

TEAM CODE: R522

5<sup>TH</sup> KIIT NATIONAL MOOT COURT COMPETITION

*Before*

THE HON'BLE SUPREME COURT OF INDIA

[Appeal filed under Section 53-T of the Competition Act, 2002]



Civil Appeal No. \_\_\_\_\_ / 2017

VIKING.....APPELLANT

v.

ZORO.....RESPONDENT No. 1

COMPETITION COMMISSION OF INDIA.....RESPONDENT No. 2

COMPETITION APPELLATE TRIBUNAL.....RESPONDENT No. 3

MEMORANDUM *for* RESPONDENTS

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## LIST OF ABBREVIATIONS

¶	Paragraph
§	Section
CCI	Competition Commission of India
AIR	All India Reporter
Anr.	Another
Antitrust LJ	Antitrust Law Journal
AP	Andhra Pradesh
CompLR	Competition Law Review
COMPAT	Competition Appellate Tribunal
GLR	Gujarat Law Reporter
HC	High Court
Hon'ble	Honourable
ILR	Indian Law Reports
M	Mars
Ors.	Others
ITR	Income Tax Reports
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
V	Viking
Z	Zoro

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**STATEMENT OF JURISDICTION**

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The appellant Viking (“V”) has approached this Honourable Tribunal under Section 53-T of the Competition Act, 2002 against the interim order of the Competition Appellate Tribunal. The respondents Zoro (“Z”), CCI and COMPAT humbly submit to the jurisdiction of this Honourable Court.

**STATEMENT OF FACTS**

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**INDIA**

India is the relevant geographic market in the present case. Viking (“V”) and Mars (“M”) are the major players in the credit card market in India. Apart from these two, there were other small players in the market which have combined market share of 30 percent.

**VIKING (“V”)**

V is the major market player in the credit card market with 40 percent market share. It has entered into exclusionary contracts with different member banks, prohibiting them to issue any other competitor’s credit cards.

**MARS (“M”)**

M is the second major player in the credit card market with 30 percent market share. It has also entered into exclusionary contracts with different member banks, prohibiting them to issue any other competitor’s credit cards.

**ZORO (“Z”)**

Z entered into the credit card business in 2015. Over the course of 2 years, it acquired a market share of 7 percent. The conduct of V & M in entering into exclusionary agreement had severely affected business of Z and other competitors.

**MATTER BEFORE THE CCI**

Being aggrieved, Z filed a complaint with the CCI alleging anti-competitive conduct by V and M (both being individually dominant), in entering into exclusionary contracts and abusing their dominant position to the disadvantage of small players like Z. Z also filed an application for interim relief to restrain V & M from entering into or acting upon the said exclusionary contracts, in absence of which small players like Z would be wiped out and forced to exit the market very shortly.

However, the CCI considered fierce competition between V & M and rejected the complaint citing that there cannot be more than one dominant entity. Further, the CCI also observed that the concept of more than one dominant enterprise is alien to Competition Act, 2002.

**APPEAL TO COMPAT**

Aggrieved by the order of the commission, Z filed an appeal before the COMPAT and the appellate tribunal held both V & M dominant in the market. COMPAT further, ordered DG to investigate the matter and granted interim relief to Z by restraining V & M to enter or act upon any exclusionary contracts, prohibiting the member banks from issuing other credit cards.

**APPEAL TO SUPREME COURT**

Aggrieved by the order of COMPAT, V appealed before the apex Court questioning the prima facie view of the appellate tribunal and submitting that the case was not fit for grant of interim relief. V also contends commercial justification, however it does not elaborates on the same.

**ISSUES RAISED**

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**FOLLOWING ARE THE ISSUES RAISED BEFORE THE HONOURABLE SUPREME COURT-**

- I. WHAT IS A “PRIMA FACIE” VIEW AND WHETHER IN THE PRESENT CASE THE COMPAT WAS JUSTIFIED IN DIRECTING INVESTIGATION?**
- II. WHETHER IT WAS A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT?**
- III. WHETHER THERE CAN BE MORE THAN ONE DOMINANT UNDERTAKING/ENTERPRISE IN THE SAME MARKET?**

## SUMMARY OF ARGUMENTS

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### **I. DETERMINING “PRIMA FACIE” VIEW AND COMPAT’S JUSTIFICATION IN DIRECTING INVESTIGATION.**

- Material on Record support existence of a Prima Facie Case
- COMPAT has the Authority to ask DG to investigate the matter
  - Commission in its reconsideration could erred in declining to order investigation
  - COMPAT power to direct DG is an ancillary function
  - Appellate Tribunal has wide power in regard to the order appealed against

### **II. IT WAS A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT.**

- Principal of natural justice
- Prima facie case supports the COMPAT’S conclusion
- Existence of irreparable damage
  - Irreparable damage on Refusal of Injunction
  - Irreparable damage not ‘Quantifiable’ in terms of money
- Balance of convenience is in favour of respondents
- Other factors in support of interim relief

### **III. THERE CAN BE MORE THAN ONE DOMINANT UNDERTAKING/ENTERPRISE IN THE SAME MARKET.**

- Two entities can be considered dominant in the same market
- V and M abused their dominant position by entering into exclusionary contracts
  - The relevant market in the present case is “Market for general purpose credit cards in India”
  - The relevant product market is ‘Market for general purpose credit cards’
  - V was in dominant in the relevant market
  - V’s exclusionary conduct amounts to abuse of dominant position

**BODY OF ARGUMENTS****I. DETERMINING “PRIMA FACIE” VIEW AND COMPAT’S JUSTIFICATION IN DIRECTING INVESTIGATION**

¶(1.) It is contended before the Hon’ble Court that Prima facie case means that the contentions which the plaintiff is raising<sup>1</sup> require consideration in merit and are not liable to be rejected summarily.<sup>2</sup> The *prima facie* case would mean that a case which has proceeded upon sufficient proof to that stage where it would support finding if evidence to contrary is disregarded.<sup>3</sup> It has been held by the Hon’ble court that while determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.<sup>4</sup>

**A. MATERIAL ON RECORD SUPPORT EXISTENCE OF A PRIMA FACIE CASE**

¶(2.) It is humbly submitted before the Hon’ble Court that it has been held by the Competition Commission of India that *prima facie* case with reference to sub-section (1) of S. 26 of the Act, means no more than that the Commission is satisfied that the case is not frivolous or vexatious and that there is a serious question to be investigated.<sup>5</sup> Further the commission needs to verify if the material on record prima facie supports the alleged conduct and, if so, if the said conduct is prima facie in violation of any of the provisions of the Act.<sup>6</sup> Also if the COMPAT is satisfied that the opinion of Commission on issue of existence of a prima facie case is vitiated by an error of law, then it can direct an investigation.<sup>7</sup>

¶(3.) It is contended that in the present case the COMPAT took into consideration that Market report of V and M was 40% and 30% respectively<sup>8</sup> and by entering into exclusionary contract with different member banks reveals that there is existence of abuse of dominant position by them. Thus in under Section 53-B of the Act, the COMPAT is satisfied that decision of CCI is erroneous and thus forming a prima facie case it has ordered investigation.

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<sup>1</sup> Moot Proposition, ¶ 4.

<sup>2</sup> Prakash Singh v. State of Haryana, 2002 (4) Civil L.J. 71 (P.H), ¶ 6 [hereinafter “Prakash Singh”].

<sup>3</sup> BRYAN A. GARNER, BLACK’S LAW DICTIONARY, 956 (Thomson, 9th ed. 1999).

<sup>4</sup> Martin Burn Ltd. v. R.N. Banerjee, A.I.R. 1958, S.C. 79, ¶ 28.

<sup>5</sup> V.E. Commercial Vehicles Limited v. Uttar Pradesh State Road Transport Corporation, 2015 (1) A.K.R. 769, ¶ 11.

<sup>6</sup> *Id.*, at ¶ 3.

<sup>7</sup> North East Petroleum Dealers Association v. Competition Commission of India, (2016) Comp. L.R. 71 (Comp.A.T.) ¶ 9.

<sup>8</sup> Moot Proposition, ¶ 1.

**B. COMPAT HAS THE AUTHORITY TO ASK DG TO INVESTIGATE THE MATTER**

¶(4.) It is humbly submitted before the Hon'ble Supreme Court that as per the Section 53B (3)<sup>9</sup> of the Competition Act, 2002 which defines the power of COMPAT it has been stated that the Appellate Tribunal after giving an opportunity of being heard can pass any order which it seems fit. On a plain reading of section 53B (3) it has been stated that the expression 'as it thinks fit' confers a jurisdiction of widest amplitude on COMPAT.<sup>10</sup> The above section makes it amply clear that the COMPAT can pass any orders as it thinks fit. Naturally, it should include a direction for investigation. The object of giving such wide powers is to mitigate the rigour of the technicalities of the law, for achieving the object of effective investigation.<sup>11</sup>

¶(5.) It is humbly submitted that this is the only way to ensure the desired outcome if the COMPAT is of the considered view that an investigation is needed and the Commission has erred in not directing an investigation by the DG while making a prima facie opinion. Thus it can be concluded that COMPAT has wide sweep of appellate powers and there is no need for it to assume any powers. COMPAT is an appellate authority and once an appeal is made it can order an investigation. Thus it can be concluded that this course of action eliminates another round of avoidable litigation; if the mind of the COMPAT is made up that the matter needs an investigation.

**I. COMMISSION IN ITS RECONSIDERATION COULD ERRED IN DECLINING****TO ORDER INVESTIGATION**

¶(6.) It is further contended that in situations where the appellate order is against an order Section 26(2) of the Act, referring/remanding the matter back to the Commission may or may not always result in an investigation by DG. It is humbly submitted by the Respondent that in the recent case of *K. Sera Sera Digital Cinema Pvt. Ltd.*<sup>12</sup> where COMPAT had remanded the matter back to the CCI for reconsideration stressing on the need to analyse as to at what point forcing standards can lead to pushing out competition. However, upon reconsideration, the CCI again dismissed the matter and during the second appeal, the COMPAT noted that the CCI had done nothing by "way of value addition" in the CCI's second order and thus

<sup>9</sup> § 53B (3), the Competition Act, 2002.

<sup>10</sup> § 53B (3), the Competition Act, 2002.

<sup>11</sup> *M/s. Aachi Masala Foods (P) Ltd. v. S.D. Murali and The Registrar of Trade Marks*, 2013 (55) P.T.C. 315 (I.P.A.B).

<sup>12</sup> *K. Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives, LLC and Ors.*, 2016 Comp.L.R. 1260 (Comp.A.T).

Commission in its reconsideration erred in declining to order investigation under Section 26(1) of Act.

¶(7.) It is humbly contended before the Hon'ble Supreme Court that If the COMPAT sets aside the order of the Commission to be decided afresh by the Commission after evaluating the information along with all the material evidence afresh there is no certainty that, in the second round, the Commission would form a prima facie opinion to direct an investigation into the matter by the DG. Also, the Act allows the COMPAT, as an appellate body having overarching powers, to pass such orders as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against and therefore, the COMPAT is well within its powers to direct the DG to conduct investigations.

## 2. COMPAT POWER TO DIRECT DG IS AN ANCILLARY FUNCTION

¶(8.) It is humbly submitted before the Hon'ble Court that Tribunal functions as a court within the limits of a statute with all powers conferred expressly by the statute.<sup>13</sup> It was held by the Hon'ble Supreme Court that it would be useful to recollect that every Tribunal is clothed with incidental and ancillary powers to effectuate its orders, and to carry out its functions effectively.<sup>14</sup> When an act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.<sup>15</sup> It is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.<sup>16</sup> It was further held by the Hon'ble Supreme Court that if there was jurisdiction to do certain matters then all powers to make that jurisdiction effective must be implied to the authority unless expressly prohibited.<sup>17</sup>

¶(9.) It is further contended that the Appellate Tribunal i.e. COMPAT has ample powers to regulate its own procedure as stated in Section 53B (3) of the Act. Section 53(B) of the Competition Act or any other provision does not limit the exercise of Appellate powers of the COMPAT. It is concluded that the COMPAT has inherent or incidental or ancillary powers to effectuate the statutory power expressly granted to it and the power to direct DG conforms with the inherent powers as being incidental to and necessary for the Appellate Tribunal to exercise its appellate function for doing justice, *ex debito justitiae*, i.e., in the interest of

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<sup>13</sup> Union of India and Another v. Paras Laminates (P) Ltd., A.I.R. 1991 S.C. 696.

<sup>14</sup> *Id.*

<sup>15</sup> PETER S. LANGAN & PETER B. MAXWELL, MAXWELL ON INTERPRETATION OF STATUTES 3501 (Sweet & Maxwell, 12<sup>th</sup> ed. 1969) [hereinafter "MAXWELL"].

<sup>16</sup> NORMAN J. SINGER & J.G. SUTHERLAND, SUTHERLAND STATUTORY CONSTRUCTION 540 (7<sup>th</sup> ed. 2007).

<sup>17</sup> Hukum Chand Boid v. Kamalanand Singh, (1906) I.L.R. 33 Cal. 927, ¶ 11.



substantial justice.

3. APPELLATE TRIBUNAL HAS WIDE POWER IN REGARD TO  
THE ORDER APPEALED AGAINST

¶(10.) It is humbly submitted before the Hon'ble Court that the Appellate Tribunal is empowered to pass such order "as it thinks fit", confirming, modifying or setting aside the order appealed against.<sup>18</sup> The expression pass such order as it thinks fit invests the authority with vast powers.<sup>19</sup> The Appellate Tribunal has the power to confirm, modify or set aside the order appealed against. It is humbly submitted before the Hon'ble Court that as per Section 53B (3) the Appellate Tribunal has power to set aside the order appealed against. It is humbly submitted that it has been held that to set aside does not mean mere cancellation; further directions have also to be issued.<sup>20</sup>

¶(11.) It is respectfully submitted before the Hon'ble Supreme Court that the COMPAT is justified in ordering an investigation by DG because it has the jurisdiction as well as duty to correct all errors in the proceedings under appeal and to issue the direction to the DG. It is concluded that the Appellate Tribunal has the power under Section 53B(3) of the Competition Act, 2002 under the term 'set aside' to order DG for investigation on the matter concerned.

**II. IT WAS A FIT CASE FOR GRANT OF INTERIM RELIEF BY COMPAT**

¶(12.) It is humbly submitted before the Hon'ble Bench that under Section 53 of the Competition Act, 2002 it has been stated that the Competition Appellate Tribunal has the competent authority to pass such orders as it thinks fit.<sup>21</sup> Further in the *Rajkumar Dyeing case*<sup>22</sup> the COMPAT had not only allowed the interim application but also granted an interim application. Also the Delhi High Court stated that application for interim relief could be filed before the COMPAT thus upholding that the appellate tribunal has the authority to grant an interim relief.<sup>23</sup> It is contended that it is a well settled principle that an interim order can be granted in the aid of and as ancillary to the main relief available to the party on final

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<sup>18</sup> § 53B (3), the Competition Act, 2002.

<sup>19</sup> D.P. MITTAL, COMPETITION LAW AND PRACTICE: A COMPREHENSIVE SECTION WISE COMMENTARY ON LAW RELATING TO THE COMPETITION ACT 282 (Taxmann, 3<sup>rd</sup> ed., 2011) [hereinafter "COMPETITION LAW AND PRACTICE"].

<sup>20</sup> Kapurchand Shrimal v. C.I.T., 1982 S.C.R. (1) 505, ¶ 15.

<sup>21</sup> § 53B (3), the Competition Act, 2002.

<sup>22</sup> Rajkumar Dyeing and Printing Works Private Limited v. Competition Commission of India, 2015 Comp.L.R. 201 (Delhi), ¶ 3.

<sup>23</sup> Super Cassettes Pt. Ltd. v. Union of India, 2014 S.C.C. Online Del. 2372.

determination of his rights in a suit or any other proceeding.<sup>24</sup> Therefore, a court undoubtedly possesses the power to grant interim relief during pendency of the suit.<sup>25</sup>

¶(13.) It is thus contended that an order or decision or direction made by the Competition Commission, if taken in appeal before the Appellate Tribunal, can eventually be set aside or modified or confirmed by the Tribunal if it chooses to intervene in the matter. There appears to be no such limitation which can persuade to take the view that the Appellate Tribunal has no power, during pendency of an appeal before it, to suspend the operation of the order or decision or direction of the Commission under challenge in Appeal.

#### A. PRINCIPAL OF NATURAL JUSTICE

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¶(14.) It is humbly submitted before the Hon'ble Court that this Court while deciding on the availability of the power of the Tribunal in the absence of any express provision held that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice.<sup>26</sup> It is contended that it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties.<sup>27</sup>

¶(15.) Further it was held by the Hon'ble Supreme Court while dealing with the recovery of debts due to Banks and Financial institutions Act, 1993 held that although Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but it shall be guided by principles of natural justice. It was further held that the Tribunal can exercise powers contained in the Code of Civil Procedure and can even go beyond the Code as long as it passes orders in conformity with principles of natural justice.<sup>28</sup>

¶(16.) It is humbly contended before this Hon'ble Court that it is true that there is no express provision in the Act or the rules under Competition 2002 act framed thereunder giving the Tribunal jurisdiction to do so. However under Section 53 of the Competition Act it has been stated that the Appellate Tribunal shall be guided by the principles of natural justice.<sup>29</sup> Thus it can be concluded that passing interim order by COMPAT is in conformity with the principle of natural justice.

¶(17.) It is humbly submitted before the Hon'ble Court that for grant of temporary injunction i.e. interim relief, three factors have to be satisfied which are prima facie case[A], irreparable

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<sup>24</sup> C.K. TAKWANI, CIVIL PROCEDURE WITH LIMITATION ACT, 1963, 344 (8<sup>th</sup> ed., 2017).

<sup>25</sup> State of Orissa v. Madan Gopal, A.I.R 1952 S.C. 12, ¶ 14.

<sup>26</sup> Grindlays Bank Ltd., v. Industrial Tribunal, 1980 (Supp.) S.C.C. 420, ¶ 9.

<sup>27</sup> *Id.*

<sup>28</sup> Allahabad Bank, Calcutta v. Radhakrishna Maity & Ors., A.I.R. 1999 S.C. 3426.

<sup>29</sup> § 53O (1), the Competition Act, 2002.

loss[B]and balance of convenience[C].<sup>30</sup>

### B. PRIMA FACIE CASE SUPPORTS THE COMPAT'S CONCLUSION

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¶(18.) It is humbly submitted before the Hon'ble court that Prima facie case does not mean that the plaintiff should have a cent percent case which will in all probability succeed in trial. Prima facie case means that the contentions which the plaintiff is raising require consideration in merit and are not liable to be rejected summarily.<sup>31</sup> It has been held by the Hon'ble Supreme Court that while granting an interim relief should record its satisfaction which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Competition Act.<sup>32</sup> Further it was also stated that the Commission is expected to record at least some reason while forming a prima facie view.

¶(19.) It is humbly submitted before the Hon'ble Supreme Court that anti-competitive conduct on part of V and M by entering into "exclusionary contracts"<sup>33</sup> which prohibit their member banks from issuing cards for other companies proves the anti-competitive conduct on part of V and M. Further the Market research reports showed that the market share of V was 40% and that of M was 30% ensures that both the companies enjoyed a dominant position in the credit card market. Thus it was a fit case for grant of an interim order in favour of Zoro (Z) by COMPAT.

### C. EXISTENCE OF IRREPARABLE DAMAGE

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¶(20.) It is humbly submitted that the one of the basic principal while granting an interim relief is existence of Irreparable injury which is considered in a proper perspective in the facts and circumstances of a particular case.<sup>34</sup> It is submitted that the existence of the second element, i.e. irreparable loss to the Informant or definite apprehension of adverse effect on competition in the market has been satisfied in the instant case. "Irreparable injury" does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages.<sup>35</sup>

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<sup>30</sup> Dalpat Kumar v. Pralhad Singh, A.I.R. 1993 S.C. 276, ¶ 5 [hereinafter "Dalpat Kumar"].

<sup>31</sup> Prakash Singh, *supra* note 2.

<sup>32</sup> Competition Commission of India v. Steel Authority of India Ltd. and Anr. (2010) 10 S.C.C. 744, ¶ 4 [hereinafter "Steel Authority"].

<sup>33</sup> Moot Proposition, ¶ 3.

<sup>34</sup> Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., 1999 (7) S.C.C. 1, ¶ 13 [hereinafter "Colgate Palmolive"].

<sup>35</sup> Dalpat Kumar, *supra* note 30.

**1. IRREPARABLE DAMAGE ON REFUSAL OF INJUNCTION**

¶(21.) In the case of *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd*<sup>36</sup>, this court had observed that the other considerations which ought to weigh with the Court while hearing the application or petition for the grant of injunctions/ interim order is that the issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case. In the present set of facts and circumstance of the case it is respectfully submitted that the defendant i.e. Zoro (Z) entered into the credit card business in 2015.<sup>37</sup> As the defendant is very new in the field of credit card business the exclusionary contract by Viking and Mars would adversely affect the plaintiff and in case an interim order is not granted, the plaintiff would suffer irreparable loss.

**2. IRREPARABLE DAMAGE NOT 'QUANTIFIABLE' IN TERMS OF MONEY**

¶(22.) It is humbly submitted that in the case of *Fast Track Call Cab (P) Ltd.*<sup>38</sup> it was held by the Competition Commission that if the damage is not quantifiable in terms of money the same is said to be irreparable damage and in that case the interim order could be granted. Further in case of where appropriate compensation cannot be quantified in terms of damages in that case the interlocutory remedy by way of a grant of an order of injunction can be granted.<sup>39</sup>

¶(23.) In the present set of facts it is clear that the damages are not quantifiable in terms of money and thus the harm appears to be irreparable. Thus it can be stated that since it is difficult to calculate the extent of damage in the present case, COMPAT was right while granting an interim order in favour of Z.

**D. BALANCE OF CONVENIENCE IS IN FAVOUR OF RESPONDENTS**

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¶(24.) It is humbly submitted that for the grant of a temporary injunction, the plaintiff has to prove that besides prima facie case the balance of convenience also lies in his favour.<sup>40</sup> Balance of convenience means that comparative mischief or inconvenience which is likely to issue from withholding the injunction<sup>41</sup> will be greater than that which is likely to arise from

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<sup>36</sup> *Colgate Palmolive, supra* note 34.

<sup>37</sup> Moot Proposition, ¶ 1.

<sup>38</sup> *Fast Track Call Cab (P) Ltd. v. Competition Commission of India*, 2016 Comp.L.R.381 (Comp.A.T.).

<sup>39</sup> *Colgate Palmolive, supra* note 34.

<sup>40</sup> *The Indian Hotels Company Ltd. and Anr. v. Jiva Institute of Vedic Science and Culture*, 2008 (37) P.T.C. 468 (Del.), ¶ 43.

<sup>41</sup> *Lanco Hills Technology Park Pvt. Ltd. v. Mahaboob Alam Khan*, 2012 (4) A.L.D. 385, ¶ 23.

granting it.<sup>42</sup> If the scale of inconvenience leans to the side of the Plaintiff, then alone interlocutory injunction should be granted.<sup>43</sup> If the plaintiff is able to show that the denial of injunction would aggravate the mischief intended by the defendant and causes greater harm than the one the defendant would suffer, the Court can infer the balance of convenience.

¶(25.) It is humbly submitted before this court that in the present case the balance of convenience is in the favour of 'Z'. The denial of interim relief to the plaintiff in the present case would result in greater mischief thereby aggravating the damage. The decision of Viking (V) and Mars (M) decision to enter into exclusionary contract has adversely affected the Zoro (Z) position in the market. Further denial of injunction would aggravate the harm that the defendant is suffering. Thus interim relief granted by the COMPAT should be upheld.

### E. OTHER FACTORS IN SUPPORT OF INTERIM RELIEF

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¶(26.) It is humbly submitted before the Hon'ble Supreme Court that interim order is an equitable relief and even if the three conditions stated above is satisfied there may be other circumstances leading to grant of interim order.<sup>44</sup> Lord Diplock has stated in the case of *American Cyanamid Co.*<sup>45</sup> has stated that in addition to the three factors specified above, there may be other special factors to be taken into consideration. It is further submitted that the Hon'ble Supreme Court while dealing with the interim order had stated that the court should not ignore the factum of strength of one party's case being stronger than the others.<sup>46</sup>

¶(27.) In the present case it is clearly established in the lights of facts presented that the Viking (V) and Mars (M) were major players in the credit card market with a market share of 40% and 30% respectively. Also it is an established fact that the Respondent i.e. Zoro entered into the market of credit card in 2015 with only 7% shares. Thus it can be concluded from the facts stated that the COMPAT while granting an interim order in favour of Z had considered the fact that the strength of V and M is stronger than Z.

### III. THAT THERE CAN BE MORE THAN ONE DOMINANT ENTERPRISE IN THE SAME MARKET

¶(28.) It is humbly submitted before the hon'ble court that V and M are severally dominant

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<sup>42</sup> Anwar Elahi v. Vinod Misra and Anr, 1995 IV A.D. (Del.) 576, ¶ 11.

<sup>43</sup> Orissa State Commercial Transport Corporation Ltd v. Sri Satyanarayan Singh and Anr., 40 (1974) C.L.T. 336, ¶ 12.

<sup>44</sup> Gujarat Bottling Co. Ltd. v. Coca Cola Co., A.I.R. 1995 S.C. 2372, ¶ 50.

<sup>45</sup> American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316.

<sup>46</sup> Colgate Palmolive, *supra* note 34.

in the relevant market.<sup>47</sup> Dominance of more than one enterprise in the same relevant market has been assessed in past.<sup>48</sup> It is submitted that two entities can be considered dominant in the same market (A) and that V and M abused their individual dominant positions by entering into exclusionary contracts (B).

#### **A. TWO ENTITIES CAN BE CONSIDERED DOMINANTS IN THE SAME MARKET**

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¶(29.) It is submitted that more than one enterprise can be considered as dominant in the same market because of the standing committee's report on Competition Act, 2002 and purposive interpretation of the act.

##### **I. THE STANDING COMMITTEE REPORT ON COMPETITION ACT, 2002**

¶(30.) It is humbly submitted before the honourable court that the CCI's opinion that there can be only one dominant entity in a relevant market is based solely on the language of section 4 which reads "if an enterprise or a group"<sup>49</sup>. Further, the CCI has opined that had the legislature's intent been to recognise more than one dominant player in a relevant market, it would have used the words "any enterprise" instead of "an enterprise"<sup>50</sup>.

¶(31.) However, this opinion of CCI is in contrast with the government's explanation of the same clause at the time of introduction of the Competition Bill in 2001. The explanatory statement provided to the Parliamentary Standing Committee on Home Affairs on the Competition Bill states that "the clause prohibits abuse of dominant position by any enterprise".<sup>51</sup> Therefore it can be logically concluded that the legislative intent was to include more than one market entities having the potential of being dominant.

##### ***a. Economic laws such as the competition law should keep pace with changing economies and business realities***

¶(32.) "The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system".<sup>52</sup> "Economic model" is the model for perfect competition and the very objective of the Act is to promote economic efficiency and prevent anti-competitive practices "keeping in view the

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<sup>47</sup> Moot Proposition, ¶ 1.

<sup>48</sup> U.S. v. Visa Inc., 344 F.3d 229 (2<sup>nd</sup> Cir. 2003), pp. 239 [hereinafter "Visa"].

<sup>49</sup> § 4 (2), the Competition Act, 2002.

<sup>50</sup> Akash Gupta & Shweta Dubey: Nurturing competition, Business-standard.com, available at: [http://www.business-standard.com/article/opinion/akash-gupta-shweta-dubey-nurturing-competition-117021800695\\_1.html](http://www.business-standard.com/article/opinion/akash-gupta-shweta-dubey-nurturing-competition-117021800695_1.html) (last accessed on 25 July. 2017 at 3:00 P.M.).

<sup>51</sup> Department-Related Parliamentary Standing Committee on Home Affairs, Ninety-third Report on the Competition Bill, 2001, ¶ 3 [hereinafter "Standing Committee"].

<sup>52</sup> Steel Authority, *supra* note 32.

economic development of the country”.<sup>53</sup>

¶(33.) The word “any” can have various meanings depending on the purpose and overall context of the statute<sup>54</sup> which in the present case is to promote healthy completion. Reading it with the opinion of CCI<sup>55</sup> vis-a-vis the legislative intent as reflected in the standing committee report, more than one dominant entity can exist in the market.

¶(34.) Therefore, the legislation has provided CCI with enough powers to prevent more than one dominant entities to abuse their dominant position to the detriment to the other players such as the respondents. CCI needs to reconsider its opinion on the issue, while keeping in view the fundamental objective of competition law which to promote competition and the legislative intent that two wrongs cannot make a right.

## 2. PURPOSIVE INTERPRETATION OF THE ACT

¶(35.) It is submitted that section 4 of the Act should be purposively interpreted<sup>56</sup> in order to remove any mischiefs which may be exercised. This Hon’ble court has approved the purposive approach citing the beneficial need in numerous cases.<sup>57</sup> When the literal construction of the statute leads to either ambiguity or absurdity, the court shall read the statute in the legal context in which the words are used for.<sup>58</sup>

¶(36.) Moreover, in addition to standing committee’s report on the competition bill 2001, the legislature has realised the anomalies which may result from the current construction of language in the act. Therefore, in order to prevent any ambiguity or mischief arising from the act, the Competition (Amendment) Bill 2012, has provided for inserting the words “jointly or singly” after the words “or group”.<sup>59</sup> It is therefore submitted, that two enterprises should be allowed to be adjudicated as severally dominant if the case requires so.

### B. V AND M ABUSED THEIR DOMINANT POSITION BY ENTERING INTO EXCLUSIONARY CONTRACTS

¶(37.) It is submitted that V and M were individually dominant in the relevant market and violated section 4(2) (c) of the Competition Act by entering into exclusionary contracts with various member banks. According to §. 4(1) of the Act no enterprise or group shall abuse its

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<sup>53</sup> Steel Authority, *supra* note 32.

<sup>54</sup> Ali v. Federal Bureau of Prisons, 552 U.S. 214 (2008).

<sup>55</sup> Standing Committee, *supra* note 51.

<sup>56</sup> MAXWELL, *supra* note 15.

<sup>57</sup> Tirath Singh v. Bachittar Singh & Ors., A.I.R. 1955 S.C. 830, ¶ 5.

<sup>58</sup> Molar Mal v. Kay Iron Works Pvt. Ltd., A.I.R. 2000 S.C. 1261, ¶ 12.

<sup>59</sup> § 4, the Competition Amendment Bill, 2012.

dominant position.<sup>60</sup>

¶(38.) The COMPAT's order interim order that V and M has abused section 4(2) (c) of the Act should be upheld since, the relevant market in the present case is, "Market for general purpose credit cards in India" [1], V is in a dominant position in the relevant market [2], and V's conduct amounts to abuse of dominant position under §. 4(c) of the Act [3].

**1. THE RELEVANT MARKET IN THE PRESENT CASE IS**  
**"MARKET FOR GENERAL PURPOSE CREDIT CARDS IN INDIA"**

¶(39.) It is essential to ascertain<sup>61</sup> the 'relevant market'<sup>62</sup> in order to establish abuse of dominant position.<sup>63</sup> The commission must consider<sup>64</sup> the relevant geographic market<sup>65</sup> and relevant product market for determining the relevant market<sup>66</sup>.

¶(40.) In the present case, the Relevant Geographic Market is India (a), and the Relevant Product Market is 'Market for general purpose credit cards' (b).

***a. The relevant geographic market is India***

¶(41.) The relevant geographic market comprises of the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.<sup>67</sup> §. 2 (s) read harmoniously with §. 19 (6) of the Act defines relevant geographic market.<sup>68</sup> The CCI has held that defining relevant market as global is against the provisions of the Act.<sup>69</sup> According to §. 2 (s) of the act, relevant geographic market involves two major elements; homogenous condition of competition and distinct condition of competition, which are satisfied in the present case.

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<sup>60</sup> § 4, the Competition Act, 2002.

<sup>61</sup> § 4(2), the Competition Act, 2002.

<sup>62</sup> Shri M. M. Mittal v. M/s Paliwal Developers Ltd., 2016 S.C.C. Online CCI 61, ¶ 4.

<sup>63</sup> Prints India v. Springer India Pvt. Ltd., (2012) 109 C.L.A. 411 (C.C.I.), ¶ 19 [hereinafter "Prints India"].

<sup>64</sup> Shri Sonam Sharma v. Apple Inc. USA, (2013) Comp. L.R. 346 (C.C.I.).

<sup>65</sup> Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. & Ors., (2016) Comp. L.R. 209, (C.C.I.), ¶ 18; *See also* United States v. Marine Bancorporation, 418 U.S. 602 (1974).

<sup>66</sup> Steel Authority, *supra* note 32, at ¶ 5.

<sup>67</sup> In Re: Shri Avtar Singh v. M/s Ansal Township & Land Development Ltd., (2014) Comp. L.R. 154 (C.C.I.), ¶ 8.

<sup>68</sup> ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES 54 (Oxford and Portland, 4<sup>th</sup> ed., 2014) [hereinafter "ARIEL EZRACHI"].

<sup>69</sup> Maharashtra State Power Generation Limited v. Coal India Limited & Ors., (2013) Comp. L.R. 910 (C.C.I.), ¶ 42 [hereinafter "MSPGL"].



*b. The relevant product market is ‘Market for general purpose credit cards’*

¶(42.) The assessment of relevant market<sup>70</sup> is necessary for analysing dominance.<sup>71</sup> The relevant product market may be established by all or any factors listed under §. 19 (7). It has been held that other forms of payment such as cash, cheque and proprietary cards are not considered reasonable substitutes by most consumers.<sup>72</sup> Therefore, the relevant product market is ‘Market for general purpose credit cards’.

**2. V WAS DOMINANT IN THE RELEVANT MARKET**

¶(43.) The determination of dominance in relevant market is pre requisite to enquire into for establishing abuse of dominance.<sup>73</sup> The factors which COMPAT should regard<sup>74</sup> to determine the dominant position of an enterprise is enumerated under §.19 (4) of the Act.<sup>75</sup>

¶(44.) It is submitted that V is dominant in the relevant market since, V has the ability to operate independently of the competitive forces prevailing in the relevant market (a), and, V affected its competitors, consumers and the relevant market to their disadvantage, in its favour (b).

*a. V has the ability to operate independently of the competitive forces prevailing in the relevant market*

¶(45.) To ascertain that V has the ability to operate independently of the competitive forces prevailing in the relevant market,<sup>76</sup> the factors under §. 19 (4) should be considered.<sup>77</sup> These factors include market share<sup>78</sup> of the enterprise (i), size and resources of the enterprise (ii), size and importance of the competitors (iii), V and M’s commercial advantages over its competitors (iv), dependence of consumers on V and M (v) and market structure and size of market (6).

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<sup>70</sup> § 4(2), the Competition Act, 2002.

<sup>71</sup> Prints India, *supra* note 63.

<sup>72</sup> Visa, *supra* note 48.

<sup>73</sup> §19(5), the Competition Act, 2002.

<sup>74</sup> Arshiya Rail Infrastructure Ltd. v. Ministry of Railways, (2013) 112 C.L.A. 297 (C.C.I), ¶ 28 [hereinafter “Arshiya Rail”].

<sup>75</sup> §19(4), the Competition Act, 2002.

<sup>76</sup> S.M. DUGAR, GUIDE TO COMPETITION LAW 45 (LexisNexis, 5<sup>th</sup> ed., 2015).

<sup>77</sup> COMPETITION LAW AND PRACTICE, *supra* note 19.

<sup>78</sup> Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805 (1990).

i. Market share of V and M

¶(46.) Market share indicates the dominance of an enterprise in a relevant market.<sup>79</sup> According to §. 19 (4) (a) of the Act,<sup>80</sup> the commission shall consider market share of the enterprise to determine existence of dominance.<sup>81</sup> Even if market share cannot be the sole factor for determination of dominance, it however, is a persuasive<sup>82</sup> and highly significant factor for the courts to consider.<sup>83</sup> Holding a significant amount of share in the market indicates a dominant position.<sup>84</sup> The European Commission found British Airways in a position of dominance with a market share of 39.7%.<sup>85</sup>

¶(47.) In the present case, V held 40% share and M held 30% of market share in the relevant market which enabled them to severally possess a dominant position in the relevant market. Therefore, V and M are enjoying the dominant position in terms of market share in the relevant market.

ii. Size and resources of the enterprises

¶(48.) According to §. 19 (4) (b) of the Act, the commission may consider enterprise dominant in terms of large size and resources.<sup>86</sup>

¶(49.) It would not be unreasonable to induce that V and M (with 40% and 30% market share respectively) possesses distinguishable resources and has a very large size of operations.

iii. Size and importance of the competitors

¶(50.) In accordance with, §. 19 (4) (c) the commission may consider size and importance of the competitors to ascertain an enterprise's dominant position.<sup>87</sup>

¶(51.) With their respective high market shares, it is clearly evident that no other enterprise

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<sup>79</sup> United Brands v. Commission, (1978) E.C.R. 207, ¶ 3 [hereinafter "United Brands"].

<sup>80</sup> S.V.S. Raghavan Committee Report on High Level Committee on Competition Policy & Law 23 (2007 available at: [http://www.competitioncommission.gov.in/Act/Report\\_of\\_High\\_Level\\_Committee\\_on\\_Competition\\_Policy\\_Law\\_SVS\\_Raghavan\\_Committee29102007.pdf](http://www.competitioncommission.gov.in/Act/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf) (last accessed on 20<sup>th</sup> July, 2017 at 03:30PM).

<sup>81</sup> §19(4), the Competition Act, 2002.

<sup>82</sup> Neeraj Malhotra, Advocate v. Deutsche Post Bank Home Finance Limited & Ors., (2011) 106 S.C.L. 108 (C.C.I), ¶ 19.2.

<sup>83</sup> Hoffmann-La Roche & Co. AG v. Commission, (1979) E.C.R. 461, ¶ 5.

<sup>84</sup> Arshiya Rail, *supra* note 74.

<sup>85</sup> British Airways v. Commission, [2003] E.C.R. 5917, ¶ 175.

<sup>86</sup> Schott Glass India Pvt. Ltd. v. M/s Kapoor Glass Pvt. Ltd., (2014) Comp. L.R. 295 (Comp. A.T, ¶ 22; Continental Can Company Inc. v. Commission of the European Communities, (1973) E.C.R. 215, ¶ 21; Prasar Bharati v. TAM Media Research Private Limited, (2016) Comp. L.R. 595 (C.C.I), ¶ 7.9.

<sup>87</sup> MAHER M. DABBAH, EC AND UK COMPETITION LAW: COMMENTARY, CASES AND MATERIALS (Cambridge, 1<sup>st</sup> ed., 2004).

substantially threatens V or M in terms of competition.

iv. Commercial advantage over its competitors

¶(52.) Commercial advantage of an enterprise over its competitors is another criteria for ascertainment of dominant position under §. 19(4) (d).<sup>88</sup>

¶(53.) By entering into exclusive contracts with different member banks and prohibiting them from issuing any other cards, V and M clearly enjoyed commercial advantage over any other competitor in market, thereby making them individually dominant in the market.

v. Dependence of consumers on V and M

¶(54.) Where any enterprise has acquired huge market share of a product and the substitutability of goods is absent,<sup>89</sup> the chances of an enterprise to exercise its dominance increases.<sup>90</sup> The market shares unequivocally concludes that 70% of the market depended either on V or M for the general purpose cards in India.

vi. Market structure and size of the market

¶(55.) The market structure in the present case, though competitive, is largely dominated by V and M severally and such exclusionary contracts blocks the entry for potential entrants.

***b. V and M affected their competitors, consumers and the relevant market in its favour.***

¶(56.) The principle of dominant position has direct proximity to market power which allows it to act independently of its competitive constraints.<sup>91</sup> Such independence enables enterprise holding dominant position to operate independently,<sup>92</sup> in its favour to the economic disadvantage of its competitors.<sup>93</sup> The courts have also observed that a dominant enterprise has a special responsibility to ensure that its conduct does not impair the effective competition in the market.<sup>94</sup> The factors which can determine such position of dominance include, unavailability of substitutes (i) and existence of barriers for competitors (ii).

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<sup>88</sup> GIORGIO MONTI, E.C. COMPETITION LAW 356 (Cambridge, 1<sup>st</sup> ed., 2007).

<sup>89</sup> ARIEL EZRACHI, *supra* note 68.

<sup>90</sup> M/s Maharashtra State Power Generation Company Ltd. v. M/s Mahanadi Coalfields Ltd, Case No. 03/2012 (C.C.I), ¶ 78.

<sup>91</sup> Guidelines on the Role of Competition Policy in Regulatory Reform (1998, available at: <http://www.oecd.org/dataoecd/3/24/2497266.pdf> (last accessed on 17 July, 2017 at 02:00 P.M).

<sup>92</sup> Emanuela Arezzo, *Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 24 J. Marshall J. Computer & Info. 455 (2005).

<sup>93</sup> Shamsher Kataria v. Honda Siel Cars India Ltd., (2015) Comp.L.R. 753 (C.C.I), ¶ 20.

<sup>94</sup> N.V. Nederlandsche Banden Industrie Michelin v. Commission, (1983) E.C.R. 3461.

i. Unavailability of Substitutes

¶(57.) The CCI has considered demand side substitutability<sup>95</sup> as the most essential element for determining substitutability.<sup>96</sup> In the present case, V and M did not leave any other choice for banks but to issue only their respective credit cards.

ii. Existence of barriers for competitors

¶(58.) Although, there are no regulatory barriers to entry, V and M created barriers to entry in the market by entering into exclusionary contracts with member banks. It is a settled position of law<sup>97</sup> that existence of entry barriers<sup>98</sup> or market access leads to the conclusion of dominance of any enterprise and usually results in abuse of dominance.<sup>99</sup>

3. V'S EXCLUSIONARY CONDUCT AMOUNTS TO ABUSE OF DOMINANT POSITION

¶(59.) The Competition law allows an enterprise to be in a dominant position<sup>100</sup> since dominance *per-se* is not illicit, but bars it from abusing it.<sup>101</sup> Abuse of dominant position is defined under §. 4(2) of the Act.<sup>102</sup> The ECJ has attempted to define dominant position in *United Brands Case* as one “*which enables it to prevent effective competition being maintained on the relevant market.*”<sup>103</sup> The competition act<sup>104</sup> and the commission has considered exclusionary conduct/abuse<sup>105</sup> as abuse of dominant position.<sup>106</sup>

¶(60.) Engaging in exclusionary contracts<sup>107</sup> and denial the market access<sup>108</sup> have been held to be exclusionary abuse by the commission.<sup>109</sup> V and M denied any potential entrant to enter in the market, thereby individually abusing their position under section 4.

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<sup>95</sup> LENNART RITTER & W. DAVID BRAUN, COMPETITION LAW: A PRACTITIONERS GUIDE 526 (Kluwer Law International, 3<sup>rd</sup> ed., 2005).

<sup>96</sup> MSPGL, *supra* note 69, at ¶ 75.

<sup>97</sup> §4(1), the Competition Act, 2002.

<sup>98</sup> M/s H.T. Media Limited v. Super Cassettes Industries Ltd., 2014 S.C.C. Online CCI 120, ¶ 174 [hereinafter “H.T. Media”].

<sup>99</sup> Cine Prakashakula Viniyoga Darula Sangham v. Hindustan Coca Cola Beverages Pvt. Ltd., 2011 S.C.C. OnLine C.C.I. 27, ¶ 42.

<sup>100</sup> § 4, the Competition Act, 2002.

<sup>101</sup> M/s Jupiter Gaming Solutions Private Ltd. v. Secretary, Finance, Government of Goa, (2012) Comp. L.R. 56 (C.C.I), ¶ 80.

<sup>102</sup> § 4 (2), The Competition Act, 2002.

<sup>103</sup> United Brands, *supra* note 79.

<sup>104</sup> § 4 (2), the Competition Act, 2002.

<sup>105</sup> MCX Stock Exchange Ltd. v. NSE India Ltd., 2011 S.C.C. Online C.C.I. 52, ¶ 11.5.

<sup>106</sup> H.T. Media, *supra* note 98.

<sup>107</sup> In re Bhartia Cutler Hammer Ltd., (1997) 24 C.L.A. 104 (M.R.T.P.), ¶ 22.

<sup>108</sup> Justickets Pvt. Ltd. v. Big Tree Entertainment Pvt. Ltd. & Vista Entertainment Solutions Ltd., 2017 S.C.C. Online C.C.I. 14, ¶ 69.

<sup>109</sup> XYZ v. REC Power Distribution Co. Ltd., 2015 S.C.C. Online C.C.I. 8, ¶ 19 & 21; Case T-201/04, Microsoft Corpn. v. Commission of the European Communities, ¶ 22; H.T. Media, *supra* note 98.

**PRAYER FOR RELIEF**

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Wherefore, in the light of the facts stated, arguments advanced and authorities cited it is most humbly prayed and implored before the Hon'ble Supreme Court, that it may be graciously pleased to adjudge and declare that:

1. COMPAT was justified in directing DG to investigate the matter.
2. The interim order passed by COMPAT in favour of Respondent is sustainable.
3. There can be more than one dominant undertaking/enterprise in the same market.

*Any other order as the Hon'ble Court deems fit in the interests of equity, justice and good conscience.*

*All of which is humbly prayed*

**Place:** New Delhi

**Dated:** 08.09.2017

**(S/d)**

*Counsels for the Respondent*