BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO.ISD/MGPL/FDIL/AO/DRK/AKS/EAD-3/296/62-11]

UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5(1) OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

Against:

Manmohan Gems Pvt. Ltd.
519-B, Panchratna
Opera House, Mumbai- 400004
PAN No. AADCM6024G

FACTS IN BRIEF

1. An alert was generated at IMSS regarding huge off-market transfer at National Securities Depository Ltd. (hereinafter referred to as '**NSDL**') and Central Depository Services (India) Ltd. (hereinafter referred to as '**CDSL**') wherein it was observed that significant quantity of shares of Flawless Diamond (India) Ltd. (hereinafter referred to as ' **FDIL** / **Company**') has been transferred through off-market transfer from Promoter / Non-Promoter related entities to Rotomac Global Private Ltd (hereinafter referred to as '**RGPL**') on 30/10/2009 and 31/10/2009.

2. Based on the alert, information was collected from Bombay Stock Exchange Ltd. (hereinafter referred to as '**BSE**'), NSDL and CDSL and clarification was sought from the company and RGPL.

APPOINTMENT OF ADJUDICATING OFFICER

3. I was appointed as the Adjudicating Officer and the same was communicated vide proceedings of the Whole Time Member appointing Adjudicating Officer dated 09.05.2011 under Section 15 I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Rules') to inquire into and adjudge under Section 15A (b) of the SEBI Act, the violation of Regulations 13 (1), 13 (3) read with 13 (5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as '**PIT Regulations**') and Regulations 7 (1) read with 7 (2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as '**Takeover Regulations**') alleged to have been committed by Manmohan Gems Pvt. Ltd. (hereinafter referred to as '**noticee'**).

SHOW CAUSE NOTICE, HEARING AND REPLY

4. A Show Cause Notice No. A&E/DRK/AKS/20767/2011 (herein after referred to as **'SCN'**) dated 28.06.2011 was sent to the noticee by "Hand Delivery Acknowledgement Due" in terms of the provisions of Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 requiring it to show cause as to why an inquiry should not be held against it and why penalty, if any, should not be imposed on it under Section 15A (b) of the SEBI Act.

5. However, the said notice came back undelivered with remark "office closed". Vide letter dated 01.07.2011 the SCN was served through "Registered Post Acknowledgement Due". In the said notice, it was alleged as follows:

a. From the investigation report it is observed that noticee had offloaded 10,00,000 shares (6% of the paid up share capital of the company) to RGPL on 31.10.2009. After the transfer of the shares, noticee's holding in FDIL had become zero. It is alleged that no disclosure has been made by the noticee for such transfer as required under PIT Regulations to the company which has led to the violation of Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations.

b. It was further observed that the transferred shares of FDIL have been transferred back to the noticee on 15.03.2010 by RGPL. It is alleged that the noticee had not disclosed its acquisition of shares of FDIL to the company and to the stock exchange as required under Regulations 7 (1) read with 7 (2) of Takeover Regulations.

c. Further, it is observed that under Regulation 13 (1) of PIT Regulations, noticee was required to disclose to the company within 2 working days of the receipt of intimation of allotment of shares or the acquisition of shares, as the case may be. However, it is alleged that no disclosure for such acquisition of shares has been made by the noticee to the company as required under PIT Regulations.

6. Vide personal hearing notice dated 04.08.2011, the noticee was granted time till 12.08.2011 to submit a detailed reply to the SCN and attend the hearing on 22.08.2011 at SEBI Bhavan, Mumbai. The said hearing notice was sent through "Registered Post Acknowledgement Due". Noticee vide its letter dated 18.08.2011 requested for an adjournment as it was unable to appoint advocate / consultant due to long holidays.

7. A final hearing notice dated 26.08.2011 was sent to the noticee by "Registered Post Acknowledgement Due" granting it time till 05.09.2011 to submit a detailed reply to the SCN and attend the hearing on 08.09.2011 at SEBI Bhavan, Mumbai. Noticee's authorized representative, Shri Joby Mathew, Advocate vide his letter dated 07.09.2011 requested for another adjournment of the hearing as he was in the process of preparing a reply.

8. Subsequently another hearing notice dated 08.09.2011 was sent to the noticee by "Hand Delivery Acknowledgement Due" granting it time till 16.09.2011 to submit a detailed reply to the SCN and attend the hearing on 19.09.2011 at SEBI Bhavan, Mumbai. The said hearing notice came back undelivered with remark "office closed". Vide letter dated 14.09.2011 the said hearing notice was served on the noticee by "Registered Post Acknowledgement Due". In response to the same, another adjournment of the hearing was requested by the Advocate of the noticee.

9. A final hearing notice dated 26.09.2011 was served on the noticee granting time till 05.10.2011 to submit a detailed reply to the SCN and attend the hearing on 11.10.2011 at SEBI Bhavan, Mumbai. In response to the final hearing notice, noticee vide its letter dated 06.09.2011, authorized Shri Joby Mathew, Advocate (hereinafter referred to as '**AR**') to attend the scheduled hearing. The AR vide letter dated 28.09.2011 confirmed his attendance for the scheduled hearing.

10. During the personal hearing the AR submitted a reply dated 05.10.2011 to the SCN which was taken on record. The AR submitted that the said transaction is not an off-market transfer but is in the nature of pledge. The AR admitted that the noticee had not complied with all the provisions related for creation and cancellation of pledge as given under Depositories Act,

1996 and SEBI (Depositories and Participants) Regulations, 1996. The AR further submitted that since the said transaction is not in the nature of sale, there was no need to make disclosure either under Takeover Regulations or PIT Regulations. The AR undertook to submit the following clarifications within 10 days from the date of hearing:

- Consideration given / paid to the noticee.
- Whether the said transaction by the noticee was one off transaction?
- Since when the noticee is holding the shares of FDIL?

11. The noticee in its reply dated 05.10.2011 to the SCN stated as follows-

- The noticee is not a promoter of the company in whose shares it has dealt during the investigation period. The noticee is also not connected with the Promoters in any manner whatsoever.

- The noticee submitted that it had entered into a pledge agreement with RGPL for 10,00,000 shares of FDIL on 31st October 2009. The shares would be transferred back to the noticee within 6 months. The said shares were given to RGPL for the purpose to avail margin funding from its stock broker.

- The shares were pledged with RGPL. This was not a sale of shares to RGPL and therefore, there was no change in the ownership of the shares. Consequently, there was no requirement to inform the company regarding the said transfer under PIT Regulations.

- Further, the noticee submitted that the pledged shares were returned to the noticee on 15.03.2010. Therefore, this was not a purchase / acquisition of the said shares by the noticee. Consequently, there was no requirement to inform the company or the stock exchange under Takeover Regulations and PIT Regulations.

12. The noticee in its reply had requested for a copy of the alert generated by IMSS or the investigation report. It may be added that the contents of IMSS alert / investigation report were mentioned in the SCN.

13. The noticee vide its letter dated nil which was received by SEBI on 14.11.2011 submitted a further reply to the SCN wherein it reiterated

whatever it had stated in its earlier reply dated 05.10.2011. Further, it also stated as follows-

- The said pledge was a one off transaction by the noticee and it had not entered into any such transaction prior thereto or thereafter.

- The noticee did not receive any monies from RGPL. However, non receipt of consideration may not prejudice the matter since no complaint or dispute was raised by either party to the pledge agreement. Furthermore, the promise to pay sums of money as per the demand of the Pledgee i.e. Rotomac, is itself sufficient consideration for the purpose of the agreement.

CONSIDERATION OF EVIDENCE AND FINDINGS

14. I have taken into consideration the facts and circumstances of the case and the material made available on record. The allegations in the present matter are that the noticee offloaded 10,00,000 shares of FDIL on 31.10.2009 to RGPL and the same number of shares were transferred back to the noticee by RGPL on 15.03.2010 but the noticee failed to make disclosures under Takeover Regulations and PIT Regulations.

15. The noticee has submitted that it had entered into a pledge agreement with RGPL for 10,00,000 shares. However, the investigation report observes that the documents submitted for the proof of the pledge are not in accordance with the provisions of Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996 and the Bye-laws and Business Rules of the Depositories. Pledge or hypothecation under the Depository Regulations does not involve any transfer of shares from the pledger to the pledgee as only an entry is recorded in respect of the securities so pledged or hypothecated, which would evidence the creation of pledge. Since shares from the noticee were clearly transferred in off-market to RGPL and RGPL's demat account does not indicate any creation of pledge, the investigation

report observes that the noticee's argument regarding shares were pledged to RGPL may not be accepted.

16. In this regard it may be noted that the said shares of FDIL are in demat form. The manner of creating pledge is given in the Depositories Act, 1996 and SEBI (Depositories and Participants) Regulations, 1996. It is observed from Section 12 of the Depositories Act, 1996 and Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996 that for creation of pledge, the pledger has to make an application to the depository through the participant and the participant after making a note in its records of the notice of pledge, forward the application to the depository. The depository after confirmation from the pledgee that the securities are available for pledge with the pledger shall within 15 days of receipt of the application creates and records the pledge and send an intimation of the same to the participants of the pledger and the pledgee. On receipt of the intimation the participants of both the pledger and the pledgee shall inform the pledger and the pledgee respectively of the entry of creation of the pledge. An entry in the records of a depository shall be evidence of a pledge.

17. Further, it is also seen from Bye-Law 9.9 of NSDL and Business Rule 12.9 of NSDL that there is a specific procedure for creation of pledge. The pledger has to submit an instruction to the depository participant to initiate a pledge request in the DPM (software provided by NSDL to the depository participant) indicating the option to 'create a pledge' in the pledge form. The depository participant will accept the form for processing and issue an acknowledgment for the same to the pledger. The depository participant then will enter the details of the request in the DPM, generate a pledge instruction number for the request and release the request to NSDL. The securities pledged are moved from 'Free balances' to 'Pledged balances' account. The depository participant shall write the pledge instruction number on the pledge form and intimate the same to the pledger. Further,

Regulations 58 (6) and 58 (7) of SEBI (Depositories and Participants) Regulations, 1996 lays down the manner of cancellation of a pledge. It states that a pledge may be cancelled by the depository if the pledger or the pledgee makes an application to the depository through its participant provided there is prior concurrence of the pledgee. The depository on the cancellation of the entry of pledge shall inform the participant of the pledger.

18. It is noted from the available records that none of the documents required under Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996, Bye-Law and Business Rule of NSDL as discussed above for creation of pledge such as copy of the instruction to the depository participant given by the pledger to initiate a pledge request or the acknowledgment by the depository participant for processing pledgee's request or pledge instruction number, etc. has not been submitted by the noticee. Rather it is seen from the transaction statements received from NSDL that on 31/10/2009, noticee had transferred in an off-market transaction 10,00,000 shares of FDIL to RGPL.

19. It is worthwhile to mention that NSDL in its letter dated 03.06.2010 has submitted data for the period from 16.10.2001 to 26.05.2010 regarding creation of pledge in the scrip of FDIL wherein it is observed from the said data that the noticee has not created any pledge in the scrip of FDIL in favour of RGPL as claimed by the noticee. Further, the noticee has also not submitted a copy of the application made to the depository through its participant to cancel the pledge. Thus, it can be observed from the above that the noticee has not followed the procedure prescribed under the Depositories Act, Depositories Regulations, Bye-Law and Business Rule of NSDL for pledging of shares or for cancellation of the pledge. It is also observed that during the personal hearing the AR admitted that the noticee had not complied with all the provisions related for creation and cancellation of

pledge as given under Depositories Act, 1996 and SEBI (Depositories and Participants) Regulations, 1996.

20. In this case, I would like to quote the order of the Hon'ble Securities Appellate Tribunal, in *Parsoli Corporation Limited et al* Vs *SEBI* dated 12.08.2011 wherein it was held as follows:

> *"…There is no material on the record to show that the shares were ever pledged. The mere ipse dixit of the appellants cannot be accepted. It is pertinent to mention that there is a procedure prescribed under the Depositories Act and the regulations framed thereunder for pledging shares and when a pledge is created the same is recorded in the records of the depository. Had a pledge been created, as is now sought to be argued, the appellants would have produced the records from the depository..."*

21. In view of the facts of the case and the Order of the Hon'ble Securities Appellate Tribunal discussed in pre para, noticee's submission that the shares were pledged is not acceptable.

22. The investigation report states that the noticee had offloaded 10,00,000 shares (6% of the paid up share capital of the company) in off-market to RGPL on 31.10.2009 and after the transfer of the shares, noticee's holding in FDIL had become zero. The said 10,00,000 shares of FDIL were credited to the account of RGPL on the same day. There is nothing on record to show that the noticee had made disclosure about the aforesaid transfer as required under Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations to the company. Noticee's argument that there is no need to file any disclosure for pledge of shares under PIT Regulations is not acceptable as the shares were not pledged as concluded above. Thus, it can be concluded that the noticee has violated Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations. The text of the said Regulations is reproduced below:

SEBI (Prohibition of Insider Trading) Regulations, 1992

Continual disclosure.

13 (3) Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.

13 (5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within two working days of:

(a) the receipts of intimation of allotment of shares, or

(b) the acquisition or sale of shares or voting rights, as the case may be.

23. Further the investigation report observes that the transferred shares of FDIL were transferred back to the noticee on 15.03.2010 by RGPL. The SCN alleges that noticee has not made disclosure about the acquisition of shares of FDIL to the company and to the stock exchange under Regulations 7 (1) read with 7 (2) of Takeover Regulations and under Regulation 13 (1) of PIT Regulations to the company. The noticee's argument that pledged shares were returned to the noticee and this was not a purchase / acquisition of the said shares by the noticee, therefore, there was no requirement to inform the company or the stock exchange under Takeover Regulations and PIT Regulations is not acceptable as the shares were not pledged as concluded above. Therefore, it can also be concluded that the noticee has violated Regulations 7 (1) read with 7 (2) of Takeover Regulations and Regulation 13 (1) of PIT Regulations. The text of the said Regulations is reproduced below:

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997

Acquisition of 5 per cent and more shares or voting rights of a company.

7. (1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than

five per cent or ten per cent or fourteen per cent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

…

(2) The disclosures mentioned in sub-regulations (1) and (1A) shall be made within two days of,—
(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

SEBI (Prohibition of Insider Trading) Regulations, 1992

Disclosure of interest or holding by directors and officers and substantial shareholders in a listed companies - Initial Disclosure.

13. (1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 working days of :—

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

24. The said violations attract penalty under Section 15A (b) of the SEBI Act. The text of Section 15A (b) is as follows:

15A. Penalty for failure to furnish information, return, etc.- If any person, who is required under this Act or any rules or regulations made thereunder,-

…

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

25. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely;

a. the amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default
b. the amount of loss caused to an investor or group of investors as a result of the default
c. the repetitive nature of the default

26. It has been noted from the material available on record that it is difficult to quantify any gain or unfair advantage accrued to the noticee as a result of this kind of default committed by the noticee. The investigation report has also not quantified the profit/ loss for the nature of violations committed by the noticee and no material is made available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of actions of the noticee.

27. In view of the abovementioned conclusion and after considering the factors under Section 15J of the SEBI Act, I hereby impose a penalty of ₹ 2,00,000/- (Rupees Two Lakh only) on the noticee under Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for the violations of Regulation 13 (1), Regulation 13 (3) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 and ₹ 1,00,000/- (Rupees One Lakh only) for the violation of Regulations 7 (1) read with 7 (2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 which is appropriate in the facts and circumstances of the case.

ORDER

28. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I hereby impose a consolidated penalty of

₹ 3,00,000/- (Rupees Three Lakh only) on Manmohan Gems Pvt. Ltd. having PAN No. AADCM6024G in terms of the provisions of Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for the violations of Regulations 7 (1) read with 7 (2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and Regulation 13 (1), Regulation 13 (3) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the violations committed by the noticee.

29. The penalty shall be paid by way of Demand Draft drawn in favour of "SEBI – Penalties Remittable to Government of India" payable at Mumbai within 45 days of receipt of this order. The said demand draft shall be forwarded to Deputy General Manager- ISD, Securities and Exchange Board of India, Plot No. C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400051.

30. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this order are being sent to Manmohan Gems Pvt. Ltd. having its office at 519-B, Panchratna, Opera House, Mumbai-400004 and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

Date: November 24, 2011

D. RAVI KUMAR
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER