CODE: **Q**

IN THE

HON'BLE SUPREME COURT OF INDIA

IN THE MATTERS OF:

LIFELINE LTD……APPELLANT 1

V.

PROMOTERS OF JEEVANI……..……..RESPONDENT 1

AND

FOREIGN LENDER/BANK…….……..…APPELLANT 2

V.

JEEVANI LTD.....….....RESPONDENT 2

AND

SWASTH LIFE LTD…….…….....APPELLANT 3

V.

COMPETITION COMMISSION OF INDIA/ LIFELINE……...……..RESPONDENTS 3

ON SUBMISSION TO THE HONOURABLE SUPREME COURT

MOST RESPECTFULLY SUBMITTED
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FOREIGN DECISIONS

INDIAN DECISIONS

19. *Haji Ahmad Yarkhan* v *Abdul Gani Khan* A.I.R. 1937 Nag 270.
20. *Hoffman la Roche* v *CIPLA Ltd* 148 (2008) DLT 598
21. *In Re : Dabur Foods Limited and Another* [2008] 144 Comp Cas 378
22. *In Re : Northgate Technologies Limited* [2012]172CompCas438(AP)
23. *In Re* :*Telesound India Ltd* 1983 53 CompCas 926
24. *In Re Maneckchowk and Ahmedabad Manufacturing Company Limited* [1970] 40 Comp Cas 819
25. *ITT Promedia* v *Commission* T-1111/96;
26. *Jagdish Chander* v *Ramesh Chander and Ors.* (2007) 5 S.C.C. 719.
27. *Mayar (H.K.) Limited and Ors.* v *Owners and Parties, Vessel M.V. Fortune Express and Ors.* A.I.R. 2006 S.C. 1828.
28. *Miheer H Mafatlal* v *Mafatlal Industries Ltd.* JT 1996 (8) 205
29. *Namrata Marketing Pvt. Ltd.* v *Competition Commission of India and Ors* AIR 2014 All 11.
30. *Nasiran Bibi* v *Mohd Hasan,* (1996) All LJ 1648.
31. *Nissan Motors India Private Limited* v *CCI* 2014 (5) MLJ 267.
32. *P. J. Chacko* v *LIC* A.I.R. 2008 S.C. 424.
33. *Pradeep Kumar @ Pradeep Kumar Verma* v *State of Bihar and Anr,* A.I.R. 2007 S.C. 3059.
34. *Rashtriya Ispat Nigam Limited and Anr.* v *Messrs Verma Transport Company* A.I.R. 2006 S.C. 2880.
35. *Re: Vikrant Tyres Limited,*[2005] 126 Comp Cas 288
36. *Saroj Agarwal* v *LIC* (2004) 4 C.L.T. 490.
37. *Shri Krishnan* v *Kurukshetra University, Kurukshetr,* A.I.R.1976 SC 376.
38. *Smt. Rukmanibai Gupta* v *Collector of Jabalpur and Ors.* A.I.R. 1981 S.C. 479.
39. *State of Goa* v *Praveen Enterprises* A.I.R. 2011 S.C. 3814
40. *Union of India (Through The Commissioner of Income Tax, Central, New Delhi) v Asia Udyog P. Limited and Others* 1974 44 CompCas 359 Delhi; *Telesound India Ltd* 1983 53 CompCas
41. *United Bank of India Limited* v *United India Credit and Development Company Limited* [1977] 47 Comp Cas 689
42. *Vikrant Tyres Limited, In Re* [2005] 126 Comp Cas 288
43. *Zee Interactive Multimedia Limited, In Re. Siti Cable Network Limited, In Re* [2002] 111 Comp Case 733

STATEMENT OF JURISDICTION

The Respondent 1, 2 and 3 humbly submits to the Jurisdiction of this Hon'ble Supreme Court in response to an appeal filed by the Appellants 1, 2 and 3.

STATEMENT OF FACTS

1. The Promoters of Jeevani and Lifeline entered into a separate share sale agreement through which 18% of the shares owned by the promoters were sold to Lifeline. After the merger came into effect the pending investigation by Food and Drug Administration of USA came to light. Lifeline contends that there has been a breach of contract and seeks damages for fraud and misrepresentation.
2. The dispute was then referred to the High court despite the presence of an arbitration clause in the agreement. The division bench of the High court ruled that there existed an arbitration clause, aggrieved by which Lifeline has filed an appeal in the Supreme Court.
3. Jeevani and Lifeline filed an application under Section 391 of Companies Act, 1956 for the approval of the Scheme by the Delhi High Court. Consequently, a meeting of creditors was ordered by the Company Judge.
4. Jeevani issued notice of the meeting of creditors in a local language newspaper and local English newspaper which contained the terms of the proposal and explained its effect. Accordingly, in the meeting of creditors the resolution was passed by majority. Thereafter, the High Court approved the Scheme.
5. The foreign lenders who have a foreign arbitral award in their favour against Jeevani made an application to recall the order of the approval of the Scheme and set it aside.
6. The Company Judge and the Division Bench of the Delhi High Court have dismissed the application of foreign lenders. The foreign lenders aggrieved by the order have come before the Supreme Court.

7. Lifeline decided to launch a new life saving drug "Novel" after further developing active R&D which belongs to Lifeline. Before the launch of Novel, Swasth filed a suit for IPR right infringement against Lifeline alleging that the new drug is substantially similar to their drug.
8. As soon as the injunction was granted by the Delhi High Court Swasth launched a similar cost effective drug and cornered a large chunk of the market after which it withdrew the case against Lifeline and the interim injunction was vacated.
9. Lifeline filed in the CCI alleging that Swasth abused its dominant position by engaging in bad faith litigation. The Commission after having a prima facie view passed an order for investigation, the report on which is still awaited.
10. Swasth aggrieved by the order of CCI filed a writ in Delhi High Court against Lifeline and when the court found no reason to interfere, Swasth has come before the Supreme Court.

STATEMENT OF ISSUES

I. THIS COURT DOES NOT HAVE JURISDICTION ON THE PRESENT CASE AS THE ARBITRATION AGREEMENT IS VALID AND THE DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT

A. The Dispute Resolution Clause Amounts to an Arbitration Clause

B. This Court has the power to refer the present matter back to Arbitration under Section 8 of Arbitration and Conciliation Act

II. THE PROMOTERS ARE NOT LIABLE FOR DAMAGES FOR BREACH OF CONTRACT, AS A RESULT OF THEIR CONCEALMENT OF THE US FDA INVESTIGATION

A.Concealment of the fact of the Pending Investigation does not result amount to Misrepresentation

B.Concealment of the material fact of the Pending Investigation does not result in Fraud and Active Concealment out of Mala fide Intention

III. THE SCHEME MUST NOT BE SET ASIDE

A. The foreign lenders are not creditors within the meaning of the Companies Act, 1956 therefore non-issue of notice to them cannot be a hindrance to sanction the scheme.

B. The scheme cannot be set aside even if notice was not served to the foreign lenders.

IV. FOREIGN LENDERS DO NOT CONSTITUTE SEPARATE CLASS OF CREDITORS

A. The foreign lenders do not constitute a separate class of creditors.

V. THE SUPREME COURT HAS NO JURISDICTION TO ADMIT THIS PETITION

A. The order for investigation is not appealable.

B. Swasth has abused its dominant position by engaging in bad faith litigation

C. It is Merely an Investigation Order on the basis of a Prima Facie case

SUMMARY OF ARGUMENTS

I. The dispute resolution clause provided for in the share sale agreement amounts to arbitration clause as it meet all the requisites laid down under S. 7 of the Arbitration and Conciliation Act and the courts. This court thus, by the power vested in it through S. 8 of the act should refer the matter back to arbitration. The non-disclosure of information of the pending investigation also does not amount to fraud and misrepresentation, as it is not a material fact to the agreement. Therefore, the Promoters are not liable for breach of contract.

II. The foreign lenders are not creditors because the foreign arbitral award in their favour against Jeevani has not been enforced and recognized in India. Therefore, the foreign lenders were not served with the notice of the meeting of creditors. Assuming without admitting that even if they are creditors of Jeevani they do not constitute a separate class of creditors hence there is no requirement of a separate meeting for them. The interests of all creditors are safeguarded; intentions of the Company are reasonable, just and fair. The Court having supervisory jurisdiction cannot intervene in the commercial wisdom of Jeevani. Therefore, the scheme must not be set aside.

III. Supreme Court has no jurisdiction over the investigation order passed by the CCI as it is not an adjudicatory order but an administrative order. In addition to this, Swasth is dominating in the life saving drug market as Inventive is a premier drug in the life saving drug market and because it has IP rights over the drug in the relevant market. Swasth has thus abused its dominance by denying market access by engaging bad faith litigation and there the act of Swasth shows a prima facie over which the CCI has the authority to order for investigation.

ARGUMENTS ADVANCED

I.THIS COURT DOES NOT HAVE JURISDICTION ON THE PRESENT CASE AS THE ARBITRATION AGREEMENT IS VALID AND THE DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT

A.The Dispute Resolution Clause Amounts to an Arbitration Clause

1. Section 7 of the Arbitration and Conciliation Act provides the essentials of an arbitration clause.[1] In *Bihar State Mineral Development Corporation and Ors.* v *Encon Builders (I) Pvt. Ltd.*[2] this court laid down that the essentials elements of an arbitration agreement are: a) there must be a present or future difference in connection with some contemplated affair, b) there must be intention of the parties to settle such difference by a private tribunal, c) the parties must agree to be bound by the decision of such tribunal, and d) the parties must have consensus ad idem. However, this court has also held that the arbitration agreement is not required to be in a particular form.[3] It is also not necessary for the clause to state that it is an arbitration clause or that the disputes would be referred to arbitration specifically.[4]
2. In the present case, though the dispute resolution clause does not use the word 'arbitration', it is in writing as it is a part of the share sale agreement, a document signed by the Promoters and Lifeline. The clause clearly states that "all questions and issues" will be referred an empowered committee comprising of three executive level personnel of the company whose decision shall be final, binding and conclusive upon the parties which also projects that the parties had consensus

[1] § 7, Arbitration and Conciliation Act, 1996.

[2] A.I.R. 2003 S.C. 3688.

[3] *Smt. Rukmanibai Gupta* v *Collector of Jabalpur and Ors.* A.I.R. 1981 S.C. 479.

[4] *Jagdish Chander* v *Ramesh Chander and Ors.* (2007) 5 S.C.C. 719.

ad idem. Therefore the dispute resolution clause between fulfills all the essential ingredients to be considered an arbitration clause.

B..This Court has the power to refer the present matter back to Arbitration under Section 8 of Arbitration and Conciliation Act

3. In the presence of a valid arbitration agreement Section 8(1) of the Act provides the courts with a power to refer the parties to arbitration when in a suit is filed by one of the parties.[5] In *State of Goa* v *Praveen Enterprises,* this court laid down that where it is found that the subject-matter of the suit is covered by an arbitration clause which is valid, the court will refer the parties back to arbitration.[6] The pre-requisite for the application of Section 8 has been mentioned in Section 7.[7] Section 8 of the Act as held by this court intended to refer the parties back to the arbitral proceedings in the first instance where the judicial authority comes to know the existence of an arbitration agreement or an arbitration clause.[8] Additionally, this court has observed that if an application is filed by the defendant before actually filing the first statement on substance of the dispute the matter can be still referred to arbitration.[9] There is also clear jurisprudence on arbitration in India that that the court should encourage arbitration and intervene in the least[10] especially in the cases where the dispute is the result of the breach of contract.[11]

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[5] N.D. BASU, LAW OF ARBITRATION AND CONCILIATION, (11th ed., Orient Publishing Company) (2011).

[6] A.I.R. 2011 S.C. 3814

[7] *Atul Singh and Ors.* v *Sunil Kumar Singh and Ors.* A.I.R. 2008 S.C. 1016.

[8] *Ardy International Pvt. Ltd. and Anr.* v *Inspiration Clothes and U and Anr.* (2006) 1 S.C.C. 417.

[9] *Rashtriya Ispat Nigam Limited and Anr.* v *Messrs Verma Transport Company* A.I.R. 2006 S.C. 2880.

[10] *Enercon (India) Ltd. and Ors* v. *Enercon GMBH and Anr.* (2014) 5 S.C.C. 1.

4. In the present case, since there exists a valid arbitration clause, Section 8 would be attracted. The subject matter of the current suit, which is an alleged breach of contract due to non-disclosure of certain information, would come under the scope of the Dispute Resolution clause as it covers all issues regarding the meaning and scope of a clause in the agreement. Therefore, this Hon'ble court being vested with the power should refer the present case to arbitration.

II.THE PROMOTERS ARE NOT LIABLE FOR DAMAGES FOR BREACH OF CONTRACT, AS A RESULT OF THEIR CONCEALMENT OF THE US FDA INVESTIGATION

A.Concealment of the fact of the Pending Investigation does not result amount to Misrepresentation

5. The essential ingredients as laid down under Section 18[12] of the Indian Contract Act are positive assertion of an untrue statement or a breach of duty with the intent to deceive or causing the party to mistake the subject-matter of an agreement.[13] An act amounting to misrepresentation should consist of leading the other man into damages by recklessly causing him to believe and act on falsehood.[14] It has also been laid down by this court that misrepresentation is established when it leads to a misconception of facts based on which the other party consents to the contract.[15]

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[11] *Rashtriya Ispat Nigam Ltd. and Anr.* v *Messrs Verma Transport Company* A.I.R. 2006 S.C. 2800.

[12] § 18, Indian Contract Act, 1872.

[13] AVTAR SINGH, CONTRACT AND SPECIFIC RELIEF, (11th ed. Eastern Book Company) (2013).

[14] *Bhaurao Dagdu Paralkar* v *State of Mahrashtra and Ors.* A.I.R. 2005 S.C. 3330.

[15] *Pradeep Kumar @ Pradeep Kumar Verma* v *State of Bihar and Anr,* A.I.R. 2007 S.C. 3059.

6. In the present case it cannot be said the Promoters in any manner asserted an untrue fact as the fact about the pending investigation was not even mentioned. Additionally, they did not commit breach of duty, as the clause in the Share sale agreement is limited to the furnishing of information, which was relevant to the transaction in the agreement. The non-disclosure of the fact also did not lead the other party to damages which would not affect the consent of Lifeline. Therefore, non-disclosure of this information does not amount to misrepresentation.

B. Concealment of the material fact of the Pending Investigation does not result in Fraud and Active Concealment out of Mala fide Intention

7. One of the important ingredients to establish the commission of a Fraud by a party is the active concealment of a fact even though the party has knowledge or believes the fact to be true[16]. This ingredient does not hold good with respect to every fact but holds good only with respect to a material fact to the contract.[17] It has previously been held by this court that what a material fact in a particular contract is depends upon the facts and circumstance of each case.[18] Mere silence is no fraud even if its result is to conceal facts that are likely to affect the willingness of a person to enter into the contract which are material facts.[19] One of the situations where there is a possibility of silence resulting in fraud is when the party keeping silence is under a Duty to

[16] **§** 17 Indian Contract Act, 1872.

[17] **§** 17 (Explanation), Indian Contract Act, 1872. *See,* for example, Illustrations (a) and (d). *See also: A. B. C. Laminart Pvt. Ltd. and Anr.* v *A. P. Agencies, Salem* A. I. R. 1989 S.C. 1239.

[18] *Mayar (H.K.) Limited and Ors.* v *Owners and Parties, Vessel M.V. Fortune Express and Ors.* A.I.R. 2006 S.C. 1828.

[19] *Shri Krishnan* v *Kurukshetra University, Kurukshetr,* A.I.R.1976 SC 376.

Speak[20] where one party reposes, and the other accepts, confidence.[21] In the absence of any such relationship mere silence will not amount to fraud.[22] Duty to speak also arises is where the other party is utterly without means of discovering the truth..[23] But a party cannot complain of misrepresentation or fraud if it had the party had the means of discovering the fact with ordinary diligence[24]as was held in *Balraj Chibber* v *NOIDA,*[25]

8. In the present case the pending investigation of FDA would not amount to a material fact with regard to the Share Sale Agreement, as it would not indicate the quality of the drugs. Further Lifeline did not exercise ordinary diligence before entering into the agreement with the Promoters. They could have gained information about the pending investigation of the FDA from their official website which is accessible even to ordinary citizens.[26] It is an established market practice that external factors such as investigations adversely affect the demand of a company's shares, which in turn results in the decline of the prices of the shares.[27] Jeevani is a publicly-traded company, and the investigation is public knowledge; therefore, the value of shares reflects the proper market value even with the fact of investigation. Additionally, Lifeline

[20] AVTAR SINGH, CONTRACT AND SPECIFIC RELIEF, (11th ed. Eastern Book Company) (2013).

[21] *Saroj Agarwal* v *LIC* (2004) 4 C.L.T. 490.

[22] *Haji Ahmad Yarkhan* v *Abdul Gani Khan* A.I.R. 1937 Nag 270.

[23] *P. J. Chacko* v *LIC* A.I.R. 2008 S.C. 424.

[24] *Nasiran Bibi* v *Mohd Hasan,* (1996) All LJ 1648.

[25] 1995 All LJ 1513.

[26] U.S. Food And Drug Administration, U. S. Department of Health and Human Services, Available at: http://www.fda.gov, (Last viewed on: 30th August 2014).

[27] Uma V. Sridharan, Lori Dickes, W. Royce Caines, *The Social Impact of Business Failure: Enron,* American Journal Of Business (2002).

did not entirely depend upon the Promoters to furnish them with all information regarding the merger.

III. THE SCHEME MUST NOT BE SET ASIDE

A. The foreign creditors are not creditors within the meaning of the Companies Act, 1956 therefore non-issue of notice to them cannot be a hindrance to sanction the scheme.

9. The word "*creditor*" is not defined in the Companies Act, 1956. There is no hard and fast rule to determine whether the person who is complaining is a creditor or not.[28] In the case of *Bharat Aluminium Company Limited and others* v *Kaiser Aluminium Technical Service, Incorporate and others awards*[29] held that the foreign awards which are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration and Conciliation Act, 1996 are subjected to the jurisdiction of Indian Courts; the intention of the legislature is clear that the Court may refuse to enforce the foreign award on the basis of grounds mentioned in Section 48 of the Arbitration and Conciliation Act, 1996 (herein referred as ACA). In the case of *Fuerst Day Lawson Ltd* v *Jindal Exports Ltd*[30] observed that it is on the satisfaction of the Court that the foreign award is enforced and then it is deemed to be the decree of the Court.

10. In the case at hand there has been noncompliance with Section 48 and 49 of the ACA, 1996 by the foreign lenders. The foreign arbitral award is a private award and it will have no force until it gets the sanctity of law in India. The matter whether they are creditors cannot be proved unless the foreign arbitral award is given the shape of a decree by the Indian Court. Therefore, foreign

[28] *Re: Vikrant Tyres Limited* [2005] 126 Comp Cas 288

[29] (2012) 9 S.C.C. 552

[30] A.I.R. 2011 S.C. 2649

lenders are not creditors because the foreign arbitral award has not been enforced and recognized in India.

B. The scheme cannot be set aside even if notice was not served to the foreign lenders

11. Section 393 of Companies Act, 1956 provides that notice of meeting of creditors or members must be given to the creditors or members. It is imperative to know whether non-issue of notice of a meeting to a creditor would have made a material difference or not.[31] The0 objecting creditor needs to prove to the Court that the scheme is *mala fide* or fraudulent which if passed will adversely affect his interests in the company; the right of the creditor to attend the meeting and vote cannot be a tool in his hands to coerce the company to pay money[32]. The Supreme Court in the case of *Miheer H. Mafatlal v Mafatlal Industries Limited*[33] has held that a Court in matters of merger does not have appellate jurisdiction but only has supervisory and peripheral jurisdiction due to which the Court will not interfere in the corporate and commercial wisdom of the creditors who have approved the Scheme with the requisite majority. In the case of *In Re English, Scottish, and Australian Chartered Bank*[34] it was held by that since the majority creditors of the bank were Australian therefore only Australian creditors could express a cogent view regarding the details of the bank; no one other than them knew better about the state of things. The interests of the foreign lenders are safeguarded as "*the liability of the transferee-company to pay the creditors of the transferor-company could not be a step in aid to*

[31] *Re: Vikrant Tyres Limited,*[2005] 126 Comp Cas 288

[32] *Zee Interactive Multimedia Limited, In Re. Siti Cable Network Limited, In Re* [2002] 111 Comp
Cas 733

[33] JT 1996 (8) 205

[34] [1893] 3 Ch. 385

amalgamation but would be a consequence of it.[35] The creditors of company which is sought to be merged are compelled to become the creditors of the merged entity even if they had no prior dealings with the new entity and have no trust in its management[36]. There is no specific provision directing the manner in which notice must be served other than public advertisement.[37] Therefore, the scheme shall be sanctioned when there is substantial compliance with the statute and if the objectors are mere speculators then their objections will not be considered as reasonable or *bona fide*[38].

12. Assuming without admitting that even if the foreign lenders are considered as creditors of the company their commercial interest will not be affected by this merger because all the assets and liabilities of Jeevani would be transferred to Lifeline. There is clarity in law that the Court makes a provision by which the property or liabilities of the transferor company are transferred to the transferee company[39]. Property implies the "*rights arising out of a contract*"[40] and liabilities mean "*duties of every description*". [41]Therefore, the rights, property and liabilities of Jeevani will be transferred to Lifeline without impeding the interests of the foreign lenders. Jeevani has strictly complied with the law[42] as it issued notice of meeting in the local language newspaper

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[35] *Union of India (Through The Commissioner of Income Tax, Central, New Delhi) v Asia Udyog P. Limited and Others* 1974 44 CompCas 359 Delhi; *Telesound India Ltd* 1983 53 CompCas 926

[36] *Id.*

[37] *Id.*

[38] *United Bank of India Limited* v *United India Credit and Development Company Limited* [1977] 47 Comp Cas 689

[39] § 394 of the Companies Act, 1956

[40] *In Re : Northgate Technologies Limited* [2012]172CompCas438(AP)

[41] *In Re*: *Telesound India Ltd* 1983 53 CompCas 926

[42] § 393 of Companies Act, 1956

and local English newspaper explaining the terms and proposal as well as its effect. The intentions of the company are *bona fide,* fair and just and the Court having supervisory jurisdiction cannot intervene in the commercial wisdom of the Company. Therefore, non-issue of notice to the foreign lenders is not an impediment for sanctioning of the Scheme.

IV. FOREIGN LENDERS DO NOT CONSTITUTE SEPARATE CLASS OF CREDITORS

A. The foreign lenders do not constitute a separate class of creditors.

13. "*It is always a moot question what constitutes a class*[43]". The Supreme Court in the landmark case of *Miheer H. Mafatlal* v *Mafatlal Industries Limited*[44] has held that "*unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened*." If the creditors have commonality of interests then they constitute one homogeneous class and not a separate class[45]. The fact that the lenders are from a foreign country or are off shore lenders does not establish the ground that they form a separate class; if the terms are equal and alike then the scheme will not be set aside even if the syndicate of foreign banks are deliberately clubbed with other creditors[46]. If the rights of the creditors are not adversely affected pursuant to the sanctioning of the Scheme then meeting of creditors can be dispensed with[47]. *"If a debt is disputed and it is the subject-matter of litigation and if total value of such debt makes no significant-difference to the total*

[43] *In Re Maneckchowk and Ahmedabad Manufacturing Company Limited* [1970] 40 Comp Cas 819

[44] JT 1996 (8) 205

[45] *D. A. Swamy and Others* v *India Meters Limited* [1994] 79 Comp Cas 27

[46] *Commerzbank Ag* v *Arvind Mills Limited* 2002 110 CompCas 539 Guj

[47] *In Re : Dabur Foods Limited and Another* [2008] 144 Comp Cas 378

amount of debt due by the company and if a substantial or overwhelming majority of creditors approve a scheme, non-issue of notice to such a creditor would not affect the meeting held or resolutions approved in such meeting.[48]" The Court has to be satisfied that the order is passed under misrepresentation and is erroneous and illegal only then it can be recalled[49]."

14. In the case at hand the foreign lenders constitute one homogeneous class with other creditors because their interests are not separate or distinct. The debt of the foreign lenders will be transferred to Lifeline in the form of a liability by a provision made by the Court[50]. Terms are equal for all creditors and no conflicting interest therefore there is no requirement of a separate meeting for foreign lenders. The Scheme is approved by the requisite majority and it will bind all the creditors including the dissenting creditors[51] as the scheme is *bona fide*, just, and reasonable from the point of view of a prudent businessman. All the statutory requirements have been duly complied with by Jeevani. The objections raised by the foreign lenders are baseless and speculative and therefore the Scheme must not be set aside.

V. THE SUPREME COURT HAS NO JURISDICTION TO ADMIT THIS PETITION

A. The order for investigation is not appealable.

15. Under Section 26(1) of the Competition Act, 2002, the Commission can order the Director General for investigation if it is of the opinion that there exists a prima facie case. In *CCI* v.*Steel Authority of India*[52], the courts decided that order of investigation is not appealable as it does not

[48] *Vikrant Tyres Limited, In Re* [2005] 126 Comp Cas 288

[49] *Commerzbank Ag* v *Arvind Mills Limited* 2002 110 CompCas 539 Guj

[50] § 394 of Companies Act, 1956

[51] § 391 of Companies Act, 1956

[52] [2010] 11 SCR 112; *See also Namrata Marketing Pvt. Ltd.* v *Competition Commission of India and Ors* AIR 2014 All 11.

entail any civil consequences on any person and does not effectively determine rights and/or obligation of the parties.[53] It is an administrative function and not a part of the adjudicatory process.[54] The Competition Commission is not required to give an opportunity of hearing to the parties or mention reasons for forming such opinion at the prima facie stage.[55] In the present case the order for investigation under Section 26(1), passed by the Competition Commission (hereinafter "CCI"), is therefore merely an administrative order. It is thus not appealable and the Supreme Court (hereinafter "SC") should dismiss the petition.

16. Adjudication over Competition Law matters involves specialized knowledge with respect to economics, trade, and commerce,[56] due to which a specialized tribunal, the CCI, was established to administer and adjudicate over competition law cases.[57] In pursuance of this, the SC should adhere to the procedure of appeal prescribed in the statue.

17. Article 133[58] of the Constitution states that Supreme Court can exercise appellate jurisdiction over the matter when it involves substantial question of general importance and the High Court is of the opinion that the matter is to be decided by the Supreme Court. Further, writ jurisdiction cannot be evoked if a statue provides for a remedy and the courts should thus not entertain this

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[53] [2010] 11 SCR 112; *Automec Srl* v *Commission of the European Communities* (1990) ECR II 00367.

[54] [2010] 11 SCR 112.

[55] *Id.*; *Barpeta District Drug Dealer Association* v *Union of India,* 2013 (5) GLT 30.

[56] Planning Commission, Government of India, *Report of the Working Group on Competition Policy*, available at:http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf,2007.

[57] Report of the High Level Committee on Competition Policy and Law, 2000.

[58] Article 133, Constitution of India, 1950.

petition.[59] In the present case, both the Single and the Division Bench in the Delhi High Court have found no reasons to interfere with the order of investigation. Thus, the Supreme Court should not admit this petition as it involves no substantial question of law.

B. Swasth has abused its dominant position by engaging in bad faith litigation

18. Relevant product market includes all those products and services under Article 2 (t) which the consumers can regard as interchangeable and substitutable due to their intended end use and prices.[60] Whenever the prices have differed considerably the courts have often distinguished them as separate product market since people of different income groups cannot substitute between those two products. [61]

19. Dominance is established by the possession of significant market power.[62] Market power also means the ability of the firm to harm the process of competition by either raising entry barriers or by slowing innovation in the market.[63] In *Tetra Pak* case the court determined dominance of

[59] *Nissan Motors India Private Limited* v *The Competition Commission of India* 2014 (5) MLJ 267.

[60] §§ 2(t), 19(7)(a) and 19(7)(b), Competition Act, 2002.

[61] *Belaire Owner's Association* v *DLF Ltd, Haryana Urban Development, Department of Town and Country Planning, State of Haryana* [2011] 104 CLA 398 (CCI); *Wanadoo* COMP/38.223 [2005] 5 CMLR 120.

[62] *Guidelines on applications of Vertical Restraints Block,* European Commission, Available at: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf, (Last viewed on: August 31, 2014).

[63] OFFICE OF FAIR TRADING, GOVT. OF UK, *Abuse of a Dominant position, Understanding Competition Law,* 2004, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf

the company on the basis of the fact that the company held IPR rights and such rights made it difficult for the other companies to enter the market.[64].

20. Barrier to entry of a firm includes preventing firms from entering the market, and/or retarding the arrival of firms in the relevant market.[65] Bringing enforcement proceedings which does not reasonably appear as an attempt to establish rights may amount to elimination of competition. However this must be carefully adjudicated over so as to not deny any person his right to access the courts.[66] In the case of *Bull Machines* v *JCB India Ltd*[67], JCB was a dominant player in the manufacture and sale of backhoe loaders in India. The informant alleged that JCB by obtaining an ex-parte injunction intended to harass and prevent the launch of the products by Bull Machines. The informant thus contended that such bad faith litigation amounts to abuse of dominance:

> *"There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law…During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law."*[68]

21. In the present case, the relevant market would be the life-saving drug market as both Novel and Inventive are life-saving drugs and the consumers can use them interchangeably in the market, as

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[64] Case T-51/89 *Tetra Pak Rausing SA* v *Commission* [1990] ECR II- 209.

[65] OECD, POLICY ROUNDTABLES, *Barriers to Entry*, 2005, DAF/COMP(2005)42, available at http://www.oecd.org/daf/competition/abuse/36344429.pdf

[66] *ITT Promedia* v *Commission* T-1111/96; *See also Brass Band Instrument* v *Boose & Hawks* 87/500

[67] Case No. 105 of 2013

[68] *Hoffman la Roche* v *CIPLA Ltd* 148 (2008) DLT 598

per Section 19(7)(a). In the life saving drug market, Swasth would be a dominant player as it has ownership over IPR rights to produce such life-saving drugs and also because Inventive is the premier drug in this life saving drug market. Swasth thereby has substantial market power so as to prevent the entry of other competitors in the life-saving drug market.

22. As per Section 4(2)(c) of the act, Swasth being in the dominant position has abused its dominance by creating barriers to entry of Lifeline in the life saving drug market. Swasth has used its IPR rights to obtain an injunction against Lifeline so as to prevent Novel from being launched in the market. It has engaged in bad faith litigation even though the IPR used in the production of Novel and the ones assigned to Swasth were different. Considering that the IPRs were not same, the products not substantially similar, and there is no prima facie case.

23. Swasth obtained an injunction only with the intention to prevent the launch of Novel and in the meanwhile released a similar life-saving drug cornering large market share in that market. Therefore Swasth not only engaged in preventing the entry of Novel but also used its dominant position to corner significant market share. The fact that Swasth withdrew the case as soon as the new product cornered the market share shows the intention of Swasth was to harass Lifeline for entering into the life-saving drug market. It can be concluded that Swasth has engaged in bad faith litigation which is anticompetitive as it denies market access to Lifeline. This shows that Swasth has abused its dominance under Section 4(2)(c) and Section 4(2)(e).

24. Lastly, it is evident that Swasth has a dominant position and there is likelihood that Swasth may have abused its dominance in the life saving drug market. Thus, the Commission has not erred in sending the matter for investigation to the Director General under Section 26(1) of the Act. There might be a prima facie case and the Supreme Court should not quash the investigation

order, but allow the Commission to come to a conclusion based on the findings of the Director General first.

C. It is Merely an Investigation Order on the basis of a Prima Facie case

25. After establishing the fact that the dominant firm has denied market access to other competitors, the Commission sees if there exists a prima facie case of abuse of dominance.[69] The Commission thereby merely follows the procedure laid down in the statue under Section 26(1) of the Act[70], and only sends the order to the Director General for investigation without passing any judgment.[71]

26. In the present case, after establishing that Swasth is dominant in the life saving drug market, the informant has also proved how Swasth has denied market access by engaging in bad faith litigation. This dominance of Swasth and abuse of dominance forms a prima facie case. Therefore, the Supreme Court should not intervene in this matter till the Commission forms a judgment on the findings of the Director General

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[69] *Bull Machines* v *JCB India Ltd* Case No. 105/2013.

[70] *GHCL Ltd* v *Coal India Ltd.* Case No. 08/2014.

[71] *Namrata Marketing Pvt. Ltd.* v *Competition Commission of India and Ors* AIR 2014 All 11.

PRAYER

In the light of the arguments advanced it is humbly prayed before this Hon'ble Supreme Court that it may:

1. Adjudge the Dispute Resolution clause to be a valid arbitration clause and refer the matter back to arbitration
2. Order that Scheme cannot be set aside and adjudge that foreign lenders do not constitute a separate class of creditors
3. Adjudge that there is a prima facie case and dismiss the petition and wait till the Director General makes the report.

For this the Respondents shall duty bound pray.

ALL OF WHICH IS HUMBLY SUBMITTED.