The 16th Raj Anand Intellectual Property Moot Court Competition, 2018
COMPROMIS

ALL PARTIES IN THIS CASE ARE PURELY FICTIONAL. THEY HAVE NOT BEEN CREATED IN ORDER TO CAUSE HARM TO OR DISPARAGE ANY LIVING PERSON OR BUSINESS ENTITY. RESEMBLANCES, IF ANY, ARE PURELY COINCIDENTAL.

1. The Federal Republic of Nidia is a fictional country in South Asia. Its laws are, except where explicitly mentioned otherwise, *in pari materia* to those established by the Government of the Republic of India. Its currency is the Indian rupee.

2. Erdevan Laboratories Inc. (EL) is a pharmaceutical company incorporated under the laws of Nidia. It is in the business of conducting scientific research and manufacturing medicines. EL has gained a reputation for manufacturing medicines that treat heart diseases with great efficacy. The company manufactures and sells pharmaceutical products through its subsidiary company, Sulken Pharmaceuticals Inc. (SP). SP is presently amongst the largest pharmaceutical companies in the country.

3. The pharmaceutical market in Nidia is a dynamic market. There are several players, with investments at an all-time high in this sector, which has high cost of product development. Patients in this market are cost conscious, but studies show that they are willing to try new drugs, especially for severe ailments.

4. In May 2017, a study revealed that heart disease is quite prevalent in the Nidian population. This medical study, which highlighted the predisposition of Nidians towards heart disease and the necessity of developing effective drugs to combat such disease caused a flutter within the Nidian pharmaceutical industry. Investments in this sector peaked.

5. In July 2017, EL was granted both a process and a product patent over the compound glidolin (hereinafter, the "**glidolin patent**") which acts as an anticoagulant (blood thinning drug) without many of the side effects (side effects of other blood thinner drugs include excessive bleeding and other health complications.) Glidolin could also be used for preventing strokes, and both uses are approved by the Nidian Central Drugs Standard Control Organisation. SP sells this compound under the brand name Glidex. Glidolin is as effective as an intravenous drug used as a blood thinner called Parin sold in Nidia which has inadequate compliance, especially for patients aged over fifty years due to its intravenous nature.

6. Fenton Pharmaceuticals, another pharmaceutical company incorporated in Nidia, sought a licence from EL for the glidolin patent and related proprietary know how to manufacture their own brand of blood thinner. Fenton and EL entered into such a licence agreement in late 2017 for eight years. Fenton began manufacturing their own branded blood thinner drug, Glipac.

7. The Pharmaceutical Consumer Rights Association **"PCRA"** is a watchdog for the pharmaceutical sector in Nidia. They act as a citizen's rights group that ensures that people get quality medicines and are compensated if they are harmed.

8. Multiple pharmaceutical companies have sought a license to the glidolin patent from EL. These are all at varying licence rates, which EL contends is based on the extent of usage and method of usage proposed by the prospective licensee. There are, however, a few companies which contend that the licence fee sought by EL is far too high and does not reflect the value of the licence or are unable to meet it due to being smaller players. Sulken, for example, received a licence @ 3.4% of their annual sales for ten years. Certain other players, including Fenton have received a licence at 4.2%. All licensees are made to sign a non-disclosure agreement with EL.

9. The PCRA conducted a public survey, which determined that the prices of these blood-thinner drugs were quite high and were unaffordable to most of the population. Upon consultation with the other pharmaceuticals, they approached the Competition Commission of Nidia and filed an Information under Section 19(1) of the Competition Act 2002 **(Case 1 of 2018)** against EL. In doing so, they alleged that EL had:

    a. Discriminated amongst similarly placed players in the market;

    b. Provided its subsidiary with an exclusivity rebate, thereby subsidizing it to the detriment of other competing players in the downstream market.

10. The Competition Commission of Nidia admitted this case by passing an order under Section 26(1) to direct the Director General to investigate. Preliminary findings by the Director General indicate that other companies have faced discrimination in their fees; the licence agreements placed on record include highly restrictive non-disclosure agreements. A case was made out under Sections 3(4)(b), 4(2)(a)(i), (ii), 4(2)(c) and 4(2)(e) of the Competition Act 2002.

11. EL contends that they have not engaged in such abuse of dominance. Their subsidisation of the licence fee to Sulken solely reflected the output generated by them. Further, a) the licence fee depended on the fact that each licensee intended to use the patent differently b) rebates were not necessarily anticompetitive; c) there were other choices of patent licences for similar remedies in the market d) these were volume-based rebates.

12. Waynor Laboratories is a company dealing with research and development of medicine. It is by far the most prestigious in the country; it hires the best scientists and has won several accolades for its research. Its profits, however, are steadily declining as it primarily focuses on research. The company was in dire straits until November 2017.

13. Rick Cuesta is an investor. His firm, Cuesta & Co., is a company incorporated under Nidian law. Cuesta and Co., interested in the work of Waynor Laboratories, made an investment. This earned the company a seat on the board as a minority shareholder and gave them the rights pertaining to certain business activities. Cuesta and Co. has also previously invested in Fenton Pharmaceuticals.

14. With the new capital, Waynor and Fenton entered into a Joint Venture called FenWay. FenWay combines Waynor's research prowess and Fenton's presence in the pharmaceutical sector; this special purpose vehicle was formed with the sole purpose of entering the market for cardiac medicine. FenWay Lab's *wayfentil* was created as a result; this drug had significant benefits over glidolin, though more expensive. Wayfentil was sold by FenWay under the name Waxofentil.

15. Erdevan Laboratories filed a patent infringement suit against FenWay Labs, alleging patent infringement considering that Fenton was Erdevan's licensee and which license also entailed use of Erdevan's proprietary know how related to the invention covered by the glidolin patent. FenWay, in return, alleged invalidity owing to lack of inventive step. The District Court granted an interim injunction.

16. The PCRA also filed a case in the Competition Commission of Nidia against Cuesta & Co., Waynor Labs, and Fenton Pharmaceuticals, alleging that the three had engaged in anticompetitive conduct by attempting to enter into a joint venture that would drive other players out of the market. (**Case 2 of 2018)** It was noticed that the prices of drugs offered by FenWay did not quite reflect the expense incurred in manufacturing wayfentil- based drugs.

17. The three opposite parties contended that their behaviour was not anticompetitive as: a) Fenton and Waynor did not operate in the same market, b) the joint venture was merely to meet the end of competition due to Erdevan's growing presence; c) Erdevan was engaging in sham litigation before the patents court which amounted to push them out of the market.

18. The Competition Commission of Nidia considered the case and made a prima facie finding under Section 26(1); this involved violations under Sections 3(1), 3(3)(a)-(c) and 4(2)(c) of the Competition Act.

19. The Director General made the following findings: Erdevan has a prima-facie case; FenWay Labs had a steadily growing share in the market and the prices incurred in manufacturing Waxofentil did not match the low prices at which it was being sold. However, a report that Erdevan's glidolin patent had been compulsorily licensed in another country was also presented before the Director-General.

20. The Competition Commission further noted the failure of any of the three parties to file a notice under Section 6 of the Competition Act 2002. The parties submitted that a) this was a mere investment; b) Cuesta & Co. holds less than 25% equity in both Waynor Labs and Fenton Pharmaceutical.

21. These cases are now pending final argument. The Commission has clubbed the two cases. Representatives for the Informants in Case 1 shall argue on behalf of Fenton Laboratories and the Pharmaceutical Consumer Rights Association, and Erdevan and Sulken Laboratories for the Opposite Party.

22. In Case 2, representatives for the Informants shall argue on behalf of the Pharmaceutical Consumer Rights Association and on behalf of Fenton, Cuesta & Co. and Waynor Labs for the Opposite Party.

23. While the Commission has found a prima facie case under certain sections of the Competition Act in the compromis, participants are invited to add additional provisions of the Competition Act as may be relevant. They shall be judged on the ability to accurately identify the charges under the Competition Act.

24. Participants may also rely on evidence based on consumer trends, scientific reports and case law from other jurisdictions.

25. While Indian case law will constitute precedent, the Commission shall be inclined to accept case law from competition law jurisprudence of other developed nations.

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