



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Securities Market Division
Market Supervision and Registration Department

Before the Director/HOD (MSRD)

In the matter of recovery of gain made in terms of Section 224(1) of the Companies Ordinance, 1984 by United Bank Limited, a beneficial owner of more than ten percent equity securities of Fauji Cement Company Limited

Date of Hearing: January 28, 2014

Present at Hearing:

Representing the Fauji Cement Company Limited

Mr. Javed Panni,
Chief Executive,
MJ Panni and Associates

Assisting the Director/HOD (MSRD)

Mr. Muhammad Farooq,
Joint Director, SECP

Order

This Order will dispose of the proceedings initiated through Show Cause Notice NO. S.M(B.O)222/4(2267)09 (**Notice**) dated 17/04/2013, issued under Section 224 of the Companies Ordinance, 1984 (**Ordinance**) to Fauji Cement Company Limited (**Respondent**).

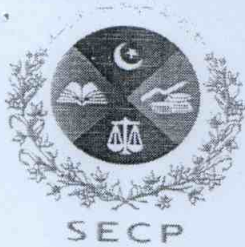
2. The facts of the matter leading up to aforesaid Notice are that the Respondent is a public listed company. While, United Bank Limited (**Beneficial Owner**) is a beneficial owner of more than ten percent ordinary shares of the Respondent. The Beneficial owner has made the following sale and purchase transactions in ordinary shares of the Respondent, within the period of less than six months:-

| Sr. No. | Date | Nature | No. of Shares | Rate per Share (Rs.) |
|---------|------------|--------|---------------|----------------------|
| 1 | 9/4/2009 | Sale | 1,405,500 | 6.97 |
| 2 | 9/4/2009 | Sale | 600,000 | 7.01 |
| 3 | 16/04/2009 | Sale | 155,000 | 6.87 |

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|----|------------|----------|-----------|------|
| 4 | 21/05/2009 | Purchase | 1,000,000 | 6.49 |
| 5 | 2/6/2009 | Purchase | 90,000 | 6.47 |
| 6 | 3/6/2009 | Purchase | 300,000 | 6.47 |
| 7 | 3/6/2009 | Purchase | 200,000 | 6.45 |
| 8 | 10/6/2009 | Purchase | 155,500 | 6.6 |
| 9 | 11/6/2009 | Purchase | 12,500 | 6.6 |
| 10 | 17/06/2009 | Purchase | 157,000 | 6.74 |
| 11 | 18/06/2009 | Purchase | 2,500 | 6.7 |
| 12 | 18/06/2009 | Purchase | 4,000 | 6.74 |
| 13 | 18/06/2009 | Purchase | 239,000 | 6.75 |
| 14 | 9/7/2009 | Sale | 1,972,500 | 7.49 |
| 15 | 10/7/2009 | Sale | 16,500 | 7.47 |
| 16 | 13/07/2009 | Sale | 2,950,000 | 7.54 |
| 17 | 15/07/2009 | Sale | 3,000,000 | 7.96 |
| 18 | 16/07/2009 | Sale | 500,000 | 7.97 |
| 19 | 23/07/2009 | Sale | 400,000 | 8.29 |
| 20 | 24/07/2009 | Sale | 860,000 | 8.36 |
| 21 | 31/07/2009 | Sale | 775,000 | 8.47 |
| 22 | 3/8/2009 | Sale | 500,000 | 8.57 |
| 23 | 3/8/2009 | Sale | 100,000 | 8.67 |
| 24 | 7/8/2009 | Sale | 177,433 | 8.47 |
| 25 | 10/8/2009 | Sale | 100,000 | 8.59 |

3. On account of the aforesaid transactions, the Beneficial Owner in terms of Section 224(1) of the Ordinance read with Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (**Rules**) has apparently made gain of Rs 4,198,308.00 (Rupees four million one hundred ninety-eight thousand three hundred eight only).

4. Section 224 of the Ordinance provides that where *inter alia* a more than ten percent beneficial owner of listed equity securities makes any gain by purchase and sale, or the sale and





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purchase, of any such security within a period of less than six months, such person is required to make a report and tender the amount of such gain to the company and simultaneously send an intimation to that effect to the Registrar of Companies and the Commission. The said Section further provides that where such person fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

5. In the instant case, as per record of this office, the Beneficial Owner failed/neglected to tender the gain to the Respondent. The Respondent was, therefore, supposed to raise demand for recovery of the said gain, within the period prescribed in Section 224(2) of the Ordinance. The record of this office further revealed that the Respondent also failed/neglected to raise demand/recover the gain, within the prescribed time limit. The Respondent was, therefore, asked vide letter dated 24/01/2013 to furnish *inter alia* documentary evidence, if the legal obligation arose under Section 224(2) of the Ordinance has already been discharged. In response, the Company Secretary of the Respondent vide letter dated 06/02/2013 instead of offering his comments regarding the matter, submitted a copy of the letter of the Beneficial Owner, addressed to the Commission.

6. The contention submitted on behalf of the Beneficial Owner (also forwarded to the Commission by Company Secretary of the Respondent) was examined in the light of provisions of Section 224 of the Ordinance and Rule 16 of the Rules and was not found convincing. Furthermore, no explanation was furnished in the matter on behalf of the Respondent, therefore, the above mentioned Notice was issued wherein the Respondent was called upon to show cause in writing along with documentary evidence, if any, as to why action may not be taken against it under Section 224(4) of the Ordinance for committing of violation of Section 224(2) of the Ordinance, as it failed/neglected to recover/raise demand for recovery of the aforesaid gain, within the stipulated time limit.

7. Furthermore, in order to provide an opportunity of being heard in person, hearing in the matter was fixed for 03/05/2013 at the Commission's Head Office, Islamabad, which on the request of the Company Secretary of the Respondent was adjourned. The matter was rescheduled for 08/5/2013, but the same was adjourned on the request of Mr. Javed Panni, Chief Executive, MJ Panni and Associates (**Authorized Representative**). Meanwhile, the Authorized Representative filed written response to the Notice vide letter dated 14/05/2013. The matter was





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rescheduled for 14/06/2013, 24/06/2013 and 14/01/2014, but hearings could not be conducted due to one or the other reasons. Finally, the personal hearing was fixed for 14/01/2014. On the given date the Authorized Representative appeared on behalf of the Respondent and filed again written response to the Notice. The submissions made by the Authorized Representative on behalf of the Respondent in writing as well verbally during the course of hearing be summarized as under:-

- 1) *Section 222 and Section 224 (1) of the Companies Ordinance, expressly places responsibility on, apart from various office holders of a listed company, on every person who is, directly or indirectly, a beneficial owner of more than 10% in the present securities, to submit to the Registrar and the Commission a return in the prescribed form. The reading of this section clearly implies that the responsibility lies on the beneficial owners to file such returns and no responsibility has been placed in this regard on the company itself.*
- 2) *Section 224 (1) of the Ordinance mentions that in case these persons make any gain by the purchase and sale, or the sale and purchase, of any such security, within a period of less than six months, such a person shall report and tender the amount of such gain to the company and inform the Registrar and the Commission as well. Here again the entire responsibility has been placed on such office holders and the principal shareholders and no responsibility has been placed in this regard on the company itself.*
- 3) *Sub-section (2) of section 224 of the Ordinance has a further provision that in case such office holders and the principal shareholders fail or neglect to tender or the company fails to recover any such gain within a period of six months after its accrual or within sixty days of a demand therefor, whichever is later, such gain shall vest in the Commission. Here again the onus lies on such office holder and principal shareholder and not on the company. In case the company fails to recover the gain within the stipulated time period, it loses its right to receive/claim the gain. Except having lost this right, no provision of the law places default responsibility on the company.*





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- 4) *Sub-section (4) of section 224 states that whoever knowingly or willfully contravenes or otherwise fail to comply with the provision of sections 222, 223 or section 224, such a person will be liable to fine. Here we would like to submit that the contravention/failure to comply with the provisions of law specifically rested on the beneficial owner (United Bank Limited) and not the company as no responsibility is placed on the company under the law.*

8. From the foregoing, it may be inferred that the primary plea of the Authorized Representative is that "Section 224 of the Ordinance lays onus on beneficial owner instead of the issuer company for reporting as well as recovery of tenderable gain". He is further of the view that "law does not place any obligation on the part of the issuer company for recovery of gain. The issuer company only loses its right to receive/claim the gain, in case it fails to recover the gain within the stipulated time period. Except having lost this right, no provision of the law places default responsibility on the company". The Authorized Representative requested that since no violation has been committed by the Respondent, therefore, the Notice may be withdrawn.

9. I have thoroughly reviewed the aforesaid submissions submitted on behalf of the Respondent, in the light of prevailing laws and rules on the subject matter. In this regard attention is invited to Section 224(2) and Section 224(4) of the Ordinance, which provide as under:-

Section 224(2)

Where a director, chief executive, managing agent, chief accountant, secretary, auditor or person who is beneficial owner as aforesaid fails or neglects to tender, or the company fails to recover, any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or within sixty days of a demand therefor, whichever is later, such gain shall vest in the [Commission] and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

Section 224(4)

"Whoever knowingly and wilfully contravenes or otherwise fails to comply with any provision of section 222, section 223 or section 224 shall be liable to a fine which may extend to thirty thousand rupees and in the case of a continuing contravention, non-compliance or default to a further fine which may extend to one thousand





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rupees for every day after the first during which such contravention, non-compliance or default continues”.

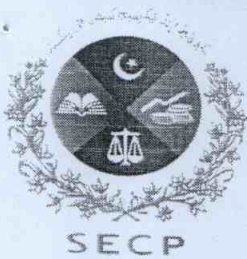
10. In my opinion, the provisions of Section 224 of the Ordinance place obligation simultaneously on the part of beneficial owner as well as on the issuer company. On one hand the said Section of the Ordinance bounds the beneficial owner to tender the amount of gain to the issuer. If the beneficial owners fails or neglects to tender amount of gain to the issuer company, apparently, it contravenes the provision of Section 224(1) of the Ordinance. At the same time the Section 224(2) of the Ordinance also places obligation on the part of the issuer company for recovery of gain. The said Section of the Ordinance speaks that “..... the company fails to recover..... Thus, the notion to be noted here is that the law uses the word “fails” so in my opinion the law simultaneously bounds the issuer company to endeavor to recover the amount of gain by raising demand for recovery of gain. The issuer company is, therefore, required to initiate the recovery proceeding of gain by raising demand within the stipulated time limit. I am of the view the issuer company stands discharged its responsibility by raising demand for recovery of the gain, within the stipulated time limit. If the issuer company does not initiate the recovery process, within the prescribed time limit, then it apparently contravenes the provisions of Section 224(2) of the Ordinance.

11. In fact the Companies Ordinance by virtue of Section 220 to Section 224 of the Ordinance envisages a scheme for reporting and monitoring of purchase and or sale and purchase activities of specified officers/beneficial owners of listed companies. On the basis of information, reported to the company by the officers/beneficial owners and record maintained by the company in terms of Section 220 of the Ordinance along with the information received from Central Depository Company of Pakistan, every listed company is capable to monitor the trading activities of its officers/directors/beneficial owners and raise demand for recovery of gain, pursuant to Section 224 of the Ordinance. In the instant case, the Respondent being issuer company has failed to discharge its obligation arose under Section 224(2) of the Ordinance, which apparently attracts the penal provisions contain in Section 224(4) of the Ordinance. Besides, the amount of gain has vested to the Commission.

12. Prior to conclude the findings, it seems necessitated to mention the following:-

(a) before announcing decision in the instant matter, the Appellate Bench of the Commission decided Appeal No. 49/2011 filed by Mrs. Nasreen Humayun Shaikh, a beneficial owner of Azgard Nine Limited. The Appellate Bench, vide Order dated





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19/06/2013, stated that “rule 16 of Rules has not been framed within the four corners of section 224 of the Ordinance. We are aided by the judgment in the matter of Messrs Honda Atlas Car (Pakistan), ltd., Lahore versus C.I.T, Legal Division, R. T. Lahore”. The Bench further held that “the rule 16 of the Rules is inconsistent with the statute and contradicts the express provisions of the statute from which it derives authority. The Appellant cannot be burdened to submit a gain, which never accrued to her in first place”. Besides, the Appellate Bench in the said Appeal calculated the amount of gain by matching the purchase and sale transactions in sequential manner rather than by applying lowest in highest out manner prescribed in Rule 16 of the Rules.

(b) Subsequent to the said judgment of the Appellate Bench, decision in the instant case was held because the amount of tenderable gain in the instant matter (at the time of issuance of Notice) was calculated pursuant to the manner provided in Rule 16(2) of the Rules, which has been declared “inconsistent with the statute” by Appellate Bench of the Commission. After seeking views of the Legislation, Litigation and General Counsel Department of the Commission, the issue of deviation of the manner of calculation of gain used by the Appellate Bench with the method of calculation prescribed in Rule 16 of the Rule was placed before Commission. The Commission considered and *inter alia* decided in its seventh meeting held on 25/05/2014 that the cases of recovery of gain be disposed of in the light of judgment made by the Appellate Bench of the Commission in the aforesaid appeal as well as the judgment made by Supreme Court of Pakistan in the matter of Appeal No. 946/2005.

13. Pursuant to the aforementioned decision of the Commission, the amount of tenderable gain in the instant matter has been recalculated as under, in the light of manner approved by the Commission:-

| Buy Date | Buy Quantity | Sale Date | Sale Quantity | buy Quantity to be Matched | Sale Quantity to be Matched | Quantity Matched | Buy Rate (Rs.) | Sale Rate (Rs.) | Gain Per Share (Rs.) | Total Gain (Rs.) |
|-----------|--------------|-----------|---------------|----------------------------|-----------------------------|------------------|----------------|-----------------|----------------------|------------------|
| 21/5/2009 | 1,000,000 | 9/4/2009 | 1,405,500 | 1,000,000 | 1,405,500 | 1,000,000 | 6.49 | 6.97 | 0.48 | 480,000 |
| 2/6/2009 | 90,000 | 9/4/2009 | 1,405,500 | 90,000 | 405,500 | 90,000 | 6.47 | 6.97 | 0.5 | 45,000 |
| 3/6/2009 | 300,000 | 9/4/2009 | 1,405,500 | 300,000 | 315,500 | 300,000 | 6.47 | 6.97 | 0.5 | 150,000 |
| 3/6/2009 | 200,000 | 9/4/2009 | 1,405,500 | 200,000 | 15,500 | 15,500 | 6.45 | 6.97 | 0.52 | 8,060 |
| 3/6/2009 | 200,000 | 9/4/2009 | 600,000 | 184,500 | 600,000 | 184,500 | 6.45 | 7.01 | 0.56 | 103,320 |

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| 10/6/2009 | 155,500 | 9/4/2009 | 600,000 | 155,500 | 415,500 | 155,500 | 6.6 | 7.01 | 0.41 | 63,750 |
| 11/6/2009 | 12,500 | 9/4/2009 | 600,000 | 12,500 | 260,000 | 12,500 | 6.6 | 7.01 | 0.41 | 5,120 |
| 17/6/2009 | 157,000 | 9/4/2009 | 600,000 | 157,000 | 247,500 | 157,000 | 6.74 | 7.01 | 0.27 | 42,390 |
| 18/6/2009 | 2,500 | 9/4/2009 | 600,000 | 2,500 | 90,500 | 2,500 | 6.7 | 7.01 | 0.31 | 770 |
| 18/6/2009 | 4,000 | 9/4/2009 | 600,000 | 4,000 | 88,000 | 4,000 | 6.74 | 7.01 | 0.27 | 1,080 |
| 18/6/2009 | 239,000 | 9/4/2009 | 600,000 | 239,000 | 84,000 | 84,000 | 6.75 | 7.01 | 0.26 | 21,840 |
| 18/6/2009 | 239,000 | 16/4/2009 | 155,000 | 155,000 | 155,000 | 155,000 | 6.75 | 6.87 | 0.12 | 18,600 |
| Total Gain | | | | | | | | | | 939,945 |

14. In pursuance of the decision of the Commission, the benefit of the manner approved by the Commission has been passed on in the instant matter, resultantly, the amount of tenderable has been reduced from Rs. 4,198,308/- to Rs 939,945/-.

15. It is evident from the foregoing discussion that the Respondent has made gain on account of the aforesaid sale and purchase transactions. But the Beneficial Owner did not tender the gain to the Respondent. The Respondent also failed to recover the gain/raise demand for recovery of the gain, within the period provided in Section 224(2) of the Ordinance. I am, therefore, of the view that the Respondent has failed to discharge its said obligations, therefore, the request to withdraw the Notice is rejected and matter is disposed of as under:-

- a) The amount of gain is still with the Beneficial Owner; therefore, as provided in Section 224(2) of the Ordinance the gain has vested to the Commission. Since Supreme Court of Pakistan in aforementioned judgment held that "the gain will remain under all circumstances property of the company". While, the entitlement of SECP to recover the amount in question from the company would be treated as being in nature of an enforcement mechanism to ensure that the wrongful gains do not remain with person who has violated the section, but are transferred for the benefit of the company. Since ultimately, the amount of gain is required to be transferred to the Issuer Company, therefore, in order to make the process of recovery of gain simple, the Beneficial Owner has been directed through separate Order dated 25/09/2014 to tender Rs 939,945/- to the Respondent, within 30 days of the issue of this Order under intimation to the Commission.
- b) Respondent is hereby directed to provide, on receipt of the aforesaid amount of gain, a copy of its bank account statement of the respective date highlighting therein credit entry of aforementioned amount, for the record of this office, within seven days of the receipt of the gain





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c) It is evident from the foregoing discussion that the Respondent has contravened the provisions of Section 224(2) of the Ordinance. In the light of said discussion, I am of the view that the Respondent has committed the violation. However, taking a lenient view of the default, in exercise of powers conferred under Section 224 (4) of the Ordinance, I hereby impose a fine of Rs. 30,000/- (thirty thousand rupees only) on the Respondent.

16. The Respondent is directed to deposit the fine in the account of the Commission being maintained in the designated branches of MCB Bank Limited within 30 days of the date of this Order and furnish Original Deposit Challan to this office.

17. This Order is issued without prejudice to any other action that the Commission/Registrar may initiate against the Respondent in accordance with the law on matter subsequently investigated or brought to the Notice of the Commission.




(Imran Inayat Butt)
Director/HOD (MSRD)

Islamabad.

Announced on September 25, 2014