TEAM CODE: C1

IN THE HON'BLE SUPREME COURT OF INDIA

In matters between:

I.

FOREIGN LENDERS **...Appellant**

AND

LIFELINE LIMITED

(ERSTWHILE KNOWN AS LIFELINE LIMITED AND JEEVANI LIMITED)

...Respondents

II.

LIFELINE LIMITED **...Appellant**

AND

PROMOTERS, JEEVANI LIMITED **...Respondent**

III.

SWASTH LIFE LIMITED **...Appellant**

AND

LIFELINE LIMITED &

COMPETITION COMMISSION OF INDIA **...Respondents**

Written Submission on behalf of the Respondents

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2. Whether or not:
   (i) There is a valid arbitration clause in the Share Sale Agreement?
   (ii) There has been a breach of contract by the Respondent?
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STATEMENT OF JURISDICTION

The Respondents in each case humbly submit before the Honorable Supreme Court of India, the memorandum for the Respondents in the case of Foreign Lenders v. Lifeline Limited (erstwhile Jeevani Limited and Lifeline Limited) ***and*** Lifeline Limited v. Promoters, Jeevani Limited ***and*** Swasth Life Limited v. Lifeline Limited & Competition Commission of India filed as an appeal before this Hon'ble Court from the decisions of the Hon'ble High Court of Delhi.

The present memorandum sets forth the facts, contentions and arguments in the present case.

SUMMARY OF FACTS

Jeevani Limited is a listed public company, incorporated in 1990 with its registered office in New Delhi. Jeevani is one of the leading market players in the pharmaceutical manufacturing industry. As of July 2011, the company has been looking for opportunities for expansion in the market. Lifeline Limited is another listed public company, incorporated and registered in Mumbai. It is involved in food production and is looking to foray into the pharmaceutical sector.

November 2011

Lifeline approached Jeevani for a possible partnership to venture into the pharmaceutical sector. Both companies initiated negotiations for a possible merger.

27 January 2012

It is decided that Jeevani would completely merge into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline. A Scheme of arrangement is prepared for the same.

5 March 2012

Scheme is finalised and filed before the Bombay Stock Exchange for approval. However, such approval was not provided.

23 March 2012

The three promoters of Jeevani, also majority shareholders in Jeevani, agree to sell their entire promoter shareholding to Lifeline via a separate sale agreement. This agreement contained specific representations regarding disclosure of information by either party, which may be vital to the transaction. Further, all intangible properties including active research and development and intellectual property rights belonging to Jeevani would also become Lifeline's property, with all rights vested in Lifeline.

30 March 2012

Jeevani and Lifeline jointly file an application under Section 391 of the Companies Act, 1956 for approval of Scheme by the Delhi High Court. In accordance with the provisions, Jeevani issued notice of

meeting to its creditors by publishing an advertisement in a local language and local English language newspaper. The meeting was held and a resolution was passed in support of the Scheme, by a vote of majority.

5 July 2012

Delhi High Court further approved the Scheme. All other relevant approvals were taken by Jeevani. Lifeline also received the Bombay High Court's approval for the Scheme.

Prior to public announcement by Jeevani, arbitration proceedings initiated in a tribunal in Hong Kong, against Jeevani by certain creditors, mainly foreign banks, for the payments to be made under a consortium agreement between the lenders and Jeevani. The award passed on 27 July 2010, in favour of the foreign lenders, directing Jeevani to pay amounts to them. No proceeding for enforcement of such award till date.

Early August 2013

The foreign lenders of Jeevani make an application before Delhi High Court for recall of order dated 5 July 2013 stating, they constitute a separate class of creditors and they had not received notice of the meeting. The Company contended that no notice was required to be sent to the foreign lenders as they are not creditors of the Company and do not constitute a separate class. The Hon'ble Company Judge as well as on appeal, the Division Bench dismissed the application of the foreign lenders. This matter is now before this Hon'ble Court.

After the merger, Lifeline continued with the operations of the erstwhile Jeevani, including supplying generic drugs to the United States of America. However, Lifeline received notices from the US Food and Drug Administration (FDA) stating the drugs produced were of below par quality and violate the parameters set out by the FDA. On further scrutiny, Lifeline discovered the investigation by the FDA on the drugs produced by Jeevani had commenced before the merger took place. Lifeline filed a suit for breach of contract against the Promoters of Jeevani before the Delhi High Court claiming compensation for wrongful gain of Promoters by way of defrauding and misrepresenting a bonafide purchase by

Lifeline. The Promoters contended that the High Court did not have jurisdiction as the Share Sale Agreement dated 23 March 2013 had an arbitration clause. Lifeline contended that no such clause existed. Upon differing opinions of the Court, even on appeal, this matter is now before this Hon'ble Court.

Meanwhile, Lifeline decided to introduce a new life saving drug called 'Novel', which it created upon further developing the active research and development which was originally Jeevani's property. Another drug 'Inventive' is the premier drug in the market, manufactured by Swasth, a sister concern of the Promoters of Jeevani. Sometime in 2010, Swasth got assigned a few of the complete and developed research and development projects and intellectual property rights of Jeevani. Before Lifeline could launch 'Novel', Swasth filed a suit for infringement of its intellectual property, stating 'Novel' is substantially similar to 'Inventive' and alleged that it was based on the intellectual rights assigned to Swasth. An interim injunction was obtained by Swasth, which restrained the release of 'Novel'. During this time, Swasth launched a similar cost effective drug and cornered a large chunk of the market, after which it withdrew its case and vacated the injunction.

Upon this, Lifeline filed an application with the Competition Commission of India (CCI), stating Swasth had abused its dominant position by indulging in bad faith litigation. Finding a prima facie establishment of such fact, the CCI passed an order directing the Director General of the CCI to investigate in the matter.

Swasth, aggrieved by the Order of the CCI, filed a writ petition in the Delhi High Court stating that its endeavour to save its intellectual property rights cannot be seen as abuse of dominant position. The High Court dismissed the writ petition, stating that the investigation would continue as no adverse effect has been caused to Swasth. On appeal, the dismissal was upheld. At present, the matter is before this Hon'ble Court.

STATEMENT OF ISSUES

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

II. WHETHER OR NOT :

(i) THERE IS A VALID ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT BY THE RESPONDENT?

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

SUMMARY OF ARGUMENTS

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

The order approving the scheme cannot be recalled as it has been done as per statutory requirements. The Appellants cannot be termed as creditors let alone a separate class of creditors. The Respondent has called for meetings as per the directions of the High Court and has not acted in any manner contravening such provisions.

II. WHETHER OR NOT :

(i) THERE IS A VALID ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT BY THE RESPONDENT?

It is contended that this Hon'ble Court does not have the jurisdiction to entertain this matter, as an arbitration clause has been specifically provided for and agreed upon by the parties in the Share Sale Agreement. Further, the Appellant's poor conduct of due diligence and ignorance of information available in public domain cannot be construed to be a breach of contract on the Respondent's part.

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

The Appellant has abused its dominant position not only by creating legal barriers so as prevent another entity from entering the relevant market but has also engaged in bad faith litigation so as to corner a large chunk of the market. The Appellant has not acted in a *bona fide* manner so as to engage with possible competition. Further the CCI has acted in consonance with S. 59 and S. 18 of the Competition Act, 2002.

BODY OF PLEADINGS

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

It is submitted before this Hon'ble Court that the scheme of arrangement that was approved by the Hon'ble Delhi High Court should not be recalled as it is a valid scheme and follows the statutory provisions and requirements. As long as a scheme is *bona fide*, reasonable and *prima facie* feasible and in the interest of all the parties under consideration, the Court can lawfully approve the Scheme.[1] The order must not be recalled due to the reasons that are belowmentioned:

1.1. The arbitral award has not been enforced by the Appellants and thus they cannot be considered creditors. The Supreme Court in a two judge Bench observed that till the award is transformed into a judgment and decree, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of it being enforceable only after it is made a rule of the court upon the judgment and decree in terms of the award being passed.[2]

The arbitral award was given to the Appellants in 2010. A foreign award becomes executable only after a Court in India holds as enforceable in proceedings filed for its execution in Indian courts.[3] In the case of a foreign award, the Court executing the award has to first record a finding that the award is enforceable in India. It is only after the Court finds it as executable, the Court proceeds to

[1] In Re, Modiluft Ltd., (2004) 119 Comp Cas 142 (Del); In Re, Suri and Nayar Ltd., (1983) 54 Comp Cas 868 (Kar).

[2] Oil & Natural Gas Commission v. Great Western Company of North America, (1987) 1 SCC 496.

[3] N.K ACHARYA, LAW RELATING TO ARBITRATION AND ADR, 153 (Asia Law House, 3rd Ed.).

execute the award as if it is a decree of its own.[4] Additionally, a duty is cast upon the decree holder, if he desires to execute the decree, to file an application for execution to the competent court.[5]

In the present case, the arbitral award was passed on 27th July 2010 at a time when Hong Kong was not recognised by India as a reciprocatory territory. A Non-Convention foreign award, such as the present award cannot be enforced in India under the provisions of the 1996 Act. S 2(2) read with S. 2(7) excludes application of Part I to such an award.[6] The Supreme Court of India has held that enforcement of an award includes not only recognition of legal effect of the award but also ensuring that it is carried out.[7] An important consideration that is to be made is that the law on the enforcement of foreign awards dated pre 2012 when Hong Kong was not recognised by India is not clear. The Appellant has not only failed to enforce the award but such award cannot be enforced since it was made at a time when Hong Kong was not recognised by India as a reciprocatory territory.

Even if the Court states in the present situation that such an award must be made enforceable and recognisable by the court in the interests of justice, the provisions of the Limitation Act, 1963 will be attracted. The matter would be covered by Article 137 under which the period of limitation is three years.[8] The award was passed in July 2010 and since then there was no attempt at enforcing the award by the Appellants. In early 2013 however, the Appellants came forth to ask for the recall of the order. There is a clear bar on the enforcement of this award on the ground of limitation since a period of three years have passed. The Appellants thus cannot be considered to be creditors.

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[4] *Id.* at 154.

[5] State of Rajasthan v. Rustamji Savkasha, AIR 1972 Guj 179.

[6] ASHWINIE KUMAR BANSAL, ARBITRATION AGREEMENTS & AWARDS: LAW OF INTERNATIONAL AND DOMESTIC ARBITRATION, 65 (Universal Law Publishing Co., 2nd Ed.).

[7] Brace Transport Corp of Monrovia and Bermuda v. Orient Middle East Lines Ltd. Saudi Arabia, AIR 1994 SC 1715.

[8] Luduig Winsche & Co. v. Raunaq International Ltd., AIR 1983 Del 247.

1.2. The Appellants do not constitute a separate class of creditors. The law is not clear on what set of persons constitutes a "class" of creditors. [9] Classification of members or of creditors in a scheme is necessary only when different members or creditors would be affected by the scheme differently.[10] Creditors who have secured a decree cannot be regarded as a separate class of creditors.[11] There is no question of dividing foreign lenders as a separate class of lenders merely on their nationality.[12] All creditors - whether lenders in foreign currency or Indian rupees constitute a single class of creditors.[13] Hence, the Appellants cannot seek to recall the order since they do not constitute a separate class of creditors.

1.3. Since the Appellants do not constitute a separate class of creditors, there is no statutory requirement to hold a separate meeting for them. As long as the foreign lenders do not enjoy any distinct and different position than other creditors, there is no need to hold a separate meeting for them as it does not constitute a separate class.[14] In *Niulab Equipment Co (P) Ltd., Re*,[15] the Court held that as long as there is a disclosure of all material facts the scheme of arrangement is as per the provisions of law. In the present case as well, there exist no grounds for regarding the Appellants as a separate class of creditors and thereby no separate meeting needs to be convened for the Appellants.

1.4. The Respondents contend that the Appellants do not constitute a separate class of creditors and in any case were provided with sufficient notice by the Respondents. A document advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed

[9] S.K. Gupta v. K.P. Jain, (1979) 49 Com Cases 342 (SC).

[10] Jaypee Cement Ltd. Re. (2004) 122 Com Cases 854.

[11] Jalpaiguri Banking & Trading Co. Ltd., Re, (1935) 5 Com Cases 335; Hari Charan Karanjia v. Ulipur Bank Ltd., (1942) 12 Com Cases 110.

[12] S RAMANUJAM, MERGERS ET AL, 829 (LexisNexis Butterworths Wadhwa Nagpur, 3rd Ed., 2012).

[13] K.R. CHANDRATRE, COMPANY MEETINGS, LAW PRACTICE AND PROCEDURE, 347 (LexisNexis Butterworths Wadhwa Nagpur, 2nd Ed.).

[14] *In Re*, Siel Ltd, (2004) 122 Comp Cas 536 (Del).

[15] (2009) 152 Com Cases 375.

to be duly served on the day on which the advertisement appears, even on every affected party of the company who has no registered office in India.[16] Thus, on such ground as well the Appellants claim of not receiving notice falls.

The Respondents have followed the orders of the Hon'ble Company Judge in terms of the meetings to be convened and the notices to be given out. They have not acted in any manner contravening such order. It is also of importance that all other relevant approvals were taken by the erstwhile Jeevani Ltd. The Hon'ble Delhi High Court would not approve a scheme without ensuring that all the prior and requisite approvals are taken by both companies involved in such scheme. Since there is no established ground upon which the scheme has an adverse effect on the Appellant and so long as due consideration is being give to all the interested parties, this approved scheme cannot be recalled.

II. WHETHER OR NOT :

(i) THERE IS A VALID ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT BY THE RESPONDENT?

It is contended that there exists a valid arbitration clause that must be respected and adhered to so as not to waste the precious time of the Hon'ble Courts. Additionally it is also argued that there has been no breach of contractual duty and that the Respondents have abided by the provisions of the Share Sale Agreement (SSA) as to what has to be reasonably disclosed. Below are the substantiated arguments in furtherance of these issues.

2.1. There is a valid arbitration clause, considering which the courts do not have the jurisdiction to hear this matter. A clause in the agreement *inter alia* stated that 'that if any dispute touching the effect and meaning of this agreement arises in between the parties, it shall be referred to the Chairman of

[16] K.R. CHANDRATRE, *supra* note 13 at 97.

the board whose decision shall be final and binding on the parties.' It was held to be an arbitration clause.[17] Absence of words like 'arbitrator' or 'arbitration' would not make any difference if it can be culled out from the clause that the parties intended to get their disputes resolved through an informal forum.[18] In *P Anand Gajapathi Raju v. PVG Raju*[19] the Court held that under S. 8(1) of the Arbitration and Conciliation Act, 1996, if a defendant in a suit pleads the existence of an arbitration agreement, it is mandatory for the civil court to refer the parties to arbitration. In an arbitration agreement, what is essential is that the parties should intend to make a reference or submission to arbitration, and should be *ad idem* in this respect.[20] It is clear that through the SSA the parties aimed through the insertion of clause 2.1 of the SSA to refer any matter of claim or rights under this agreement to arbitration. The matter of dispute in the present case is with respect to breach of a contractual duty by the Respondents which will come under the terms 'claims' or 'rights' with respect to the agreement and thus such can be a valid arbitration agreement. The essentials of an arbitration agreement are (i) agreement should be in writing, (ii) the parties should have agreed to refer an disputes between them to the decision of a private tribunal, (iii) the private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to parties to put forth their case, and (iv) the parties should have agreed that the decision of the private tribunal shall be binding on them.[21] The SSA clearly specifies in clause 2.2. that the decision of an empowered committee comprising of three executive level personnel of the Company shall be final, binding and conclusive on parties to this agreement. This clearly shows the intention of the parties

[17] Bhagwan Devi v. Delhi Agricultural Marketing Board 2006 (3) Raj 372 (Del).

[18] *Id.*

[19] (2000) 4 SCC 539.

[20] O. P. MALHOTRA, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION, 359 (LexisNexis Butterworths Wadhwa Nagpur, 3rd Ed.).

[21] Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719.

to submit disputes to a private tribunal whose decision shall be final and binding on the parties. Thus it is clear that a valid arbitration clause exists in the present case.

2.2. There has been no breach of contract by the Respondent. The claim raised by the Appellants is that there has been a breach of a contractual duty by the Respondents which has been carried out in a *mala fide* manner. There has been no fraud or misrepresentation that has been carried out by the Respondents. When a person intentionally misrepresents a fact, with the knowledge that such fact is false, he is said to have committed fraud.[22] The Respondent has not concealed any fact with the intention of deceiving or causing any harm to the Appellant.

2.3. The seller is under no duty to reveal defects in the company or business to the purchaser. Most purchasers want to make their purchase with their eyes open giving value to the principle of caveat emptor.[23] The principle that there is no duty to disclose in every contract appears to rest on the view that each party must obtain the necessary information for himself and cannot expect it to be, supplied by the other, even when that other is aware of his ignorance and could easily put him right.[24] Due to the failure of the Appellants in carrying out their duties before entering into an agreement, the Respondents cannot be blamed for such consequences arising out of the same. Additionally, exception to S. 19, Contract Act, 1872 applies in the present case, where a party might, with due diligence, have discovered or had the means of so discovering the alleged misrepresentation[25] before he entered into the contract; in such a case, he cannot avoid the contract on the ground that he was deceived by the misrepresentation.[26] Where a person on whom fraud is alleged to have been committed is in a position to discover the truth by due diligence, fraud is not

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[22] POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 272 (LexisNexis Butterworths Wadhwa Nagpur, 13th Ed., Vol. 1).

[23] Slaughter and May, *Due Diligence and Disclosure in Private Acquisitions and Disposals*, 2007 at 7.

[24] *Id.*

[25] Dulipadi Namayya v. Union of India, AIR 1958 AP 533.

[26] Governor of Orissa State v. Shivaprasad Sahu, AIR 1963 Ori 217.

proved.[27] So long as the party has the means to know the facts, the party cannot be said to have been defrauded.[28] The ordinary diligence of which the exception to S. 19 speaks is such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its results.[29]

2.4. It is the duty of the Appellants to assess the standard pharmaceutical organisational structure and should have tried to estimate the full extent of the legal risk that tends to be attached to a pharmaceutical company. There was inadequate due diligence that seems to have been carried out considering the size, scale and scope of the deal. To find out whether companies are complying with Food & Drug Administration's (FDA) requirements, FDA can carry out investigations of different kinds, including routine and for-cause inspections of companies and individuals who manufacture, distribute, or test regulated products, and criminal investigations.[30] These investigations and inspections carried out by the FDA are in the public domain, and hence accessible to all individuals.[31] As such merger was the Appellants entry into the pharmaceutical business it is a given that such investigations by the FDA which are in public domain should have been looked into by the party trying to enter such market and the inadequacies of such party cannot be shifted to the other. The responsibility to ensure that this is done rests with the offeror.[32] Courts are hesitant to

[27] Krishan v. Kurukshetra University, (1976) 1 SCC 311.

[28] Kamal Kant Paliwal v. Prakash Devi Paliwal, AIR 1976 Raj 79.

[29] POLLOCK & MULLA, *supra* note 22 at 589.

[30] FDA website, http://www.fda.gov/AboutFDA/Transparency/TransparencyInitiative/ucm254426.htm., accessed on August 25, 2014

[31] *Id.*

[32] Slaughter and May, *supra* note 23 at 5.

provide a remedy to a purchaser that neglects the due diligence process, either by failing to adequately investigate or by ignoring the information discovered.[33]

On the above grounds and reasons put forth before this Hon'ble Court, it is humbly submitted that such a matter must be submitted to arbitration proceedings. Additionally, it is wrong on the part of the Appellants to shift the blame of their negligence in conduct of due diligence on to the Respondents and hence there has been no breach of contractual duty by the Respondents.

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

The Respondents submit that there has been an abuse of dominant position by the Appellants by contravening S. 4 of the Competition Act, 2002. The Appellant has also engaged in bad faith litigation, substantiating such abuse. Additionally, the CCI has been wrongfully made a party in the present matter, despite its actions being well within the purposes of its establishment. The arguments for such matters are laid down below.

3.1. The Appellant enjoys a dominant position in the relevant market, and has abused such position in the present case. In order to eliminate the competition that is being faced by the Appellant by the launch of such drug, the Appellant has engaged in a practice that is *prima facie* an abuse of their dominant position.[34] S. 4(1) of the Competition Act, 2002 specifically states that no enterprise shall abuse its dominant position. In the *United Brands*[35] case, the Court observed that a dominant position is "a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an

[33] Wendy B. Davis, *The Importance of Due Diligence Investigations in Mergers and Acquisitions*, 11 N.Y. BUSINESS L. J. 24.

[34] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & ors, Case No. 13/2009, Competition Commission of India.

[35] United Brands v Commission of the European Communities, [1978] ECR 207.

appreciable extent independently of its competitor, customers and ultimately of its consumers." The Appellant's drug 'Inventive' is the premier life saving drug in the market and the Appellant enjoys a large chunk of the market share, based upon which its dominant position may be established. An undertaking in a dominant position is entitled to protect its commercial interests, if it is threatened and takes such reasonable steps as it deems appropriate, but such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.[36]

3.2. The Appellant has engaged in bad faith litigation, which furthers the argument of abuse of dominant position mentioned above. The Competition Commission of India in, *In re Bull Machines Pvt Ltd*[37] has dealt with a similar factual circumstance as the present case. In this order, the DG CCI was ordered to conduct an investigation into the anti-competitive behaviour indulged in by JCB. The CCI stated that abuse of dominant position presents an increasing threat to competition, particularly due to its relatively low anti-trust visibility where bad faith litigation and abuse of the judicial process initiated by the party holding a dominant position in the relevant market to prevent the launch of a product where the product would have acted as competition to that of the party in dominance in the relevant market goes against the provisions of anti competition. In the present case, the Respondents were preparing to release 'Novel' that would have been competition to the other life saving drugs in the market. The Appellant has engaged in anti-competitive behaviour by way of bad faith litigation in order to restrain the Respondent from releasing such product into the market. The Appellant obtained an interim injunction for the same, and while such injunction was in action, the Appellant released a cost effective drug that was similar to 'Novel'. After such release, the Appellant vacated the injunction and withdrew their case. This clearly indicates a wrongful intention on behalf of the Appellant in order to capture a major share of the market,

[36] *Id.*

[37] Case no. 105/2013, Order of the CCI.

ultimately showcasing a monopolistic tendency. Therefore, this establishes the Respondent's contention of abuse of the Appellant's dominant position in the relevant market.

3.3. The Appellants have abused the legal process by unnecessarily inserting legal barriers. The legal process in its proper form is used to accomplish some improper purpose for which it was not designed. The plaintiff alleging such a tort must show that the predominant purpose of the defendant in using the legal process has been one other than that for which it was designed and as a result it has caused him damage.[38] In *Filmistan Distributors case*[39] the defendants secured an interim injunction apparently to save themselves from loss but used it to cause loss to the plaintiff's and it was held that as the injunction was used for an improper purpose the tort of abuse of legal process was made out and it was not necessary to prove malice or want of reasonable and probable cause. Similarly, the Appellant has obtained an interim injunction in order to cause loss to the Respondents, by stopping the production of the drug 'Novel'. The Respondents contend that there has been an abuse of legal process engaged in by the Appellants, in the instant case. By indulging in frivolous litigation, they have not only wasted the precious time of the Hon'ble Court approached, but they have also affected the business of the Respondents.

3.4. The Appellants have further indulged in predatory pricing. Predatory pricing is defined as the situation where a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire and maintain a position of dominance.[40] The predators' sales must account for a sizeable fraction of the market sales.[41] In the present case, the Appellants' launch of the new drug earned them a large chunk of the market. This shows that the Appellants have engaged

[38] Metall and Rohstoff AG v. Donaldson Lufkin & Jenrette, (1989) 3 All ER 14 (CA), pp.51, 52; C.B. Aggarwal v. Smt. P. Krishna Kapoor, AIR 1995 Delhi 154.

[39] AIR 1986 Guj 35.

[40] Raghavan Committee Report on Competition Law, 4.5-1.

[41] Ashish Ahluwalia, *Abuse of Dominance: Predatory Pricing*, Competition Commission of India, 17.

in predatory pricing. As a dominant player in the market, there was special onus on such entity to ensure fair competition in the market.[42]

3.5. The Appellants' IPRs do not give them the right to act in an anti-competitive manner. Intellectual property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society.[43] There is need to curb and prevent anti-competitive behaviour that may surface in the exercise of intellectual property.[44] A course of conduct adopted by a dominant undertaking with a view to excluding a competitor from a market by means of other than legitimate competition on the merits is an infringement.[45] In the prevailing circumstances, the Appellant has on purpose restricted the launch of the Respondent's cost effective drug by claiming infringement of their intellectual property rights, which inevitably showcases a monopolistic and anti-competitive behaviour.

3.6. The Competition Commission of India has also been made party to the present appeal. S. 59 of the Competition Act, 2002 specifically states that no suit, prosecution or other legal proceedings shall lie against the Commission for anything which is done in good faith. This Respondent has acted in consonance with the statutory power and rights that has been awarded to it. They have not acted in a malicious manner or in a way that is abusing a legal provision. There has been a *prima facie* finding that there is an abuse of dominant position based on which the Respondent ordered the DG CCI to investigate on such matter. Further there is in no way any sort of adverse effect that is being caused to the Appellant by such investigation and thus there is no reason to interfere with the functions of the Respondent. S. 18 specifically states that it shall be the duty of the CCI to eliminate practices

[42] Kapoor Glass Private Limited v. Schott Glass India Private Limited, Appeal no. 91/2012, Competition Appellate Tribunal.

[43] AVATAR SINGH, COMPETITION LAW, 64 (Eastern Book Company, 2012 Ed.).

[44] S.M. DUGAR, GUIDE TO COMPETITION LAW, 289 (LexisNexis Butterworths Wadhwa Nagpur, 5th Ed., Vol. 1).

[45] D.P. MITTAL, COMPETITION LAW AND PRACTICE, 319 (Taxmann, 3rd Ed.).

that have an adverse effect on competition and based on such duty, the Respondent is carrying out its functions. Therefore, this appeal should not be entertained as this Respondent has acted with *bona fide* intention and within the purposes and provisions of its functions.

The Respondents understand that competitors must be engaged with; however this does not give the Appellants the right to indulge in anti-competitive activities in order to maintain/strengthen its dominant position. Therefore, it is humbly submitted before this Hon'ble Court that the Appellant has abused its dominant position and engaged in bad faith litigation thus abusing the legal process. Further, the second Respondent has acted in good faith and within the scope of its authority.

PRAYER

Wherefore, in the light of the issues raised, arguments advanced, reasons given and authorities cited, it is humbly prayed before the Hon'ble Supreme Court to:

1. Dismiss the appeals.

And any other relief that this Hon'ble Court may be pleased to grant in the interest of justice, equity and good conscience.

And for this act of kindness, the Appellants shall as duty bound ever pray.

Counsel for Respondents