IN THE SUPREME COURT OF INDIA,

AT NEW DELHI

Appeal No./_____ of 2014

(Article 133 of the Constitution of India)

"Foreign lenders" under the Consortium Agreement……..……..Petitioners

v.

Lifeline Limited …….Respondents

CLUBBED WITH

Swasth Life Limited .....……Petitioners

v.

Lifeline Limited and *Competition Commission of India……..…Respondents*

CLUBBED WITH

Lifeline Limited.....Petitioner

v.

Promoters of Jeevani……..Respondents

Written Submission on Petitioner/Respondents,

Counsel G,

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STATEMENT OF JURISDICTION

APPEAL 1

The Foreign Lenders of Jeevani have approached this court under the Article 133 of the Constitution of India, 1950.

Lifeline Limited humbly submits to the jurisdiction of this court.

APPEAL 2

Swasth Life Limited have approached this court under Article 133 of the Constitution of India, 1950.

Lifeline Limited and the Competition Commission of India humbly submit to the jurisdiction of this court.

APPEAL 3

Lifeline Limited has approached this Hon'ble Court under Article 133 of the Constitution of India, 1950.

STATEMENT OF FACTS

I. **THE SCHEME OF ARRANGEMENT-**Jeevani Limited "Jeevani" is a company registered under the companies Act, 2013, and is also listed on the Bombay Stock Exchange. It is a leading national and major global pharmaceutical company. On 27th January, 2012, it was decided that Jeevani would be completely merged into Lifeline Limited "Lifeline", a major food producing company. All of Jeevani's assets and liabilities were directly transferred to Lifeline. The Promoters of Jeevani "The Promotors" would sell their majority 18% stakeholding to Lifeline, via the execution of a separate Sale Agreement between them entered into on 23rd March 2013. The agreement included specific representation regarding disclosure of vital information by either party, and stated that all the intangible right (including IPRs and active R&D and their rights) would be transferred to Lifeline. Accordingly, finalized scheme was filed with the Bombay Stock Exchange for its approval on 5th March, 2012. It was rejected.

II. On 30th March, 2012, Jeevani and Lifeline submitted the Scheme to the Hon'ble Delhi High Court for approval. It ordered a meeting of creditors to be convened. Jeevani sent out notice to creditors, and notified the scheme in two local papers. The Scheme was passed by a majority meeting of creditors who had been notified, after which the Hon'ble court approved it on 5th July, 2012. The scheme for Lifeline was also approved by the Bombay High Court. Before the public announcement, certain foreign creditors of Jeevani, "foreign lenders", invoked arbitration proceedings in Hong Kong regarding certain payments under a consortium agreement. The tribunal granted an award in their favour, but no attempt to enforce the award has been made. In August 2013, the foreign lenders filed a petition with the Delhi High Court seeking that an Order of Recall be passed against the order passed on the 5th July, 2012. They contended that they had not received notice of the Scheme, and had not been present at the meeting of the creditors.

III. THE ORDER OF THE COMPETITION COMMISSION OF INDIA - Lifeline decided to introduce a drug named 'Novel' into the market. It was cheaper than other lifesaving drug in the market, such as the presently premier drug 'Inventive'. Swasth owned complete rights to 'Inventive', which had been developed used active R7D which had erstwhile belonged to Jeevani. Swasth filed for interim injuction before release of the drug 'Novel', citing infringement of IPR in the Delhi High Court. This was granted by the court, and Swasth released a cost effective version of the same drug, and gained a chunk of market. It then lifted the injunction against Lifeline. Lifeline then filed a petition with the Competition Commission of India against Swasth, citing abuse of dominant position and bad faith litigation. CCI took a prima facie view in favour of Lifeline, and ordered the Director General to investigate the matter. Swasth filed a writ petition in the Delhi high Court, which challenged the order of the CCI. The Delhi High Court ruled in favour of the Lifeline and CCI, citing that there was no harm caused to Swasth in a prima facie investigation. On appeal, the division bench also dismissed the appeal.

IV. THE DISPUTE RESOLUTION CLAUSE -After the merger, Lifeline continued exporting products abroad, including USA. It received notices from the Food and Drug Administration, for supply of food with below par production parameters. On investigation, it was revealed that the notices by FDA commenced much before the merger. Lifeline filed a suit against the Promoters of Jeevani, for damages arising from breach of contract, unjust enrichment by defrauding and misrepresenting the bona fide purchaser and payment of inflated priceto the Promoters for the shares, due to the concealment of this information. The Promoters argued that Delhi High Court had no jurisdiction over this dispute, and the arbitration clause in the contract will govern the dispute. Lifeline argued that the clause was not valid.

ISSUES RAISED

1. WHETHER THE SCHEME OF ARRANGEMENT FOR JEEVANI LTD. MUST BE SET ASIDE?
2. WHETHER THE DECISION OF THE COMPETITION COMMISSION OF INDIA, IN HOLDING THE A PRIMA FACIE CASE EXISTED AGAINST SWASTH LIFE WAS GOOD IN LAW?
3. WHETHER THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT WAS A VALID AND ENFORCEABLE ARBITRATION CLAUSE?

SUMMARY OF ARGUMENTS

I. THE SCHEME OF ARRANGEMENT FOR JEEVANI MUST NOT BE SET ASIDE .

The application to recall the order was rightly rejected as the power of the court to recall its order is limited. Moreover, the scheme cannot be set aside as the foreign lenders are not creditors. Thus, notice was not required to be sent. Arguendo, the foreign lenders are creditors, the scheme need not be set aside because *firstly*, they do not constitute a separate class of creditors, hence no separate meeting was required and *secondly,* the scheme is neither unfair, unreasonable nor against public policy. Further, third party rights have already been vested. Lastly, the Company is in compliance with Clause 24(f) of the Listing Agreement.

II. THE COMPETITION COMMISSION'S ORDER FOR DIRECTING AN INVESTIGATION WAS GOOD IN LAW.

The standard for a*prima facie case* by which the CompetitionCommission orders an investigation should be low, as it is not a final decision and has no adverse consequences for the company. Swasth has a dominant position in the market as it is the only seller of low-cost drugs and has captured a large section of the market. It did so by filing an infringement suit against Lifeline and,afterhaving captured the market it withdrew the same, so as to restrict Lifeline from releasing its product and restrict market access in its favour. Thus, a *prima facie* case against Swasth is established wherein it abused its dominant position by means of bad faith litigation.

III. THE ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT IS NOT VALID

The arbitration clause is not valid or enforceable, as there is no express or implied intention to arbitrate. The Empowered Committee does not fulfil conditions to constitute a valid arbitral tribunal, but follows the process of expert determination. Finally, the dispute lies within the jurisdiction of the Delhi High Court, not the Empowered Committee.

ARGUMENTS ADVANCED

I. THE SCHEME OF ARRANGEMENT FOR JEEVANI SHOULD NOT BE SET ASIDE

A. THE POWER OF THE COURT TO RECALL THE ORDER IS LIMITED

1. The power of a court to recall its order must be exercised only in the "*rarest of cases*".[1] Further, an application to recall should not be entertained when there are other remedies available such as an appeal.[2] In line with an amendment to Section 391 of the Companies Act, 1956, [hereinafter the 1956 Act] replacing the jurisdiction of 'Court' with the 'tribunal', the right to appeal under Section 391(7) was replaced by a right under Section 10FQ of the 1956 Act. Section 421 of the new Companies Act, 2013 similarly provides for the right of appeal against an order of the tribunal.[3] The appellants in the instant case have filed for an application for recall of the order of the Hon'ble Delhi Court. Given the existence of an alternative statutory remedy, the *exceptional* power of recall must not be exercised. It is hence submitted that the decision of the Hon'ble Company Judge of the Delhi High Court rejecting the application for recall of the order dated 5th July, 2014 is correct.

B. THE 'FOREIGN LENDERS' ARE NOT CREDITORS,AND HENCE NOTICE WAS NOT REQUIRED TO BE SENT.

2. As per Section 44 of the Arbitration and Conciliation Act, 1996, [hereinafter the 1996 Act] a 'foreign award' is any award to which i) the New York Convention applies and ii) is made in a territory which is notified by the Central Government as a territory to

[1]J. Ranganathan, A.R. Antulay v. R.S. Nayak, (1988) AIR 1531 (SC).

[2]Shri Budhia Swain v. Gopinath Deb, (1999) AIR 2089 (SC).

[3]The Companies Act, § 421 (2013).

which the New York Convention applies.[4] The award in this case was passed by the arbitral tribunal in Hong Kong which has been notified as a reciprocating state in 2012.[5] Hence the award is a foreign award governed by Part II of the 1996 Act. It is submitted that the foreign lenders are not creditors because *firstly,* the original debt has merged with the foreign award and *secondly*, the debt under the foreign award is not *in praesenti* recognized.

i. The Original Claim Has Merged With The Foreign Award

3. It is well settled that all rights and liabilities under a contract or otherwise which are the subject matter of arbitration merge into the award which is pronounced.[6] The '*rule of non merger of cause of action'* in the case of foreign judgments is an obsolete position of law.[7] The abovementioned rule was based on the theory that foreign judgments are, only evidence of a decision. However this position of law has been rejected subsequently.[8]

4. Moreover, the doctrine of non merger of cause of action with judgment does not apply to foreign arbitration, because of their inherently different natures. While claims under a foreign judgment are of the nature of a sovereign ruling of one state accepted by another, foreign awards are of the nature of a contractual obligation made freely between both parties.[9] It is hence, submitted that the original liability ensuing from the consortium agreement, giving rise to the cause of action has merged with the foreign award.

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[4]The Arbitration and Conciliation Act, §44 (1996).

[5] Ministry of Law and Justice (Official Gazette), Issue no. 502 [580(E)], '*The Central Government Declares The People's Republic of China to be a Territory to Which the Convention on the Recognition and Enforcement ofForeign Arbitral Awards Applies as per the First Schedule of the Arbitration and Conciliation Act, 1996*,' (24th March 2012).

[6]Satish Kumar v. Surinder Kumar, (1970) AIR 883 (SC).

[7]J.H.C. MORRIS, DICEYS CONFLICT OF LAWS 996-97 (6th ed. 1957).

[8]Godard v. Gray, (1870) 6 L.R. 49 (QB).

[9]Badat And Co v. East India Trading Co, (1964) AIR 538 (SC).

Therefore,the status of the foreign lenders as creditors under a consortium agreement stands extinguished. Instead, obligations have been created under a foreign award.

ii. The Debt under the Foreign Award is Not Presently Recognized

5. As per Section 49 of the 1996 Act, when the court is satisfied as to the enforceability of a foreign award, it shall be deemed to be a decree of the court.[10] In the case of *Yehuda Silberberg Ltd*[11] it was held that the rights and liabilities created under a foreign judgment will only be recognized once it has been made a rule of the court in India. The onus is on the award holders to bring an action before the Indian courts, for the debt to be recognized as valid. In the recent decision of *Marine Geotechnics LLC* v. *Coastal Marine Construction & Engineering Ltd*[12] it was held that it is for the alleged creditor to show that the debt is a sum payable *in praesenti*, i.e. it must be "*payable now in India, according to Indian law*."[13] Thus the award of a foreign arbitral tribunal becomes a recognized debt only when the court is satisfied that the award is enforceable and deems it to be a decree of the court in a proceeding for enforcement brought at the instance of the foreign award holder under section 49 of the 1996 Act. In the present case,although the foreign lenders have an award passed in their favour, they are yet to file for proceedings for enforcement of the award.[14] It is hence submitted that the foreign lenders did not have to be notified of the meeting of creditors as they are not 'creditors', until their award is deemed to be a decree of the court.

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[10]The Arbitration and Conciliation Act, §49 (1996).

[11]Yehuda Silberberg Ltd. v. Premier Polyweaves P. Ltd, (2009) 147 CompCas 360 (Mad).

[12]Marine Geotechnics LLC v. Coastal Marine Construction & Engineering Ltd, (2014) 183 CompCas 438 (Bom).

[13]Marine Geotechnics LLC v. Coastal Marine Construction & Engineering Ltd, (2014) 183 CompCas 438 (Bom);Marina World Shipping Corporation v. Jindal Exports Ltd. (2004) 2 Comp.L,J. 50 (Del).

[14]Moot Problem, ¶ 6.

C. *ARGUENDO, THE 'FOREIGN LENDERS' ARE NOT CREDITORS, THE FACTSDO NOT WARRANT THE SETTING ASIDE OF THE SCHEME*

6. The scope of review in order to set aside an already sanctioned scheme of arrangement is limited and can only be exercised when the *"whole scheme is unfair, unreasonable, contrary to law and public policy."*[15] It is submitted that the scheme of amalgamation between Jeevani and Lifeline, was entered into with the legitimate intention of expanding the businesses of both the companies. It has thereafter been accepted by a vote of majority as well as sanctioned by the court. This indicates that the scheme as a whole is neither unfair, unreasonable, nor contrary to law or public policy. Any contentions made by the foreign lenders to the effect that scheme is unfair must be supported with strong evidence showing that the sanctioning of the scheme has severely and adversely affected them. A mere allegation that the notice ought to have been dispatched to them is not sufficient. [16]

7. It has been held in *Vikrant Tyres Ltd*[17]that a scheme cannot be invalidated merely on the ground that a creditor was not served notice, as long as a majority has voted in favour of such a scheme of arrangement. The rationale for the above as stated by the Supreme Court is that once a scheme has attained finality, the amalgamation leads to the vesting of third party rights through the ordinary course of business. These must not be divested unless the scheme is patently illegal or against public policy.[18] In the instant case rights have already been vested in the shareholders of Lifeline. The company has further undertaken the supply of generic drugs and the manufacture of their new

[15]In re: Shyam Telecom Ltd, (2007) 135 CompCas 387 (Raj); In re Rossell Industries Ltd, (1995) 4 Comp LJ 1 (Cal).

[16]In re: Mayfair Ltd. and Zodiac Clothing Co. Ltd, (2004) 122 CompCas 748 (Bom).

[17]In re: Vikrant Tyres Ltd., (2003) 47 SCL 613 (Kar).

[18]Konark Investments v. Union of India, (1999) 97 CompCas 52 (SC).

lifesaving drug 'Novel', soon after the merger. As third party rights have clearly been created, it is submitted that they must not be disturbed by setting aside the scheme.

D. *ARGUENDO, THE FOREIGN LENDERS ARE CREDITORS, THEY DO NOT CONSTITUTE A SEPARATE CLASS OF CREDITORS*

i. The Rights Of Foreign Creditors Are Not Dissimilar.

8. A separate class meeting must be convened when the rights of the parties are so dissimilar that it is "*impossible for them to consult together*".[19]It has also been stated that it is the difference in *rights* and not the *interests* of the creditors which leads to the formation of separate classes.[20] The court in the case of *In re Arvind Mills*[21]considered the question of whether foreign creditors form a separate sub-class of creditors, apart from being secured or unsecured creditors. It was held that they are *not* a separate sub –class. This is because their rights are not so dissimilar from the rights of other creditors in their class. The mere fact that they *perceive* their interests and considerations differently from other creditors does not necessitate a separate class meeting. Similarly in the case of *In Re Sovereign Company Marine General Insurance Co Ltd*[22] it was held that foreign currency lenders could effectively consult with other secured creditors. Thus they did not form a separate class.

9. The appellant may also contend that a separate set of circumstances such as different laws, economic and political scenario may affect foreign creditors unlike domestic creditors. However it is the "*dissimilarity of legal rights against the company*"

[19]Sovereign Life Assurance Co. v. Dodd, (1892) 2 QB 573 (CA); Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1996) 87 ComCas 792 (SC); In re: Maneckchowk and Ahmedabad Mfg. Co. Ltd., (1970) 40 ComCas 819 (Guj).

[20]In Re:Telewest Communications Plc (No. 1), (2004) EWHC 924 (Ch).

[21]In re: Arvind Mills Ltd., (2002) 111 Com Cas 118 (Guj); Commerz Bank AG v. Arvind Mills Ltd., (2002) 110 ComCas 539 (Guj).

[22]In Re Sovereign Company Marine General Insurance Co Lt, (2006) EWHC 1335 (Ch).

and not the private interests of individuals which lead to a separate class.[23] It is submitted that the rights of foreign creditors and domestic creditors against the company are not dissimilar under the Companies Act, 2013. In fact it does not distinguish between the two. For instance, both foreign and domestic creditors are treated *pari passu* during winding. They are both entitled to petition for winding up and equally participate in the same.[24]

ii. No Separate Scheme Has Been Offered To The Foreign Creditors

10. Creditors are divided into three classes – preferential creditors, secured and unsecured creditors.[25] Sub classes may only be formed if the rights of such creditors are dissimilar or different schemes have been offered to different sub-classes.[26] It is notable that in the instant case the same scheme of arrangement in pursuance of the amalgamation has been offered to all creditors, including foreign lenders.

11. The respondents submit that since the foreign lenders do not constitute a separate class, the scheme cannot be set aside for improper conduct of class meeting.

E. JEEVANI HAS COMPLIED WITH THE LISTING AGREEMENT REQUIREMENTS

12. While Clause 24(f) of the Listing Agreement requires the presentation of the scheme of amalgamation before the appropriate stock exchange for approval, the same is merely *directory* and not *mandatory.* The company does not need to obtain a 'no objection' certificate before it proceeds with the scheme. [27] It is sufficient that Jeevani has

[23]In re: UDL Holding Ltd, (2002) 1 HKC 172 (Court of Appeal); In Re:Telewest Communications Plc (No. 1), (2004) EWHC 924 (Ch).

[24]Raja of Vizianagaram v. Official Receiver, Vizianagaram, (1962) AIR 500 (SC).

[25]A. RAMAIYA, GUIDE TO THE COMPANIES ACT, VOL III 4023 (17th ed. 2010).

[26]Mihir H. Mafatlal v. Mafatlal Industries Limited, (1996) 87 CompCas 792 (SC).

[27]Phenil Sugars Private Ltd. v. Basti Sugar Company Ltd., (2013) 179 CompCas 83 (Del); Compact Power Sources Pvt. Ltd v. HBL Nife Power Systems Ltd, (2005) 125 CompCas 289 (AP).

filed the scheme before the stock exchange. Further, this scheme was filed twenty five days prior to its presentation before the Delhi High Court. This qualifies as *substantial compliance* and is sufficient for the purposes of compliance with the listing agreement requirements.[28]

II. THE COMPETITION COMMISSION OF INDIA'S ORDER DIRECTING THE DIRECTOR GENERAL TO INVESTIGATE SWASTH IS GOOD IN LAW

A. *THE COMPETITION COMMISSION OF INDIA WAS TO FORMULATE ONLY A* PRIMA FACIE*OPINION OF ABUSE OF DOMINANT POSITION, WHICH ENTAILS A LOWER STANDARD OF EVIDENCE.*

13. The commission is empowered to investigate into any alleged abuse of dominant position based on information it has received from any person, and has rightly done so in this case.[29] A person, as per the Competition Act, 2002 (hereinafter the Competition Act) also includes a company[30] such as Lifeline, as defined under the Companies Act, 2013.[31]

14. On receiving information from an informant, the Commission can order an investigation by the Director General into the matter if it has formed a *prima facie* view that an alleged abuse of dominant position may have taken place.[32]*Prima facie* has been defined as "*At first sight; on first appearance"*.[33]

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[28]In Re Chemidye Manufacturing Company Pvt. Ltd., (2006) 134 CompCas 58 (Bom).

[29]Competition Act, §19 (1)(a) (2002);*see* Ramachandran Reddy and others v. HDFC Limited, (2011) IndLaw 21 (CCI).

[30]Competition Act, § 2(I)(iii) (2002).

[31]Companies Act, § 2(20) (2013).

[32]Competition Act,§26(1) (2002).

[33]H.K. BLACK, BLACK'S DICTIONARY OF LAW 1071 (5th ed. 1979).

15. In interpreting the phrase *prima facie* in the context of the Competition Act, courts have cited the purpose with which the Act was passed.[34] It aims to ensure that practises that have an adverse effect on competition are prevented so as to facilitate economic development as well as protect consumers.[35] It is further submitted that the fact that the act does not provide for an appeal of the *prima facie* decision by the Competition Commission of India to the appellate tribunal and thus only writ jurisdiction can be availed of[36] is indicative of the legislative intent for expediency without litigation that would damage the effectiveness of the Commission in investigating based on information it receives.

16. The Indian Supreme Court has held that the ordering of this investigation is not a final judicial decision and simply a departmental step initiating an investigation into the matter;[37] it has no legal ramifications for the company. There is also no loss that is incurred to a company, since these investigations are not made public.[38] Further, acknowledging the value of recording reasons for decisions being made, the courts have stated that reasons for ordering an investigation, in consonance with the need for efficiency and the process not passing judgement, need only be rudimentary and not those of critical value.[39]

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[34]Hemant Sharma v. Union of India, (2011) MANU 7438 (Del).

[35]Shubham Srivastava v Department of Industrial Policy & Promotion (DIPP), (2013) IndLaw 55 (CCI).

[36]Competition Act, § 53(A) (2002).

[37]State of Mizoram v. Competition Commission of India,(2014) IndLaw 216 (Guw).

[38]Competition Act, § 57 (2002);*see* Competition Commission of India v. Steel authority of India Limited, (2010) MANU 0690 (SC).

[39]Competition Commission of India v. Steel Authority of India Limited, (2010) MANU 0690 (SC).

17. Thus, it is submitted that the standard of *prima facie* evidence based on which the Commissionorders an investigation is low and has been reasonably derived and satisfied in this case.

B. THE COMPETITION COMMISSION OF INDIA'S DECISION TO DIRECT AN INVESTIGATION BASED ON PRIMA FACIE OPINION WAS GOOD IN LAW

18. For a company to abuse its dominant position,[40] it is essential to prove both that the company has a dominant position and that it has abused it.[41]

i. Swasth has a Dominant Position in the Relevant Market

19. The Competition Act defines a dominant position as a position in the relevant market by which a company *"affects its competitors or consumers or the relevant market in its favour".*[42] Thus, it is essential to first identify the relevant market, in terms of the relevant product market and relevant geographical market.

20. The test for identifying the relevant product market is that where commodities are *"reasonably interchangeable by consumers for the same purposes".*[43]Thus, two products which act as substitutes to each other can be said to constitute the relevant product market.[44] As per the facts, the drug released is described as "*similar*" to Novel as it "*cornered a chunk of the market"*. Thus, the relevant product market is that of low-cost

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[40]The Competition Act, § 4(1) (2002).

[41]Shree Neeraj Malhotra, Advocate v. North Delhi Power Limited, (2006) MANU 0026 (CCI).

[42]The Competition Act, §4(a)(ii) (2002); *see* Hoffmann-La Roche and Co. V. Commission, (1979) ECR 461 (ECJ).

[43]United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Competition Act, §19(7)(c), (2002).

[44]United States v. Grinell Corp., 384 U.S. 563 (1966).

life-saving drugs into which Novel was to be released. As geographical constrains have not been referred to, it can be assumed the relevant geographical market is India.[45]

21. In order to establish as to whether a company has a dominant position in a market, courts have often considered the market share of a product that a company possesses.[46] However, this calculation is not an absolute one and is to be based on a relative scale[47] factoring in other market factors such as the number of competitors.[48]

22. As per the facts, Swasth had captured a "*large chunk of the market"*. It was also the only seller of low-costlife saving drugs in the market. It is thus submitted that *prima facie* Swasth had a dominant position in the Market.

ii. SwasthAbused Its Dominant Position

23. An enterprise is said to abuse its dominant position if it acts in a manner "*resulting in the denial of market access*".[49] It has been held that the use of a suit before a High Court concerning intellectual property right violations does not, *prima facie,* disallow the Competition Commission "*to proceed under the Competition Act"*.[50]Further,

[45]Nissan Motors India Private Limited (NMIPL) v.The Competition Commission of India (CCI), (2014) MANU 1020 (TN).

[46]American Tobacco Co et al v. United States, 328 US 781 (1946); Competition Act, §19(4)(a) (2002).

[47]S.V.S. Raghavan Committee, *Report of the High Level Committee on Competition Policy and Law* 4.4.5(2000);*see* M. P. Mehrotra v Jet Airways (India) Limited, (2012) IndLaw 6 (CCI).

[48]The Competition Act, § 9(4)(c), 2002; *see* Prints India v. Springer India Private Limited, (2012) IndLaw 19 (CCI).

[49]The Competition Act, § 4(c) (2002); *see* Vidharbha Industries Association v. MSEB Holding Company Limited, (2014) IndLaw 48 (CCI).

[50]Micromax Informatics Limited v.Telefonaktiebolaget LM Ericsson, (2013) MANU 0066 (CO).

in the case of *M/s. Bull Machines Pvt. Ltd*. v. *M/s. JCB India Ltd. and anr.*[51],it was claimed by M/s. JCB India Ltd that a rival product infringed upon intellectual property rights and an injunction was granted. However, it was successfully argued that the fact that the suit was later withdrawn was evidence that *prima facie* the entire suit was bad faith litigation intended to prevent competition in the relevant market of backhoe loaders. The standard of evidence required to prove *mala fide*intentis even lower when the nature of the product is such that it is indispensable to consumers.[52]

24. As per the facts, on hearing of a competitor that was to release a cheaper drug, Swasth filed a case in the Delhi High Court stating that Novel infringed upon their intellectual property rights, this in spite of the fact that the rights they had purchased were two years old. The facts also explicitly mention that there was *"further developing*" of the research Lifeline acquired from Jeevani, not those which had been assigned to Swasth in 2010. An interim injunction was granted, but vacated as Swasth withdrew the case after it captured the market for what was a life saving and thus indispensable drug for consumers. It has also been accepted by courts that, even though the products may be identical, in the case of life saving drugs, it is unlikely that people will switch away from a product even if a substitute is available.[53] Thus, it is submitted that a *prima facie* case has been established that Swasth abused its dominant position by denying market access. The order for further investigation by the Commission is good in law and not arbitrary as per article 14.[54]

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[51]M/s. Bull Machines Pvt. Ltd. v. M/s. JCB India Ltd., (2014) MANU 0032 (CCI).

[52]Microsoft Corp, v Commission of the European Communities, (2007) Case T-201/04 (Court of First Instance).

[53]Roussel-Uclaf v G. D. Searle and Co. Limited, (1977) F.S.R. 125 (Ch.).

[54]CONSTITUTION OF INDIA, art. XIV, 1950; *see* E.P. Royappa v. State of Tamil Nadu (1974) AIR 555 (SC).

III. THE DISPUTE RESOLUTION CLAUSE IN THE SHAREHOLDERS AGREEMENT DOES NOT CONSTITUTE A VALID ARBITRATION CLAUSE

A. THERE IS NO INTENTION TO ARBITRATE

25. The Appellants submit that the Dispute Resolution Clause [hereinafter 'the Clause'] in the Sale Agreement is vaguely worded and does not convey an unequivocal intention to arbitrate. In *Lucent Technologies*, [55]A valid arbitration clause requires a clear agreement by the parties to submit to arbitration their dispute related to the defined legal relationship. The clause must state that the chosen form of dispute resolution is arbitration, for it to be a valid arbitration clause.[56]

26. The Clause in the Sale Agreement does not expressly or impliedly indicate arbitration to be the chosen form of dispute resolution; it merely indicates a desire to amicably resolve disputes though an '*Empowered Committee'*.[57] It is submitted that this construction is too vague to imply an explicit choice of arbitration by both parties in case of a dispute. Further, it is mandatory for the clause to indicate the chosen method of dispute redressal as arbitration for intention to arbitrate to be determined.[58]

27. It is further submitted that terms like "*intention to amicably settle disputes*"[59] and setting up mechanisms for the same cannot be presumed to mean arbitration unless otherwise specified. This is because, in practise, these are included in dispute resolution clauses as pre-arbitration mechanisms to settle disputes informally.[60] Hence, these cannot

[55]Lucent Technologies v. ICICI Bank, (2010) 5 R.A.J. 574 (Raj).

[56]Lucent Technologies v. ICICI Bank, (2010) 5 R.A.J. 574 (Raj).

[57]Problem, ¶ 9.

[58]Salem Advocate Bar Association, T.N. v. Union of India, (2005) AIR 3353 (SC).

[59]Problem, ¶9.

[60]Visa International v. Continental Resources (USA) Ltd, (2008) Indlaw 1914 (SC).

amount to an express or implied intention to use arbitration as a dispute resolution mechanism.

B. CHOSEN FORM OF DISPUTE RESOLUTION IS EXPERT DETERMINATION AND NOT ARBITRATION

28. It is submitted that the appointment of an Empowered Committee of officials of the company cannot be construed to be the appointment of an arbitral tribunal. A valid arbitral tribunal must ensure a fair and impartial hearing of both sides, and must owe equal obligation of fairness to each party.[61] A committee of officials of the Respondent Company cannot be considered to have an equal obligation of fairness to both parties.

29. It is further submitted, that the constitution of an empowered committee of executive level officials as a dispute redressal mechanism amounts to the use of 'expert determination' as a means of dispute redressal, which cannot be equated to arbitration. When working officials within a company are instituted into a committee to facilitate amicable dispute resolution, this mechanism is called expert determination.[62] The choice of such a forum is construed to imply that the focus is on amicable and informal resolution of disputes as opposed to the utilisation of a quasi-judicial forum such as arbitration.[63]

30. In any case, even if this empowered committee was to constitute a valid arbitral tribunal, there must be a clear intention to bestow the role of an arbitral tribunal upon such a committee.[64] This would entail an express or implied indication that the committee would fulfil all the conditions of constitution and judicial form of functioning of a valid arbitral tribunal.[65] Since there is no such intention, express or implied, in the dispute

[61]K.K. Modi v. K.M. Modi, (1998) AIR 1297 (SC).

[62]Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd, (1999) AIR 899 (SC).

[63]Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd, (1999) AIR 899 (SC).

[64]Vishnu (Dead) by Lrs. V. State of Maharashtra, (2014) 1 SCC 516 (SC).

[65]RUSSELL ON ARBITRATION 76 (21st ed. 1997).

resolution clause, it cannot be considered to have bestowed the role of an arbitral tribunal on the empowered committee.

C. THE DISPUTE LIES IN THE JURISDICTION OF THE DELHI HIGH COURT.

31. The Clause clearly grants jurisdiction to the Delhi High Court to try the disputes arising from the subject matter of the agreement, and the Committee was to try issues arising from claims, interpretation, meaning, scope, rights or instructions related to the agreement.[66] It is submitted that the dispute the regarding alleged the breach of contract of the agreement and unjust enrichment falls within the jurisdiction of the Delhi High Courts, because it arises out of the subject matter of the contract.[67]

[66]Problem, ¶ 9.

[67]Scarola Ellis LLP v. Padeh, (2014) NY Slip Op 02847 (SC).

PRAYER

In light of the questions presented, arguments advanced and authorities cited,it is most humbly and respectfully prayed before this Hon'ble Court that it may adjudge and declare that:

1. The Scheme of Arrangement for Jeevani should not be set aside.
2. The order passed by the Competition Commission of India ordering an investigation by the Director General was good in law.
3. The Dispute Resolution Clause in the Share Sale Agreement is not a valid arbitration clause.

It is additionally prayed that the Court may make any such order as it deems fit in terms of equity, justice and due conscience.

All of which is humbly prayed,

Counsel G,

Counsel for the Petitioners/Respondents.