC was not found to be "fit and proper" as Jermyn Capital, Dubai company registered with SEBI as a foreign institutional investor was managed by Mr. Andrews who had close links with Dharmesh Doshi and Ketan Parekh against whom CBI and other agencies have launched prosecution for committing securities scam. In the present case, there is no

allegation that any of Airan's directors or KMP have any close association with anyone against whom CBI or any other intelligence agencies have initiated prosecution proceedings. A member of a stock exchange or a person holding a registration certificate from SEBI as an intermediary cannot be construed as having close association with exchange or SEBI merely based on being a member or intermediary unless there is common ownership, management or control. If this concept is stretched further, any person having any sort of relationship with NSEL or any entity which was promoted/managed by the erstwhile promoters of NSEL (including MCX and 63 Moons Technologies) would be deemed to be having close relations with NSEL or erstwhile promoters who were declared not "fit and proper" persons by FMC and SEBI, and consequently, all such persons may have to be declared as not "fit and proper persons".

- (v) **Reliance on observations of courts and authorities including EoW:** Reliance placed by DA on adverse observations made by courts/authorities including EoW cannot be considered for determining "fit and proper" criteria in light of judgment of Hon'ble Bombay HC in the matter of 63 Moons Technologies Ltd. vs. State of Maharashtra dated August 22, 2019. In the said judgment, Hon'ble HC held that NSEL is not a "financial establishment" and paired contracts are not a "financial transaction" under the MPID Act. Therefore, the EoW case and the Serious Fraud Investigation Office ("SFIO") report as far as they allege that paired contracts were "financial transactions" have become infructuous. Further, the reliance on EoW report is erroneous as there are no specific charges made against Airan in the EoW Report. As on the date of closure of business of NSEL, an amount of Rs. 7,55,64,980 was outstanding against Airan which is fraud committed by NSEL's management and defaulting brokers.
- (vi) Reliance placed by DA on the FMC order which in turn relies on the GT Report is erroneous as Hon'ble Madras HC *vide* its judgement dated July 26,

2018 had granted injunction against its use in any manner adverse to 63 Moons Technologies Ltd. The said judgment was extended till further orders on October 23, 2018. Hence, the use of FMC order and GT Report by the DA is in violation of the aforesaid order by Hon'ble Madras HC and amounts to contempt of court. Further, the FMC order found fault with the operations of NSEL for launching paired contracts and the role of its promoters and KMP. The DA Report is silent regarding the fact that Airan was neither party to the said proceedings nor the court had considered its role/activities as member of NSEL.

- (vii) With respect to the judgment of Hon'ble Bombay HC in 63 Moons Technologies Ltd. vs UOI (WP no. 2473 of 2014), the same has become redundant in light of the order of Hon'ble Bombay HC dated August 22, 2019. Further, the said judgment does not draw any adverse inference against Airan.
- (viii) The DA has made another erroneous observation to the effect that as a commodity broker, Airan allowed itself to become an instrument and agent of NSEL in promoting trading in paired contracts among its clients. Such a finding is perverse and totally baseless. The DA has failed to appreciate that the paired contracts were introduced by NSEL with the approval of its board. As a member of NSEL, it had no other option but to trade in such contracts, as per its contract specifications, by complying with the business rules and regulations of NSEL. There is no allegation whatsoever that it had committed any breach of the business rules and regulations of NSEL as applicable to trading in paired contracts. NSEL had always presented to the public as well as to the brokers including as that to be paired contracts provided by the exchange are otherwise legal and permissible contracts as per 2007 Exemption Notification. When it was reported in the Economic Times dated October 03, 2012 about issuance of SCN by DCA to NSEL alleging short selling charge, NSEL had on the same day, issued a circular/clarification

stating that all contracts traded on the NSEL are for one-day duration only, which are covered under the said exception.

6.4 CONTENTION 4: DA REPORT HAS NOT DEALT WITH/GIVEN DUE CONSIDERATION TO CERTAIN CONTENTIONS OF AIRAN

- (i) All clients who dealt through Airan were duly registered clients who had done adequate documentation with Airan. There is no observation that Airan had funded its clients for execution of alleged paired contracts.
- (ii) All trades were carried out as per the NSEL bye laws. The contract notes were issued to clients as per terms and conditions and bye laws of NSEL. There is nothing on record that the prescribed procedure has not been followed.
- (iii) No brochures/pamphlets/presentations on NSEL products were issued or provided by Airan to its clients and it had never marketed the paired contract product.
- (iv) NSEL was functioning in complete public, governmental and regulatory knowledge and hence there was no reason for Airan to question the legality of such product. Byelaw 4.1 of NSEL byelaws mandates NSEL to prescribe contract specifications and Airan had no role to formulate the same. Byelaw 4.2 of NSEL mandates that transactions can be executed and cleared only in contracts which have been approved by NSEL board. Byelaw 4.5 mandates that all transactions in commodities permitted on the exchange shall be made only in the manner approved by the exchange. Therefore, Airan could have not traded in paired contracts which were otherwise violative of byelaw 4.2 and 4.5 of NSEL. The SCN does not specify any rules, regulations, byelaws of NSEL allegedly violated.

- (v) Paired contracts were being widely traded in the market. Airan's clients were constantly requesting it to allow them to invest their funds in paired contracts. After carrying out due diligence of product on the basis of inquiries with NSEL officials, fellow brokers and their clients, Airan started trading activity in the product for only some clients.
- (vi) Out of 12100 registered clients in the equity and commodity segments, Airan executed trades only for 160 clients who had approached on Airan on their own. The number shows that Airan neither marketed this product nor it had intention to do so. Airan earned brokerage of barely Rs.8,75,399. There were no complaints of alleged violations of regulations against Airan. There are no outstanding dues to any clients. Cancellation of registration certificate is proposed to be made in respect of all NSEL members irrespective of the number or value of trades entered into by them in the alleged paired contracts. NSEL has to pay Rs. 7,55,64,980 towards its obligations towards Airan.
- (vii) With respect to the letter dated December 30, 2014, submitted by Ministry of Finance, the letter merely confirms that GOI is in agreement with FMC's view that NSEL has violated the first 2 conditions of exemption granted to it under section 27 of FCRA, and hence, FMC is advised to initiate appropriate actions under FCRA. The letter merely stated that GOI wanted FMC to take action against NSEL. It is silent on the activities of members of NSEL or any contemplated action against such members.
- (viii) As regards judgment and order of Hon'ble SC dated April 30, 2019 in the case of amalgamation of 63 moons, the said judgment is neither relevant with respect to the role of NSEL members nor Airan was a party to the said proceedings. With respect to paragraph 52 of the said judgment, the Hon'ble Supreme Court has held that no "public interest" is involved in recovery of private dues of traders who traded on NSEL. Relying upon the said

observation, the Hon'ble Bombay High Court in its Interim Order dated January 15, 2020 in Criminal Application in Moonish Rangari & Ors. vs. Union of India, has held that the entire jurisdiction basis of the SFIO Investigation which was ordered by the Central Government in the purported "public interest" vide its order dated October 28, 2016 has ceased to exist. In view thereof, the SFIO investigation report appears to be without jurisdiction. In view of the aforesaid judgements of the Hon'ble Supreme Court and Hon'ble Bombay High Court, the investigation of SFIO is without any jurisdiction and hence, cannot be relied upon by SEBI for drawing any adverse inference.

6.5 The Noticee *vide* its email dated July 10, 2023, has also placed reliance on the following:

- (i) Joindre Commodities Ltd. and Ors. vs. SEBI (Appeal no. 502 of 2023), passed by Hon'ble SAT dated June 20, 2023.
- (ii) Venkataraman Rajamani and Ors. vs. SEBI and Ors. (WP No. 17978 of 2023), passed by Hon'ble Bombay HC dated July 06, 2023.

7. A hearing opportunity was also granted to the Noticee on June 19, 2023. *Vide* email dated June 16, 2023, the Noticee requested for an adjournment of 30 days. The adjournment requested was acceded to and the hearing was rescheduled to July 10, 2023. The authorized representative ("**AR**") of the Noticee appeared through video conferencing before the undersigned on July 10, 2023. The AR reiterated the submissions made by the Noticee *vide* letter dated April 26, 2023 and requested the WTM to consider the cases sent *vide* email dated July 10, 2023. The AR requested the current proceedings to be kept in abeyance until the appeals pending before Hon'ble SAT are disposed of. Further, the AR stated that she does not have any further submissions to make with respect to the Noticee.

C. BRIEF HISTORY OF NSEL SCAM

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

- (i) NSEL was incorporated in May 2005 with the purpose of developing an electronic spot exchange for trading in commodities. In exercise of powers conferred under section 27 of the FCRA, the Central Government *vide* the notification dated June 05, 2007 ("**2007 Exemption Notification**"), granted an exemption to all forward contracts of one-day duration for the sale and purchase of commodities traded on NSEL from operations of the provisions of the FCRA subject to certain conditions. The said notification *inter alia* stated that "*no short sale by the members of the exchange shall be allowed*" and "*all outstanding positions of the trades at the end of the day shall result in delivery*". It was also stipulated that all information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency.
- (ii) In October 2008, NSEL commenced operations providing an electronic trading platform to its participants for spot trading of commodities, such as bullion, agricultural produce, metals, *etc.* It is observed that NSEL had introduced the concept of 'paired contracts' in September 2009 which allowed buying and selling in same commodity through two different contracts at two different prices on the exchange platform wherein the investors could buy a short duration contract and sell a long duration contract and *vice versa* at the same time and at a pre-determined price. The trades for the buy contract (T+2 /T+3) and the sell contract (T+25/T+36) used to happen on NSEL on the same day at same time and at different prices, involving the same counterparties. The transactions were structured in a manner that buyer of the short duration contract always ended up making profits.

- (iii) On February 06, 2012, the erstwhile FMC was appointed by DCA as the 'designated agency' as stipulated in one of the conditions prescribed under the said 2007 Exemption Notification, authorizing it to collect the trade data from NSEL and to examine the same for taking appropriate measure, if needed, to protect investors' interest.
- (iv) DCA on April 27, 2012 directed NSEL to show cause as to why action should not be initiated against it for violation of the conditions mentioned in the 2007 Exemption Notification.
- (v) Subsequent to the above, NSEL filed a reply. Further, MCA sought comments of FMC on the said replies. MCA also sought certain information from NSEL pursuant to which *vide* its letter dated July 12, 2013, MCA directed NSEL to give an undertaking that:
 - a. No further/fresh contracts shall be launched by NSEL until further instructions from the concerned authority; and
 - b. All the existing contracts will be settled on the due dates
- (vi) NSEL issued a circular on July 31, 2013 suspending its spot exchange operations.
- (vii) On August 27, 2013, FMC directed a forensic audit of NSEL by Grant Thornton LLP. Further, the Union of India ordered an inspection of accounts of NSEL and 63 Moons Technologies Ltd. (*earlier FTIL*) under section 209A of the Companies Act. The EoW also registered cases against the directors and key management personnel of the NSEL and 63 Moons (*earlier FTIL*) and against trading members and brokers of NSEL under the provisions of the Indian Penal Code and Maharashtra Protection of Interest of Depositors Act, 1999 ("**MPID Act**").

(viii) After analyzing the trade data received from NSEL and the forensic audit report submitted by Grant Thornton LLP, the FMC passed Order dated December 17, 2013 in the matter ("**FMC Order**") wherein it *inter alia* observed that Financial Technologies (India) Ltd. is not a fit and proper person to continue to be a shareholder of 2% or more of the paid-up equity capital of MCX. Further, from paragraph 8 of the FMC Order, I note that the DCA *vide* its letter dated April 27, 2012 directed NSEL to explain as to why action should not be initiated against NSEL for violation of the conditions of the 2007 Exemption Notification. In response to the same, NSEL submitted a reply *vide* their letter dated May 29, 2012. DCA, *vide* its letter dated May 31, 2012, sought comments of FMC on the NSEL reply. The FMC, *vide* its letter dated August 02, 2012 to the DCA provided its comments on the two main issues, which are relevant for consideration of the matter at hand, as paraphrased hereunder:

- (a) Short sale by members of the exchange: NSEL did not insist upon ownership of goods before allowing its members to place the sale order. FMC was of the view that all the sale transactions which are not backed by the ownership of goods were in violation of the condition of "*no short sale by the members of the Exchange shall be allowed*" as stated in the 2007 Exemption Notification.
- (b) Contracts in which settlement period goes beyond 11 days: In view of the definition of "forward contract" under FCRA, FMC was of the view that all the contracts traded on NSEL which provide settlement schedule for a period exceeding 11 days are "non-transferable specific delivery contracts". Thus, even if the 2007 Exemption Notification does not specify the delivery period, NSEL had to settle the delivery for all open positions within a period of 11 days as NSEL

was allowed to only trade in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days.

- (ix) On September 19, 2014, Ministry of Finance, Government of India, issued a notification withdrawing the exemption granted to NSEL *vide* the 2007 Exemption Notification.
- (x) From the above, it is clear that NSEL had permitted contracts of various commodities having duration longer than 11 days and these contracts were in contravention of the exemption granted to NSEL. Subsequently, certain entities who were primarily borrowing on the NSEL platform through the modus of trading in the aforesaid “paired contracts” defaulted in fulfilling their payment obligations leading to a huge settlement default of outstanding contracts to the tune of Rs. 5600 Crores.
- (xi) EoW, Mumbai, *vide* letter dated April 04, 2015, had forwarded an interim report in connection with the investigation conducted by them to identify the role played by the broking houses in the NSEL case. The relevant extracts of the said interim report are as follows:

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

The actual role of the brokers was:

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

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

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

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

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

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

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

- (xii) *Vide the Finance Act, 2015, FMC was merged with SEBI on September 28, 2015 in pursuance thereof SEBI was entrusted with the powers to regulate the trading in commodities futures market. As per the said act, an existing intermediary could continue to buy, sell or deal in commodity derivatives as a commodity broker, if it would make an application for its registration as an*

intermediary to SEBI within a period of 3 months from the date of merger till the disposal of such application by SEBI. Accordingly, the Noticee on the basis of an application so made by it, was granted SEBI registration number to operate as a stock broker in the securities market. In terms of the said act, FCRA was also repealed with effect from the aforesaid date.

- (xiii) On September 24, 2018, SEBI filed a complaint with EoW to initiate appropriate action against brokers/members of NSEL and other persons in the NSEL matter under sections 20, 21 and other appropriate provisions of the FCRA.
- (xiv) On September 28, 2018, SEBI gave a statement to the police which resulted into a FIR under section 154 of CrPC.
- (xv) It is also pertinent to refer to the judgment of the Hon'ble Supreme Court decided on April 30, 2019, passed in the matter of 63 Moons Technologies Ltd. (*formerly known as Financial Technologies India Ltd.*) & Ors. vs. Union of India & Ors. (Civil Appeal No. 4476 of 2019) (2019)18 SCC 401 ("**Merger Petition**"), wherein it *inter alia* held that:

"....There is no doubt that such Paired Contracts were, in fact, financing transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA....."
- (xvi) Further, in judgement dated April 22, 2022 passed by the Hon'ble Supreme Court in the matter of The State of Maharashtra vs. 63 Moons Technologies Ltd. (Civil Appeal No. 2748-49 of 2022), the Hon'ble Supreme Court while drawing reference to the presentations made by NSEL in respect of the "paired contracts" has *inter alia* held that:

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

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

D. CONSIDERATION OF ISSUES AND FINDINGS

9. I have carefully perused the contents of the DA Report, the SCNs issued to the Noticee, the responses filed by the Noticee and the submissions made during the course of the personal hearing and other documents available on record as shared with the Noticee.
10. Before moving forward to examine the charges and the evidence available on record, it would be appropriate to take a look at the legal provisions of the SEBI Act, which are relevant in the present case. It is alleged that the Noticee has violated (i) regulation 5(e) of SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992

(“**Brokers Regulations**”) read with Schedule II of Intermediaries Regulations; and (ii) regulation 9(b), 9(f) read with clause A(1), A(2) and A(5) of Schedule II of Brokers Regulations. The same are reproduced below for reference:

SEBI Act

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

12. (3) *The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations: Provided that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard.*

Brokers Regulations

Consideration of application for grant of registration.

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

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

Conditions of registration.

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

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

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

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

27. *A stock broker shall be liable for any action as specified in Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008*

including suspension or cancellation of his certificate of registration as a stock broker, if he —

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

SCHEDULE II

Code of Conduct for Stock Brokers

A. General.

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

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

(5) Compliance with statutory requirements: A stock-broker shall abide by all the provisions of the Act and the rules, regulations issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him.

Intermediaries Regulations

Schedule II

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

(a) the competence and capability in terms of infrastructure and manpower requirements; and

(b) the financial soundness, which includes meeting the net worth requirements.

(2) The 'fit and proper person' criteria shall apply to the following persons: (a) the applicant or the intermediary; (b) the principal officer, the directors or managing partners, the compliance officer and the key management persons by whatever name called; and (c) the promoters or persons holding controlling interest or persons exercising control over the applicant or intermediary, directly or indirectly: Provided that in case of an unlisted applicant or intermediary, any person holding twenty

percent or more voting rights, irrespective of whether they hold controlling interest or exercise control, shall be required to fulfill the 'fit and proper person' criteria. Explanation– For the purpose of this sub-clause, the expressions “controlling interest” and “control” in case of an applicant or intermediary, shall be construed with reference to the respective regulations applicable to the applicant or intermediary.

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

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

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

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

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

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

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

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

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

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

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

- (ix) such person has been categorized as a wilful defaulter;*
- (x) such person has been declared a fugitive economic offender; or*
- (xi) any other disqualification as may be specified by the Board from time to time.*

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

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

(6) Any disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub-clause (b) of clause (3), shall not have any bearing on the 'fit and proper person' criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter: Provided that if any person as referred in sub-clause (b) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall replace such person within thirty days from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against the intermediary:

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

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

11. I find it appropriate to first deal with the preliminary contentions raised by the Noticee. The Noticee has contended that the power to appoint DA has been vested with the Executive Director in terms of the Intermediaries Regulations, while in the instant case the DA was appointed by the WTM of SEBI in terms of the Section 3(2) of the SEBI (Delegation of Powers) Order, 2015 ("**DoP Order**"). It has further argued that owing to the general principle that a special law shall override a general law, the appointment of DA is irregular (in the present case, the Intermediaries Regulations should override the DoP Order). In this regard, I note that section 3(2) of the DoP Order 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*". While the Intermediaries Regulations provides for the appointment of DA by an Executive Director, the same, when read along with the aforementioned section 3(2) of the DoP Order, empowers the WTM also to make the appointment (as his authority is higher in grade, rank and position to the Executive Director of SEBI). Accordingly, the submissions of the Noticee in this regard are rejected.
12. Noticee has also argued that SEBI Act and regulations therein were never applicable to paired contracts traded by Noticee on NSEL at the relevant time and that as per section 29A(2)(e) of FCRA, SEBI could initiate prosecution proceedings against NSEL members for alleged violation of FCRA within 3 years from the date FCRA was repealed but could not initiate enquiry proceedings under the Intermediaries Regulations. FCRA does not contemplate declaring an entity as not "fit and proper" person as an intermediary under the SEBI regulations.

13. In this regard, I note that pursuant to the merger of FMC with SEBI, the Noticee had applied for a certificate of registration as a commodity broker and it was granted a certificate of registration by SEBI. Therefore, the Noticee has become a SEBI registered intermediary from the said date. Being a SEBI regulated intermediary, SEBI has the jurisdiction to examine whether the activities of the Noticee in 'paired contracts' for its clients on the NSEL platform violates securities law (including provisions of FCRA) and affects its ability to be considered as a "fit and proper person" under the Intermediaries Regulations. As admitted by the Noticee, the power of SEBI to investigate/ inquire into the alleged violation of FCRA flows from the Finance Act, 2015, which amended the provisions of FCRA. I note that Section 29A(2)(e) of FCRA, as inserted by the Finance Act, 2015, reads as follows:

"29A. Repeal and savings

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

(e) a fresh proceeding related to an offence under the Forward Contracts Act, may be initiated by the Security Board under that Act within a period of three years from the date on which that Act is repealed and be proceeded with as if that Act had not been repealed;"

14. I note that the aforesaid provision empowers SEBI to initiate a fresh proceeding with respect to the offences within a period of three years from the date on which FCRA is repealed. Thus, exercising its powers, SEBI has filed a complaint dated September 24, 2018 with EoW, seeking appropriate action under Sections 20 and 21 and other applicable provisions of FCRA against the brokers/members of NSEL, mentioned in the list attached thereto. Pursuant to the SEBI complaint, FIR No. Spl LAC No. 110/18 dated September 28, 2018 under section 154 of the CrPC at the MIDC Police Station, Mumbai was registered requesting it to take lawful action against the same trading members, which were listed in the SEBI complaint to EoW (Noticee's name is listed at serial no. 18). Therefore, I am of the considered view that the preliminary issue pertaining to jurisdiction of SEBI has no force and is accordingly rejected.

15. Noticee has also contested that in terms of the letter addressed by Ministry of Finance to SEBI dated November 20, 2015, SEBI could not have dealt with the matter pertaining to NSEL members which was not taken up by FMC. Thus, the present enquiry proceedings are beyond the regulatory framework of SEBI as per the aforesaid letter. In this regard, I note that there was a special team of secretaries (“**STS**”) set up by the Government of India to examine the violation of laws by NSEL and to suggest measures. The STS in its last review meeting held on February 11, 2016, advised SEBI to examine and take necessary action against defaulting brokers as per law. Thus, the Noticee has relied upon incomplete sequence of events to advance its contention, which merits rejection. Notwithstanding the above, I note that the issue under consideration in the present proceedings is limited to the determination of “fit and proper person” status of the Noticee under the Intermediaries Regulations. As discussed above, SEBI has the statutory authority to determine the “fit and proper person” status of the intermediaries registered with it. Since the Noticee is an intermediary registered with SEBI, I am of the view that SEBI is within its jurisdiction to determine the “fit and proper person” status of the Noticee. Thus, the submission of the Noticee is not tenable.
16. Noticee has placed reliance on the decision of Joindre Commodities Ltd. vs. SEBI (Appeal No. 502 of 2023) dated June 20, 2023, to request that current proceedings be kept in abeyance until the appeals pending before Hon’ble SAT are disposed of. In the aforesaid case in the same matter, Hon’ble SAT has stayed the effect of impugned order(s). In this regard, no explicit directions have been issued by Hon’ble SAT to SEBI to keep the proceedings in abeyance with respect to entities who have not filed an appeal. As regards the order passed by Hon’ble Bombay HC on July 06, 2023, in the matter of Venkataraman Rajamani and Ors. vs. SEBI in a batch of writ petitions, I note that Hon’ble Bombay HC has also not issued any directions to SEBI to keep the present proceedings in abeyance. In light of the above, I find that reliance on the aforesaid two appeals does not aid the Noticee.

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

- (i) The observations of the Hon'ble Bombay High Court in the matter of 63 Moons vs. Union of India (Writ Petition No. 2743 of 2014 dated December 04, 2017) cannot be relied upon as the said judgement has been set aside in appeal by the Hon'ble Supreme Court in the Merger Petition judgment.
- (ii) The observation from the order dismissing the Writ Petition filed by NSEL against the invocation of the MPID Act in NSEL vs. State of Maharashtra and Ors. (Writ Petition No. 1403 of 2015 dated October 01, 2015), cannot be relied upon, as in a subsequent Writ Petition moved by 63 Moons Technologies Ltd., in Writ Petition No. 1181 of 2018, a Division Bench of the Hon'ble Bombay High Court observed that the *prima facie* observations made in its earlier order were not binding and the same was observed since further investigation was in process at the relevant stage.
- (iii) The observations in the bail rejection order dated August 22, 2014, passed by the Hon'ble Bombay High Court in the matter of Jignesh Prakash Shah vs. The State of Maharashtra, also cannot be relied upon as such observations were limited to the fact as to whether the bail should be granted or not.
- (iv) Reliance on the SFIO Report was misplaced. The report only directs EoW/Police to initiate appropriate proceedings against NSEL and its directors/promoters. Based on the SFIO Report, the Special Sessions Judge took cognizance of the matter by an order dated July 29, 2019 which was challenged due to jurisdiction before Hon'ble Bombay High Court. The

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

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

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

18. Further, I note that Hon'ble SC in Merger Petition, *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. Further, I note that the Noticee in its replies has not stated that it had not traded in "paired contracts". In this regard, I note from the EoW report that the Noticee had a client exposure of Rs. 9,99,78,319. In view of the above, transactions on NSEL facilitated by the Noticee, could not have been anything but "paired contracts".
19. Noticee has argued that the case of Jermyn Capital vs. SEBI cannot be relied upon as the said case referred to the applicability of SEBI Regulations in general and there was no issue pertaining to applicability of SEBI Regulations retrospectively. In this regard, I note that SEBI can look into the past conduct of the Noticee in facilitating 'paired contracts' in determining whether the Noticee satisfies the "fit and proper person" criteria, such examination does not mean that Intermediaries Regulations is being applied retrospectively. I note that the condition to be a "fit and proper person" is not a onetime condition applicable only at the time of seeking registration. Rather, the provisions governing the criteria show that this is a condition which each and every registered intermediary is required to fulfil on a continuous basis as long as the entity remains associated with the securities market.
20. The Noticee has argued that the DA Report has considered irrelevant documents which have no relevance on the case made out against the Noticee. The Noticee has submitted that the evidence and cases referred to in the DA Report viz. (i) observations of FMC order dated December 17, 2013; (ii) observations in EoW

interim report dated April 04, 2015; (iii) observations in Hon'ble SC's order in 63 Moons Technologies vs. UOI and Ors. (WP no. 2473 of 2014) dated December 04, 2017; (iv) SFIO report; and (v) Hon'ble SAT's order in Jermyn Capital LLC vs. SEBI, are irrelevant as the Noticee was neither a party to the said proceedings nor any order was passed against it in the said evidence/cases. Considering the findings of Hon'ble SAT with respect to the above in the June 2022 SAT Order (except EoW interim report dated April 04, 2015), I find that the said documents are not relevant for consideration in the present matter. Further, I note that *vide* the Supplementary SCN, the Noticee was given a copy of SEBI complaint dated September 24, 2018 and FIR dated September 28, 2018, and called upon the Noticee to file its reply in relation to it. Thus, I find that the aforesaid two documents are relevant material which can be relied upon for determining the "fit and proper person" criteria.

21. The Noticee has contended that the DA has made an erroneous observation that the Noticee allowed itself to become an agent of NSEL in promoting trading in paired contracts among its clients, because the DA has failed to appreciate that the paired contracts were introduced by NSEL with the approval of its board. Noticee has claimed that as a member of NSEL, it had no other option but to trade in such contracts, as per its contract specifications, by complying with the business rules and regulations of NSEL. In this regard, I note that the long leg of the paired transaction involved contracts being settled on a T+25 or T+36 basis, whereas the exemption granted by the DCA permitted NSEL to only offer spot delivery contracts. The 2007 Exemption Notification was available in the public domain and even basic due diligence would have shown that the paired contracts were *per se* in violation of the said notification. Therefore, I am of the view that while participating in such contracts, the Noticee failed to examine the basic nature of the product and also failed in understanding the source of powers relied upon by NSEL for selling such products which other exchanges were not offering. Thus, the Noticee failed to conduct proper and effective due diligence on these aspects of "paired contracts" which were not essentially spot contracts. Hence, the Noticee cannot evade its

responsibility by citing that paired contracts were introduced with approval of NSEL's board or that it had no option but to trade in paired contracts.

22. Noticee's contention that (i) it had not funded its clients; (ii) it had carried out its trades as per bye-laws of NSEL; (iii) it had not marketed paired contracts; (iv) it had executed trades for only 160 clients out of 12100 registered clients; (v) it had earned a brokerage of Rs. 8,75,399; (vi) there are no complaints with respect to the Noticee; (vii) there are no outstanding dues to any clients, does not take away the fact that Noticee was required to perform adequate due diligence. The Noticee cannot turn a blind eye on the actions of its clients and claim that its clients carried out the trades, especially when it has earned a brokerage from those trades on NSEL whether the said brokerage is meagre or not.
23. Given the above, I am constrained to conclude that the Noticee has traded in "paired contracts" on behalf of its clients on NSEL. The execution of such paired contracts shows participation of the Noticee in the said scam which raises questions regarding the integrity, honesty, ethical behavior, reputation, fairness and character of the Noticee. I note that a FIR has been registered with the MIDC Police Station, Mumbai, *inter alia*, against the Noticee on September 28, 2018 and the same is pending as on date and is subsisting and has not been quashed or stayed by any competent court *qua* the Noticee. Since the FIR is still pending for final determination by a Court of competent jurisdiction, the disqualification specified in clause 3(b) under the amended Schedule II of the Intermediaries Regulations stands invoked.
24. The facts and circumstances along with other material available on record clearly leads me to the conclusion that the Noticee has not satisfied the "fit and proper person" criteria specified in Schedule II to the Intermediaries Regulations. I have also taken into consideration orders previously passed by SEBI in the context of similar facts and circumstances, namely, R. Wadiwala Commodities Private Limited (order dated September 26, 2023) and Adroit Commodities Services Pvt. Ltd. (order dated September 01, 2023), wherein the registration of the said entities has been

suspended for 3 months or till the said entity is acquitted by an order of a Court, whichever is later.

25. Considering all of the above, while I find that the Noticee does not satisfy the “fit and proper person” criteria specified in Schedule II of the Intermediaries Regulations, I do not agree with the measure recommended by the DA.

E. ORDER

26. In view of the facts and circumstances of the case and the conclusions arrived at discussed above, I, in exercise of powers conferred upon me under section 12(3) read with section 19 of the SEBI Act and regulation 27 of the Intermediaries Regulations, hereby suspend the certificate of registration of Airan Commodities Pvt. Ltd. bearing registration no. INZ000078934 for a period of 3 (three) months from the date of this Order or till an order is passed by a Court of competent jurisdiction discharging or acquitting the Noticee, whichever is later.
27. The Noticee shall, after receipt of this Order, immediately inform its existing clients about the aforesaid direction in the paragraph above.
28. The Order shall come into force with the immediate effect.
29. 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.
30. A copy of this Order shall be served on the Noticee and upon all recognized stock exchanges and depositories.

DATE: NOVEMBER 08, 2023

PLACE: MUMBAI

ANANTH NARAYAN G.

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA