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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 36 of 2015

In Re:

Shri Suprabhat Roy, Proprietor, M/s Suman Distributors,
Murshidabad

Informant

And

Shri Saiful Islam Biswas, District Secretary of Murshidabad District
Committee of Bengal Chemists and Druggists Association

Opposite Party No. 1

Shri Bajlur Rahaman, Organising Secretary of Murshidabad District
Committee of Bengal Chemists and Druggists Association and
Secretary of Nowda Zone Committee

Opposite Party No. 2

Shri Nikhilesh Mondal, Treasurer of Murshidabad District Committee
of Bengal Chemists and Druggists Association and Secretary of
Nabagram Zone Committee

Opposite Party No. 3

Shri Ujjal Paul, Vice-President of Nowda Zone Committee

Opposite Party No. 4

Shri Fajlul Haque, President of Nowda Zone Committee

Opposite Party No. 5

Bengal Chemists and Druggists Association

Opposite Party No. 6

Case No. 31 of 2016

In Re:

Shri Sankar Saha, Branch Secretary, Pharmaceuticals Traders
Welfare Association of Bengal – Burdwan Branch

Informant

And

Shri Hitesh Mehta, Depot Manager of Alkem Laboratories Limited

Opposite Party No. 1

Shri Sanjoy Banerjee, GM-Sales (West Bengal) of Alkem
Laboratories Limited

Opposite Party No. 2

Shri Kaushik Deb, District Sales Manager of Alkem Laboratories
Limited

Opposite Party No. 3

Alkem Laboratories Limited

Opposite Party No. 4

Burdwan District Committee of Bengal Chemists and Druggists
Association

Opposite Party No. 5

Bengal Chemists and Druggists Association

Opposite Party No. 6

Shri Chintamani Ghosh, Director, Directorate of Drug Control,
Government of West Bengal

Opposite Party No. 7

Shri Basudeo Narayan Singh, Executive Chairman of Alkem
Laboratories Limited

Opposite Party No. 8



Shri Dhananjay Kumar Singh, Joint Managing Director of Alkem Laboratories Limited	Opposite Party No. 9
Shri Sandeep Singh, Joint Managing Director of Alkem Laboratories Limited	Opposite Party No. 10
Shri Balmiki Prasad Singh, Executive Director of Alkem Laboratories Limited	Opposite Party No. 11
Shri Mritunjay Kumar Singh, Executive Director of Alkem Laboratories Limited	Opposite Party No. 12
Shri Kaushick Mallick, Proprietor of M/s Siddheshwari Medical Hall, Burdwan	Opposite Party No. 13

Case No. 58 of 2016

In Re:

Shri Joy Deb Das, Proprietor, M/s Maa Tara Medical Agency, Murshidabad Informant

And

Shri Rajeev Mishra, authorised signatory of Macleods Pharmaceuticals Limited	Opposite Party No. 1
Macleods Pharmaceuticals Limited	Opposite Party No. 2
Murshidabad District Committee of Bengal Chemists and Druggists Association	Opposite Party No. 3
Shri Samir Ranjan Das, Former General Secretary of Bengal Chemists and Druggists Association	Opposite Party No. 4
Shri Tushar Chakrabarti, Former Director of Bengal Chemists and Druggists Association	Opposite Party No. 5
Shri Subodh Kumar Ghosh, present General Secretary of Bengal Chemists and Druggists Association	Opposite Party No. 6
Bengal Chemists and Druggists Association	Opposite Party No. 7
All India Organization of Chemists and Druggists	Opposite Party No. 8

CORAM

Ashok Kumar Gupta
Chairperson

Sangeeta Verma
Member

Bhagwant Singh Bishnoi
Member



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Present:

For Shri Suprabhat Roy, Informant in Case No. 36 of 2015, Shri Sankar Saha, Informant in Case No. 31 of 2016 and Shri Joy Deb Das, Informant in Case No. 58 of 2016

For Bengal Chemists and Druggists Association ('**BCDA**') and Shri Subodh Kumar Ghosh, General Secretary of BCDA

For Murshidabad District Committee of BCDA, Shri Saiful Islam Biswas, District Secretary of Murshidabad District Committee of BCDA, Shri Nikhilesh Mondal, Treasurer of Murshidabad District Committee of BCDA, Shri Bajlur Rahaman, Organising Secretary of Murshidabad District Committee of BCDA, and Burdwan District Committee of BCDA

For Alkem Laboratories Limited ('**Alkem**'), Shri B.N. Singh, Executive Chairman of Alkem, Shri Sanjoy Banerjee, Senior General Manager of Alkem, Shri Hitesh Mehta, Regional Distribution Manager of Alkem, and Shri Kaushik Deb, Zonal Sales Manager of Alkem

For Macleods Pharmaceuticals Limited ('**Macleods**')

For Shri Rajendra Agarwal, Managing Director of Macleods

For Shri Rajeev Mishra, Senior Vice-President, Field Operations and Sales Administration of Macleods

For Shri Subrata Sadhukhan, Deputy Sales Manager, West Bengal of Macleods and Shri Pradipta Dhar, Zonal Sales Manager of Macleods

Shri Indranil Ghosh, Ms. Arushi Arora and Shri Palzer Moktan, Advocates

Shri Nakul Mohta and Shri Johnson Subba, Advocates

None

Shri Krishnan Venugopal, Senior Advocate with Shri Manas Kumar Chaudhuri, Shri Aman Singh Baroka, Ms. Alisha Mehra and Shri Kaushik Mishra, Advocates, alongwith Ms. Divya Mewani, Senior General Manager (Legal) and Assistant C.S., Alkem

Shri Raju Ramachandran, Senior Advocate with Shri Rishad A. Chowdhury, Ms. Madhurika Roy and Shri Shankarnarayan, Advocates alongwith Shri Himanshu Ranvah, General Manager (Legal) of Macleods

Shri Jayant Mehta, Ms. Archana Sahadeva and Ms. Anu Srivastava, Advocates

Shri Sahil Bhalaiik, Shri Tushar Giri and Shri Sewa Singh, Advocates

Shri T. Sundar Ramanath and Ms. Prerna De, Advocates



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ORDER UNDER SECTION 27 OF THE COMPETITION ACT, 2002

Background:

Case No. 36 of 2015

1. Information in Case No. 36 of 2015 was filed by Shri Suprabhat Roy, Proprietor, M/s Suman Distributors, Murshidabad ('**IP-1**') on 01.05.2015 under Section 19 (1) (a) of the Competition Act, 2002 (the '**Act**') alleging the malpractice of mandating Product Availability Information ('**PAI**') and Stock Availability Information ('**SAI**') being carried on by the Opposite Parties arrayed in the information. The Opposite Parties were stated to be involved in the retail/ wholesale medicine trade in the District of Murshidabad in West Bengal and were stated to be members of Bengal Chemists and Druggists Association ('**BCDA**'). They were also stated to be holding the posts of office-bearers in the Murshidabad District Committee of BCDA as well as different Zone Committees of Murshidabad District Committee of BCDA. It was alleged by IP-1 that for issuance of PAI and SAI, the office bearers of Nabagram Zone Committee of Murshidabad District Committee of BCDA charged hefty amounts from it. Further, it was alleged that despite making such payments, no SAI was issued to it. IP-1 also alleged that BCDA was an active participant/ silent supporter of such anti-competitive practices of PAI and SAI being adopted by the various identified office-bearers of Murshidabad District Committee and Nowda Zone Committee in the District of Murshidabad, thereby limiting and controlling the supply of drugs and pharmaceutical products in the market of Murshidabad.
2. Considering the above information and after hearing IP-1 and the arrayed Opposite Parties in the information, the Commission passed an order dated 08.10.2015 under Section 26 (1) of the Act, opining that *prima facie*, the conduct of BCDA appears to be in contravention of Section 3 (3) (b) read with Section 3 (1) of the Act. The Commission directed the Director General ('**DG**') to investigate the conduct of BCDA and also examine the role of other arrayed Opposite Parties who were the District/ Zonal office-bearers of BCDA.



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Case No. 31 of 2016

3. Information in Case No. 31 of 2016 was filed by Shri Sankar Saha, Branch Secretary, Pharmaceuticals Traders Welfare Association of Bengal ('PTAB') – Burdwan Branch ('IP-2') on 23.03.2016 under Section 19 (1) (a) of the Act alleging that Alkem Laboratories Limited ('Alkem'), despite issuance of Offer Letter for Stockistship ('OLS') to M/s Siddheshwari Medical Hall, did not make supplies to it and rather insisted on it to obtain 'No Objection Certificate' ('NOC') or SAI from BCDA under the garb of imposing the condition that M/s Siddheshwari Medical Hall needs to 'get clearance from the required authorities' for grant of stockistship of Alkem. When M/s Siddheshwari Medical Hall insisted on getting supplies, it received a letter dated 10.08.2015 from Alkem declining its request for stockistship altogether on the ground of already existing adequate dealer network in the region. IP-2 thus, alleged that BCDA and the Burdwan District Committee of BCDA, owing to their strong presence in the State of West Bengal and Burdwan District respectively, and Alkem and its Chairman, Directors and Managers, have an understanding amongst themselves of not supplying essential drugs to any licensee without the prior endorsement and direction of BCDA. As a result, they have been able to restrict/ control the supply and distribution of lifesaving drugs in the West Bengal market, particularly in the District of Burdwan.
4. Considering the above information, the Commission passed an order dated 05.05.2016 under Section 26 (1) of the Act clubbing the present case with Case No. 36 of 2015 and directed the DG to investigate the matter. The Commission took cognizance of the OLS dated 28.02.2015 as well as the subsequent letter dated 10.08.2015 of Alkem and noted the change in its stand. In light of such facts of the case, the Commission was of the opinion that there existed a *prima facie* case of contravention of the provisions of the Act by Alkem, Burdwan District Committee of BCDA and BCDA. The DG was also directed to investigate the role of officials of Alkem and office-bearers of Burdwan District Committee of BCDA and BCDA.



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Case No. 58 of 2016

5. Information in Case No. 58 of 2016 was filed by Shri Joy Deb Das, Proprietor, M/s Maa Tara Medical Agency, Murshidabad ('IP-3') on 20.06.2016 under Section 19 (1) (a) of the Act alleging that upon grant of OLS by Macleods Pharmaceuticals Limited ('Macleods'), IP-3 was asked to procure usual SAI/ PAI from BCDA as part of fulfilling the formalities. However, he was denied the same by Murshidabad District Committee of BCDA when he applied for it, as he had earlier agitated against the same. IP-3 had even applied to the office-bearers of BCDA on multiple occasions, besides making several requests to Macleods in this regard. Finally, he was able to obtain NOC from BCDA and only thereafter, supplies of drugs was made to him by Macleods.
6. Considering the above facts and allegations, the Commission, being *prima facie* satisfied that BCDA, alongwith its District Committees, has been mandating NOC/ SAI for appointment of stockists in West Bengal, passed an order dated 21.09.2016 under Section 26 (1) of the Act clubbing the present case with Case Nos. 36 of 2015 and 31 of 2016 and directed the DG to investigate violation of Section 3 (3) (b) read with Section 3 (1) of the Act by BCDA and Macleods. Further, the Commission was of the view that the role of the concerned office-bearers of BCDA for such alleged NOC practice and of the officials of Macleods for implementing such NOC practice was also needed to be examined. In addition, it was observed that though there was no specific allegation against All India Organization of Chemists and Druggists ('AIOCD') in the information, yet it being the parent association of all the chemists' and druggists' associations, its role also required investigation.

Investigation by the DG:

7. The DG, after causing an investigation, submitted a consolidated investigation report to the Commission in all the three cases. During its investigation, the DG issued probe letters to the Informants, to the arrayed Opposite Parties, and to various third parties. It also recorded the statements on oath of several individuals and analysed the video and audio recordings submitted by the Informants. Based upon the allegations made in the informations, the orders passed under Section 26 (1) of the Act by the Commission, the submissions made before the DG by the various parties, and other



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documentary evidences collected during the course of investigation, the DG observed as follows:

- 7.1 BCDA was carrying on the practice of issuance of SAI/ NOC for appointment of stockists, which was required prior to their appointment by the pharma companies. BCDA was also collecting donations *in lieu* of issuing SAI to prospective stockist(s) through the nomenclature of ‘donation’ or ‘well wishes’ from prospective distributors which were not voluntary in nature but rather forced upon them by BCDA. Such practices adopted and followed by BCDA resulted in limiting and controlling the supply of drugs in the West Bengal market. Thus, the same were in contravention of Section 3 (3) (b) read with Section 3 (1) of the Act.
- 7.2 Authorised distributors appointed by small companies to promote the products of pharma companies are known as Promotion cum Distributor (‘PCD’) agents in trade parlance. It has been admitted by some PCD Agents that almost all PCD Agents used to take PAI from BCDA after paying a subscription fee and thereafter, on the basis of PAI, District Committee of BCDA issued to them a SAI after receiving some amount as donation. BCDA was thus, also carrying on the practice of issuing PAI letter in camouflaged form, which was required before pharma companies’ PCD agents commenced their supplies of the product in the zone/ District concerned. Such practices also resulted in limiting and controlling the supplies of drugs in the market, particularly in the State of West Bengal, thus, being in violation of Section 3 (3) (b) read with Section 3 (1) of the Act.
- 7.3 Alkem and Macleods made their first supplies to the new stockists only after BCDA issued a circulation letter stating that “*To enable to publish your appointment as Alkem Laboratories Ltd./ Macleods Pharmaceuticals Ltd. stockiest in the Ousadh-O-Prasadhani/ Journal of BCDA, please deposit a sum of Rs. 100/- as circulation charges*”. Further, when BCDA delayed the release of such circulation letter, Alkem also correspondingly delayed its appointment/ first supply to the concerned stockist. Hence, for Alkem and Macleods, BCDA’s letter was considered as an important criterion in the appointment of new stockist.



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7.4 Furthermore, though BCDA gave information in its Journal declaring the distributor having been appointed as stockist of Alkem or Macleods without any verification from the companies, Alkem or Macleods never objected to the same. The only possible reason for BCDA to not verify the factual status of the new stockists before circulation and for Alkem or Macleods to not object to this irregular practice was that both of them were aware that publication in the *Ousadh-O-Prasadhani/* Journal of BCDA was a camouflaged NOC for starting the supplies and this camouflaged practice was to avoid the ire of regulatory bodies such as the Commission. Hence, there was an anti-competitive agreement between BCDA on the one hand and Alkem and Macleods on the other hand in the appointment of stockists by Alkem and Macleods on account of which, a dealer was not able to get the supplies of pharmaceutical products as an authorised dealer/ distributor of Alkem or Macleods until an NOC/ SAI was issued by BCDA. Therefore, Alkem and Macleods, in concert with BCDA, actively forced the applicant stockists to obtain clearances from BCDA, thereby creating entry barriers for new entrants in the West Bengal drug market. Thus, Alkem and Macleods are liable under Section 3 (1) read with Section 3 (3) (b) of the Act for their such anti-competitive agreements with BCDA.

7.5 The failure of AIOCD to respond to the repeated queries of the DG on actions taken by it to prevent recurrence of anti-competitive activities post decision of the Commission in the case of *Santuka Associates Pvt. Ltd., Cuttak v. AIOCD and Others, Case No. 20 of 2011 decided on 19.02.2013*, leads to the credible inference that AIOCD has been tacitly supporting the anti-competitive activities being indulged in by BCDA and its affiliate committees.

7.6 Lastly, the following persons were found liable under Section 48 (1) of the Act, being in-charge of and responsible to their respective companies/ associations, for the conduct of their business:

OP	PERSON	ROLE
BCDA	Shri Subodh Kumar Ghosh, General Secretary	Taken a lead role in the anti-competitive activities of BCDA
AIOCD	Shri J.S. Shinde, President	Vicariously liable for the anti-competitive conduct of AIOCD
	Shri Suresh Gupta, General Secretary	



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OP	PERSON	ROLE
Alkem	Shri B.N. Singh, Executive Chairman	Person in-charge of and responsible for the conduct of business of the company at the relevant time
Macleods	Shri Rajendra Agarwal, Managing Director	

7.7 Further, the following persons were found liable under Section 48 (2) of the Act for their active connivance:

OP	PERSON	EVIDENCES
BCDA	Shri Subodh Kumar Ghosh, General Secretary	<ul style="list-style-type: none"> NOCs issued by BCDA were signed by him He had telephone conversation with IP-3 whereby he called IP-3 to meet in person regarding the SAI/ NOC letter
Murshidabad District Committee of BCDA	Shri Saiful Islam, District Secretary	They accepted that BCDA carried on the practice of issuance of mandatory NOC/ SAI
	Shri Nikhilesh Mondal, Treasurer	
	Shri Bajlur Rahaman, Organising Secretary	
Alkem	Shri Sanjoy Banerjee, Senior General Manager	<ul style="list-style-type: none"> He issued OLSs on behalf of Alkem He wrote letter to District Secretary of Murshidabad District Committee of BCDA with regard to appointment of M/s Manorama Medical Stores, Murshidabad as stockist of Alkem
	Shri Hitesh Mehta, Regional Distribution Manager	<ul style="list-style-type: none"> NOC/ SAI was submitted by M/s Subha Medical Agency, Murshidabad to him He insisted on NOC/ SAI to be procured by M/s Siddheshwari Medical Hall, Burdwan from BCDA
	Shri Kaushik Deb, Zonal Sales Manager	<ul style="list-style-type: none"> He had verbally assured M/s Siddheshwari Medical Hall, Burdwan that an additional stockist in Burdwan was required by Alkem but later Alkem cancelled the OLS of M/s Siddheshwari Medical Hall on the ground of unviable economic commercial parameters leading to postponement of additional stockist appointment in Burdwan He insisted on NOC/ SAI to be procured by M/s Siddheshwari Medical Hall, Burdwan from BCDA



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OP	PERSON	EVIDENCES
Macleods	Shri Rajeev Mishra, Senior Vice-President, Field Operations and Sales Administration	<ul style="list-style-type: none"> He admitted that officials of Macleods used to regularly go through <i>Ousadh-O-Prasadhani</i>/ Journal of BCDA and verify the contents related to Macleods. Thus, though Macleods (including Shri Rajeev Mishra) was aware of BCDA circulating incorrect information about stockists of Macleods, it did not object to the same
	Shri Subrata Sadhukhan, Deputy Sales Manager, West Bengal	<ul style="list-style-type: none"> He sent a letter to IP-3 stating that its OLS would soon be treated as cancelled He was informed telephonically by IP-3 about receipt of SAI/ NOC from BCDA
	Shri Pradipta Dhar, Zonal Sales Manager	<ul style="list-style-type: none"> He was informed telephonically by IP-3 about receipt of SAI/ NOC from BCDA and he sent one Shri Liton Das to collect the same from IP-3

Proceedings before the Commission:

- After receipt of the DG’s investigation report, the Commission, *vide* its order dated 06.02.2019, decided to forward an electronic copy thereof to the Informants in all the three cases and the Opposite Parties against whom evidence was found in the DG report of contravention of the provisions of the Act as well as to their respective individuals who were found liable by the DG under the provisions of Section 48 of the Act. The Commission gave the parties an opportunity to file their objections/ suggestions, if any, to the DG Report, and thereafter appear for an oral hearing on the DG Report. The Commission also directed the Opposite Parties and their individuals found to be liable by the DG in terms of the provisions of Section 48 of the Act, to furnish their financial statements for the Financial Years (‘FYs’) 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. The Commission however, did not forward the report to AIOCD against which, though the DG had given a finding of contravention, but no evidence was available in the DG Report.
- Thereafter, upon requests of the parties from time to time, the time for filing the objections/ suggestions to the DG Report and financial statements was extended and final hearing in the matter, accordingly rescheduled. In the meanwhile, upon request, Macleods was given an opportunity to conduct cross-examination of IP-3 which took



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place on 03.07.2019 and Alkem was given an opportunity to conduct cross-examination of IP-2 which was conducted on 11.07.2019. The records of such cross-examinations were forwarded by the Commission to the parties giving them an opportunity to file their comments, if any, upon such cross-examinations.

10. Finally, after receiving the objections/ suggestions to the DG Report and comments on the cross-examination proceedings from the parties, and after rescheduling the hearing on the DG Report four times, the final hearing in the matter took place on 04.09.2019 and 06.09.2019. The Commission heard extensive arguments made on behalf of all the parties and decided to pass an appropriate order in the matter. Thereafter, written submissions in the matter were also received from various parties.

Submissions of the parties:

11. In their objections/ suggestions to the DG Report, arguments made during the oral hearings, and in their written submissions filed post hearings, the parties have essentially made the following submissions:

11.1 BCDA and Shri Subodh Kumar Ghosh, General Secretary of BCDA

- i. Taking NOC/ SAI/ PAI from BCDA or its Committees is not mandatory for appointment of stockists or sale of medicines by pharmaceutical companies in the State of West Bengal. BCDA, *vide* its letter dated 23.04.2013, had informed all its District Secretaries that they are not required to obtain NOC for appointment of stockists and there would be no boycott of any pharmaceutical company on this account.
- ii. Representatives of Alkem and Macleods have stated on oath before the DG that they have not faced any resistance from BCDA while appointing stockists and NOC/ approval from BCDA is not a pre-condition for appointment.
- iii. The evidence forming part of the DG Report also shows that BCDA did not interfere with the supply of medicines and appointment of stockists.
- iv. Several distributors/ stockists like M/s Westland Distributors, M/s Park Blue Print, M/s Durga Agency, M/s Gayatri Pharmaceuticals, M/s Das Medical House, M/s Kanak Medical Agency, M/s Binapati Enterprise *etc.*, while replying to the DG, have acknowledged that no donation/ contribution/ approval



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of BCDA is required for appointment of stockist. They have stated that in the absence of stockist circulation letter and publishing information of appointment in the BCDA journal, no retailer or wholesaler will come to know that a new stockist of any pharmaceutical company has been appointed and for such circulation, other than Rs. 100 charges, no money of any sort is required to be paid to anybody.

- v. Publication of price list in the BCDA Journal ensures circulation of such information amongst medicine dealers. Thus, the same is not anti-competitive.
- vi. All the three Informants have filed the present informations with *mala fide* interests. The DG has failed to notice that the telephonic conversation between IP-1 and Shri Bajlur Rahaman dated 01.03.2014 reveals that the District Committee had received several complaints from retailers regarding expiry and breakage of medicines supplied by IP-1 and that IP-1 was not taking back the expired stock. Further, even the doctors were not prescribing IP-1's medicines because of their poor quality as a result of which stock had piled up with the retailers. IP-1, however, falsely alleged in its information that its products could not be sold due to boycott by BCDA. IP-2, on the other hand, is a Branch Secretary of another rival association of BCDA viz. PTAB and thus, he had a vested interest in filing false complaints against BCDA. With regard to IP-3, it may be noted that the very fact that he recorded the conversation happening between him and officials of Macleods and him and Shri Subodh Kumar Ghosh, General Secretary of BCDA which took place in March, 2016 shows that he was planning to file the present information for a very long time and was trying to create a trail of evidence.
- vii. Admittedly, IP-1 was appointed the promoter-cum-distributor agent of M/s Trumac Healthcare and Alna Biotech Private Limited in 2009 and 2008 respectively, in Districts of Murshidabad, Nadia and Birbhum. Though IP-1 has made allegations regarding charges in this regard for commencement of sales being demanded by BCDA or its office-bearers with respect to the District of Murshidabad, IP-1 has been selling the products of these companies in the Districts of Nadia and Birbhum without any obstruction. Further, admittedly,



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IP-2 is in pharma trade since 1999 and has stockistship of at least 7 pharma companies in respect of which he has made no allegation regarding requirement of NOC/ approval from BCDA. Admittedly, he was most recently appointed a stockist by USV Pvt. Ltd. in March 2017 without any NOC/ approval from BCDA. Also, admittedly, IP-3 has the stockistship of Standard Pharmaceuticals (since 2005), Cadilla Pharmaceuticals (since 2013), RPG Lifescience (since 2016) and Glenmark Pharmaceuticals Ltd. (since 2017) in respect of which there is no allegation of requirement of NOC. Even Macleods, before the DG, while giving the complete record of its stockists' appointment during the period 2014-2016, has stated that it has appointed multiple stockists without intimation/ approval/ NOC from BCDA.

- viii. IP-2 is the Branch Secretary of Burdwan branch of PTAB, which is a rival association of BCDA. In Burdwan District, there are 5150 pharmaceutical dealers of which 300 belong to PTAB. Yet IP-2 has been unable to provide any evidence to the DG that BCDA had issued NOC/ SAI to any pharmaceutical trader in Burdwan.
- ix. Voluntary interactions between BCDA, pharmaceutical companies and their prospective stockists is not a *per se* anti-competitive activity. The Expert Committee Report prepared by Dr. R.A. Mashelkar has concluded that a healthy interaction between Chemists and Druggists Association and pharmaceutical companies is beneficial for preventing the entry of spurious drugs in the market. Thus, without prejudice, even if SAI letters, if any, were issued to stockists, it is in compliance with the Mashelkar Committee Report.
- x. BCDA cannot be held responsible for the alleged contravention by the Murshidabad District Committee of BCDA. The total number of members in BCDA is around 34,000. The functions of BCDA is divided into 24 Districts in the State of West Bengal, further divided into 214 zones. The Districts and zones conduct their affairs under the supervision of the respective District Committee and Zone Committee. It is expected that such Committees would function according to the guidelines issued by BCDA. However, if any element in them goes rogue and misuses the position of the association, BCDA has only



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limited coercive powers against such defaulter element as no employer-employee relationship exists and no salaries or remuneration of any kind is paid, BCDA being a non-profit company. When IP-1 had complained to BCDA against demand of SAI and PAI by Murshidabad District Committee and Nowda Zone Committee members, BCDA had taken steps in the form of dissolving the Murshidabad District Committee, briefing its members about Competition Law, holding training session in Competition Law on 23.07.2016 at Calcutta University Institute Hall for its District leaders *etc.* which information was given to the DG. It even introduced an amendment to its Articles of Association on 02.07.2016 to empower the Executive Committee to take drastic actions against persons violating the norms of the Association, as it was committed to put an end to NOC/ PAI/ SAI *etc.* Admittedly, IP-1 was selling the products of M/s Trumac Healthcare and Alna Biotech Private Limited in the Murshidabad District, Nadia District and Birbhum District from 2008 to 2014, without any obstruction. Thereafter, he, for the first time, allegedly faced problems with Murshidabad District Committee members, in the District of Murshidabad. However, he has been selling the products of these companies in Nadia and Birbhum without any obstruction. This shows that there was no State-wide direction with regard to mandating PIS/ NOC/ PAI/ SAI by BCDA.

- xi. The statements made by Shri Saiful Islam Biswas, Shri Nikhilesh Mondal, and Shri Bajlur Rahaman cannot be relied upon. All these three persons are now members of a rival association of BCDA *viz.* Progressive Chemists and Druggists Association ('PCDA'). Further, Shri Saiful Islam Biswas, due to political rivalry, has also deliberately made false statements against BCDA. They, while being members of Murshidabad District Committee of BCDA, had deliberately violated the norms of BCDA. It may be noted that the present matter pertains to a period when these three persons only were the office-bearers of Murshidabad District Committee.



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- xii. The DG is wrong to conclude that there existed an ‘agreement’ between BCDA on the one hand and pharmaceutical companies like Alkem and Macleods on the other, that no stockist can be appointed without NOC/ SAI from BCDA. There is no evidence on record that any such ‘agreement’ existed. There is no evidence regarding any ‘meeting of minds’ between pharmaceutical companies and BCDA and the DG has based its findings on mere coincidences. There is no evidence of any correspondence between BCDA and Alkem or Macleods which may establish that BCDA was responsible for non-supply of medicines by them.
- xiii. There are justifiable reasons for pharmaceutical companies not to supply medicines to the newly appointed stockists immediately after issuing OLS. They need to make sure that existing stockists clear their outstanding dues before learning the appointment of a new stockist; they also need to check if there are any complaints against the prospective stockists in the market. Such reasons have even been stated before the DG by M/s Pharma Centre which issues the appointment approval letters to the stockists of Macleods. The DG has erred in concluding that such delay was on account of SAI mandated by BCDA.
- xiv. Even in the telephonic conversation between IP-3 and Shri Subodh Kumar Ghosh, General Secretary of BCDA, Shri Ghosh nowhere required that IP-3 should get SAI from BCDA. This clearly shows the non-mandated nature of such document.
- xv. BCDA, after receipt of DG Report, conducted a market survey of companies selling their products in the State of West Bengal without paying any charges to BCDA and of stockists who have been appointed without SAI being issued by BCDA. Illustrative lists thereof show that at least 45 companies have been selling their products in the State of West Bengal without paying any charges to BCDA and that at least around 1,000 stockists have been appointed by various pharmaceutical companies in various Districts of West Bengal, without any NOC having been issued by BCDA.



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- xvi. BCDA being a non-profit company in terms of Section 8 of the Companies Act, 2013, is entitled to receive donations, which are exempted from its income subject to tax, under Section 80G of the Income Tax Act, 1961. BCDA receives such donations to carry out certain public charitable activities. Even for its day-to-day functioning, such donations are required. However, there is no evidence apart from mere allegations to show that such donations had to be paid by the stakeholders under coercion. The DG has wrongly concluded that such donations had to be paid for obtaining SAI. It is clearly evident from the DG Report itself that for issuance of circulation letters in the Journal, BCDA charges only Rs. 100 from its members. In fact, thousands of stockists have been appointed in the State of West Bengal without receipt of any donations from them. Such donations were paid on a voluntary basis. Receipts of donations only constitute proof of payment; they do not, in any manner, reflect that payment so made was mandatory.
- xvii. Even if there was an ‘agreement’ between BCDA on the one hand and pharmaceutical companies like Alkem and Macleods on the other, no AAEC as a result of such agreement was caused in any market. No ‘relevant market’ has been delineated by the DG in its report. Multiple stockists have been appointed by various pharmaceutical companies in the State of West Bengal without any NOC/ SAI/ approval from BCDA which clearly shows that there are no barriers to entry or foreclosure of competition in the market. No harm to consumers has been established. The number of stockists appointed has no direct impact on consumers. Consumers purchase drugs from retailers and there are a large number of retailers present in the market. The evidence in this matter primarily relates to Murshidabad District wherein issues being faced, if any, were temporary in nature due to some District Committee members who were later suspended.
- xviii. Regarding Shri Subodh Kumar Ghosh, General Secretary of BCDA, no direct evidence is available. His specific role and function in such alleged practice of NOC, if any, has not been examined by the DG. He became the General Secretary of BCDA only in September 2014. Several facts of this matter relate prior to September 2014 for which Shri Ghosh cannot be made liable.



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11.2 Alkem and its officials Shri B.N. Singh, Executive Chairman, Shri Sanjoy Banerjee, Senior General Manager, Shri Hitesh Mehta, Regional Distribution Manager, and Shri Kaushik Deb, Zonal Sales Manager

- i. As per the decisions of the Hon'ble Delhi High Court in *Mahindra Electric Mobility Limited and Another v. Competition Commission of India and Another*, W.P. (C) No 11467 of 2018 and others decided on 10.04.2019 by Division Bench and *Cadd Systems and Services Private Limited v. Competition Commission of India*, W.P. (C) No. 6661 of 2019 decided on 17.07.2019 by Single Bench, in the absence of a judicial member in the Commission, no hearing on the DG Report can be held or final order be passed by the Commission.
- ii. The letters of Alkem requiring prospective stockists to obtain 'necessary clearance from required authorities' do not imply NOC from BCDA. Alkem has repeatedly clarified that this phrase refers to documentation such as drug and food licenses, PAN, VAT, etc.
- iii. The delay in supply of pharmaceuticals to M/s Subha Medical Agency and M/s Manorama Medical Stores was not on account of lack of NOC. In case of M/s Subha Medical Agency, delay was because of non-submission of requisite documents by it such as food and drugs license till 11.03.2016. Upon receipt of such documents, supplies commenced from 18.03.2016. In case of M/s Manorama Medical Stores, delay was occasioned due to receipt of a new application from it on 10.06.2015 and a new OLS been issued to it on 15.07.2015. Thereafter, documentation was submitted by M/s Manorama Medical Stores on 20.01.2016 and supplies started from 25.01.2016.
- iv. The letter dated 16.09.2014 addressed by M/s Subha Medical Agency to BCDA only requests BCDA "... to do the needful ...". It does not imply issuance of NOC from BCDA. Further, Alkem was not aware of any such letter being written by M/s Subha Medical Agency or even by M/s Manorama Medical Stores to BCDA. There is also no evidence that any NOC was submitted by M/s Subha Agency to Alkem. Thus, no adverse finding against Alkem can be drawn on this count.



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- v. Since date of first supply *i.e.* 18.03.2016, Alkem has been continuously supplying pharmaceuticals to M/s Subha Medical Agency and has received no complaints from it.
- vi. Letter dated 01.09.2014 addressed by Shri Sanjoy Banerjee of Alkem to BCDA was not related to stockistship of M/s Manorama Medical Stores. M/s Manorama Medical Stores had applied for stockistship only on 10.09.2014. Also, the letter does not mention the name of any particular stockist. During investigation, Shri Sanjoy Banerjee had clarified that the said letter was written with the strategic intent to create pressure on the two existing stockists of Alkem who were in default of certain payments. Even the letter dated 25.07.2017 addressed by Alkem to the DG providing the list of defaulting stockists proved that Alkem had initiated claims of recovery against them. Also, Shri Sanjoy Banerjee, who is the Senior General Manager of Alkem, is not even involved in the process of appointment of stockists.
- vii. There was no delay in appointment of M/s Siddheshwari Medical Hall as a stockist by Alkem. On 28.02.2015, OLS was issued by Alkem to M/s Siddheshwari Medical Hall. Since no communication for three months was received from M/s Siddheshwari Medical Hall, *vide* letter dated 08.06.2015, the OLS was terminated. Thereafter, Alkem addressed a second letter to M/s Siddheshwari Medical Hall on 10.08.2015 reiterating revocation of OLS. Due to change of circumstances during this period of 6 months, Alkem no longer required a stockist in that region. Such decision was a prudent business decision. Thereafter, M/s Siddheshwari Medical Hall addressed a fresh letter dated 19.01.2016 to Alkem cancelling all previous orders placed by it on its own accord and placed a fresh order for supplies. In this letter, M/s Siddheshwari Medical Hall acknowledged that previous orders were being cancelled because it did not have the requisite FSSAI license. Though Shri Kaushik Mallick, proprietor of M/s Siddheshwari Medical Hall alleged that it was told by Alkem to write such letter, there is no evidence produced by him in support of its such claim. Upon receipt of letter dated 19.01.2016 from M/s Siddheshwari Medical Hall and upon receiving all its documentation, supplies were commenced from 27.06.2016.



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- viii. There are contradictions in the statements and cross-examination statements of IP-2 and Shri Kaushik Mallick, proprietor of M/s Siddheshwari Medical Hall.
- ix. M/s Dutta Syndicate was appointed for Kalna, a region different than that for which M/s Siddheshwari Medical Hall was issued the OLS. They had been issued OLS on 14.02.2015, submitted their documentation on 04.12.2015, and supplies commenced from 05.12.2015.
- x. IP-2, during his cross-examination, has categorically admitted that he does not have any documentation to prove the averments made in his information or to prove that BCDA had issued NOCs to stockists operating in Burdwan District of West Bengal.
- xi. The signatures of IP-2 upon the information filed by it under Section 19 (1) (a) of the Act and the Affidavit filed in support thereof, do not match. His signatures on the Affidavit match his signatures put on various other documents during the course of investigation. This establishes that the signatures put on the information were not made by IP-2 himself. Therefore, the information filed itself is invalid in terms of Regulation 15 of the Competition Commission of India (General) Regulations, 2009. Also, the date of the Affidavit filed in support of the information precedes the date mentioned on the information itself. Thus, evidently, at the time of getting the Affidavit attested, the information itself was not signed.
- xii. It has come in the cross-examination of IP-2 that he suppressed material information in the form of letter dated 14.05.2015 addressed by Shri Kaushik Mallick, proprietor of M/s Siddheshwari Medical Hall, to PTAB requesting for issuance of SAI, and that he did not furnish the details of all the associations of which he was a member from 1999 to 2012 despite specific order of the Commission dated 18.07.2019 directing him to do so. He, being a member of rival association PTAB of BCDA, seems to be only interested in challenging the conduct of BCDA, without even establishing as to how the end consumers in the State of West Bengal or the District of Burdwan are adversely affected by the business model of Alkem.



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- xiii. The contents of letter dated 14.05.2015 addressed by Shri Kaushik Mallick, proprietor of M/s Siddheshwari Medical Hall, to PTAB requesting for issuance of SAI, do not indicate that the requirement of NOC was mandated by Alkem or that Alkem was even aware of such a request being made by Shri Kaushik Mallick.
- xiv. There is no link between the circulation letter issued by BCDA and the commencement of supplies made by Alkem. There is no evidence that issuance of such circulation letter was even communicated to Alkem. To the best of knowledge of Alkem, the BCDA Journal is published at the end of every month with details of preceding months, that is pursuant to the date of first supply to the stockist by Alkem. Thus, publication of circulation letter takes place after commencement of supplies. It is in no way substantiated by the DG as to how would Alkem even come to know of issuance of a circulation letter in favour of the stockist. Further, the DG could have drawn a causal link between submission of documentation by the stockists and commencement of supplies by Alkem, but it does not.
- xv. Statements of Shri Saiful Islam Biswas, Shri Nikhilesh Mondal and Shri Bajlur Rahaman, cannot be relied upon as corroborative evidence in the absence of any actual evidence against Alkem on merits that it insisted upon obtaining NOC from BCDA. There is also no documentary evidence in support of the claims made by these three third parties, who are erstwhile members of BCDA, against Alkem.
- xvi. Even if a practice of issuing NOC by the Association is presumed, an 'agreement' in terms of Section 2 (b) of the Act cannot include one-sided enforcement of a condition. There should be 'meeting of minds' to achieve a common objective, which is lacking in the present matter. The DG has failed to demonstrate any 'rational economic motive' for Alkem to enter into such anti-competitive agreement with the Association in terms of Section 3 of the Act. It would, in fact, be contrary to the rational business interests of Alkem to allow the Association to dictate the terms of its distribution network.



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- xvii. Assuming but not conceding that Alkem had, in fact, mandated its distributors to obtain a prior NOC from the Association, such agreement entered into between Alkem and the Association would not fall within the scope of Section 3 (3) (b) of the Act. Section 3 (3) covers only those agreements which are entered into between enterprises 'which are engaged in the identical or similar trade of goods or provision of services'. BCDA comprises of wholesalers and retailers of drugs, while Alkem is engaged in the manufacturing of drugs; hence, they operate on different levels of supply chain and cannot be called to be engaged in same business or identical market. Also, any alleged 'agreement' between Alkem and Association cannot contravene Section 3 (1) of the Act on a standalone basis. Section 3 (1) is interlinked with Section 3 (3) and Section 3 (4) and the same cannot be read mutually exclusive of each other. Such interpretation gains strength from the non-use of the word "or" between different sub-sections of Section 3.
- xviii. No appreciable adverse effect on competition ('AAEC') has been caused as at all times, M/s Siddheshwari Medical Hall was free to procure the products of Alkem from Alkem's other stockists. Also, no AAEC in terms of the factors contained in Section 19 (3) of the Act has been established by the DG. There are approx. 55,000 wholesalers and retailers that operate in the State of West Bengal. In Burdwan District alone, there are around 5,000 traders. Less than 2% of traders in West Bengal are members of BCDA. There are numerous pharmaceutical companies operating in West Bengal; thus, Alkem is not in a position to cause any market harm or impact market dynamics. Few incidents of delayed supply by Alkem, if any, cannot cause any AAEC in West Bengal. During the alleged delay, such prospective stockists could have approached competitors of Alkem, without any cost. Thus, there were no barriers to entry being created by Alkem. AAEC could have only established had the DG found that significant number of pharmaceutical companies in West Bengal have been mandating such NOC from BCDA. The DG was thus, required to assess the aggregate impact of the alleged requirement of NOC or collective impact of pharmaceutical companies in the Districts of Murshidabad or Burdwan, or the State of West Bengal to arrive at a finding of AAEC. The DG has failed to



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establish any 'refusal to deal' by Alkem or establish any 'harm to end consumers' been caused.

- xix. The DG chose to investigate only Alkem and Macleods despite it having evidence of similar nature against other pharmaceutical companies also like Blue Cross Pvt. Ltd., Allergan India Pvt. Ltd., Alembic Pharmaceuticals Ltd., East India Pharmaceuticals Works Ltd. *etc.*
- xx. In the absence of any finding of contravention against Alkem by the Commission, the DG erred in giving a finding against the officials of Alkem at a premature stage.
- xxi. With regard to Shri B.N. Singh, Executive Chairman of Alkem, the DG has given an adverse finding without establishing his role and without even giving an opportunity to him to defend himself. Shri B.N. Singh, being not involved in the process of appointment of stockists by Alkem, had no knowledge, of contravention of the provisions of the Act, if any, being committed by Alkem. His role in the company is limited to facilitation of decision making by the Board, Board Committees and individual Directors, and developing and assisting with regard to overall corporate strategy of Alkem and he is not in any day-to-day field work of Alkem.
- xxii. With regard to Shri Sanjoy Banerjee, General Manager of Alkem, contravention, if any, committed by Alkem was without his consent or connivance. He was not involved in the process of appointment of stockists by Alkem. His role was only limited to the overall business promotion of Alkem in the State of West Bengal. The letter dated 01.09.2019 that he addressed to BCDA was a one-time exception, and as explained earlier, was necessary to ensure recovery of dues from defaulting stockists of Alkem. None of OLSs has been signed by Shri Sanjoy Banerjee.
- xxiii. With regard to Shri Kaushik Deb, who was the Zonal Sales Manager of Alkem for the States of West Bengal and Odisha, contravention, if any, committed by Alkem was without his consent or connivance. He leads an entire team of Area Managers, Regional Managers, Division Managers who are delegated the responsibility of executing sales and marketing decisions. It is highly



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improbable that he is involved in day-to-day operations like appointment of stockists. His concern in such area is limited – he merely recommends a prospective stockist for appointment which is a mere formality as groundwork regarding suitability of the prospective stockist has already been undertaken by the field staff.

- xxiv. Penalty, if any, to be imposed upon Alkem for alleged contravention may be mitigated keeping in mind that: (a) Alkem is not the ring leader/ perpetrator of the practice of requirement of NOCs, though it may have been a mere follower of such practice under threat to its business, BCDA being in a position to severely affect its business operations; (b) Alkem never refused to make supplies to its stockists though on few occasions there may have been delays; and (c) No profit was derived by Alkem out of mandating such practice.

11.3 Macleods and its officials Shri Rajendra Agarwal, Managing Director, Shri Rajeev Mishra, Senior Vice-President, Field Operations and Sales Administration, Shri Subrata Sadhukhan, Deputy Sales Manager, West Bengal, and Shri Pradipta Dhar, Zonal Sales Manager

- i. As per the decisions of the Hon'ble Delhi High Court in *Mahindra Electric Mobility Limited and Another v. Competition Commission of India and Another*, W.P. (C) No 11467 of 2018 and others decided on 10.04.2019, it is impermissible in law for the Commission to carry out its *quasi-judicial* functions (including final hearings) in the absence of a judicial member. Thus, the present proceedings ought to have been kept in abeyance until appointment of a judicial member in the Commission.
- ii. Investigation in the matter has been carried out by one officer of the rank of Deputy Director General while the investigation Report has been authored by another officer of the rank of Joint Director General. Thus, the DG Report has been authored by a person other than the one who had actually carried out the investigation. Therefore, it is liable to be disregarded and set aside.



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- iii. IP-3 has filed the information in Case No. 58 of 2016 with *mala fide* intention to harass Macleods and its senior officials. The conduct of IP-3 is such that though he was made advance supplies of drugs by Macleods and was allowed to make payments subsequently through cheques, three of his cheques got dishonoured on account of insufficient funds. He made online payments of those amounts later on. Nonetheless, such conduct of IP-3 raised grave doubts in the mind of the company about his integrity and financial viability. Thus, his credit facility was discontinued and he was asked to make advance payments for receiving supplies. Hence, IP-3 has filed this *mala fide* information against Macleods. IP-3 has given no proof that Macleods cancelled his OLS *vide* letter dated 16.08.2014 on account of non-furnishing of SAI.
- iv. Macleods never asks its stockists, much less insists, to get an NOC from BCDA. In all regions of the country including in West Bengal, there are numerous instances of stockists being appointed by Macleods without any NOC. On odd instances, stockists may have submitted NOC alongwith other papers to Macleods. However, this was without Macleods asking for the same and merely on account of force of habit (as this practice existed earlier) or with the hope that this may strengthen their chances of appointment. However, this practice has never been explicitly or implicitly been encouraged by Macleods and therefore, Macleods cannot be held liable for the same.
- v. The letter dated 17.04.2014 written by IP-3 to BCDA requesting for issuance of SAI was written on his own accord. Macleods or its officials had not asked IP-3 to procure such SAI. Macleods has no policy of seeking a SAI/ NOC. In fact, Macleods had issued a circular whereby it had laid down the requirements for appointment of stockists and had denounced the practice of obtaining any SAIs or NOCs from BCDA. When IP-3 submitted his requisite documents (PAN Card, drug licenses, VAT registration, proof of ownership, proof of storage area *etc.*) on 11.04.2016 to Macleods, it started making supplies to IP-3 from 14.04.2016.



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- vi. There was no delay in making supplies to the stockists by Macleods. As can be seen from the DG's investigation report itself, almost all of its stockists received their first supplies within 2-3 months of the issue of OLS and the same was done upon completion of documentation formalities by the stockists. Any coincidence with respect to the procurement of BCDA circulation letter by these stockists is nothing more than just co-incidence. The SAI letter had nothing to do with appointment of stockists by Macleods. Any delay in supplies post issue of OLS is a contractual issue and not a competition issue. Such delays may be caused for various reasons in normal course of business.
- vii. Factual findings of the DG are conjectural and speculative. The sample of stockists selected by the DG has no basis. The DG has cherry picked a few co-incidences to conclude violation against Macleods.
- viii. The telephonic conversations and transcripts thereof relied upon by the DG are inadmissible in evidence and of doubtful veracity. No Certificate in terms of Section 65B of the Indian Evidence Act, 1872 has been given by IP-3 in support of these telephonic conversations submitted by him. Further, no verification of the same has been done by experts to ascertain as to how far the recordings have been edited for selective presentation before the Commission.
- ix. Unauthorised acts by company's executives in clear violation of declared company policy cannot be imputed to the company. Any action by junior level sales executives which might be construed to have an anti-competitive element is outside the scope and ambit of their authority and cannot be attributed to the company. The format allegedly given to IP-3 on 02.04.2016 mentioning "*NOC Copy from the association*" as one of the items is not a company document. It is neither on letterhead of the company nor sent to IP-3 as part of its OLS. Most significantly, Shri Liton Das, a junior sales representative of Macleods, who allegedly gave this format with receiving of documents to IP-3 on 02.04.2014 and who could have shed light on the reason why such checklist was used, was not examined before the DG. Thus, the said document cannot be imputed to Macleods.



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- x. Just because Shri Pradipta Dhar, Zonal Sales Manager of Macleods asked IP-3 as to whether he has the SAI in the alleged telephonic conversation between them, it does not mean that Macleods insists upon the SAI to appoint its stockists. Further, just because in the alleged telephonic conversation Shri Dhar asks Shri Subrata Sadhukan, Deputy Sales Manager, if SAI is needed and Shri Sadhukan casually responds that a photocopy or original may be given, does not imply that SAI was mandated. Such conversation between two junior employees of a company does not prove the company's policy or that the company had an 'agreement' with BCDA. Furthermore, all references to SAI in these alleged conversations at the most show that BCDA coerced the parties to indulge in the practice of SAI and not an agreement between Macleods and BCDA in this regard.
- xi. Without prejudice, failure to appoint a stockist cannot amount to an anti-competitive activity. No applicant has an absolute right to be appointed as a stockist of a company.
- xii. Ingredients of an 'agreement' in terms of Section 3 read with Section 2 (b) of the Act are not established. For existence of an agreement, the parties to the agreement, the relationship between the parties in terms of chain of production/ distribution, the objective of the agreement and broad contours of the agreement have to be identified. However, the DG has failed to do the same. The DG has not identified the parties to any such agreement nor explained how such agreement would serve the commercial objective of Macleods. Even if such practice did exist, Macleods was only a silent witness to the same. There was no voluntary 'meeting of minds' of Macleods. Even the telephonic conversations, if believed to be correct, suggest that Macleods was a victim of harassment and economic coercion by BCDA and on the basis of the same, no 'agreement' between BCDA and Macleods is established.
- xiii. Merely because BCDA issues the circulation letter without verifying the authenticity of the claim of stockist cannot become a basis to conclude that there is an 'agreement' between Macleods and BCDA.



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- xiv. Without prejudice, if Macleods in fact does insist upon SAI from BCDA by its prospective stockists, it is because of the fact that BCDA exercises significant coercion upon the pharmaceutical companies to follow its *diktats*, else their sales and supplies are boycotted. There is sufficient evidence in this regard in the DG Report itself. Such coercion cannot be called an ‘agreement’. Merely because Macleods may not have complained against coercion, it does not imply that Macleods was an active participant in such practice.
- xv. Without prejudice, even if BCDA did insist on SAI letters to be obtained by the proposed stockists before their appointment by pharmaceutical companies, it is not an anti-competitive practice but rather an act in compliance with the Mashelkar Committee Report.
- xvi. Even if an agreement is established, there was no AAEC in the market. Firstly, the DG has delineated no ‘relevant market’. Secondly, there was robust supply of pharmaceutical drugs in the District of Murshidabad in West Bengal of Macleods as well as of other competing companies. Therefore, merely on account of non-empanelment or purported cancellation of empanelment of any stockist (IP-3), there could have been no impact whatsoever in the market, much less an appreciable adverse impact. Macleods had a large number of stockists in the State of West Bengal who made huge sales, which clearly evidences that there was no shortage of drugs of Macleods in the market. Further, Macleods has multiple competitors in West Bengal across several categories of drugs. Thus, it cannot be said that there were any significant barriers to new entrants in the market. There are a large number of stockists operating in the Murshidabad District and they have a good market. Further, Macleods has given numerous instances of stockists been appointed without NOC practice. Further, no harm to consumers has also been caused. Consumers purchase drugs from retailers and there are a large number of retailers present in the market.
- xvii. Without giving a finding of contravention against a company, a finding against any official of that company cannot be given.



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- xviii. With regard to Shri Pradipta Dhar, Zonal Sales Manager, and Shri Subrata Sadhukhan, Deputy Sales Manager, they are very junior officers and not Director, Secretary or other officer within the meaning of Section 48 (2) of the Act. They are not ‘manager’ within the meaning of the term as given in the Companies Act, 2013. Shri Dhar’s job profile only included training field staff and improving market sales and assisting the company to appoint a suitable stock distributor. His role is limited to due diligence and sending documents to Head Office for final approval. These two individuals have no power to decide appointment of a new stockist. The alleged telephonic conversations of Shri Pradipta Dhar and Shri Subrata Sadhukan with IP-3 also do not indicate any consent or connivance of Shri Dhar or Shri Sadhukan in the alleged NOC practice.

Analysis by the Commission:

12. The Commission has perused the informations filed by the Informants, the investigation report of the DG and the evidences collected by the DG, the objections and suggestions to the DG Report and the written submissions filed by the Opposite Parties and the Informants, the material available on record, and also heard the oral arguments of the respective learned counsel representing the parties in the matter.
13. At the outset, the Commission notes that Alkem and Macleods have raised a preliminary objection regarding absence of a judicial member from the hearing of the Commission. As per Alkem and Macleods, in light of the decision of the Hon’ble Delhi High Court in *Mahindra Electric (supra)* and *Cadd Systems (supra)*, without the presence of a judicial member, the final hearing in the present matter ought not to take place and no final order by the Commission in this matter can be passed.
14. In this regard, the Commission notes that though the Hon’ble Delhi High Court, in the *Mahindra Electric (supra)* decision, had stressed upon the need of having a judicial member present in the Commission at the time of final hearings and at the time of passing the final order, it has clarified in its subsequent order in *Cadd Systems (supra)* that the *Mahindra Electric (supra)* decision cannot be interpreted to mean that the functioning of the Commission is interdicted till the time such appointment is made. The Hon’ble Delhi High Court, in *Cadd Systems (supra)*, has observed “... Court did



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not interdict the functioning of the CCI pending such appointment. There is no specific direction that was issued to the aforesaid effect. The Central Government was directed to fill the vacancy within the period of six months and it cannot be assumed that the Court had interdicted the working of the CCI during this period. ...” Therefore, in light of such clarification given by the Hon’ble Delhi High Court, the Commission is of the view that the plea raised by the parties in this regard is misconceived and there exists no bar in proceeding with the matter.

15. Further, the Commission notes that Macleods has also raised another objection by pointing out that though the investigation in the matter has been carried out by the Deputy Director General, the investigation report has been authored by the Joint Director General. In this regard, the Commission notes that once a matter is sent for investigation to the Office of the DG, the DG assigns the same to an investigating unit which comprises of Additional Director Generals, Joint Director Generals, Deputy Director Generals, Assistant Director Generals, *etc.* who are all covered within the definition of the ‘Director General’ as contained in Section 2 (g) of the Act. The investigating unit then carries out the investigation under the supervision of the DG in terms of Section 16 (2) of the Act. Thus, the objection raised by Macleods is unmerited and is rejected.
16. Having disposed of the preliminary objections raised by the parties, the Commission proceeds to decide the matter on merits. In this regard, at the outset, the Commission notes that in terms of Section 2 (b) of the Act, an ‘agreement’, *inter alia*, includes any ‘arrangement’ or ‘understanding’ or ‘action in concert’, whether or not formal or in writing or intended to be enforceable by legal proceedings. Thus, evidently, this definition, being inclusive and not exhaustive in nature, is a wide one. Understanding, for the purposes of Section 2 (b), may be tacit and the definition covers situations where the parties act on the basis of a nod or even a wink.
17. The Commission is cognizant of the fact that there is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in any anti-competitive dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term ‘agreement’, the Commission assesses the evidence in Section 3 cases on the basis of



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benchmark of preponderance of probabilities. The Commission is also cognizant of the fact that since prohibition on participating in anti-competitive agreements and penalties the offenders may incur are well-known, it is normal that such activities may be conducted in a clandestine manner, where the meetings are held in secret and the associated documentation is reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between enterprises such as minutes of a meeting, it will normally be only fragmentary and sparse.

18. Hence, it is to be kept in mind that it is often more than necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement has to be inferred from a number of coincidences and *indicia* which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an anti-competitive agreement.

19. Keeping in view the above, the Commission now proceeds to analyse the evidence collected by the DG, party wise, as follows:

20. **BCDA and its General Secretary Shri Subodh Kumar Ghosh**

20.1 As per the informations, three anti-competitive practices were alleged to be indulged into by BCDA:

- (a) Mandating procurement of 'Stock Availability Information (SAI)' which is in the nature of an NOC from BCDA by a prospective stockist of a pharmaceutical company, before commencement of supplies of pharmaceuticals by the pharmaceutical company to the stockist;
- (b) Requiring payment of illegal donations (in addition to the circulation charges) from the prospective stockist(s) for issuance of such SAI; and
- (c) Requiring payment of illegal donations (in addition to subscription fee) from the PCD agents of pharma companies for issuance of 'Product Availability Information (PAI)' to them which was again mandated to be procured before pharma companies' PCD agents could commence their supplies of the product in the zone/ District concerned.



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20.2 With regard to the practices of mandating SAI and charging of a monetary consideration for issuance thereof, the DG collected evidence in the form of numerous instances wherein BCDA had issued SAI letters to the prospective stockists of various pharmaceutical companies and it was only thereafter that supply of drugs to them commenced from the pharmaceutical companies. An illustrative list of the same is as follows:

S. No.	Name of Stockist	Name of pharma company	Date of OLS	Date of Circulation Letter by BCDA	Date of Invoice of first supply
1.	M/s Pal Distributors, Murshidabad	Blue Cross Pvt. Ltd.	14.07.2014 “... you are requested to complete all the procedure with your local organisation for smooth business transaction.”	16.03.2016	08.04.2016
2.	M/s New Drug Agency, Murshidabad	Allergan India Pvt. Ltd.	10.04.2014 “... final appointment as a stockist is subject to your agreement to work as per company’s terms and conditions.”	18.01.2016	28.01.2016
3.	M/s Surya Medical Agency, Murshidabad	Alembic Pharmaceuticals Ltd.	19.09.2015 “You are requested to complete all the necessary formalities with BCDA State Committee and provide us the relevant documents for our doing the needful.”	17.03.2016	29.06.2016
4.	M/s Matri Agency, Uttar Dinajpur	East India Pharmaceuticals Works Ltd.	15.06.2015 “... other formalities will be informed to you in due course.”	21.09.2015	30.09.2015
5.	M/s Subha Medical Agency, Murshidabad	Alkem Laboratories Ltd.	11.09.2014 “... we have no objection to give you an appointment as a stockist for our products provided you get necessary clearance.”	09.02.2016	18.03.2016



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S. No.	Name of Stockist	Name of pharma company	Date of OLS	Date of Circulation Letter by BCDA	Date of Invoice of first supply
6.	M/s Manorama Medical Stores, Murshidabad	Alkem Laboratories Ltd.	11.09.2014 “... we have no objection to give you an appointment as a stockist for our products provided you get necessary clearance.”	18.01.2016	25.01.2016
7.	M/s Maa Tara Medical Agency, Murshidabad	Macleods Pharmaceuticals Ltd.	07.04.2014 “You are requested to fulfil the formalities and tender the same to us for speedy execution”.	29.03.2016	22.04.2016

20.3 When the DG made enquiries in this regard from such stockists, M/s Subha Medical Agency stated it had to obtain SAI from BCDA as ‘necessary clearance’ after paying a sum of Rs. 13,000/- to get supplies from Alkem. M/s Manorama Medical Stores also stated that it had to obtain SAI from BCDA as ‘necessary clearance’ after paying a sum of Rs. 13,000/- to get supplies from Alkem. M/s Matri Agency which was appointed stockist of East India Pharmaceuticals Works Ltd. also informed about payment of donation of Rs. 30,000 on 01.10.2015 to BCDA *in lieu* of issuance of SAI by BCDA. They also submitted the donation receipts from BCDA.

20.4 Apart from the above, Shri Arajit Das of one M/s Green Vision, even submitted transcripts of his telephonic conversations with the officials of Alembic Pharmaceuticals Ltd. wherein he was asked to submit NOC from BCDA. Such transcript was also supported by a Certificate in terms of Section 65B of the Indian Evidence Act, 1872. Relevant extracts of such conversation are noted below:

Shri Arajit Das and Shri Samrat Mukherjee

“Arajit Das: Don’t you give anything except the stockist?”

Samrat Mukherjee: no, we do not give except stockist. Though goods may be given except stockist, but there are many proceedings. Any one has to complete that procedure. You have to submit an application stating that you are interested and you have to produce



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your turnover. You will submit an application stating that you have this type of works. That application will be scrutinised by the head of marketing. They will scan the necessity of that at Dumdum then checking the validity of that the signing authority will sign. Four to five persons will sign that copy. You will show that to BCDA then they will approve that and after generating your party code, offer letter will be given, after showing that the work will be done. This is the total procedure.”

Shri Arajit Das and Shri Sandip

“Arajit Das: No, I have no business with any other division of your company. But how I will get the order supplied.

Sandip: This is the matter of stockist.

Arajit Das: I have sent order, Cheque everything. What you have to do after this?

Sandip: You have to collect one N.O.C from local B.C.D.A. There are some Formalities.

Arajit Das: Yes but don't I get the order supplied. Actually I have many requirements this area. You will see that I have placed an order consulting with the parties. We have made a projection of seven days and placed the order. Don't we get the order supplied?

Sandip: Hear me, I am giving a number of your area manager who control the area of Dum Dum, You please consult with him. He will take steps if necessary.

Arajit Das: What is the procedure, please tell me.

Sandip: Procedure means, we cannot supply to the parties directly, if they did not get the approval from B.C.D.A though we have vacancy of stockist in that area. So, in that situation there is problem in catering. You consult with him. OK? You please note the number.”

Shri Arajit Das and Shri Koushik Das

“Arajit Das: I am saying that you came to our office Green Vision few days ago and we have talked about delivering goods to you.

Koushik Das: Yes, talking means I have send it in your text, it has been noticed about many procedures, but nothing has been discussed as there is year ending. Another reason is one interest certificate issued by you is required. You are interested to make business with Alembic and to establish this you have to produce this interest certificate. Thereafter, you have to procure one N.O.C from B.C.D.A. as there is no stockist vacancy in your region. There is no opening for sell.

...

Shri Arajit Das: what you are telling about meeting? About N.O.C.?



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Koushik Das: Yes, one BCDA N.O.C. is required with the application.

Shri Arajit Das: Yes, that is essential, you prepare your papers I need the orders, otherwise it is problem to me. I have submitted my drug licence number, trade licence number everything.

Koushik Das: Yes, but only those papers are not enough, there are something more, you have deal with Alembic before and done with other parties also.

Shri Arajit Das: that is not required.

Koushik Das: interest letter is required.

Shri Arajit Das: what you are telling about B.C.D.A.

Koushik Das: N.O.C.

Shri Arajit Das: N.O.C. required, is it?

Koushik Das: yes, yes, and one interest letter is required, that you are interested to deal with Alembic.”

When the transcript of his conversation was confronted to Shri Samrat Mukherjee, Regional Manager of Alembic Pharmaceuticals Ltd., he admitted to have had such conversation and further stated that he is aware that NOC from BCDA is being collected by the prospective stockists.

20.5 IP-3 also submitted transcripts of his telephonic conversation dated 28.03.2016 with Shri Subodh Kumar Ghosh, General Secretary of BCDA regarding SAI for supplies from Macleods. This was again supported by a Certificate in terms of Section 65B of the Indian Evidence Act, 1872. The relevant extracts of such conversation are noted below:

“IP-3: I shall go. But one condition, if I get the SAI of Macter’s Pharmaceuticals, then I shall move.

Subodh Ghosh: Oh! I cannot speak much about this over telephone. I am telling you to come. What else I can say you. I am saying you to come tomorrow...”

When this conversation was confronted to Shri Subodh Kumar Ghosh, he denied his voice on the audio recording. In these circumstances, the DG obtained the CDRs of Shri Subodh Kumar Ghosh from his service provider Vodafone. When such CDRs submitted by Vodafone are compared with the audio recording submitted by IP-3, it can be seen that the duration of the call recording submitted by IP-3 matches the duration of the call received by Shri Subodh Kumar Ghosh on the said date from IP-3.



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- 20.6 Further, the practice of SAI from BCDA being submitted by the prospective stockists to the pharmaceutical companies being in vogue was even accepted by the erstwhile office bearers *namely* Shri Saiful Islam Biswas, Shri Bajlur Rahaman and Shri Nikhilesh Mondal, of Murshidabad District Committee of BCDA. They accepted before the DG that when approached by a stockist, the District Executive Committee of Murshidabad made a recommendation to the State Committee, and based on the same, BCDA issued a Circulation Letter (SAI) in favour of the stockist. Shri Nikhilesh Mondal, erstwhile treasurer of Murshidabad District Committee of BCDA, also admitted that monetary considerations were being received in the form of donations for issuance of SAI to distributors.
- 20.7 From the aforesaid evidences collected by the DG, the Commission is of the view that it is established that BCDA was carrying on the practice of requiring the prospective stockists of pharmaceutical companies to obtain its SAI/ NOC, before supply of drugs to them from the pharmaceutical companies could be commenced. Further, it also stands established from the aforesaid evidences that certain District Committees of BCDA such as Murshidabad District Committee, used to collect monetary considerations in the form of donations from prospective stockists before recommending their name to BCDA for issuance of the SAI letters.
- 20.8 Once such practices being carried on by BCDA are established, the same would be presumed to have an appreciable adverse effect on competition ('AAEC') by virtue of the provisions contained in Section 3 (3) of the Act. The onus to rebut such presumption would then lie upon the parties. In the present case, BCDA has been unable to rebut the said presumption in terms of the factors contained in Section 19 (3) of the Act. It has been unable to show as to how its such impugned practices resulted in accrual of benefits to consumers or made improvements in the production or distribution of pharmaceutical products in the State.
- 20.9 In fact, it has come out in the investigation that Shri Saiful Islam Biswas had even written a letter dated 01.03.2015 to the General Secretary BCDA wherein he wrote that:



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“It is emphatically stated that some of the stake holder raised objection against the issuance of SAI paper and subsequently, in a further representation dated 15th November, 2014, they prayed inter alia for issuance of SAI paper, which representation is already lying with your office. Under the circumstances above, the respective SAI paper should be issued as early as possible for following reasons:-

- i. People of the rural area are suffering from inconvenient useful Medicine supply.*
- ii. Pressure is being mounted from common people for convenience of useful medicine supply of respective locality smoothly.*
- iii. Each and every medicine agency is submitting repeated representation to us for communicating the same to you, as well as they are also expressing their dissatisfaction for non issuance of SAI paper.*
- iv. Apart from the above reasons, on moral ground it is to be looked upon that common people are affected due to non issuance of SAI paper.*

Hence, I would like to draw your kind attention, to re-look the above mentioned matter ...”.

When Shri Subodh Kumar Ghosh, General Secretary of BCDA, was confronted with this letter and certain NOCs issued by him, he had no justification for the same. The contents of such letter in fact, categorically show that because of such SAI/ NOC practice being indulged in by BCDA, the supply of medicines in the rural areas of West Bengal was limited/ controlled.

20.10 In view of the above, the Commission finds that by indulging in the practice of issuing SAI and by charging monetary considerations for issuance of the same, BCDA and its District Committees, have contravened the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act.

20.11 The third allegation for which the DG has found evidence against BCDA pertains to charging of illegal donations from the PCD agents of pharma companies for issuance of PAI – a mandatory requirement before pharma companies’ PCD agents could commence their supplies of the product in the zone/ District concerned. In this regard, the Commission notes that in its information, IP-1, the PCD agent of M/s Trumac Healthcare and Alna Biotech Pvt. Ltd., responsible for selling their products to the retail chemists, had alleged that the office-bearers of BCDA’s Nowda and Nabagram Zone Committee, through the retail chemist



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members of these Committees, threatened to boycott the products of M/s Trumac Healthcare and Alna Biotech Pvt. Ltd. sold by IP-1, unless Rs. 30,000 was paid in the name of approval for such marketing to BCDA. Further, IP-1, even in his statement recorded by the DG, stated that he was forced to deposit Rs. 32,000/- with BCDA as donation for obtaining PAI for circulation of ten products of M/s Trumac Healthcare and Alna Biotech Pvt. Ltd.

- 20.12 To examine the veracity of the above allegations, the DG recorded the statements of some PCD agents other than IP-1. These included Shri Prabir Kumar Chanda, PCD Agent of M/s USP Lifesciences and M/s Genova Biotech and Shri Prasanta Chaudhari, PCD Agent of Gentech Health Care Pvt. Ltd. and Oscoderma Pvt. Ltd. They all also stated that they had to deposit money with BCDA (through its Zone/ District Committee) to procure PAI from BCDA.
- 20.13 When Shri Nikhilesh Mondal and Shri Bajlur Rahaman, office-bearers of Nowda/ Nabagram Zone Committee of Murshidabad District Committee were confronted with the aforesaid statements, they denied the allegations levelled by Shri Prabir Kumar Chanda and Shri Prashanta Chaudhari and only admitted that during their tenure, almost all PCD Agents used to take PAI from BCDA after paying a subscription fee.
- 20.14 However, on examination of the bank details of BCDA which have been collected by the DG, it is observed that there are 216 entries of Rs. 30,000 each credited from various distributors. Two of them when contacted by the DG confirmed making such donations to BCDA.
- 20.15 Having considered the aforesaid, the Commission is of the view that it is highly unlikely that all these distributors would have given the donations of exact Rs. 30,000 only, voluntarily. Thus, from the above evidences collected by the DG, the Commission finds that evidently, BCDA was also indulging in the anti-competitive practice of charging monetary considerations in the form of 'voluntary' donations from the PCD agents of pharma companies for issuance of PAI, for them to start marketing drugs of their respective pharma companies.



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- 20.16 In view of the above discussion, the Commission holds BCDA guilty of indulging in anti-competitive activities in contravention of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act on three counts: (i) it used to require pharmaceutical companies in at least some Districts of the State of West Bengal have their new stockists obtain a prior SAI/ NOC from BCDA before supply of drugs can be commended to them; (ii) it used to collect monetary considerations from the prospective stockists against issuance of SAI to them, through its District Committees; and (iii) PCD agents of pharma companies had to obtain PAI from BCDA after payment of monetary considerations to it in the form of donations, to start marketing drugs of their respective pharma companies in the State of West Bengal.
- 20.17 In light of the aforesaid evidences collected by the DG against BCDA on all the three counts, the arguments of BCDA regarding *mala fide* of the Informants in instituting the present cases or of the erstwhile office bearers of its Murshidabad District Committee in making admissions before the DG, are of no significance. Further, though BCDA has argued that it had issued a letter dated 23.04.2013 to all its District Secretaries stating that they are not required to obtain NOC for appointment of stockists and has placed on record a copy of such letter, the Commission notes that despite issuing such letter, BCDA, through its General Secretary Shri Subodh Kumar Ghosh, in fact issued NOCs/ SAI/ Circulation Letter, as and when demand in this regard came to it from BCDA's District Committees. Also, though BCDA has argued that when it came to know that the Murshidabad District Committee was charging money for issuance of SAI and PAI, it dissolved the Committee and also held competition compliance programme, the Commission notes that despite taking such steps, BCDA continued to issue SAI, as and when demanded by the prospective stockists in the District of Murshidabad. Furthermore, even assuming as contended by BCDA that thousands of stockists all over the State of West Bengal have been appointed by pharmaceutical companies without any SAI from BCDA, yet, from the material on record, the Commission finds that it is evident that at least in certain districts (Murshidabad, Burdwan *etc.*), several remnants of such practice still remained.



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- 20.18 As far as Shri Subodh Kumar Ghosh, General Secretary of BCDA is concerned, the Commission notes that the DG has found Shri Ghosh to be liable for the conduct of BCDA, in terms of Section 48 (1) as well as Section 48 (2) of the Act. The Commission notes that the NOCs/ SAIs issued by BCDA were signed by Shri Subodh Kumar Ghosh. He had the telephonic conversation dated 28.03.2016 regarding SAI with IP-3. Therefore, the Commission is of the view that sufficient evidence is available against Shri Subodh Kumar Ghosh to hold him guilty of contravention of the provisions of the Act in terms of Section 48 of the Act.
- 20.19 The Commission is further of the view that for the conduct of Murshidabad District Committee of BCDA, the DG has rightly identified Shri Saiful Islam Biswas, District Secretary of Murshidabad District Committee of BCDA, Shri Nikhilesh Mondal, Treasurer of Murshidabad District Committee of BCDA and Shri Bajlur Rahaman, Organising Secretary of Murshidabad District Committee of BCDA, to be liable in terms of Section 48 (2) of the Act. These persons have accepted the anti-competitive activities being indulged into by Murshidabad District Committee of BCDA and BCDA itself.
21. **Alkem and its officials Shri B.N. Singh, Shri Sanjoy Banerjee, Shri Hitesh Mehta, and Shri Kaushik Deb**
- 21.1 With regard to the appointment of stockists by Alkem, the DG first approached M/s Subha Medical Agency, one of the stockists appointed by Alkem in 2014 for Murshidabad District. Alkem had issued OLS to M/s Subha Medical Agency on 11.09.2014 which stated that “... we have no objection to give you an appointment as a stockist for our products provided you get necessary clearance.” However, it commenced supplies to it only from 18.03.2016 after M/s Subha Medical Agency got the SAI from BCDA on 09.02.2016. In this regard, when asked by the DG as how did it get ‘necessary clearance’, M/s Subha Medical Agency stated it had to obtain SAI from BCDA as ‘necessary clearance’ after paying a sum of INR 13,000/- to get supplies from Alkem. From the same, it is evident that M/s Subha Medical Agency had to procure SAI from BCDA before Alkem commenced supplies. Though Alkem has argued that delay in making supply to M/s Subha Medical Agency was on account of non-submission



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of documents by it till 11.03.2016, the Commission notes that M/s Subha Medical Agency had stated before the DG that one of the documents submitted by it on 11.03.2016 was in fact the circulation letter from BCDA (SAI). Further, the Commission notes that M/s Subha Medical Agency, being a third party to the present matter, would have no reason to lie about submission of BCDA Circulation Letter to Alkem or their insistence upon obtaining the same before commencing supplies. Thus, it is clear that M/s Subha Medical Agency was forced to obtain SAI from BCDA before Alkem commenced making supplies of drugs to it. It is inconsequential that Alkem has been continuously making such supplies to M/s Subha Medical Agency henceforth and has received no complaints from it.

21.2 Similarly, with respect to the appointment of M/s Manorama Medical Stores as stockist of Alkem in Murshidabad District, the DG made enquiries from M/s Manorama Medical Stores. M/s Manorama Medical Stores was appointed as stockist by Alkem *vide* OLS dated 11.09.2014. However, supplies to it commenced only from 25.01.2016 after it first got a SAI from BCDA on 18.01.2016. M/s Manorama Medical Stores, when enquired by the DG, stated that it had to obtain SAI from BCDA as 'necessary clearance' after paying a sum of INR 13,000/- to get supplies from Alkem. From the same, the Commission notes that it is again evident that M/s Manorama Medical Stores had to procure SAI from BCDA before Alkem commenced making supplies to it. Though Alkem has argued that delay in making supply to M/s Manorama Medical Stores was on account of a new OLS being issued to it on 15.07.2015, the fact of the matter is that supplies to M/s Manorama Medical Stores commenced only on 25.01.2016 after it got SAI from BCDA on 18.01.2016 (even after around 6 months of alleged new OLS). Thus, it is clear that M/s Manorama Medical Stores was forced to obtain SAI from BCDA before Alkem commenced making supplies of drugs to it.

21.3 In fact, apart from the aforesaid evidences, M/s Manorama Medical Stores has also provided to the DG a copy of a letter dated 01.09.2014 written by Alkem to the District Secretary of Murshidabad District Committee of BCDA, the contents whereof stated that "*Please treat this application as a prayer letter for appointing*



a new stock point at Murshidabad District. I shall be highly obliged for your doing the needful.” When the DG confronted Shri Sanjoy Banerjee, General Manager of Alkem, the writer of the letter with the letter, he stated that *“this letter was written in exceptional circumstances”* to use BCDA *“to create pressure”* and to *“send a message ... defaulting stockists”*. Alkem has also argued before the Commission that the said letter was written with the strategic intent to create pressure on the two existing stockists of Alkem who were in default of certain payments. The Commission however, notes that the argument put forth by Alkem has no merit. From the language of the letter, it is clear that Alkem had written to the BCDA seeking approval for appointment of a new stock point in the District of Murshidabad, though the same may or may not have been M/s Manorama Medical Stores. Thus, such letter, with its clear and unambiguous language, when seen in the light of proximity of the other evidences available on record, is self-explanatory and the rationale projected by Alkem appears to be an afterthought and not plausible.

- 21.4 Even Shri Saiful Islam Biswas, Shri Nikhilesh Mondal, and Shri Bajlur Rahaman, erstwhile office-bearers of Murshidabad District Committee of BCDA have categorically accepted before the DG that when approached by a stockist, the District Executive Committee made a recommendation to the State Committee, based on which, BCDA issued a Circulation Letter in favour of the stockist. Apparently, such recommendation was issued by the District Committee only after receiving a monetary consideration in the form of donation from the stockist. Without such recommendation, no SAI was issued, and without SAI, no supplies by Alkem were made. Thus, effectually, in order to obtain supplies from Alkem, the stockists had to pay money to the BCDA and obtain SAI from it.
- 21.5 Further, with regard to grant of OLS to M/s Siddheshwari Medical Hall by Alkem, the Commission notes that OLS was given to M/s Siddheshwari Medical Hall on 28.02.2015 stating that *“... we have no objection in giving you the stockistship provided you get necessary clearance from the required authorities”*. Thereafter, on 10.08.2015, after 6 months of issuing the OLS, Alkem changed its stand and communicated to M/s Siddheshwari Medical Hall that *“... we would like to inform you that currently the generic products of the company are*



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sufficiently distributed through the existing network of distributors of Alkem available in the region. Additional stockist in the region to which you have shown your interest has been internally assessed and examined on commercial and economic parameters and viability thereof and pursuant to such analysis, it appears an unproductive proposition for Alkem to add a new stockist for the time being. The existing network of distributors are efficiently catering to the requirements/ needs of Alkem. We are therefore, not in the immediate need of expanding our distributors base ...”. However, supplies to M/s Siddheshwari Medical Hall were started by Alkem from 27.01.2016.

- 21.6 In this regard, the DG recorded the statement of Shri Kausihik Mallick, Proprietor of M/s Siddheshwari Medical Hall. He stated that he had submitted all the requisite documents to Alkem on 08.06.2015. However, ‘necessary clearance’ in the letter of Alkem, as per practice, meant NOC/ Approval from BCDA. Thus, he had to apply for such NOC to the Burdwan District Committee of BCDA. However, the Burdwan District Committee refused to accept such letter from Shri Mallick so he had to make a request in this regard to them verbally. He stated that though he had submitted all the other requisite documents to Alkem, since he could not arrange a positive response from BCDA, Alkem cancelled its stockistship on the pretext of adequate dealer network. Further, as per IP-2, later, when M/s Siddheshwari Medical Hall escalated the issue before various authorities, only then Alkem started supplies to M/s Siddheshwari Medical Hall on 27.01.2016. In their cross-examinations by Alkem, Shri Kausihik Mallick and IP-2 have stood by their statements though Alkem argued that there have been a few minor contradictions in their stories.
- 21.7 Though Alkem suggested that M/s Siddheshwari Medical Hall had, in its letter dated 19.01.2016, addressed to Alkem acknowledged that its previous order be cancelled on account of not being able to submit FSSAI License *etc.*, the Commission notes that M/s Siddheshwari Medical Hall, when asked about such letter by the DG, had replied that such letter was submitted as per demand of Alkem only. Further, the Commission notes that despite issuing such letter by M/s Siddheshwari Medical Hall, since in the meanwhile IP-2 had raised the grievance of M/s Siddheshwari Medical Hall before various authorities like



NPPA and the Competition Commission, Alkem started supplies to M/s Siddheshwari Medical Hall from 27.01.2016 without the requirement of FSSAI License. Be that as it may, the supplies to be made to Alkem were of pharmaceutical drugs and not of food products. Thus, non-submission of FSSAI License by it may have been of no consequence. Further, though Alkem has averred that since it received no communication from M/s Siddheshwari Medical Hall for 3 months' post issuance of OLS, it cancelled their appointment on 08.06.2015 itself (when Shri Kaushik Mallick had allegedly given documents to Alkem) and thereafter, it only reiterated such cancellation on 10.08.2015, the Commission observes that once cancellation was done by Alkem *vide* letter dated 08.06.2015 allegedly, there arose no reason for Alkem to reiterate such cancellation *vide* another communication dated 10.08.2015.

21.8 The Commission also takes note of the fact that the DG has observed that during the same period when Alkem cancelled the stockistship of M/s Siddheshwari Medical Hall on account of adequate dealer network in the region, it had appointed one other M/s Dutta Syndicate as its stockist in the region. This M/s Dutta Syndicate had a letter in its favour issued from BCDA. In this regard, Alkem has argued before the Commission that M/s Dutta Syndicate was appointed as a stockist by Alkem for a region (Kalna) other than that for which M/s Siddheshwari Medical Hall had applied. In view of the Commission, even if such argument proposed by Alkem is taken to be true at its face value, yet the same does not explain the fact as to why Alkem, issued cancellation letters to M/s Siddheshwari Medical Hall, one after the other or as to why Alkem eventually started making supplies to M/s Siddheshwari Medical Hall *w.e.f.* 27.01.2016 though it had no requirement of an additional stockist in the region for which M/s Siddheshwari Medical Hall had applied.

21.9 Therefore, in light of such evidences, the Commission is of the view that Alkem was forcing M/s Siddheshwari Medical Hall to obtain SAI from BCDA before Alkem commenced making supplies of drugs to it. However, since in the meanwhile M/s Siddheshwari Medical Hall requested another Chemists and Druggists Association in the State of West Bengal *viz.* PTAB on 14.05.2015 for issuance of such SAI, which in turn raised the issue before legal authorities like



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the Competition Commission, Alkem, without insisting for SAI, started making supplies to M/s Siddheshwari Medical Hall from 27.01.2016.

21.10 Apart from the above three specific instances, the DG has also collected details regarding appointment of all other new stockists by Alkem in 2014-15 (till July 2015 when the practice of issuing OLS was discontinued by Alkem). The information collected by the DG regarding the dates on which OLSs were issued by Alkem to the stockists, the dates on which they obtained circulation letters from BCDA and the dates on which Alkem commenced supplies commenced to them, are tabulated as follows:

S. No.	Name of Stockist	Date of OLS	Date of Circulation Letter by BCDA	Date of Invoice of first supply
1.	M/s Subha Medical Agency	11.09.2014	09.02.2016	18.03.2016
2.	M/s Manorama Medical Stores	11.09.2014	18.01.2016	25.01.2016
3.	M/s Dutta Syndicate	14.02.2015	01.12.2015	05.12.2015
4.	M/s Anima Enterprise	04.05.2015	01.06.2016	09.06.2016
5.	M/s Ghosh Drug Agency	04.02.2015	22.02.2015	04.03.2015
6.	M/s S.P Medicine	08.01.2015	10.02.2015	02.04.2015
7.	N.R Pharmaceuticals Pvt. Ltd.	04.03.2015	13.04.2015	06.05.2015
8.	M/s Dokania Medicine	06.05.2015	24.06.2015	21.08.2015

21.11 From the above, it can be seen that not only in the case of M/s Siddheshwari Medical Hall, but rather in cases of all new stockists appointed in 2014-15, Alkem started its first supply to its new stockists only after BCDA issued the circulation letter to them declaring that they have been appointed as a stockist of Alkem. The obvious implication drawn is that the phrase ‘necessary clearance’ in the OLSs issued by Alkem meant NOC from BCDA.

21.12 It has also come out in the investigation that BCDA obtained no verification from Alkem regarding appointment of such stockists before issuing such circulation letters to them. The circulation letters of BCDA simply stated that “to enable to publish your appointment as ALKEM LABORATORIES LTD. stockist in the OUSHADH-O-PRASADHANI/ Journal of BCDA, please deposit a sum of Rs. 100/- as circulation charges”. Moreover, it has come out in the investigation that Alkem, despite knowing that BCDA was issuing such circulation letters and thereafter publishing such appointment in their journal, never objected to the



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BCDA for publishing such information without prior verification. Shri Hitesh Mehta, Regional Distribution Manager of Alkem, in his statement on oath before the DG has accepted that “*we receive the Journal from the BCDA and verify the correctness of contents related to our company*”. It is not the case of Alkem or even argued by BCDA that while applying for such circulation letter/ SAI from BCDA, the stockist(s) used to give a copy of the OLS issued by the pharmaceutical company to BCDA and therefore, no verification in this regard was required. In view of the Commission, since it is not the case of the parties that the circulation letters were issued by BCDA on the basis of OLS granted by pharmaceutical company to the stockist(s), and since Alkem despite having knowledge that such publication of names of new stockists takes place in the BCDA journal without any prior verification from Alkem never objected to the same, the only inference that can be drawn is such verification was not done because both Alkem and BCDA were aware that such circulation letters issued by BCDA to the stockist(s) which were to be given to Alkem by the stockist alongwith other requisite documents and thereafter publication in Ousadh-O-Prasadhani/ Journal of BCDA was a camouflaged NOC for starting the supplies and this camouflaged practice was to avoid the ire of regulatory bodies such as the Commission.

21.13 Such practice being in vogue has even been accepted by the office bearers Shri Saiful Islam Biswas, Shri Bajlur Rahaman and Shri Nikhilesh Mondal of Murshidabad District Committee of BCDA. Though Alkem has argued that statements of these office bearers should not be given much weightage as they are erstwhile office bearers of Murshidabad District Committee of BCDA, the Commission does not find much merit in such argument put forth by Alkem in light of the other factual documentary evidences gathered during the course of investigation.

21.14 Though Alkem has raised several other arguments imputing *mala fide* conduct by IP-2, the Commission is of the view that an Informant is only an information provider and a challenge to his credibility, does not have much bearing on the merits of a case, especially when the DG during investigation has been able to collect sufficient evidences against the contravening party.



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21.15 Consequently, in light of the above evidences, the Commission finds that Alkem, after issuing OLS to prospective stockists, in agreement with BCDA, was indulging in the practice of demanding SAI/ NOC/ Approval Letter/ Circulation Letter from BCDA before commencing supplies. This constitutes an anti-competitive agreement between Alkem and BCDA. AAEC as a result of such NOC/ SAI practice has already been noted by the Commission in the earlier part of the present order. Absence of any 'economic motive' on part of Alkem to enter into such agreement does not afford an adequate defence to Alkem for engaging in such anti-competitive conduct. Thus, for indulging into such agreement, the Commission holds Alkem guilty of contravention of the provisions of Section 3 (1) of the Act.

21.16 The Commission observes that Section 3 (1) is the main provision and can be applied independently of Section 3 (3) or Section 3 (4) of the Act. It prohibits all kinds of 'anti-competitive agreements' and is not limited to or exhausted by Section 3 (3) or Section 3 (4) of the Act. Section 3 (1) of the Act states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India. Section 3 (2) declares any agreement entered into in contravention of the provisions contained in sub-section (1) as void.

21.17 Section 3 (3) states that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding shall be presumed to have an AAEC. It is further provided in this sub-section that an agreement entered into by way of joint



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ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services is exempted from the applicability of this sub-section.

- 21.18 Further, Section 3 (4) states that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal and (e) resale price maintenance, shall be an agreement in contravention of Sub-Section (1) if such agreement causes or is likely to cause an AAEC in India.
- 21.19 Thus, from a conjoint reading of the aforesaid provisions of Section 3 of the Act, it is evident that Section 3 (1) is the *genus* and Section 3 (3) and 3 (4) are *species* thereof. Therefore, Section 3 (1) can be applied independently of Section 3 (3) or Section 3 (4) of the Act.
- 21.20 Further, in light of the judgments of the Hon'ble Delhi High Court in *Cadila Healthcare Limited and Another v. Competition Commission of India and Others*, 252 (2018) DLT 647 and *Pran Mehra v. Competition Commission of India and Another*, W.P. (C) Nos. 6258, 6259 and 6669 of 2014 decided on 26.02.2015, the argument of Alkem regarding the proceedings against its individuals being premature, does not hold good.
- 21.21 The DG has found Shri B.N. Singh, Executive Chairman of Alkem, liable for the contravening conduct of Alkem, in terms of Section 48 (1) of the Act. However, Alkem has argued that such contravention, if any, was committed by the company without the knowledge of Shri B.N. Singh as he was neither involved in the stockist appointment process of Alkem nor involved in the day to day field work of the company. In light of such contention, the Commission does not find Shri B.N. Singh to have contravened the provisions of the Act.
- 21.22 Further, the DG has found Shri Sanjoy Banerjee, Senior General Manager of Alkem, Shri Hitesh Mehta, Regional Distribution Manager of Alkem, and Shri Kaushik Deb, Zonal Sales Manager of Alkem liable in terms of Section 48 (2) of the Act. It has come out in the investigation that Shri Sanjoy Banerjee was the



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one who has signed the OLSs issued on behalf of Alkem issued to M/s Subha Medical Agency, M/s Manorama Medical Stores and he was the one who had written the letter dated 01.09.2014 on behalf of Alkem to the District Secretary of Murshidabad District Committee of BCDA. Though Alkem has argued that Shri Banerjee was not involved in the process of appointment of stockists by Alkem, the Commission has evidence indicating otherwise. With regard to the role of Shri Hitesh Mehta, the investigation has found that M/s Subha Medical Agency had submitted the SAI/ NOC obtained from BCDA to him, that he had issued OLS to M/s Siddheshwari Medical Hall and that he was the one who had issued the cancellation letter to M/s Siddheshwari Medical Hall. With regard to the role of Shri Kaushik Deb, the investigation has found that he was the one who had verbally assured M/s Siddheshwari Medical Hall, Burdwan that an additional stockist in Burdwan was required by Alkem. Further, investigation has also found that they both infact had also insisted that M/s Siddheshwari Medical Hall procures a SAI/ NOC from BCDA for commencing supplies by Alkem. Therefore, in terms of Section 48 (2) of the Act, the Commission finds Shri Sanjoy Banerjee, Shri Hitesh Mehta, and Shri Kaushik Deb, liable for contravention of the provisions of the Act by their company Alkem.

22. Macleods and its officials Shri Rajendra Agarwal, Shri Rajeev Mishra, Shri Subrata Sadhukhan, and Shri Pradipta Dhar

22.1 With regard to the appointment of stockists by Macleods, the DG first of all examined IP-3 on oath. IP-3 stated that it was issued OLS by Macleods on 07.04.2014 which stated that “*You are requested to fulfil the formalities and tender the same to us for speedy execution*”. As per prevalent practice, IP-3 had to procure the usual SAI/ NOC/ approval from BCDA to fulfil the ‘formalities’. Though IP-3 tried to get the SAI/ NOC from BCDA, it could not get the same and accordingly, its OLS was cancelled by Macleods *vide* letter dated 16.08.2014. However, IP-3 continued its efforts to obtain SAI/ NOC.



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- 22.2 On 28.03.2016, IP-3 contacted Shri Subodh Kumar Ghosh, General Secretary of BCDA over telephone regarding the same (relevant extracts reproduced above at Para 20.5) and thereafter, Shri Ghosh issued SAI/ NOC to IP-3 on 29.03.2016.
- 22.3 On 30.03.2016, IP-3 gave this information to Shri Pradipta Dhar and Shri Subrata Sadhukan of Macleods over telephone. The audio recordings and transcripts of such phone calls were also submitted by IP-3. The relevant extracts of such telephonic conversations are as follows:

IP-3 and Shri Pradipta Dhar

“Pradipta Dhar: Have you got the SAI?”

IP-3: Yes. We got it yesterday.

Pradipta Dhar: Oh, yesterday. So, you will get it. I shall send it by Sumanta what you require for a new stockist appointment. He will return tomorrow.

IP-3: that's not an urgent issue. I just ask.

Pradipta Dhar: I was with the papers. I also asked Sumanta about that. He said negative. I had to come yesterday for today's meeting.

IP-3: Shall I start my business with SAI copy and other papers?”

Pradipta Dhar: Yes. Definitely and the requirements are given therein. I have made it ready. No problem.

...

IP-3: You are bound to do the cancellation.

Pradipta Dhar: That's not at all a problem. You have already got SAI?

IP-3: Yes. The previous offer letter was cancelled and afterwards got SAI. So, I was puzzled and thoughtful.”

IP-3 and Shri Subrata Sadhukan

“IP-3: Yes. Joydev da speaking. We went to the State Office yesterday.

Subrata Sadhukan: Yes.

IP-3: Paper are given by them. I mean SAI.

Subrata Sadhukan: Oh.

IP-3: What is the next processing dada?”

...

Subrata Sadhukan: I shall return tomorrow morning. Do you know Liton?

IP-3: Yes, I know Liton.

Subrata Sadhukan: I shall give the format to you by this Liton's hand. You return this by one or two days after making ready the papers. All system shall start within 7 days.



IP-3: What else documents I have to give except SAI?
Subrata Sadhukan: Bio Data Format etc. Name of the firm
IP-3: Drug License, Trade License I know that.
Subrata Sadhukan: Yes. Yes. And a signature.
IP-3: What signature?
Subrata Sadhukan: You shall get a format from me. For the easy process of bank. I shall send you a specimen copy for your benefit.
IP-3: Do the SAI need?
Subrata Sadhukan: You can give me the photocopy of this or the original.
IP-3: We have got one copy only. Probably Subodh da shall give another copy to you.
Subrata Sadhukan: Ok. I shall talk to Subodh da later on. You shall give me the photocopy.”

22.4 Accordingly, SAI/ NOC alongwith other required documents were collected by Shri Liton Das of Macleods from IP-3 on 02.04.2016. At the time of collecting the documents, Shri Liton Das gave a ‘format’/ checklist to IP-3 which was signed by him in acknowledgement. The contents of the same are reproduced below:

- REQUIRED DOCUMENTS FOR NEW STOCKIST APPOINTMENT**
1. Bio Data Format in company format ✓
 2. Recommendation format from csa.(Not Required from stockist) ✗
 3. Recommendation from RSM,s.(Not Required from stockist) ✗
 4. NOC copy from the association ✓
 5. Drug Licences copy with renewal receipt copy. ✓
 6. Pan card copy of authorized signatory and Pan card copy of the Firm ✓
 7. Signature verification from the Banker in Bank,s letter head of the authorized signatory who will be signing the payment cheque or whose signature will be there in the blank warranty cheque. ✓
 8. Deed of partnership photocopy (if the firm is a partnership firm) ✗
 9. Copy of Memorandum of Article if the firm is registered as Limited company. ✗
 10. Two cheque in the name of " [Redacted] " ✓
 11. Invoice copy of other company in original [Redacted]
 12. [Redacted]

All documents are received are Xerox copy only. Bio data format are original and important. We received 2 cheques (Blank & Mc Payee on Pharma Centre name). The cheque details: State Bank of India, Cheque no. - {204716, 204717}

Seen only - Subrata Sadhukan 20.07.17

Exhibit - 2 "X" → [Signature] 02/04/2016

Exhibit - II [Signature] 09/11/2016



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- 22.5 Thereafter, supplies from Macleods commenced in favour of IP-3 from 22.04.2016.
- 22.6 In support of the telephonic conversations and their transcripts given by IP-3, he also submitted Certificates in terms of Section 65B of the Indian Evidence Act, 1872. Though Macleods has challenged the veracity of these telephonic conversations submitted by IP-3, the Commission is of the view that in light of the statements on oath given by the concerned persons admitting their voices on the recordings and in the absence of any specific denial by them that these conversations did not ever take place, there seems to be no legal hurdle to the admissibility of these telephonic conversations as evidence. The transcripts of the documents are also supported by a Certificate in terms of Section 65B of the Indian Evidence Act, 1872, of IP-3.
- 22.7 Further, the Commission notes that in his cross-examination, IP-3 has firmly stood his ground and Macleods could not disprove his veracity or credibility. Though Macleods has alleged *mala fide* on part of IP-3 by stating that his filing of information against Macleods was an act of revenge, the Commission, after perusing the statement and cross-examination statement of IP-3 does not find merit on this count.
- 22.8 The Commission also notes that though the list given by Shri Liton Das to IP-3 may not be on the letterhead of Macleods, it has been signed by Shri Liton Das, an employee of Macleods. In view of the Commission, it is highly unlikely that Macleods would be propagating such an illegal practice of SAI/ NOC against specific orders of the Commission in the past, on its official letterhead.
- 22.9 Thus, it stands established from the evidence on record that at the time of issuing OLS to IP-3 by Macleods, it was asked to 'fulfil the formalities' which included obtaining NOC/ SAI from BCDA. To procure such SAI, IP-3 contacted Shri Subodh Kumar Ghosh, General Secretary of BCDA. After procurement of SAI from him, IP-3 informed about the same to Shri Pradipta Dhar and Shri Subrata Sadhukan of Macleods *via* telephone. To receive the SAI and other documents from IP-3, Shri Subrata Sadhukan sent one Shri Liton Das/ Liton Saha to collect the documents (including SAI) from IP-3 who, *in lieu* of collecting the documents



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from IP-3, gave him a checklist, item no. 4 of which is “*NOC from the association*” against which a tick mark has been put. Only thereafter, Macleods commenced supplies of pharmaceuticals to IP-3 from 22.04.2016.

22.10 Apart from the above, the DG also collected details regarding appointment of other new stockists by Macleods in 2014-15. The information collected by the DG regarding the dates on which OLSs were issued by Macleods to the stockists, the dates on which they obtained circulation letters from BCDA and the dates on which Macleods commenced supplies commenced to them, are tabulated as follows:

S. No.	Name of Stockist	Date of OLS	Date of Circulation Letter by BCDA	Date of Invoice of first supply
1.	M/s. Konar’s Medical Stores	20.12.2014	29.01.2015	13.02.2015
2.	M/s. Vivekanand Agency	31.12.2014	29.01.2015	13.02.2015
3.	M/s. Medicine Centre Agency	23.12.2014	29.01.2015	13.02.2015
4.	M/s. Paul Brothers	03.04.2015	13.04.2015	30.05.2015
5.	M/s. A.C Distributors	11.08.2014	12.05.2015	27.11.2014
6.	M./s. Reliable Pharmaceuticals	07.04.2015	16.04.2015	30.05.2015
7.	M/s. Satabdi Pharma	28.01.2015	24.03.2015	30.05.2015
8.	NU Sri Shyam Pharmaceuticals Pvt. Ltd.	16.05.2015	05.06.2015	31.07.2015
9.	M/s. Disa Enterprise	16.05.2015	30.05.2015	31.07.2015
10.	M/s. Rajasthan Drug House	26.05.2015	14.09..2015	23.11.2015

22.11 From the above, it can be seen that not only in the case of IP-3, but rather in cases many other new stockists appointed in 2014-15 in various Districts, Macleods started its first supply to its new stockists only when BCDA issued the circulation letter to them declaring that they have been appointed as a stockist of Macleods. The obvious implication drawn is that the phrase ‘fulfil the formalities’ in the OLSs issued by Macleods meant SAI from BCDA.

22.12 It has also come out in the investigation that BCDA obtained no verification from Macleods regarding appointment of such stockists before issuing such circulation letters to them. The circulation letters of BCDA simply stated that “*to enable to publish your appointment as MACLEODS PHARMACEUTICALS LTD. stockist in the OUSHADH-O-PRASADHANI/ Journal of BCDA, please deposit a sum of Rs. 100/- as circulation charges*”. Moreover, it has come out in the investigation



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that Macleods, despite knowing that BCDA is issuing such circulation letters and thereafter publishing such appointment in their journal, never objected to the BCDA for publishing such information without prior verification. This is clear from the statement of Shri Rajeev Mishra, Senior Vice-President of Macleods recorded before the DG. It is not the case of Macleods or even argued by BCDA that while applying for such circulation letter/ SAI from BCDA, the stockist(s) used to give a copy of the OLS issued by the pharmaceutical company to BCDA and therefore, no verification in this regard was required. In view of the Commission, since it is not the case of the parties that the circulation letters were issued by BCDA on the basis of OLS granted by pharmaceutical company to the stockist(s), and since Macleods despite having knowledge that such publication of names of new stockists takes place in the BCDA journal without any prior verification from Macleods never objected to the same, the only inference that can be drawn is that such verification was not done because both Macleods and BCDA were aware that the circulation letters issued by BCDA to the stockists which were to be given to Macleods by the stockist alongwith other requisite documents and thereafter publication in Ousadh-O-Prasadhani/ Journal of BCDA was a camouflaged NOC for starting the supplies and this camouflaged practice was to avoid the ire of regulatory bodies such as the Commission.

22.13 Further, Macleods has argued that while NOC/ SAI may have been submitted by a few stockists to it before commencement of supplies to them, it had appointed a very large number of stockists in the State of West Bengal without them having any NOC/ SAI in their favour as well. The Commission however, is of the view that a few instances of demanding SAI/ NOC by Macleods by themselves, are sufficient to conclude that Macleods was engaging into such practice.

22.14 As stated above, such practice being in vogue has also been accepted by the office bearers Shri Saiful Islam Biswas, Shri Bajlur Rahaman and Shri Nikhilesh Mondal of Murshidabad District Committee of BCDA. It has even come out in the investigation that as a result of such practice, people of rural areas were getting affected. They were inconvenienced as supply of medicines to them was affected. In such light, the arguments put forth by Macleods with regard to no such practice being prevalent stands negated.



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- 22.15 Consequently, in light of the above evidences, the Commission finds that Macleods, after issuing OLS to prospective stockists, in agreement with BCDA, was indulging in the practice of demanding SAI/ NOC/ Approval Letter/ Circulation Letter from BCDA before commencing supplies. This constitutes an anti-competitive agreement between Macleods and BCDA. AAEC as a result of such NOC/ SAI practice prevailing in the pharmaceutical market in the State of West Bengal has already been noted by the Commission in the earlier part of the present order. Absence of any 'economic motive' on part of Macleods to enter into such agreement does not afford adequate defence to Macleods for engaging in such anti-competitive conduct. Thus, for indulging into such agreement, the Commission holds Macleods guilty of contravention of Section 3 (1) of the Act.
- 22.16 Though Macleods has tried to set up a case that such unauthorised acts by its junior employees, if any, were without the permission of the company and against the company's directives, such argument cannot be given much weightage as it is highly unlikely that junior employees may have carried on such practice of demanding NOC/ SAI for almost an year, without knowledge of the company.
- 22.17 With regard to such individuals of Macleods, the DG has found Shri Pradipta Dhar, Zonal Sales Manager and Shri Subrata Sadhukan, Deputy Sales Manager, alongwith Shri Rajeev Mishra, Senior Vice-President, Field Operations and Sales Administration of Macleods, liable in terms of Section 48 (2) of the Act. It has come out in the investigation that Shri Pradipta Dhar and Shri Subrata Sadhukan had telephonic conversations with IP-3 regarding submission of SAI. Shri Subrata Sadhukan also sent a letter dated 16.08.2014 to IP-3 stating that its OLS would soon be treated as cancelled. Though it has been argued that these two individuals are junior officers in Macleods and not Director, Secretary or other officer within the meaning of Section 48 (2) of the Act, the Commission, in light of their specific roles being proved in the anti-competitive conduct of Macleods, holds them guilty in terms of Section 48 (2) of the Act. Further, the Commission notes that the OLS dated 07.04.2014 was issued to IP-3 by Shri Rajeev Mishra and he had a direct role in the stockist appointment process. Further, from his statement recorded by the DG, it can be inferred that he was aware of the NOC/ SAI policy of BCDA being indulged into by Macleods. Therefore, the Commission also finds



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Shri Rajeev Mishra liable in terms of Section 48 (2) of the Act for the contravention of the provisions of the Act committed by Macleods.

22.18 Further, the Commission notes that the DG has found Shri Rajendra Agarwal, Managing Director of Macleods, liable for the contravening conduct of Alkem, in terms of Section 48 (1) of the Act. In the absence of any specific rebuttal on this count emerging from Macleods or Shri Agarwal and material demonstrating to the contrary, the Commission holds Shri Agarwal guilty of contravention of the provisions of the Act in terms of Section 48 (1) of the Act.

Conclusion:

23. In view of the above detailed analysis, the Commission holds BCDA and its District Committees of Murshidabad and Burdwan guilty of contravention of the provisions of Section 3 (3) (b) read with Section 3 (1) of the Act. Further, in view of the aforesaid analysis, the Commission also holds the pharmaceutical companies Alkem and Macleods to be guilty of contravention of the provisions of Section 3 (1) of the Act. Lastly, the Commission holds the following persons of BCDA, Alkem and Macleods liable in terms of Section 48 of the Act:

OP	PERSON
BCDA	Shri Subodh Kumar Ghosh, General Secretary
	Shri Saiful Islam, District Secretary of Murshidabad District Committee of BCDA
	Shri Nikhilesh Mondal, Treasurer of Murshidabad District Committee of BCDA
	Shri Bajlur Rahaman, Organising Secretary of Murshidabad District Committee of BCDA
Alkem	Shri Sanjoy Banerjee, Senior General Manager
	Shri Hitesh Mehta, Regional Distribution Manager
	Shri Kaushik Deb, Zonal Sales Manager
Macleods	Shri Rajendra Agarwal, Managing Director
	Shri Rajeev Mishra, Senior Vice-President, Field Operations and Sales Administration
	Shri Subrata Sadhukhan, Deputy Sales Manager, West Bengal
	Shri Pradipta Dhar, Zonal Sales Manager



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ORDER

24. The Commission, in terms of Section 27 (a) of the Act, directs the Opposite Parties BCDA, its District Committees of Murshidabad and Burdwan, their office bearers, pharmaceutical companies *viz.* Alkem and Macleods, and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act, as detailed in the earlier part of the present order.
25. Regarding penalty, the Commission notes that BCDA has been able to show that post the decision of the Commission in *Santuka Associates Pvt. Ltd. v. AIOCD and Others, 2013 Comp.L.R. 223 (CCI)*, it has taken several steps in the direction of ending the practice of requiring NOC/ SAI. In view of the Commission, taking of such steps by BCDA in the right direction, although not adequate, constitutes a mitigating factor against BCDA. Therefore, no penalty in terms of Section 27 (b) of the Act is being imposed on BCDA.
26. Further, though Alkem and Macleods have taken the plea before the Commission that they were indulging in the impugned conduct under threat/ duress/ directions from BCDA, in view of the Commission, this may not afford Alkem and Macleods an adequate defence for escaping the rigours of the competition law. However, keeping in mind such plea taken by Alkem and Macleods, the Commission decides not to impose any monetary penalty on Alkem and Macleods also.
27. However, in terms of Section 27 (g) of the Act, the Commission directs BCDA to conduct advocacy events by way of outreach activities with its District Committees/ Zone Committees and their office bearers, to impress upon them the need to comply with the provisions of the Act in letter and in spirit. Needless to add, the Commission would consider deputing its resource persons for such programmes, if any request in this regard is made by BCDA.



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28. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

New Delhi
Date: 12.03.2020

Sd/-
(Bhagwant Singh Bishnoi)
Member