



**COMPETITION COMMISSION OF INDIA**

**Case No. 65, 71, 72 of 2014 & 68 of 2015**

**Case No. 65 of 2014**

**In Re:**

**M/s. Alis Medical Agency**

**Informant No. 1/IP-1**

**And**

**Federation of Gujarat State Chemists & Druggists Associations OP-1**

**Amdavad Chemist Association OP-2**

**Cipla Ltd. OP-3**

**Galderma India Pvt. Ltd. OP-4**

**M/s. M.B. Enterprises OP-5**

**Lupin Ltd. OP-6**

**M/s. S.K. Brothers OP-7**

***With***

**Case No. 71 of 2014**

**In Re:**

**M/s. Stockwell Pharma**

**Informant No. 2/IP-2**

**And**

**Federation of Gujarat State Chemists & Druggists Associations OP-1**

**Surat Chemists & Druggists Association OP-2**

**Intas Pharmaceuticals Ltd. OP-3**

**M/s. M.B. Enterprises OP-4**

**Unichem Laboratories Ltd. OP-5**



<b>M/s. Shah Uni Agency</b>	<b>OP-6</b>
<b>Lupin Ltd.</b>	<b>OP-7</b>
<b>M/s. S.K. Brothers</b>	<b>OP-8</b>

*With*

**Case No. 72 of 2014**

**In Re:**

<b>M/s. Apna Dawa Bazar</b>	<b>Informant No. 3/IP-3</b>
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**And**

<b>Federation of Gujarat State Chemists &amp; Druggists Associations</b>	<b>OP-1</b>
<b>Shri V.T. Shah, President, Chemists &amp; Druggists Association of Baroda</b>	<b>OP-2</b>
<b>Alkem Laboratories Ltd.</b>	<b>OP-3</b>
<b>Aristo Pharmaceuticals Pvt. Ltd.</b>	<b>OP-4</b>
<b>Johnson and Johnson Pvt. Ltd.</b>	<b>OP-5</b>
<b>Kanchan Pharma Pvt. Ltd.</b>	<b>OP-6</b>
<b>Lupin Ltd.</b>	<b>OP-7</b>
<b>Glaxo Smith Kline Pharmaceuticals Ltd.</b>	<b>OP-8</b>
<b>M/s. S.K. Agencies</b>	<b>OP-9</b>
<b>Unison Pharmaceuticals Pvt. Ltd.</b>	<b>OP-10</b>
<b>M/s. K.B. Corporation</b>	<b>OP-11</b>

*With*

**Case No. 68 of 2015**

<b>M/s. Reliance Medical Agency</b>	<b>Informant No. 4/IP-4</b>
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**And**



<b>The Chemists &amp; Druggists Association of Baroda</b>	<b>OP-1</b>
<b>Shri V.T. Shah</b>	<b>OP-2</b>
<b>Shri Alpesh Z. Patel</b>	<b>OP-3</b>
<b>Abbott India Ltd.</b>	<b>OP-4</b>
<b>Abbott Healthcare Pvt. Ltd.</b>	<b>OP-5</b>
<b>Kanchan Pharma Pvt. Ltd.</b>	<b>OP-6</b>
<b>Mankind Pharma Ltd.</b>	<b>OP-7</b>
<b>Quality Life Sciences Pvt. Ltd.</b>	<b>OP-8</b>
<b>Novartis India Ltd.</b>	<b>OP-9</b>
<b>Dr. Reddy's Laboratories Ltd.</b>	<b>OP-10</b>
<b>USV Pvt. Ltd.</b>	<b>OP-11</b>
<b>M/s. SUA Agency</b>	<b>OP-12</b>
<b>Johnson &amp; Johnson Pvt. Ltd.</b>	<b>OP-13</b>
<b>Allergan India Pvt. Ltd.</b>	<b>OP-14</b>
<b>M/s. Aars AARS Agencies</b>	<b>OP-15</b>
<b>Astrazeneca Pharma India Ltd.</b>	<b>OP-16</b>
<b>M/s. Chimanlal Pharma</b>	<b>OP-17</b>
<b>Torrent Pharmaceuticals Ltd.</b>	<b>OP-18</b>
<b>M/s. Zeal Drugs &amp; Chemicals</b>	<b>OP-19</b>
<b>Alcon Laboratories India Pvt. Ltd.</b>	<b>OP-20</b>
<b>Parekh Integrated Services Pvt. Ltd.</b>	<b>OP-21</b>
<b>Glenmark Pharmaceutical Ltd.</b>	<b>OP-22</b>
<b>M/s. B.M. Thakkar &amp; Co.</b>	<b>OP-23</b>



<b>Systopic Laboratories Pvt. Ltd.</b>	<b>OP-24</b>
<b>M/s. Medico Agencies</b>	<b>OP-25</b>
<b>Meyer Organics Pvt. Ltd.</b>	<b>OP-26</b>
<b>M/s. F. Dinyar Pharma</b>	<b>OP-27</b>
<b>Cadila Healthcare Ltd.</b>	<b>OP-28</b>
<b>M/s. Rimi Distributors</b>	<b>OP-29</b>

### **CORAM**

**Mr. Devender Kumar Sikri**  
**Chairperson**

**Mr. Sudhir Mital**  
**Member**

**Mr. U. C. Nahta**  
**Member**

**Mr. Justice G.P. Mittal**  
**Member**

### **Appearances:**

Name of the Party  
M/s. Alis Medical Agency  
M/s. Stockwell Pharma  
M/s. Apna Dawa Bazar  
M/s. Reliance Medical Agency

Name of the Advocate  
Ms. Mansi Kukerja, Advocate, alongwith  
Shri Nayan Raval, Partner, M/s Apna Dawa Bazar  
and M/s. Reliance Medical Agency

Federation of Gujarat State  
Chemists and Druggists  
Association and  
Shri Jashvant P. Patel, President

Shri Alpesh Z. Patel, President, FGSCDA  
Shri Shantanu Srivastava, Advocate  
Shri Rajshekhar Rao, Advocate  
Ms. Gunjan Chowksey, Advocate  
Ms. Kruttika Vijay, Advocate

Amdavad Chemist Association

None

Surat Chemists and Druggists  
Association and  
Shri Pravin G. Vekariya, President

Ms. Gunjan Chowksey, Advocate  
Shri Shantanu Srivastava, Advocate



The Chemists and Druggists  
Association of Baroda,  
Shri V.T. Shah, President and  
Shri Alpesh Z. Patel, Secretary

Shri Anshul Narayan, Advocate  
Shri Prem Prakash, Advocate

Cipla Ltd.

Shri Adithya Jayaraj, Advocate

Galderma India Pvt. Ltd.

Shri Jayant Kumar, Advocate

Glaxo Smith Kline Pharmaceutical  
Ltd.  
Lupin Limited,  
Unichem Laboratories Ltd.,  
Alkem Laboratories Ltd. and  
M/s. Shah Uni Agency(C&F Agent  
of Unichem Laboratories Ltd.)  
Johnson and Johnson Pvt.Ltd.

Ms. Aditi Gopalakrishnan, Advocate

Shri Manas Chaudhuri, Advocate,  
Shri Sagardeep Rathi, Advocate,  
Shri Aman Singh Baroka, Advocate

Shri Aditya Narain, Advocate  
Shri Gaurav Sharma, Advocate  
Shri Mishra Raj Shekhar, Advocate  
Shri Arnav Narain, Advocate

Intas Pharmaceuticals Ltd.

None

Aristo Pharmaceuticals Pvt. Ltd.

None

Unison Pharmaceuticals Pvt. Ltd.

None

Abbott India Ltd. and  
Abbott Healthcare Pvt. Ltd.

Shri Akshat Kulshrestha, Advocate

Mankind Pharma Ltd., Ms. Sheetal  
Arora, Managing Director, and Shri  
Anuj Sharma, Deputy Group  
Manager

Shri Balbir Singh, Sr. Advocate  
Shri Ravisekhar Nair, Advocate  
Shri Parthsarathi Jha, Advocate  
Shri Abhishek, Advocate  
Shri Pratevsh Sharma, Advocate  
Ms. Krushika Nayan Choudhary, Advocate  
Shri Prateush Sharma, General Counsel  
Shri Ravi Kumar, Manager, Legal

Shri Avesh Makrani, Former  
Territory Manager, Mankind  
Pharma Limited

None

Novartis India Ltd. and  
Alcon Laboratories India Pvt. Ltd.

Shri Ravisekhar Nair, Advocate  
Shri Parthsarathi Jha, Advocate  
Ms. Krushika Nayan Choudhary, Advocate



Dr. Reddy's Laboratories Ltd.	Shri Subodh Prasad Deo, Advocate Shri Tanveer Verma, Advocate
USV Pvt. Ltd.	Ms. Kriti Priyadarshini, Advocate Shri Sachin Gupta, Advocate
Allergan India Pvt. Ltd. and Aars Agencies (C&F Agent of Allergan India Pvt. Ltd.)	Shri Vijay Pratap Singh Chauhan, Advocate
AstraZeneca Pharma India Ltd.	Shri G.R. Bhatia, Advocate Shri Rudresh Singh, Advocate Shri Samarth Shergil, Consultant
Torrent Pharmaceutical Ltd.	Shri Biju Samuel, AGM, SCM Shri Kripal Bisht, AGM, QRP
Glenmark Pharmaceuticals Ltd. Shri Glenn M. Salsanha, Managing Director, Shri Tapash Paul, Manager (Distribution), Shri Arun Poojari, Senior Manager (Distribution) and Shri V.S. Reddy, Vice President (Logistics and Distribution)	Shri Amit Sibal, Sr. Advocate Shri M. M. Sharma, Advocate Ms. Deepika Rajpal, Advocate Shri Sunil Miranda, GM, Legal Shri Dinkar Nigam, Manager, Legal
Quality Life Sciences Pvt. Ltd. (C&F Agent of Mankind Pharma Ltd.), Shri Yogesh Hingorani, Director, Quality Life Sciences Pvt. Ltd., M/s. B.M. Thakkar and Co. (C&F Agent of Glenmark Pharmaceuticals Ltd.) and Shri Dakshay Thakkar, Partner, M/s. B.M. Thakkar and Co.	Shri A.N. Haksar, Sr. Advocate Ms. Sitwat Nabi, Advocate Shri M. M. Sharma, Advocate Ms. Deepika Rajpal, Advocate Shri Anand Sree, Advocate Shri Aviral Shukla, Asst. Manager, Legal
Systopic Laboratories Pvt. Ltd.	None
Meyer Organics Pvt. Ltd.	Shri Anurag Tripathi, Advocate Shri Rahul Gupta, Advocate
Cadila Healthcare Ltd. (known as Zydus Cadila in trade parlance), Shri Pankaj R. Patel, Chairman and Managing Director, Shri Suryakant Dwivedi, Director., M/s. Rimi Distributors(C&F Agent of Cadila	Shri Krishnan Venugopal, Sr. Advocate Shri Rahul Goel, Advocate Shri Nitish Sharma, Advocate Shri Neeraj Lalwani, Advocate Ms. Anu Monga, Advocate Shri Srinivas Kotra, GM, Legal



Healthcare Ltd.) Shri Chirag M  
Patel, Partner, and Shri Dinesh  
Gajjar, Manager (Warehouse),

M/s. M.B. Enterprises (C&F Agent  
of Galderma India Pvt. Ltd. and  
Intas Pharmaceuticals Ltd.)

Shri Jayant Kumar, Advocate

M/s. S.K. Brothers (C&F Agent of  
Lupin Ltd.)

None

M/s. S.K. Agencies (C&F Agent of  
Lupin Ltd. and Glaxo Smith Kline  
Pharmaceuticals Ltd.)

None

Kanchan Pharma Pvt. Ltd. (C&F  
Agent of Johnson and Johnson  
Ltd.)

None

M/s. K.B. Corporation (C&F Agent  
of Unison Pharmaceuticals Pvt.  
Ltd.)

None

M/s. S.U.A Agency (C&F Agent of  
USV Ltd.)

None

M/s. Chimanlal Pharma (C&F  
Agent of AstraZeneca Pharma India  
Ltd.)

None

M/s. Zeal Drugs and Chemicals  
(C&F Agent of Torrent  
Pharmaceuticals Ltd.)

Shri Mehul Kapadia, Director

Parekh Integrated Services Pvt. Ltd.  
(C&F Agent of Alcon Laboratories  
India Pvt. Ltd.)

None

M/s. Medico Agencies (C&F  
Agent of Systopic Laboratories Pvt.  
Ltd.)

None

M/s. F. Dinyar Pharma (C&F  
Agent of Meyer Organics Pvt. Ltd.  
at Vadodara)

Shri Anurag Tripathi, Advocate



Hetero Healthcare Ltd., Shri M.  
Srinivas Reddy, Managing  
Director, and Shri Bharat Pandya,  
Regional Manager

Ms. Saurabhi, Advocate  
Shri Ranjit Raut, Advocate  
Shri Jayant Mehta, Advocate  
Shri P.C. Khasgiwal, Vice President

Divine Savior Pvt. Ltd. and Shri  
Rakesh Shah, Director

Shri Anshul Narayan, Advocate

### **Order under Section 27 of the Competition Act, 2002**

#### **Facts, in brief**

1. The matter relates to four separate informations filed by four different Informants, *namely* M/s. Alis Medical Agency (Case No. 65/2014) (hereinafter, IP-1), M/s. Stockwell Pharma (Case No. 71/2014) (hereinafter, IP-2), M/s. Apna Dawa Bazar (Case No. 72/2014) (hereinafter, IP-3) and M/s. Reliance Medical Agency (Case No. 68/2015) (hereinafter, IP-4), who were the registered dealers of pharmaceutical products and were engaged in the business of distribution of medicines in the State of Gujarat. The Informants were aggrieved because of the rampant practice of requiring a No Objection Certificate (NOC) from the local chemists and druggists association by the pharmaceutical companies in the State of Gujarat, prior to appointment of new stockists allegedly enforced by the District Level Chemists and Druggists Associations and their parent body, the Federation of Gujarat State Chemists & Druggists Association (arraigned as OP-1 to OP-4). Certain pharmaceutical companies were also impleaded by the Informants as these companies allegedly denied supply of drugs/products to the Informants solely because they were not able to obtain an NOC from the concerned chemists and druggists associations.
2. Cases No. 65/2014, 71/2014 and 72/2014 were filed around the same time. The Commission, on the basis of the material placed on record, was *prima facie* of the opinion that the Opposite Parties have indulged in anti-competitive conduct under the umbrella of OP-1, and have thus, contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act, 2002 ('Act').





Since these cases involved similar facts and allegations, they were sent to the Director General ('DG') for detailed investigation, *vide* a common order dated 29<sup>th</sup> December, 2014, passed under Section 26(1) of the Act.

3. Case No. 68/2015, filed by M/s. Reliance Medical Agency, was filed later, but contained similar issues as were alleged in the three previous cases. The Commission, after perusing the material on record, clubbed the information in Case No. 68/2015 with Cases No. 65, 71 and 72/2014, *vide* order dated 17<sup>th</sup> November, 2015, passed under Section 26(1) of the Act and sent this matter as well to the DG for investigation.
4. The DG, after seeking requisite extensions, submitted a joint investigation report in all the four (04) cases on 03<sup>rd</sup> May, 2017. The observations and findings of the DG are elucidated in the following paragraphs.

#### **Observations and Findings of the DG**

5. In order to investigate into the matter, the DG issued probe letters to all the Opposite Parties ('OPs') and the Informants to collect additional information/documents. Notices/ summons were also issued to the representatives of various pharmaceutical companies and their statements were recorded to examine the veracity of the allegations levelled by the Informants. Further, statements of the partners of the Informants, the OPs, the Distributors/ Stockists and several third parties were also recorded.
6. The DG investigated the conduct of the Federation of Gujarat State Chemists and Druggists Association (hereinafter, the '**Federation**'/'**OP-1**'), Amdavad Chemist Association (hereinafter, '**OP-2**'), Surat Chemists and Druggists Association (hereinafter, '**SCDA**'/'**OP-3**') and the Chemists and Druggists Association of Baroda (hereinafter, '**CDAB**'/'**OP-4**') to determine whether they were mandating the requirement of an NOC prior to the appointment of stockists.



7. Further, the DG also examined the allegations made against the pharmaceutical companies, *i.e.* whether they refused to supply pharmaceutical products to the Informants for want of NOC.
8. The DG observed that sub-clause (a) of Clause 28 of the Drugs (Price Control) Order, 2013 (hereinafter, 'DPCO, 2013') creates an obligation on a pharmaceutical company/ distributor to sell drugs/ medicines *unless* there is a 'good and sufficient reason' to refuse sale. The DG also relied upon the decision of the Hon'ble Kerala High Court in *Suresh Lal. R. v. The Drugs Controller of Kerala & Ors.* [(2011) 1 KW 653] wherein it was held that if a manufacturer or distributor has good and sufficient reasons, they are entitled to refuse sale of their products to a wholesaler or retailer. It was further held that there is no provision under the Drugs and Cosmetics Act, 1940 or the Essential Commodities Act, 1955 or in any Rules or Orders made thereunder which restricts the right of a manufacturer to '*channelize the supply in the market*' in a way it considers appropriate and the manufacturer is enabled to engage his own stockist. Thus, refusal by a manufacturer to supply goods to a wholesaler or a retailer for the reason that supplies are channelled through a distributor or stockist is recognised as a '*good and sufficient reason*' as per the clauses of DPCO, 2013.
9. In light of the aforesaid Clause 28 of the DPCO, 2013 and the decision of the Hon'ble Kerala High Court, the DG examined the conduct of the pharmaceutical companies to see if the refusals by them were based on '*good and sufficient reasons*'.
10. Based on the responses and documentary evidence furnished by the pharmaceutical companies during investigation, the DG found that some of the pharmaceutical companies and their C&F Agents, though arraigned as OPs, have not contravened the provisions of the Act as refusal by them was on account of justified/commercial reasons and the same cannot be attributed to



non-production of NOC from the associations by the Informants. Thus, no contravention was found against the following pharmaceutical companies or their C&F Agents by the DG:

- a) Cipla Ltd.
- b) Galderma India Pvt. Ltd.
- c) Glaxo SmithKline Pharmaceuticals Limited
- d) M/s. S.K. Agencies (C&F Agent of Glaxo SmithKline Pharmaceuticals Ltd.)
- e) Lupin Ltd.
- f) M/s. S.K. Brothers (C&F Agent of Lupin Ltd.)
- g) Johnson and Johnson Pvt. Ltd.
- h) Kanchan Pharma Pvt. Ltd. (C&F Agent of Johnson and Johnson Pvt. Ltd.)
- i) Intas Pharmaceuticals Ltd.
- j) M/s. M.B. Enterprises (C&F Agent of Galderma India Pvt. Ltd. and Intas Pharmaceuticals Ltd.)
- k) Unichem Laboratories Ltd.
- l) M/s. Shah Uni Agency (C&F Agent of Unichem Laboratories Ltd.)
- m) Alkem Laboratories Ltd.
- n) Aristo Pharmaceuticals Pvt. Ltd.
- o) Unison Pharmaceuticals Pvt. Ltd. and
- p) M/s. K.B. Corporation (C&F Agent of Unison Pharmaceuticals Pvt. Ltd.)

11. With regard to the aforesaid pharmaceutical companies and/ or their C&F agents, the DG could not find any evidence which could prove refusal to supply on account of requirement of NOC. On the contrary, these OPs were able to demonstrate, with the help of documentary evidence, regular supply and appointment of Informant(s) as stockists after their respective internal evaluations.

12. With regard to the allegation against the Federation (OP-1) and its President, Shri Jashvant Patel, the DG relied upon the following evidence to establish that they were carrying on the anti-competitive practice of requiring an NOC prior to the appointment of stockists in the State of Gujarat:

- i. Audio clips containing conversation between Shri Jashvant P Patel, President, OP-1 and Shri Ajay Solanki, Regional Manager of Astrum Healthcare Pvt. Ltd. at the time of appointment of M/s. Manish Medical



Corporation as its stockist in April, 2014, establishing issuance of directions by the association to the Manager of Astrum Healthcare to terminate stockistship of Manish Medical Corporation and refuse supply against its orders. Shri Jashvant Patel also admitted taking action of 'Gujarat Bandh' if supply to Manish Medical Corporation was not stopped. The communication also mentioned that Shri Jashvant Patel wanted to avoid any scrutiny by the Commission while still maintaining the requirement of taking approval from the Association. This recording was admitted by the parties to the conversation as well.

- ii. Audio recording containing conversation between Shri Yogesh Patel, Partner, M/s. Alis Medical Agency (IP-1), and Shri Bharat Pandya, Regional Manager, Hetero Healthcare Ltd. demonstrating mandatory requirement of NOC. The said conversation revealed that Hetero Healthcare would continue supplies to IP-1 but would not appoint it as a stockist without NOC. The transcript of the said recording was confirmed by Shri Yogesh Patel and Shri Bharat Pandya. The DG relied upon this evidence to conclude contravention by OP-1 as well as Hetero Healthcare Ltd.
- iii. Audio recording between Shri Nayan Raval, Partner IP-3/IP-4 and Shri Avesh Makrani, Territory Manager, Mankind Pharma Ltd. ( ), indicating that Mankind Pharma Ltd. was ready to supply goods but was afraid of the Association. The usage of words like 'Association problems', was relied upon by the DG to conclude contravention by OP-1 as well as Mankind Pharma Ltd.
- iv. Email dated 13<sup>th</sup> March, 2015 sent by Shri Jashvant Patel, President, OP-1 to Mankind Pharma Ltd. containing a letter dated 13<sup>th</sup> March, 2015 welcoming it to Gujarat and asking it to make supplies to M/s Shah Medicines. The DG found that Shah Medicines was appointed as a stockist of Mankind Pharma Ltd. on 9<sup>th</sup> April 2015 pursuant to this email and since Mankind Pharma Ltd. was not able to offer any valid explanation, this email and letter were relied upon by the DG to hold



OP-1 as well as Mankind Pharma Ltd. responsible for anti-competitive conduct.

- v. Another set of emails dated 04<sup>th</sup> June, 2015 and 05<sup>th</sup> June, 2015, sent by Shri Jashvant Patel, President, OP-1 to Shri Yogesh Hingorani, Director, Quality Life Sciences Pvt. Ltd. (C&F Agent of Mankind Pharma Ltd.) (hereinafter, '**Quality Life Sciences**') for appointment of another stockist, M/s. Bhoola Distributors, Surat. The said emails were sent to the personal email address of Shri Yogesh Hingorani and were on the letterhead of OP-1. They contained an attachment, a letter dated 02<sup>nd</sup> June, 2015 with the subject 'Welcome letter for MAGNET (A Mankind Group Company)'. In the said letter, a request was made by Shri Jashvant Patel to appoint M/s Bhoola Distributors as Mankind Pharma Ltd.'s stockist. The DG further found that call records of Shri Jashvant Patel showed frequent calls being made by Shri Yogesh Hingorani to Shri Jashvant Patel during the said period of June, 2015, concluding contravention by OP-1 as well as Quality Life Sciences.
- vi. Documents filed by Glenmark Pharmaceutical Limited (hereinafter, '**Glenmark**') before the DG regarding appointment of new stockists contained copies of 'Data Collected for appointment of new stockist at Ahmedabad', which was prepared by their distribution department. The said document, prepared for one M/s. Sanjay Agencies, contained a row 'NOC required' against which '*Obtained*' was recorded. Further, the DG relied upon the 'Checklist for Stockist Appointment' for M/s. Sanjay Agency which contained noting in the margins, such as '*NOC pending*' '*Mr. Jassu Bhai given Go Ahead*'. In yet another similar application, by Dhruvi Pharma Pvt. Ltd., notes were contained in the margin such as '*Mr. Jassu Bhai called Mr. Arun Poojari on 4/8/15 to proceed*'. Shri Arun Poojari, Senior Manager, Glenmark, admitted that as per the noting, he might have received a call from Shri Jashvant Patel and accordingly instructed Shri Tapash Ranjan Paul, Manager (Distribution) of Glenmark to proceed with the application of Dhruvi Pharma Pvt. Ltd. Based on these, the DG concluded that Shri Jashvant



Patel, known as 'Jassu Bhai' in trade parlance, had intervened in the stockist appointments. Based on this evidence, the DG found OP-1 and Glenmark in contravention of the provisions of the Act.

13. Against the Chemists and Druggists Association of Baroda (hereinafter, 'CDAB'/ 'OP-4') and its office bearers, the DG relied upon a telephonic conversation between Shri Nayan Raval, Partner, IP-3/IP-4 and Shri Dakshay Thakkar, Partner, M/s BM Thakkar & Co., C&F Agent, Glenmark Pharmaceuticals Ltd.. The said conversation contained excerpts which showed that NOC from local association *i.e.* CDAB was required for appointment of stockist. The DG relied upon this evidence to conclude contravention by CDAB as well as by M/s BM Thakkar & Company.
14. As against the Amdavad Chemist Association (OP-2), the DG relied upon the emails extracted from the email account of Shri Suryakant Dwivedi, M/s Rimi Distributors. The said emails were internal emails exchanged between the officials of Cadila Healthcare Ltd. and its C&F Agent M/s Rimi Distributors. There was a mention about recommendation from Shri Jashvant Patel for appointment of stockist. Further, it was apparent that Shri Jashvant Patel was following up on his recommendations. There was another set of emails exchanged between Shri Dilesh Gajjar, Manager, M/s Rimi Distributors and Shri Suryakant Dwivedi wherein it was mentioned that '*Since, Jassu Bhai has given his consent*', code should be extended to the stockist (M/s Mahindra Medicines) for all divisions. There was another email wherein issue of stated wrong rates being charged to one M/s. Bharat Medical, Ahmedabad was discussed. The email stated that supplies made to M/s. Bharat Medical was made on Price to Retailer (PTR) basis instead of Price to Stockist (PTS) basis due to system error and Shri Jashvant Patel was upset about this incident.
15. During the course of investigation, the DG also recovered emails from the official email account of Surat Chemists and Druggists Association (hereinafter, 'SCDA'/'OP-3'). Email dated 24<sup>th</sup> April, 2015, which was sent by Shri Rakesh



Shah, Director of Divine Savior Ltd., a pharmaceutical manufacturing company, to OP-3 contained the subject as '*for appointment of new stockist at Surat*'. Shri Rakesh Shah during his statement before DG stated that the said email was sent by him to Shri Pravin Vekariya, President, OP-3 for solving a previous matter with M/s. Beena Medical Agency regarding a payment default being made for the past three years and admitted to asking for a recommendation from President, OP-3 for appointment of a new stockist in Surat. Another email dated 28<sup>th</sup> April, 2013 was recovered *vide* which the President, OP-3 had conveyed his email address to Shri Rakesh Shah.

16. The DG further analysed the conduct of Federation/ Associations and pharmaceutical companies in light of the factors enumerated under Section 19(3) of the Act to assess whether there has been any appreciable adverse effect on competition (AAEC). The DG noted that the understanding between the Federation and its affiliated District Level Associations (OP-1 to OP-4) and the pharmaceutical companies (and/ or their C&F agents) had restricted the appointment of stockists and had consequently led to limiting and controlling the supply of drugs in the State of Gujarat. Even though it should be the prerogative of pharmaceutical companies to appoint their authorised stockists, the same was being driven by the Federation/ Associations who give NOC/ consent letters in order to instruct pharmaceutical companies as to whom they may appoint as their authorised stockists. The DG further observed that as per Section 3(3) read with Section 3(1) read with Section 19(3) of the Act, horizontal agreements carry presumption of AAEC, and as such no further evidence needs to be adduced to establish actual proof of AAEC in this case.

17. Thus, the DG found the following associations/pharmaceutical companies liable for the contravention of the provisions of the Act:

- i. Federation (OP-1)
- ii. Amdavad Chemist Association (OP-2)
- iii. SCDA (OP-3)
- iv. CDAB (OP-4)



- v. Mankind Pharma Ltd. and its C&F Agent at Ahmedabad, Quality Life Sciences Pvt. Ltd.
- vi. Glenmark Pharmaceutical Ltd. and its C&F Agent at Ahmedabad, M/s B M Thakkar & Company
- vii. Cadila Healthcare Ltd. and its C&F Agent at Ahmedabad, Ms/ Rimi Distributors
- viii. Hetero Healthcare Ltd. and
- ix. Divine Saviour Pvt. Ltd.

18. The DG also identified the following individuals/office-bearers/officials of the OPs to be liable under Section 48 of the Act.

S. No.	Name of the Individual	Designation and Organization
1.	Shri Jashvant Patel	President, Federation (OP-1) and Chairman, Amdavad Chemist Association (OP-2)
2.	Shri Pravin G Vekariya	President, SCDA (OP-3)
3.	Shri V.T. Shah (OP-5)	President, CDAB (OP-4)
4.	Shri Alpesh Z. Patel (OP-6)	Secretary, CDAB (OP-4)
5.	Shri Sheetal Arora	Managing Director, Mankind Pharma Ltd. (OP-19)
6.	Shri Yogesh Hingorani	Director, Quality Life Sciences Pvt. Ltd. (OP-37)
7.	Shri Anuj Sharma	Deputy Group Manager, Mankind Pharma Ltd. (OP-19)
8.	Shri Avesh Makrani	Territory Manager, Mankind Pharma Ltd. (OP-19)
9.	Shri Glenn M. Saldanha	Managing Director, Glenmark Pharmaceutical Ltd. (OP-27)
10.	Shri Tapash Ranjan Paul	Manager (Distribution), Glenmark Pharmaceutical Ltd. (OP-27)
11.	Shri Arun Poojari	Senior Manager (Distribution), Glenmark Pharmaceutical Ltd. (OP-27)





12.	Shri V.S. Reddy	Vice President (Logistics and Distribution), Glenmark Pharmaceutical Ltd.(OP-27)
13.	Shri Dakshay Thakkar	Partner, M/s. B.M. Thakkar and Company (OP-43)
14.	Shri Pankaj R Patel	Chairman and Managing Director, Cadila Healthcare Private Limited (OP-30)
15.	Shri Suryakant Dwivedi	DGM Distribution, Cadila Healthcare Private Limited (OP-30)
16.	Shri Chirag M Patel	Partner, M/s Rimi Distributors (OP-46)
17.	Shri Dinesh Gajjar	Manager (Warehouse), M/s Rimi Distributors (OP-46)
18.	Shri M Srinivas Reddy	Managing Director, Hetero Healthcare Limited
19.	Shri Bharat Pandya	Regional Manager, Hetero Healthcare Limited
20.	Shri Rakesh Shah	Director, Divine Savior Pvt. Limited

19. The Commission considered the investigation report filed by the DG in its ordinary meeting held on 20<sup>th</sup> June, 2017 and decided to forward electronic copies of the same to the Informants and the Opposite Parties in all the four cases for receiving their suggestions/objections to the investigation report. Besides, since the investigation revealed the involvement of two additional pharmaceutical companies in the alleged anti-competitive conduct, namely Hetero Healthcare Ltd. and Divine Saviour Pvt. Ltd., the Commission decided to forward the copy of the investigation report to them as well, for their suggestions/objections. The Commission also decided to forward electronic copies of the investigation report to the persons identified therein being liable under Section 48 of the Act. All these parties/persons were directed to file their objections/suggestions and appear for an oral hearing on 08<sup>th</sup> August, 2017.
20. On 08<sup>th</sup> August, 2017, the parties appeared before the Commission. Some of the parties sought extension of time for filing response which was allowed by the



Commission. Mankind Pharma Ltd., Quality Life Sciences, C&F Agent of Mankind Pharma Ltd. and M/s. B.M. Thakkar and Company, C&F Agent of Glenmark, requested for cross-examination of certain witnesses which was also allowed by the Commission, barring few exceptions. The hearing in the matter was accordingly adjourned to 12<sup>th</sup> December, 2017. Subsequently, the Federation and Shri Jashvant Patel also sought cross examination of the Informants as well as certain witnesses, which was allowed by the Commission. The cross-examination was conducted on various occasions, including cross-examination by way of video conferencing for one of the witnesses. Since the cross-examination spilled over to 01<sup>st</sup> December, 2017, the Commission decided to conduct final hearing on the investigation report on 16<sup>th</sup> January, 2018 and 17<sup>th</sup> January, 2018. The Commission further decided to hear Cadila Healthcare Ltd. and M/s Rimi Distributors on their review/recall application dated 08<sup>th</sup> September, 2017 on 16<sup>th</sup> January, 2018, at the time of final hearing in the matter.

21. On 16<sup>th</sup> January, 2018, the Commission first heard Cadila Healthcare Ltd. and M/s Rimi Distributors on their review/recall application dated 08<sup>th</sup> September, 2017. After hearing them, the Commission dismissed their review/recall request and decided to proceed with the hearing in the matter. The Commission heard Glenmark Pharmaceutical Ltd. and its officials, through their learned senior counsel. Due to paucity of time, the other OPs and the Informants were intimated that the hearing in the matter will resume on 17<sup>th</sup> January, 2018.
22. On 17<sup>th</sup> January, 2018, the learned counsel representing M/s B.M Thakkar & Co. and its Partner concluded arguments on their behalf. Similarly, the learned counsel(s) representing the Federation and its President and Hetero Healthcare Ltd. and its officials also concluded their respective arguments. The learned counsel for CDAB made a verbal request for additional time to argue the matter. The Commission considered the request and directed that the hearing of the remaining parties be scheduled on 08<sup>th</sup> and 09<sup>th</sup> March, 2018.



23. In the meantime, Cadila Healthcare Ltd. and M/s Rimi Distributors filed a writ petition (W.P.(C) 2106/2018) before the Delhi High Court challenging the order of the Commission dated 16<sup>th</sup> January, 2018, *vide* which their review/recall application and cross-examination application was dismissed.
24. On 08<sup>th</sup> March, 2018, the Commission commenced hearing of the remaining parties on the Investigation Report. The learned senior counsel representing Mankind Pharma Ltd. and its officials concluded arguments on their behalf. Thereafter, the Commission decided to defer the hearing to 10<sup>th</sup> April, 2018.
25. On 09<sup>th</sup> March, 2018, the Ld. Single Judge of the Hon'ble Delhi High Court, dismissed the writ petition filed by Cadila (W.P. (C) 2106/2018) holding that the parties can apply for review/recall of the *prima facie* order during investigation but not after the investigation report has been submitted by the DG to the Commission. However, Cadila was given the liberty to raise all factual submissions, as well as effect of denial of right to cross-examine the witnesses before the Commission, at the time of final arguments.
26. Subsequently, Cadila and M/s Rimi Distributors filed a common application dated 12<sup>th</sup> March, 2018 seeking an oral hearing in the matter pursuant to their writ being dismissed by the Hon'ble Delhi High Court. The Commission decided to hear the remaining parties, including Cadila and M/s Rimi Distributor on 10<sup>th</sup> April, 2018. However, Cadila also filed an appeal against the order dated 09<sup>th</sup> March, 2018 (in W.P. (C) 2106/2018, which was dismissed in Commission's favour) of the Single Judge *i.e.* LPA 160/2018, along with a Writ Petition W.P.(C) 2899/2018 challenging the constitutionality of Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009, challenging the *suo-motu* power of the DG to investigate against Cadila Healthcare despite there being no *prima facie* finding. The Division Bench of the Hon'ble Delhi High Court heard the parties on 18<sup>th</sup> April, 2018 and reserved the order in LPA 160/2018. The W.P. (C) 2899/2018 was allowed to be withdrawn at the request of the party with liberty to file a fresh petition, if need



be. Considering that the Hon'ble Delhi High Court is yet to pass order in LPA 160/2018, the Commission decides to deal with Cadila Healthcare Ltd. and M/s Rimi Distributors separately, based on the order/directions of the Division Bench of the Hon'ble Delhi High Court.

27. Accordingly, the Commission, in continuation of the hearing held on 16<sup>th</sup> January, 2018, 17<sup>th</sup> January, 2018 and 08<sup>th</sup> March, 2018, conducted hearing of the remaining parties on the Investigation Report on 10<sup>th</sup> April, 2018 and 22<sup>nd</sup> May, 2018 and decided to pass the final order.

*Responses/ Objections filed by the Parties*

**Informants**

28. *Vide* their common response dated 25<sup>th</sup> August, 2017, the Informants challenged the finding of the DG whereby most of the pharmaceutical companies have been exonerated of any complicity in the anti-competitive conduct. The Informants conceded that they do not have any vested legal right to purchase medicine/drugs from the pharmaceutical companies under the Drugs & Cosmetics Act, 1940. However, as per the Informants, forcing a wholesaler/stockist to buy goods from another wholesaler/stockist is anti-competitive, as the wholesaler cannot compete with other wholesalers/distributors in the market, if it is not able to procure the products at the rates and on the terms and conditions on which such products are given to the other wholesalers/distributors.
29. It was stated that by giving a favourable finding for the pharmaceutical companies, the investigation report allows perpetuation of anti-competitive practices by the pharmaceutical companies acting in tandem with the District/State level chemists and druggists associations. The DG has failed to investigate as to whether the commercial terms which are being offered by the pharmaceutical manufacturing companies to the Informants are standard industry practice or not. The DG has also failed to appreciate that making an



Informant/wholesaler buy products from another wholesaler/ distributor/ stockist would not serve any purpose as the Informants are competing with those other wholesalers. It was also argued that the DG has not investigated as to what background checks were being conducted by the pharmaceutical companies (the OPs) which denied the supply of pharmaceutical products to the Informants for over 6 months.

**Federation of Gujarat State Chemists & Druggists Association / OP-1**

30. The Federation has no role to play in the stockist appointment and the allegations of the Informants that pharmaceutical companies are imposing conditions on the dictates of the chemists and druggists associations are without any basis. The Informants have not approached the Commission with clean hands and the Federation has been falsely arrayed as one of the OP. Further, the conclusions drawn by the DG against the Federation and Shri Jashvant Patel in the investigation report are totally baseless.
31. The Investigation report has disregarded critical clarifications and submissions given by the Federation and the DG has drawn conclusion based on pre-conceived notions. The DG has failed to consider the contents and the directions given under the Mashelkar Committee Report wherein various actions have been recommended for the pharma trade associations to curb the problems of spurious/substandard drugs in the country.
32. The DG has failed to show how the Federation and Shri Jashvant Patel's conduct falls under the purview of Section 3(3)(b) of the Act when there is no question of trading of goods or provision of services.
33. It is submitted that none of the Informants have shown any cause to implicate the Federation or Shri Jashvant Patel. IP-1 was not denied any supply of medicines from the pharma companies except by Cipla Ltd. Further, IP-1 has made no direct allegation against the Federation and Shri Jashvant Patel but has only submitted a questionable audio recording of a phone call between Shri



Yogesh Patel, Partner of IP-1 and Shri Bharat Pandya, Regional Sales Manager of Hetero Healthcare Pvt. Ltd., with a transcript translating the said audio recording. Similarly, IP-2 was not denied any supply of medicines from any of the pharma companies except Intas Pharmaceuticals Ltd. The allegations are baseless and vague.

34. IP-3 has submitted two audio clips of conversation between Shri Jashvant Patel and Shri Ajay Solanki, Manager of Astrum Healthcare Pvt. Ltd. and one audio clip of conversation between Shri Nayan Raval (partner of IP-3) and Shri Mitesh Pandya, Manager, Meyer Organics Pvt. Ltd. However, the basis of its allegations (that it was not appointed as the authorised distributor by the pharma companies due to the involvement of the Federation) is unclear. Further, IP-4 was not denied any supply of medicines from the pharma companies except by Abbott Healthcare Pvt. Ltd., Mankind Pharma Ltd. and Torrent Pharmaceuticals Ltd.
35. The responses filed by the pharmaceutical companies not only refute the allegations of the Informants, but also reflect the *mala fide* conduct of the Informants in building a concocted case against the Federation. In the investigation report, the DG has categorically held that the Informants have no vested right to purchase drugs/ medicines from the pharma companies. Even if such right is presumed, the pharma companies have the statutorily recognised right to deny the supply to the Informants for 'good and sufficient reasons'. There is no evidence that refusal by the pharmaceutical companies was under the *diktats* of the Federation/ Association.
36. Though the DG has acknowledged in the investigation report that the very purpose of the analysis is to ascertain whether the conduct of Federation/ Association and pharmaceutical companies has caused AAEC, there has not been a single document from where the said inference could be deduced.



37. Further, the Federation provided the following objections with regard to each of the evidence relied upon by the DG:
- a. *Audio recording between Shri Jashvant P. Patel and Ajay Solanki, Regional Manager of Astrum Healthcare Pvt. Ltd.* has already been relied upon by the Commission in Case no. 97 of 2013. The said conversation was an attempt to resolve the pending issue of expiry claims arisen due to dumping of goods by the pharmaceutical companies. The fact that the Federation never refused the supply of products of Astrum Healthcare to M/s. Manish Medical Corporation is well reflected from the ledger showing regular supply being made to M/s. Manish Medical Corporation during the relevant period.
  - b. In the *audio recording of a purported conversation between Shri Yogesh Patel, Partner, IP-1 and Shri Bharat Pandya, Regional Manager of Hetero Healthcare Ltd.*, the latter categorically stated that the final approval for appointment of stockists is given by the head office and as such, in the entire process narrated by him, there is no role played by the Federation. Further, Shri Bharat Pandya has stated that “...I made it clear to him that his appointment cannot be regularized unless he provided us a clearance in the form of a letter/NOC from the local association”. In this part of his statement, he did not make any mention of requirement of any NOC from the Federation. During the conversation, the company was only apprehending problems from the local associations if the NOC was not taken. The Amreli Chemist & Druggist Association *vide* letter dated 1.02.2015 had categorically written to Hetero Healthcare Ltd. that “...there is no system to get NOC from our Association”. The company was providing an unnecessary reason to Shri Yogesh Patel for not appointing his firm as the stockists of the company and was trying to shift the burden upon the local association/ Federation by citing some problems faced in the past, way back in 2010. Shri Yogesh Patel is the executive member of the Amdavad Chemist Association (OP-2) and is well aware that no NOC is required for appointment of any stockist. Further, Shri Yogesh Patel acquired 28 new stockistships for IP-2 without any requirement



- of NOC; thus, negating the allegation regarding NOC. The DG, however, has drawn wrong conclusions from Shri Bharat Pandya's statement.
- c. *Evidence with regard to Mankind Pharma Ltd.:* The DG has ignored the response of Shri Anuj Sharma, Deputy Group Manager, Mankind Pharma Ltd. that the Federation has no role in the appointment of stockist and to the best of his knowledge, Mankind Pharma Ltd. has not come across any interference by the Federation in the appointment of new stockists in the State of Gujarat. The DG has ignored the statement of Shri Jashvant Patel wherein he has clarified that the said impugned letter was only sent to welcome the new division of Mankind Pharma Ltd. Further, the cross-examination of Shri Avesh Makrani establishes that all the statements made by him were based on market rumours and he has no first-hand information or evidence to allege the NOC practice.
- d. *Emails dated 04<sup>th</sup> June, 2015 and 05<sup>th</sup> June, 2015 sent by Shri Jashvant Patel to Shri Yogesh Hingorani, Director, Quality Lifesciences Pvt. Ltd.:* These e-mails were sent on the insistence of Shri Hemant Kusiya, Food and Drug Commissioner of Gujarat State and the said emails were not given as NOC for appointment of stockist. The DG reached an adverse conclusion without recording the statement of Shri Hemant Kusiya. Shri Jashvant Patel stated that the said letters (which were attached to the emails) did not bear his signatures and were not sent under his instructions. Besides, the Federation also objected that the DG obtained the email dump of Shri Jashvant Patel from the service provider and scrutinised the same without taking his consent and thus, breached his right to privacy.
- e. Shri Avesh Makrani of Mankind Pharma Ltd. has stated that Shri Nayan Raval himself spoke about the requirement of permission from Shri Jashvant Patel and he only confirmed his statements on the basis of his knowledge in the market and he did not have any conclusive evidence of the same. Mankind Pharma Ltd. was not inclined to give stockistship to IP-4 as the firm was involved in illegal sale of Mankind Pharma Ltd.'s goods and therefore, any allegations against the Federation are not justified.





- f. Shri Tapash Ranjan Paul, Manager Distribution, Glenmark Pharmaceuticals Ltd. had unambiguously stated that the NOCs referred to in the appointment documents related to the internal NOCs required from the cluster heads and did not relate to any kind of NOC from the Federation/ Associations. Further, Shri Arun Poojari, Senior Manager Distribution, Glenmark Pharmaceutical Ltd. as well as Shri Reddy Vice President, Demand Planning and Logistics, Glenmark Pharmaceutical Ltd. stated that they had no idea regarding the role of the Federation/ Association in the appointment of new stockists. They also stated that they had never been contacted by any of the office bearers of the Federation/ Association for appointment of new stockists/ extension of existing stockists. Although Shri Arun Poojari, during his deposition before the DG, contradicted by saying that Shri Jashvant Patel had intervened in the appointment of Dhurvi Pharma Pvt. Ltd., the said contradictions were seemingly due to the pressure and threat of legal action by the DG. Shri Jashvant Patel accepted that he might have requested to appoint Dhurvi Pharma Pvt. Ltd., Ahmedabad as the company's stockist but it cannot be misinterpreted to mean that he used to force the pharma companies or intervene in the appointment process. The DG has relied on the marginal noting on the proposal forms in respect of M/s Sanjay Agency and Dhruvi Pharma Pvt. Ltd. placed on record and ignored the clarifications and statements made by the officials of the company who made such marginal notings.
- g. In the *audio clip containing a purported conversation between Shri Nayan Raval and Shri Dakshay Thakkar, Partner of M/s B.M. Thakkar & Co., C & F Agent, Glenmark Pharmaceutical Ltd.*, Shri Dakshay Thakkar is referring to the requirement of NOC from the local association and there is no allegation against the Federation. Further, the Federation vehemently denied requirement of any NOC from the local association as well.
- h. The DG has relied upon the internal emails of Cadila Healthcare Ltd. (sent by Shri Suryakant Dwivedi, Deputy General Manager (Distribution & CRM) of Zydus Cadila on 20.08.2015 to Shri Dilip P. Patel of Zydus Cadila) forwarding therewith document of M/s Vishal Enterprise, Ahmedabad for



new stockist appointment. The Federation countered these emails stating that it used to give recommendations (on being asked) and used to make requests for appointment of stockists, but the same cannot be taken as mandatory requirement. Shri Dwivedi clearly stated that post the recommendations of Shri Jashvant P. Patel, the approval for appointment were taken from Shri Matai, President, IFB division, Zydus Cadila.

- i. The email dated 26<sup>th</sup> December, 2015 with the subject 'Wrong rate charged to Bharat Medical, has been relied upon by the DG. Shri Jashvant Patel explained that Zydus Cadila was billing M/s. Bharat Medical Agency on PTR basis despite requests. Therefore, the stockist complained to the association and Shri Jashvant Patel discussed the matter with Shri Suryakant Dwivedi as to why the stockist appointed was being billed at prices meant for retailers. The said act of Shri Jashvant Patel can only be classified as an act to promote the interests of the members of the Federation and cannot be qualified as an anti-competitive act as wrongly concluded by the DG.

#### **Amdavad Chemist Association/ OP-2**

38. Despite ample opportunity and due service of notice regarding hearings before the Commission, Amdavad Chemist Association/OP-2 did not appear before the Commission nor has it placed on record any written submissions/objections to the investigation report.

#### **Surat Chemists and Druggists Association ('SCDA')/ OP-3**

39. In its reply dated 15<sup>th</sup> January, 2018, OP-3 has primarily objected to it being arrayed as a party by the Informants in the present case, despite there being no direct allegation against it. It submits that the observations and findings of the DG are contradictory to the oral submissions made by President, OP-3 and Shri Rakesh Shah, Director, Divine Savior Pvt. Ltd. ('**Divine Saviour**'). OP-3 submits that on perusal of the complaints and statements of witnesses, it is apparent that OP-3 has no role to play between distributor/ stockist and the pharmaceutical company.



40. SCDA has further submitted that the DG has not been able to analyse correctly the provisions of Section 3(3)(b) of the Act, as there is no question of trading of any goods or provision of any services in the present case, much less by the persons engaged in identical or similar trade or provision of services.
41. As regards the DG's reliance on email dated 24<sup>th</sup> May, 2015, sent by Shri Rakesh Shah, Director, Divine Savior to the official email address of OP-3, it was clarified that the said email was written to the President, OP-3 to resolve an old outstanding issue with M/s. Beena Medical Agency, had defaulted in its payment to Divine Saviour for more than 3 years. Shri Shah stated that OP-3's involvement was only to resolve the said matter and the mention of NOC in the email refers to the NOC asked from M/s. Beena Medical Agency and not any association.
42. With regard to another email dated 28<sup>th</sup> April, 2015, received from Shri Pravin Vekariya, President, OP-3 by Divine Savior wherein only an email address was communicated, it was submitted that the DG wrongly relied upon the same to conclude that the same was communicated for obtaining NOC from the Association. The DG has also ignored the fact that appointment of M/s Gandhi Medical Store (firm appointed to take place of M/s Beena Medical Agency) was done by Divine Saviour without any intervention of OP-3 and without obtaining any NOC.
43. OP-3 further submitted that Shri Rakesh Shah has deposed before the DG that IP-1 was appointed by Divine Savior without any NOC from OP-3, and also submitted a list of invoices to establish continuous supply of products to IP-1. The DG has however, ignored his statement and as well as the list of invoices and wrongly concluded a tacit understanding between OP-3 and Divine Savior which may have caused or is likely to cause an AAEC in the market in the State of Gujarat and particularly, in the Surat region.



44. It was also submitted that Divine Savior has more than 40 stockists and there is no evidence to establish that either Divine Savior has approached OP-3 or OP-3 has intervened in the supply of products by it to any particular stockist/distributor. OP-3 also relied on the order dated 09<sup>th</sup> December, 2016 passed by the Hon'ble erstwhile COMPAT in *AIOCD v. CCI* (Appeals No. 21 of 2013, 06 of 2014 and 07 of 2014) to argue that the finding of NOC cannot be established in the absence of any cogent evidence.

**Chemists and Druggists Association of Baroda ('CDAB')/ OP-4**

45. OP-4 challenged the *bonafides* of the Informants in filing the present informations which according to it were filed with ill-motives. It was submitted that Shri Dayabhai Patel, Partner, IP-3, had been the President of OP-4 consistently from 1992 till 2007 and also from 2010 to 2013. Since he lost position as President in the elections held in 2013, he filed the present frivolous complaints triggered by the personal and / or political enmity.
46. OP-4 also refuted the findings of the DG arguing lack of cogent evidence against it. OP-4 further stated that it should have been awarded an effective opportunity to cross examine the Informants by the DG and absence of such opportunity has tainted the entire investigation process. It was stated that the DG has acknowledged in its report that the circulars issued by OP-4 are not illegal or anti-competitive.
47. During the hearing before the Commission on 10<sup>th</sup> April, 2018, the Ld. Counsel for OP-4 submitted that since the Commission has already passed an order against OP-4 in a similar case involving similar issues and parties, *i.e. Case No. 97 of 2013*, the present case is barred by the principle of constructive *res judicata*. OP-4 also challenged the DG's reliance on documents/evidence already relied upon in Case No. 97 of 2013.
48. OP-4 further argued that the audio clips submitted by Shri Nayan Raval have been used to play a fraud upon the Commission as the same are fabricated. The



transcripts allegedly contain words which were never used in the conversation, e.g. in the audio clip dated 24<sup>th</sup> June, 2015, Shri Dakshay Thakkar did not use the word 'NOC' which appears in the transcript of the conversation. Further, the fact that Shri Nayan Raval holds stockistship of various companies indicates that there was no insistence of NOC by OP-4. OP-4, during the hearing before the Commission, also challenged the deposition of Shri Nayan Raval on behalf of IP-3. It was stated that as per Form 21B under DPCO, 2013, Shri Nayan Raval is not a partner of IP-3 and thus, he had no locus to depose on behalf of IP-3.

49. OP-4 further pointed out the contradictions in the dates of call recordings mentioned between Shri Nayan Raval and Shri Mitesh Pandya, Area Business Manager, Meyer Organics Pvt. Ltd. and secondly, between Shri Nayan Raval and Shri Avesh Makrani, Mankind Pharma Ltd., wherein the transcripts of both the conversations show that these calls were made using the same mobile phone number at the same date and time, *i.e.* "on 06.06.2015 at 17:07", which is not possible. It is pointed that this contradiction affirms the indication of fraud being played on the Commission.
50. OP-4 also argued that in the Affidavit filed by Shri Dahyabhai Nathalal Patel along with the information in Case No. 72 of 2014, he has stated that payment of Rs. 4500/- was made by IP-3 to become a lifetime member of OP-4 but no receipt was issued by the office bearers of the association. In response to this allegation, Shri Alpesh Z. Patel, Secretary, OP-4, in his statement before the DG has clearly stated that membership is duly approved in Executive Committee meeting and OP-4 has never received any application from IP-3 during 2013 to 2016. Shri Alpesh Patel has further clarified that even though the amount of Rs. 4500/- is reflected in the bank statement of OP-4, neither any application for membership was received by the association, nor has IP-3 ever approached the Association for a receipt. Thus, this was argued to be an attempt to create evidence to file all-motived cases against OP-4 to entangle it in meaningless litigation.



51. With regard to the DG's observation that the office bearers of OP-4 admitted to the recorded conversation dated 24<sup>th</sup> June, 2015, it was argued that the office bearers only agreed that the translation of conversation is correct, but they never agreed/ admitted about the prevalence of NOC practice. It was also submitted that Shri B.M. Thakkar (of M/s B.M. Thakkar & Co., C&F Agent, Glenmark Pharmaceutical Ltd.) is not the authorized person to make supplies of Glenmark products in Baroda and, thus, non-supply by him cannot be attributed to non-issuance of NOC.

### **Mankind Pharma Ltd.**

52. Mankind Pharma Ltd. ('**Mankind**') stated that it has 57 stockists in the State of Gujarat and the DG's finding that Mankind requires NOC for appointment of stockists is based on emails exchanged between third parties (Shri Jashvant Patel and Shri Bharat Shah, M/s Shah Medicines, Bharuch or Shri Yogesh Hingorani, Quality Lifesciences Pvt. Ltd.) which cannot, by any stretch of imagination, be attributed to Mankind. These emails neither originated from nor were sent to Mankind, nor the IP-4 had approached Mankind directly with order for supply. There is no evidence to show that Shri Yogesh Hingorani and Mankind ever discussed the emails or the appointment of stockists was made pursuant to these emails. The DG did not examine Shri Bharat Shah to determine the reason as to why Shri Jashvant Patel's email was marked to him and how the said email was used. Shri Anuj Sharma, Deputy Group Manager, Mankind has clearly stated that the emails of Shri Jashvant Patel do not find mention/reference in any of the document considered for the appointment of M/s. Bhoola Distributors.
53. The DG has incorrectly and prematurely identified Shri Sheetal Arora, Managing Director, Mankind and Shri Anuj Sharma, Deputy General Manager, Mankind as office bearers liable under Section 48 of the Act, without even finding a contravention against Mankind in the first place.



54. It was argued that every pharmaceutical company has the right to determine the number of stockists it needs or when the appointment is to be made. The DG, however, has wrongly concluded that Mankind, under an alleged tacit understanding/agreement with the Federation/Association, was unwilling to grant stockistship until NOC was procured by the IP-4. The DG has clearly ignored the fact that the IP-4 had never applied for the stockistship of Mankind. Further, *vide* letter dated 29<sup>th</sup> April, 2015, Mankind clarified to the IP-4 that it has not refused to supply the products to the IP-4, rather it was indicated by Mankind that Allied Trade would be contacted by Mankind and that the IP-4 would be contacted by Allied Trade for supply of the drugs required by the IP-4.
55. The IP-4, however, *vide* its letter dated 14<sup>th</sup> March, 2015, addressed to Quality Lifesciences, contacted Mankind along with three demand drafts amounting to a total of INR 1 Lac, identification document and a list of drugs required by it. As the Informant was not an authorised stockist appointed by Mankind, Quality Life Sciences could not have supplied the drugs requested by the Informant without due permission from Mankind. While Mankind was considering the request, the IP-4 approached the Commission and the Assistant Commissioner of Food and Drug Control Administration of the area *vide* letter dated 16<sup>th</sup> March, 2015. Mankind, after due assessment of the Informant's background, replied to the Informant's letter, *vide* letter dated 21<sup>st</sup> April, 2015.
56. Next, the DG has erroneously relied upon the telephonic conversation that took place between Shri Avesh Makrani of Mankind and Shri Nayan Raval on 06<sup>th</sup> June, 2015, to conclude that Mankind requires NOC for appointment of stockist/distributors. The said conversation was in background of the fact that Shri Avesh Makrani was wanting to please Shri Nayan Raval to disclose the name of the stockist through whom IP-4 had been sourcing Mankind's products and trading in the market without authority. Despite this the DG has relied upon the said conversation and has failed to appreciate that Shri Avesh Makrani had no knowledge of the stockist appointment procedure and his conversation with





Shri Nayan Raval was based on hearsay. All these facts are even further corroborated by Shri Avesh Makrani's cross-examination conducted by Mankind.

57. Section 3(1) of the Act places a prohibition on agreements that cause or are likely to cause AAEC. However, in the present cases, the DG has relied upon one isolated instance to reach a finding of anti-competitive agreement. It was argued that Mankind had 57 stockists marketing its products in the state of Gujarat during the relevant period. Even if it is assumed that there was tacit understanding between Mankind and Federation, the DG has failed to show that the alleged anti-competitive activity caused any AAEC, especially in the absence of examination of market shares, sales *etc.* The DG also failed to show how the Federation is charged under Section 3(3)(b) and how Mankind is charged under Section 3(1) of the Act, even though they have no connection nor are they engaged in identical or similar trade of goods or provision of services.
58. Also, Shri Yogesh Hingorani, Quality Life Sciences has clearly stated that he had no role in the appointment of stockists at Mankind and for this reason, he could not answer many of the questions related to appointment process posed by the DG. However, the DG has wrongly concluded that he was evasive. The DG has raised objections to the fact that Shri Yogesh Hingorani did not accept the evidence on record and concealed material information by evading or avoiding answering the questions. Further, the DG considered a few phone calls for reaching a conclusion that Shri Yogesh Hingorani and Shri Jashvant Patel spoke frequently during the first week of June, 2015, when the impugned emails were sent by Shri Jashvant Patel to Shri Yogesh Hingorani. However, the entire call data records from 26<sup>th</sup> April, 2015 to 25<sup>th</sup> May, 2016, show that Shri Yogesh Hingorani and Shri Jashvant Patel spoke regularly over the entire period usually the beginning and end of the month. The fact that there was no appointment of stockists by Mankind each time Shri Yogesh Hingorani and Shri Jashvant Patel spoke to each other shows the wrong conclusions drawn by the DG.





**Quality Life Sciences Pvt. Ltd., C&F Agent of Mankind Pharma Ltd.**

59. It was submitted that Quality Life Sciences Pvt. Ltd. ('Quality Life Sciences') is the CFA of Mankind in Gujarat since 1999 and being a CFA, its function is restricted to making the pharma products available to the appointed stockists and it has no role to play in the appointment of stockists by Mankind.
60. Quality Life Sciences argued that the DG's findings are contradictory to the record and the whole investigation has been done with a prosecutorial bent of mind. The DG has failed to meet the prescribed legal standards while establishing existence of an agreement between Mankind/ Quality Life Sciences and Federation/ OP-1.
61. The DG primarily relied upon the email dated 04<sup>th</sup> June, 2015 and welcome letter dated 02<sup>nd</sup> June, 2015, addressed to Shri Yogesh Hingorani, Director, Quality Life Sciences, by Shri Jashvant P. Patel. Additionally, the DG relied upon the call data records of conversations made between Shri Jashvant P Patel and Shri Yogesh Hingorani to conclude that they were speaking with each other during the time when appointment of M/s Bhoola Distributors was made. Based on this, it was concluded that such appointment was made on the basis of consent/ NOC provided by Shri Jashvant Patel. Quality Life Sciences refuted these evidences and stated that the DG has drawn wrong conclusions on cherry-picked facts and has completely ignored the limited role that Quality Life Sciences had as the CFA of Mankind.
62. It was also submitted that any understanding/agreement between Quality Life Sciences and Federation/ OP-1 cannot be caught either under Section 3(3) as they do not produce identical or similar goods/ services or under Section 3(4) as Quality Life Sciences and Federation/ OP-1 do not operate at different levels of production chain. Also, Section 3(1) being an omnibus provision cannot be applied in a standalone manner to Quality Life Sciences' alleged conduct, *dehors* Section 3(3) or Section 3(4) without there being evidence that such conduct causes or is likely to cause AAEC.



63. It was further submitted that Shri Jashvant Patel clarified that the emails were written and addressed to Shri Yogesh Hingorani on the insistence of Shri Hemant Kusiya, Food & Drugs Commissioner, Gujarat. However, without examining Shri Hemant Kusiya, the DG held those emails against Quality Life Sciences, disregarding the fact that Quality Life Sciences has no control on an outsider sending emails to it. Also, it was submitted that telephonic conversations between Shri Jashvant Patel and Shri Yogesh Hingorani were made for religious purposes, and just because they happened to speak around the date on which M/s Bhoola Distributors was appointed as stockist of Mankind does not mean that such appointment was based on NOC from the Federation/OP-1.
64. Quality Life Sciences further submitted that Shri Nayan Raval, during his cross examination, had admitted that the present information in Case No. 68 of 2015 was conceived owing to the dispute he had with Shri Jashvant Patel and that the case was filed with the Commission to settle scores with Shri Jashvant Patel.
65. It was stated that the IP-4 contacted Quality Life Sciences, *vide* its letter dated 14<sup>th</sup> March, 2015, for the first time for purchase of Mankind products. As the IP-4 was not an authorised stockist appointed by Mankind, Quality Life Sciences forwarded the letter received from the IP-4 to Mankind for appropriate instructions/ directions.
66. It was also highlighted that the IP-4, at no point during the correspondence with Quality Life Sciences as well as before or after it, applied for the stockistship of Mankind.
67. Further, during the hearing, Quality Life Sciences submitted a copy of the agreement *vide* which it was appointed as the CFA of Mankind to argue that it had no role under the said agreement in the appointment of stockist.

**Glenmark Pharmaceutical Ltd.**



68. Glenmark Pharmaceutical Ltd. (**‘Glenmark’**) has submitted that an agreement between it and the Association cannot be caught either under Section 3(3) of the Act as they do not produce identical or similar goods/services or under Section 3(4) of the Act as they do not operate at different levels of the production chain. Further, Section 3(1) of the Act, being an omnibus provision, cannot be applied in a standalone manner to Glenmark’s alleged conduct, *dehors* Section 3(3) or Section 3(4) without there being an evidence that such conduct causes or is likely to cause an AAEC.
69. It was submitted that despite the DG’s observation that Glenmark may have consented to the practice of NOC by the Associations “*out of fear of backlash from the said Federation/Association in the form of disruption of its sales and distribution operations*”, a contradictory conclusion was given that Glenmark has entered into an anti-competitive ‘agreement’ in contravention of Section 3(1) of the Act.
70. It was contended that the conclusion drawn by the DG that the row titled “NOC required” in the “summary sheet” pertained to NOC obtained from the Association is perfunctory in nature and does not hold any water. Further, the marginal notings made in the ‘*Checklist for Stockist Appointment*’ in relation to the particular appointment of M/s Sanjay Agency and Dhruvi Pharma Pvt. Ltd. (which actually pertained to internal approvals within Glenmark as explained hereinafter) cannot, by any stretch of imagination, be construed as an “agreement” or “understanding” between Glenmark and Federation/ CDAB for obtaining of NOC as a condition precedent for appointment of a stockist and/or supply of medicines by Glenmark. It was further contended that two isolated instances of seeking NOC from the association does not prove that the number of players in the market or supply of medicines have been restricted/limited in any manner. The DG has completely ignored the case of 12 other stockists where no such notings were found.



71. With regard to the recorded telephonic conversation, Glenmark challenged the *bonafide* of Shri Nayan Raval and claimed that he tape recorded the telephonic conversation with Shri Dakshay Thakkar on 24<sup>th</sup> June, 2015, with the sole intent of manufacturing evidence against Glenmark and subsequently filed the information before the Commission on 31<sup>st</sup> July, 2015 alleging non-supply of goods on the ground that NOC has not been obtained.
72. Glenmark had actually supplied the products to the Informant on 07<sup>th</sup> January, 2016 *i.e.* much before the first notice dated 19<sup>th</sup> January, 2016 under Section 36(2) read with Section 41 of the Act was issued by the DG. It was also averred that Glenmark's market share in terms of total value of sale of pharmaceutical products in the State of Gujarat for the years 2015, 2016 and 2017 is only 1.86%, 1.73% and 1.44% respectively. Therefore, as a result of such miniscule presence in a highly competitive market of sale of pharmaceutical drugs in India, it is highly unlikely that any understanding between Glenmark and Federation even if it is assumed to exist would create an entry barrier for new stockist or foreclose competition by hindering entry into the market.

**B M Thakkar & Co., C&F Agent of Glenmark Pharmaceutical Ltd.**

73. B.M. Thakkar and Company ('**B. M. Thakkar**') was not responsible for appointment of stockists. Further, even as Glenmark's C&F Agent, it had no authority to supply products in Baroda. Rather, Glenmark's other C&F Agent, *namely*, M/s. Servin Healthcare, was in charge of supplies in Baroda. It was argued that *concurrent findings of contravention against Glenmark and M/s B.M. Thakkar & Co. are legally unsustainable due to principal/agent relationship between them.*
74. It was submitted that there is abuse of process of law by Shri Nayan Raval to settle his personal scores with the association which becomes apparent from his cross-examination conducted by M/s B.M. Thakkar & Co. During the said cross-examination, Shri Nayan Raval accepted that, the cause of filing



information was political rivalry between different factions of CDAB and Federation. It was also argued that the Informants have tried to fabricate evidence by simultaneously dispatching supply requests to all the pharma companies and their C&F Agents in April, 2015.

75. It was also highlighted that the reason for delayed supplies to IP-4 by Glenmark was because of the fact that IP-4 had not made complete payment. The sequence of events show that non-supply was only till the documents were verified and payment made in full. There was no non-supply due to requirement of an NOC. After full payment was made by IP-4 on 04<sup>th</sup> January, 2016, regular supplies were made to IP-4 by Glenmark and B.M. Thakkar.
76. With regard to the transcript of the audio recording between Shri Nayan Raval and Shri Dakshay Thakkar, it was submitted that there was an undue delay in filing the transcript which casts doubts on its veracity as well as the *bonafide* of the party submitting it. The conversation happened on 24<sup>th</sup> June, 2015 and was available at the time of filing the information in Case No. 68 of 2015, but the transcript was submitted in a piecemeal manner after almost 7 months from date of filing of the information.

### **Divine Savior Limited**

77. It was submitted that Divine Savior, an MSME, is a growing company with limited exposure in the pharma market, unlike other established companies with remarkable market share. It is struggling to establish its position in the Surat market with average sales of Rs. 12.57 Lacs per annum and has no ability to create stockistship competition amongst wholesalers in the pharma market.
78. As on the date of filing response, Divine Savior was operating through one super distributor and forty eight stockists at different places in the State of Gujarat. In the years 2014-15 and 2015-16, it appointed five and three stockists, respectively, as per its market requirement. In appointment of all those stockists, there was no requirement to approach any office bearers of the



Federation/association. It was also verified from e-mail records that no communication was made with any association except SCDA/OP-3.

79. It was submitted that OP-3 was contacted to seek its help to clear the outstanding dues of M/s Beena Medical Agency for which Divine Savior's Zonal Manager met Shri Gaurang (Hon. Secretary, OP-3). The correspondence clearly shows that a thanks letter was sent by Divine Savior to appreciate the time spared by OP-3 for resolving the issue.
80. When Shri Gaurang could not resolve the issue for four months, the issue was conveyed to the President of OP-3, *i.e.* Shri Pravin Vekariya. The President sent his e-mail address to Divine Saviour so that the latter could update him about the progress of the issue for further help.
81. Divine Saviour also submitted that a senior field person, who was assigned with the responsibility for stockist appointment, was under the impression that a courtesy letter needs to be written for stockist appointment to the Association. Though the company was aware that no NOC is required as such, the courtesy letter (prior to the appointment of M/s Gandhi Medical Agency) was written to OP-3 to satisfy the need of the field person. However, Divine Saviour claimed that it did not wait for any response from OP-3 and appointed M/s Gandhi Medical Agency as its stockist in Surat. It was also submitted that M/s Gandhi Medical Agency surrendered the stockistship of Divine Saviour after few months due to lack of product demand in the market.
82. It was further stated that prior to the appointment of M/s Gandhi Medical Agency, Divine Saviour had also appointed M/s Rashmi Medical Agency at Surat without any communication with OP-3 which proves that Divine Saviour was aware that there was no requirement of any permission from any association for appointment of stockists.



### **Hetero Healthcare Limited**

83. Hetero Healthcare submitted that stockists are appointed by it as per its policy and practice, based on the needs/demand in any particular area. It ascertains the credentials of the proposed stockists including their background to avoid dealing with strangers or fly-by-night operators.
84. During the period 2014-15, the pharmaceutical industry was being coerced by various associations, compelling companies to seek their consent/NOC for appointment of stockists. In the midst of such a scenario, an inadvertent error crept in by one of the Regional Managers of Hetero Healthcare, *namely* Shri Bharat Pandya, while dealing with Mr. Yogesh Patel, Partner, IP-1.
85. It was highlighted that since 2014, supplies are being made to IP-1 against orders placed by it from time to time, and there has not been any refusal. Also, the conduct on the part of Shri Bharat Pandya did not result in any shortage/restriction or control of supplies in the market. The company had no intention of creating any entry barriers in the trade channel. The said conduct was due to certain misunderstanding/confusion on the part of Shri Bharat Pandya, which cannot be attributed to Hetero Healthcare as it was not a part of its policy.
86. It was claimed that Hetero Healthcare does not indulge in any anti-competitive activity and there has not been any complaint in this regard in the past against it. Thus, a stray incident involving one of its field manager may be condoned. Hetero Healthcare assured that it will once again give clear instructions to all its field staff to not to indulge in any such matter in future.

### **Findings of the Commission**

87. The Commission has perused the information, the investigation report, including the records of cross-examination, and the suggestions/ objections submitted by the parties as well as the oral submissions made by their respective



learned counsel (s) in the hearings held on 15<sup>th</sup> January, 2018, 16<sup>th</sup> January, 2018, 08<sup>th</sup> March, 2018, 10<sup>th</sup> April, 2018 and 22<sup>nd</sup> May, 2018.

88. The main issues for determination in the present matter are as follows:

*Issue 1: Whether the allegation of the Informants against the Federation (OP-1) and/or its constituent associations, OP-2 to OP-4, regarding the practice of mandating NOC prior to the appointment of stockists/ distributors in the State of Gujarat is substantiated by facts and evidences? And if so, are the provisions of the Act contravened?*

*Issue 2: Whether the allegations of the Informants regarding denial of supply of pharmaceutical products and stockistship by pharmaceutical companies, arraigned as OPs, for not having obtained NOC from OP-1 and/ or its constituent association, OP-2 to OP-4, are substantiated by facts and evidences? If yes, whether such conduct contravenes the provisions of the Act?*

*Issue 3: In the event contravention of the provisions of the Act is concluded against any of the OPs, i.e. the Federation/ Associations/ pharma companies/ their C&F agents etc., the role of the persons who are complicit in the said conversation, under Section 48 of the Act.*

89. The Commission notes that besides objecting to the findings of the DG on merits, the OPs have also raised some preliminary issues in their responses to the investigation report. Thus, before delving into the substantive issues, the preliminary issues raised by the OPs are dealt with in the ensuing paragraphs.

***Preliminary Objection on the present case being barred by the doctrine of constructive res judicata***

90. The Commission notes that the Federation (OP-1) and CDAB (OP-4) have raised a preliminary objection regarding the present cases being barred by the





doctrine of constructive *res judicata*. It has been alleged that the issues raised by the Informant in the present matters are substantially similar to those raised by the Informant in Case No. 97 of 2013 filed by it before the Commission, *In Re: Reliance Agency and Chemists & Druggists Association of Baroda (CDAB) & Ors.* (decided on 04<sup>th</sup> January, 2018). In the said case also, the Commission decided the matter and passed an order under Section 27 of the Act. Also, the documents already relied upon in Case No. 97 of 2013 have been relied upon by the Informants as well as the DG in the present cases. Thus, there is a bar in dealing with the present case owing to which the present cases are liable to be dismissed.

91. The doctrine of *constructive res judicata* is embodied under Explanation IV of Section 11 of the Code of Civil Procedure, 1908 which reads as follows:

*“Res judicata- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit’ between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

[...]

*Explanation (IV): Any matter which might and ought to have been made the ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”*

92. The Commission observes that the above doctrine is not applicable in the present cases, as the parties (apart from Federation and CDAB) as well as the period of investigation of the alleged contravention in the present cases and Case No. 97 of 2013 are different. In Case No. 97 of 2013, the investigation was ordered on 28<sup>th</sup> February, 2014 and the investigation report was submitted by the DG on 01<sup>st</sup> October, 2015. The investigation in that case mainly covered the evidence substantiating the prevalence of NOC practice till January-February,



2015. However, in the present cases, the Commission, upon due consideration of facts and evidence, ordered investigation in Case Nos. 65/2014, 71/2014 and 72/2014 on 29<sup>th</sup> December, 2014 and in Case No. 68 of 2015 on 17<sup>th</sup> November, 2015. The investigation mainly covered the period of 2015-2016. The DG submitted its joint investigation report in all the 04 cases on 03<sup>rd</sup> May, 2017. Thus, though the Commission has dealt with the issue of NOC in Case No. 97 of 2013, the period of investigation was prior to the period covered in the present matter. Further, Case No. 97 of 2013 was mainly against CDAB and the Federation for interfering with the supply by one pharma company, namely Abbott Healthcare Ltd. However, the facts and evidence highlighted in the present matter comprise of different transactions involving multiple associations as well as pharmaceutical companies leading to different causes of action at different periods of time. Thus, the bar of *res judicata* will not apply.

93. During the hearing, the learned counsel for the Federation submitted that the Federation and other associations in Gujarat were earlier mandating NOC but have now learnt a lesson and refrain from such behaviour. However, the allegations of the Informants suggest that they were still facing issues pursuant to such practices being carried on. Thus, these allegations need to be examined in light of the evidence gathered by the DG to ascertain whether such a practice is still in existence.
94. Consequently, such preliminary objection raised by the OPs is devoid of any substance and the Commission proceed to examine the findings from the present investigation on merits.

***Preliminary issue regarding locus/ bonafide of Shri Nayan Raval/ Informant***

95. It is stated that informations in different cases have been filed by Shri Nayan Raval with ill-motives and he has used the process under the Act to threaten pharmaceutical companies to appoint him/ his firms as their stockist. Further, the Federation has brought out the relationship of Shri Nayan Raval (Partner, IP-3 as well as IP-4) and other Informants to allege that various partnership



firms have been formed by Shri Nayan Raval to file frivolous complaints before the Commission, only to harass the chemists and druggists associations in the State of Gujarat.

96. The Commission does not find any merit in these objections. Though the Commission does not encourage filing of multiple information(s) filed by any person on the same cause of action, a person is not barred from approaching the Commission if the conduct, which has been found to be in contravention, continues to exist despite directions of the Commission. The Commission has to focus on the fair functioning of the market and any motive with which the Informant might have approached the Commission is subservient to that objective. However, considering that the informations in the four cases have been clubbed and investigated together and also being disposed of *vide* this common order, the objection of the OPs is only academic.
97. During the hearing, OP-4/CDAB contended that the deposition of Shri Nayan Raval recorded before the DG on 04<sup>th</sup> November, 2015, on behalf of M/s. Apna Dawa Bazar, IP-3, was without any *locus*. It was submitted that Shri Nayan Raval is not a partner at M/s Apna Dawa Bazar as the License under Form 20B & Form 21B of DPCO, 2013 issued to M/s Apna Dawa Bazar on 06<sup>th</sup> July, 2013, annexed alongwith the information in Case No. 72 of 2014, are in name of Shri Dahyabhai Nathanlal Patel and Mrs. Jashumatiben Dayabhai Patel. Countering the said contention, the Ld. Counsel appearing for the Informant stated that Shri Nayan Raval was the Partner of M/s Apna Dawa Bazar at the time of his deposition and continues to be so. Further, upon the directions of the Commission, Shri Nayan Raval has filed an Affidavit dated 29<sup>th</sup> May, 2018, stating that he was inducted as a partner in M/s Apna Dawa Bazar on 01<sup>st</sup> April, 2015, *vide* a registered partnership deed and on 01<sup>st</sup> November, 2016, two existing partners left the firm but he continues to be a partner. A copy each of the registered partnership deeds dated 01<sup>st</sup> April, 2015 and 01<sup>st</sup> November, 2016, were attached with the Affidavit. Therefore, in light of the Affidavit filed by Shri Nayan Raval and the copies of the registered partnership deeds, the



Commission disregards the objection of OP-4 with regard to the *locus* of Shri Nayan Raval as a deponent on behalf of M/s Apna Dawa Bazar.

98. Another instance highlighted to allege *malafide* intent of Shri Nayan Raval by OP-4, is the alleged contradiction in the dates of call recordings of conversations held between firstly, Shri Nayan Raval and Shri Mitesh Pandya, Area Business Manager, Meyer Organics Pvt. Ltd. and secondly, Shri Nayan Raval and Shri Avesh Makrani, Territory Manager, Mankind, wherein the transcripts of both these telephonic conversations show that they were made on 06<sup>th</sup> June, 2015, at 17:07 Hrs by Shri Nayan Raval using the same mobile number. It was pointed out that calls cannot be made from the same mobile number at the same time to two different numbers. This discrepancy suggests use of fraudulent audio recordings and transcripts, affirming that fraud is being played on Commission.
99. Shri Nayan Raval clarified that same date and time as mentioned in the two transcripts was only a typographical error. The Commission notes that such discrepancy being a result of typographical error is brought out in the investigation report. Further, the Informant drew the attention of the Commission to the certificates submitted by the Informant as per the provisions of Section 65B, Indian Evidence Act, 1872, in support of the two telephonic conversations/audio recordings. The said certificates clarify that the conversation between Shri Nayan Raval and Shri Mitesh Pandya had occurred on 18<sup>th</sup> June, 2015 at 16:24 Hrs. and the conversation between Shri Nayan Raval and Shri Avesh Makrani had occurred on 06<sup>th</sup> June, 2015, at 17:07 Hrs. As apparent from the two Section 65-B certificates, the Commission finds no infirmity in the two transcripts bearing the same date and time, the same being merely a typographical error. Hence, the objection of CDAB in this regard stands dismissed.



***Preliminary Objection on prima facie finding not being made against specific party in the order passed under Section 26(1) of the Act***

100. Some of the pharmaceutical companies, who have been arraigned as OPs in Case No. 68 of 2015 in the present matter have objected to the findings of the investigation against them alleging that the Commission did not give any *prima facie* finding against them in its order dated 17<sup>th</sup> November, 2015, under Section 26(1) of the Act.
101. It is alleged that multiple cases have been filed by the same set of persons, namely Shri Nayan Raval and Shri Dahyabhai Patel, alleging the same facts, with ill-motives because of the political rivalry between competing factions of the chemists and druggists associations based in the State of Gujarat. The said OPs have argued that since the triggering point of investigation *i.e.* the Commission's *prima facie* order contains no findings against these OPs, the DG has exceeded the scope of his investigation by investigating their conduct.
102. The Commission has already dealt with this issue while deciding the application dated 08<sup>th</sup> September, 2017, filed by Cadila Healthcare Ltd. and M/s. Rimi Distributors requesting review/recall of the Commission's *prima facie* order dated 17<sup>th</sup> November, 2015. *Vide* order dated 16<sup>th</sup> January, 2018, the Commission has observed that the investigation directed by the Commission through the *prima facie* order was generally into the matter and more specifically *vis-à-vis* the association (CDAB) and two of its office bearers. The relevant paras of the Commission's *prima facie* order dated 17<sup>th</sup> November, 2015, are reproduced below:

*“14. Considering the similarity of facts and allegations, the Commission is of the view that the present case with regard to OP 1, OP 2 and OP 3 may be clubbed with the above-mentioned 3 cases i.e. Case No. 65, 71 and 72 of 2014 in terms of the proviso to section*



*26(1) of the Act read with Regulation 27(1) of the Competition Commission of India (General) Regulation 2009.*

*15. The DG is accordingly directed to investigate the role of OP 1, OP 2 and OP 3 for the alleged contravention of the provisions of the Act. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in the said contravention. In case of contravention, DG shall also investigate the role of the persons who at the time of such contravention were in-charge of and responsible for the conduct of the business of the contravening entity.”*

*(emphasis supplied)*

103. During hearing before the Commission on 16<sup>th</sup> January, 2018, the aforesaid OPs had raised an objection regarding the purported *suo motu* investigation by the DG against the Applicants, who were not specifically directed to be investigated in the *prima facie* order of the Commission. It was argued that the DG ought to have sought approval of the Commission before proceeding with such an investigation.
104. As stated earlier, the proceedings before the Commission are inquisitorial in nature and thus, the scope of inquiry need not be confined to the facts stated in the information. The purpose of filing information before the Commission is only ‘to set the ball rolling’ as per the provisions of the Act. If the inquiry by the Commission were to be limited to the facts stated in the information, it would render its purpose of the enquiry infructuous and incomplete. Further, once the matter is sent for investigation, Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009 (hereinafter, the ‘General Regulations’) obligates the DG to investigate comprehensively and give its finding on each of the allegation made in the information. The DG need not be restricted to the specific facts or the specific parties stated in the *prima facie* order as the information. Thus, the Commission finds no infirmity in the DG



proceeding to investigate the Applicants, especially when there was a specific direction in the *prima facie* order to *investigate the conduct of such other parties who may have indulged in the said contravention*. Specific inclusion of such a direction to the DG also empowers it to investigate not only the named OPs but also such other parties which are found to be indulging in the contravention under investigation. The purpose of such a direction is to allow the DG to carry out a detailed investigation in the matter, without getting restricted to the specific facts and parties stated in the information and concerned *prima facie* order. In light of the foregoing discussion, the objection of the pharmaceutical companies in this regard is hereby rejected.

105. Having dealt with the preliminary issues, the Commission now proceeds to examine the main issues in the present case.

***Issue 1: Whether the allegation of the Informants against the Federation (OP-1) and/or its constituent associations, OP-2 to OP-4, regarding the practice of mandating NOC prior to the appointment of stockists/ distributors in the State of Gujarat is substantiated by facts and evidences, and if so, are the provisions of the Act contravened?***

106. In the previous cases concerning the conduct of regional/ district/ State level Chemists and Druggists Associations, the Commission has held that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market, contravening Section 3 (3) (b) read with Section 3 (1) of the Act. NOC requirement is a hindrance that discourages new/existing stockists to enter/expand in a market amounting to an entry barrier for them. Appointment of a new stockist should be the exclusive right of a pharmaceutical company, without any interference by any third party. Any influence or interference with the choice of a distributor of a pharmaceutical company would restrict its freedom to do business with persons of its choice. Such interference not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-



times the *diktats* are sanctioned by consequent boycott of the pharmaceutical companies not following the directions of the association(s).

107. Notably, the Federation/OP-1, during the hearing before the Commission, vehemently claimed that though the associations in the State of Gujarat were earlier mandating NOC, they have now learnt a lesson and are not indulging in such a behaviour any more. However, the allegations of the Informants suggest not only continuance of such conduct but also newer ways devised by these associations to camouflage the said conduct.
108. In order to ascertain whether OP-1, and its constituent associations, OP-2 to OP-4, were continuing to indulge in such practice, the Commission finds it appropriate to analyse the evidence gathered by the DG during the investigation in the light of the objections raised by the parties.
109. It is noted that the DG has relied upon an audio call recording dated 16<sup>th</sup> June, 2015 between Shri Yogesh Patel, Partner, IP-1 and Shri Bharat Pandya, Regional Sales Manager, Hetero Healthcare Pvt. Ltd. In the said recording, it was mentioned by Shri Bharat Pandya that the company, Hetero Healthcare Pvt. Ltd., was not in a position to appoint IP-1 as its stockist until and unless it is provided NOC from OP-1/OP-2. Shri Bharat Pandya also conveyed that conditional supply of goods can be made to IP-1 but stockistship will be regularised only upon receipt of NOC from OP-1/OP-2, formats for which were also suggested by Shri Bharat Pandya to Shri Yogesh Patel. The Commission notes that this conversation clearly establishes the continued prevalence of NOC practice at the behest of OP-1/OP-2 in the State of Gujarat which led to restriction and control of provision of services in the market.
110. The following excerpts from the aforesaid conversation between Shri Yogesh Patel, Partner of IP-1 and Shri Bharat Pandya, Regional Manager, Hetero Healthcare are relevant in this regard:





*Bharat: **But only Gujarat is such a state that their association had pulled me long** (Not allow /permit to distribute all to all division goods to stockiest)*

*Bharat: **And they allowed us on 2012.it means Gujarat Association is very strong.***

*[....]*

*Bharat: So, I told him that all responsibility of stockiest, but he told me that we want this only, otherwise we not go ahead.*

*Yogesh: It means need a N.O.C.?*

*Bharat: **Means he want that ahmedabad chemist & druggist ass. Write letter on their letter head that.***

*Yogesh: Yes.*

*Bharat: If you made stockiest then we (asso.) Had No objection.*

*Yogesh: So, in short that ...*

*Bharat: Or in short if they write we (ahmedabad chemist & druggist ass.) Not do any practice for N.O.C. requires to company. He want any of one letter in writing. In short he want clearance letter from Ahmadabad chemist & druggist association, this talked on last Monday.*

*[....]*

*Yogesh: So, he is asking for N.O.C. right*

*Bharat: **Yes, only one N.O.C. letter is short, which you have to make available.***

*[....]*

*Yogesh: It means it I want goods in regular way without any discrimination then I have to provide NOC of Ahmedabad chemist & druggist Association.*

*Bharat: Right... Right ...*

(emphasis supplied)

111. The aforesaid excerpts clearly establish the clout exercised by OP-1/OP-2. The dialogues from the conversation establishes that the appointment of IP-1 at that time was not possible without a consent letter/ NOC by Amdavad Chemists Association (OP-2)/Federation (OP-1) and that some formats were also suggested to Shri Yogesh Patel (IP-1) to get the said consent from the association.
112. Also, the contention of the Federation that IP-1 had acquired stockistship of various pharmaceutical companies in Ahmedabad without NOC is of no consequence as the conversation shows that appointment by Hetero Healthcare will only be completed upon receipt of NOC by the company. Though Hetero Healthcare was willing to continue supply and had generated a customer code for IP-1, it was insistent on provision of NOC from Association/ Federation. This shows the prevalence of NOC practice in the State of Gujarat which has



been held to be anti-competitive by the Commission in its various past orders. This makes OP-1 and OP-2 liable for limiting and controlling supplies in the market, in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

113. Further, from the e-mail dump of Shri Jashvant Patel, President, OP-1 the DG discovered a letter dated 13<sup>th</sup> March, 2015 with the subject “stockist letter” and attachment as ‘Magnet Welcome Letter from Federation Office for Shah’. A screenshot of the said letter is reproduced below:

In Gujarat state,

You are  
Medicines Stock

114. The Commission notes that the aforesaid letter was issued by the Federation under the signatures of Shri Jashvant Patel on the pretext of welcoming Mankind’s new division (Magnet) in Gujarat. However, a plain reading suggests that through this letter, the Federation/Shri Jashvant Patel gave its ‘Go Ahead’ which was indeed a permission to Mankind to supply the goods of all its divisions to its new stockist, M/s. Shah Medicines, Bharuch. Upon confrontation, Shri Jashvant Patel stated that *vide* this letter only Mankind’s new division was welcomed by the Federation and someone might have forged his signatures upon the said letter on the Federation’s letterhead. The DG, however,



had discovered such letter from the email dump of Shri Jashvant Patel and the same was sent without any signatures using the official email address of the President of the Federation. Further, neither the sender nor the recipient have denied the exchange of this email. The Commission, thus, finds no merit in the contentions raised by Shri Jashvant Patel and is of the view that the email dated 13<sup>th</sup> March, 2015 along with the welcome letter establishes that the Federation was indulging in the practice of interfering in the stockist appointment process.

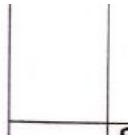
115. Another set of emails dated 04<sup>th</sup> June, 2015 and 05<sup>th</sup> June, 2015 that were discovered during the investigation, related to the appointment of additional stockist and welcoming of Mankind's Magnet Division which were sent by Shri Jashvant Patel to Shri Yogesh Hingorani, Director, Quality Life Sciences, C & F Agent of Mankind. These emails contained attachment in the form of letters for appointment of M/s Bhoola Distributors, Surat. These letters were duly signed by Shri Jashvant Patel and were issued on the letterhead of the Federation. On confrontation, Shri Jashvant Patel stated M/s Bhoola Distributors is a partnership firm with Shri Himanshu H Koshiya as one of its partners, who is the brother/cousin of Shri Hemant Koshiya, Commissioner, Food & Drugs Administration, Gujarat and such 'welcome letters' were issued on his insistence. However, he could not sufficiently explain the purpose and occasion for issuing such letters.

116. The Commission notes that though the Federation has tried to use benign nomenclatures like 'welcome letter', the intent of such letters is evident. Neither the Federation nor Shri Jashvant Patel was able to explain the need of issuing such welcome letters. The only plausible conclusion that can be drawn is that these welcome letters were in fact camouflaged NOC letters with garbed language issued by the Federation without explicitly using the word 'NOC'. The purpose of such letters was only to convey the consent of Federation/ Association in the matter of appointment of stockist. The Commission also notes that these letters were sent to Quality Life Sciences which, as per Mankind's as well as Quality Life Science's submissions, had no authority to



appoint stockist. Nevertheless, the liability of the Federation stands established for indulging in such anti-competitive practices.

117. Further, in this context the Commission also finds the documents placed on record by Glenmark relevant. The same contain data for appointment of new stockist at Ahmedabad prepared by the Distribution Department of the company during 2014-1501. The documents contain, in the specified format, information regarding requirement of NOC and whether the same was obtained or not in instances of stockist appointment. The summaries were prepared by Shri Tapash Ranjan Paul, Manager (Distribution), Glenmark. During his deposition before the DG, he contended that 'NOC' mentioned therein refers to internal NOC taken from Cluster Heads of other divisions. However, such explanation is not acceptable. The DG has also relied upon the '*Checklist For Stockist Appointment Form*' submitted by prospective stockists which was found in such documents. Such forms contain authentication and forwarding remarks by field officers of Glenmark which are sent to the company headquarters for processing and deciding on new stockist appointment. The DG discovered two instances which are of particular relevance. On the application form of M/s Sanjay Agency, Gandhinagar, a marginal handwritten noting states "*Mr. Jassubhai given Go ahead*" and a similar noting was also found on the application form of M/s Dhruvi Pharma Pvt. Ltd. which were admittedly written by Shri Tapash Ranjan Paul in his own handwriting. The Screenshots of these two checklist forms are reproduced below:





118. The Commission observes that the aforesaid 'Checklist For Stockist Appointment' in case of M/s. Sanjay Agency and Dhruvi Pharma clearly reveal the interference of Shri Jashvant Patel, President OP-1/OP-2 in the appointment of stockists. There are clear notings that '*NOC pending*', '*Mr. Jassubhai* '*Mr. Jasubhai given Go Ahead*' etc.. Before the DG, Shri Tapash Ranjan Paul admitted that he had made the marginal noting stating that '*Jasubhai had called Mr. Arun Poojari on 4/8/15 to proceed*'.
119. Read in light of these 'Checklist For Stockist Appointment', it becomes clear that the 'NOC required- obtained' mentioned in summary sheets does not refer to approval from Cluster Heads but clearly refers to NOC from Federation/ Association.
120. Thus, the aforesaid documentary evidence establishes that the appointment of the said two stockists by Glenmark was pursuant to the approval ('Go Ahead') given by Shri Jashvant Patel, President, OP-1/OP-2.
121. In addition to the documentary evidences discussed above, the DG also examined the audio clip of a recorded conversation, along with its transcript, containing conversation between Shri Nayan Raval (*Mr. N*) and Shri Dakshay Thakkar (*Mr. D*), Partner of M/s. B M Thakkar & Co., C&F Agent of Glenmark. The said conversation clearly reveals that 'NOC from Association' is required for stockistship, as is indicated by the following content:

*Mr. N: On what subject E-Mail will come? So I can prepare accordingly.*

*Mr. D: Nothing **JUST YOU HAVE TO TAKE N.O.C. FROM ASSOCIATION [CHEMIST & DRUGGIST ASSOCIATION]***

*[...]*

*Mr. N: so, I has been written to Glanmark (sic) OR to your C&F. B.M. Thakkar & Co.*

*Mr. D: No...No... Glanmark will inform to me and I will Write to you [FOR N.O.C.] that your order and draft received and I am giving you the goods, code and all a/c are generate **but you have to provide just N.O.C. OR I will write that after supply there will be no problem from association and if***



*there will be any issue /problem arise by chemist and druggist association then responsibility is yours.*

This was further confirmed by Mr. Thakkar in the following dialogues:

*Mr. D: whatever company will ask me in E-Mail, I will forward to you.*

*Mr. N: no problem and you need N.O.C. from chemist and druggist association or need from federation. [Gujarat]*

*Mr. D: just now we need N.O.C. from local association.*

122. The Commission notes that Shri Dakshay Thakkar has admitted before the DG, the aforesaid conversation between Shri Raval and himself as well as the transcript thread. Since the conversation mentions the role of local association as well *i.e.* CDAB/OP-4, the DG confronted the conversation as well as the transcript to the office bearers of OP-4, who could not offer any plausible explanation to rebut their complicity. They only alleged *malafide* on the part of Shri Nayan Raval in recording the said conversation but offered no substantive rebuttal to Shri Dakshay Thakkar's claim that NOC from local association is required. Shri Alpesh Patel, Secretary, CDAB/OP-4, neither negated the fact that Shri Dakshay Thakkar had explicitly indicated the requirement of NOC/ consent of the local association (implying CDAB) before the appointment of a new stockist, nor could produce any evidence indicating to the contrary. He only tried to create confusion by stating that the stockists at Baroda were being catered to by the other CFA of Glenmark (Servin Healthcare Pvt. Ltd.), which is not a material fact. As a matter of fact, IP-4 has been getting supplies of Glenmark through M/s B M Thakkar & Company only.
123. The Commission, thus, concludes that the recorded conversation between Shri Dakshay Thakkar and Shri Nayan Raval, duly corroborated by the oral evidence discussed hereinabove, establishes that OP-4/CDAB also followed the practice of issuing NOC/ giving its verbal consent before the appointment of stockists by a pharmaceutical company. The arguments put forth by Shri Alpesh Patel, the then Secretary and President of CDAB at present, that only two new stockists had been appointed by Glenmark since 2007 (namely, M/s Allied Trade Corporation and M/s Baroda Agency) at Vadodara and both of them were



appointed without NOC/ consent of CDAB, is not material in the instant case as the recorded conversation between Shri Nayan Raval and Shri B M Thakkar unequivocally indicates a requirement of NOC/ consent from CDAB before the appointment of IP-4 as the stockist of Glenmark. Further, the contention of Shri Alpesh Patel regarding service of Glenmark's products at Vadodara by another C&F Agent are also not material to this case as the DG has found out that IP-4 was being served by M/s B M Thakkar & Company only.

124. Thus, the Commission holds OP-4 along with its office bearers namely Shri VT Shah and Shri Alpesh Patel also liable for carrying on the practice of NOC/ approval prior to the appointment of stockists for appointment by pharma companies. Such practice adopted and followed by the CDAB, and likely placed associations, acting through its President and Secretary, result in limiting and controlling the supplies in the market, thus, rendering them liable for anti-competitive conduct under Section 3(3)(b) read with Section 3(1) of the Act.
125. With regard to the involvement of OP-2/Amdavad Chemists Association, the Commission observes that apart from the recorded telephonic conversation between the Shri Yogesh Patel, Partner of IP-1 and Shri Bharat Pandya, Regional Manager, Hetero Healthcare (excerpts of which have already been reproduced above), the DG has also found emails from the account of Shri Dilesh Gajjar, Manager, M/s Rimi Distributors, C&F agent of Cadila Healthcare Ltd. and Shri Suryakant Dwivedi, Deputy General Manager, Cadila Healthcare Ltd.. These emails clearly reveal the role of Shri Jashvant Patel/OP-2 in stockist appointment. It is apparent that Shri Jashvant Patel had intervened in the appointment of M/s Vishal Enterprises, Ahmedabad and extension of divisions to M/s Gayatri Pharma Distributors, Gandhinagar. There are also other emails, which are not reproduced herein for the sake of brevity, contents of which show the interference of OP-1 as well as OP-2, through their President/Chairman Shri Jashvant Patel, in the appointment and extension of stockists. The Commission, thus, concludes that OP-1 and OP-2 were carrying on the practice of NOC/ giving their consent, which was required to be taken from them prior to





appointment of new stockists by the pharmaceutical companies in the State of Gujarat. By doing so, the Federation (OP-1) and Amdavad Chemists Association (OP-2) along with Shri Jashvant Patel, President of OP-1 and Chairman of OP-2, have contravened Section 3(3)(b) read with Section 3(1) of the Act.

126. As regards SCDA/OP-3, the DG has relied upon the email alongwith attachment dated 24<sup>th</sup> April, 2015, sent by Shri Rakesh Shah, Director, Divine Savior Limited to Shri Praveen Vekariya, President, SCDA, requesting for grant of permission to appoint a new stockist at Surat. The following screenshot of the letter attached with the email dated 24<sup>th</sup> April, 2015, is self-explanatory:

mc  
ou  
Me

127. The subject line is '*For the Appointment of New Stockist at Surat*' as well as the contents are '*....we would like to have your favour to grant a permission to appoint a new stockist in Surat in lieu of following points*'. The said '*points*'



refer to low coverage of Divine Saviour's products in Surat and its pending payment issues with the then existing stockist namely M/s Beena Medical Agency. Later emails were also exchanged between Shri Rakesh Shah and Shri Pravin Vekariya, President, OP-3 discussing the issue of delay in payment by M/s Beena Medical Agency.

128. OP-3 as well as Divine Saviour have taken the plea that the only purpose of said emails was to resolve pending payment issues which Divine Saviour was having with its stockist M/s Beena Medical Agency. However, the Commission notes that the contents of the letter dated 24<sup>th</sup> April, 2015 (attached with the email of the same date) rather depict even a stronger role played by the chemists and druggists associations (SCDA in this case). These associations not only intervene in the appointment of stockists but also interfere with the termination of their stockistship. It is apparent that Divine Saviour was having issues with M/s. Beena Medical Agency and it was facing shortage of supplies/low coverage in Surat. However, it was difficult for Divine Saviour to take an independent decision to terminate the stockistship of M/s Beena Medical Agency and appoint a new stockist without seeking the NOC from SCDA/OP-3. Thus, the aforesaid evidence shows that the averments of pharma companies that stockist appointment is done on a need basis and they have the discretion to choose their stockists, are nothing but shallow claims.

129. Based on the aforesaid evidence, the Commission concludes that Shri Pravin Vekariya, President, OP-3 had intervened in the appointment of stockist by Divine Savior to replace its existing stockist by providing his consent. Though Shri Vekariya feigned ignorance on the objective and purpose of the requirement of NOC to replace the existing stockist by Divine Savior, the very fact that another stockist (namely M/s. Gandhi Medical Agency) was subsequently appointed as a new stockist by Divine Saviour at Surat in April 2015 substantiates the fact that the consent was sought from, and provided, by OP-3. By following this practice, OP-3 has contravened the provisions of



Section 3(3)(b) read with Section 3(1) of the Act, rendering it alongwith its President Shri Pravin Vekariya liable.

130. The aforesaid evidence once again brings to light the covert anti-competitive practices followed by the District Level Chemists and Druggists Associations (namely, OP-2, OP-3 and OP-4) under the umbrella of the State Level Association *i.e.* OP-1/Federation. The Commission has clarified in many past orders, one being issued specifically against the associations in Gujarat, that appointment of stockists is the prerogative of the pharmaceutical companies and the associations have no authority to decide or interfere in such process. Such interference not only disturbs the free play of market forces but also creates disruptions in the supply chain through which drugs and medicines reach the consumers.
131. The Commission further notes that the OPs have relied upon the Mashelkar Committee Report to argue that the said Committee has recommended the proactive role of AIOCD, and affiliated chemists and druggists associations, in educating their members and to cooperate with regulatory authorities to eliminate the sale of spurious/sub-standard drugs by their members. Thus, in lines with the recommendations contained in the Committee's report, NOC is arguably an effective instrument to avoid unhealthy competition and prevent excess supply in the market.
132. The Commission has perused the observations and recommendations of the Mashelkar Committee Report. The Commission notes that the said Committee was formed to examine all aspects relating to regulatory infrastructure for supply of drugs to combat the problem of spurious/substandard drugs in the country. Neither there is any mention of the practice relating to grant of NOC by the district/state/national level chemists and druggists associations nor does the report validate the prevalence of such a practice. The only recommendations given by the Mashelkar Committee Report to pharmaceutical trade associations are as follows:



- a. Play a proactive and visible role to contain the menace of spurious/counterfeit drugs.
  - b. Develop a mechanism for identifying the persons directly or indirectly involved in abetting the distribution of spurious, counterfeit or questionable quality drugs.
  - c. Prepare a checklist for the guidance of members and widely publicise the same for information of all the members.
  - d. Sub Rule 3 of Rule 65 (4) of the Drugs & Cosmetics Rules requires that the retail supply of any drug shall be made against a cash/credit memo. This condition of license should be strictly adhered to by all retail licensees.
  - e. Every chemist/pharmacist to act as a watchdog to prevent the entry of any spurious/doubtful quality drugs or those purchased from unauthorised sources or without proper bills in the supply chain.
133. Apparently, the aforesaid recommendations of the Mashelkar Committee report are mainly aimed at combating the distribution of spurious, counterfeit and questionable quality drugs. These recommendations do not, in any manner, appear to suggest that the associations can undertake the task of mandating NOC prior to the appointment of stockists by pharmaceutical companies.
134. The Commission is not disputing the role of Federation/ Associations in protecting the interests of their members and/or ensuring the supplying of non-spurious drugs in the markets. However, neither these associations (OP-1 to OP-4) have argued that their conduct was aimed at achieving the results recommended by Mashelkar Committee nor have they produced any data/evidence to demonstrate any causal relationship between their conduct and prevention of sale of spurious drugs in the market. Rather, by restraining the pharmaceutical companies from appointing new stockists under the threat of boycott/ stoppage of sale/purchase of their products by the existing stockists, or any other form of inconvenience to the pharmaceutical companies, they have



attempted to limit and control the supplies in the relevant market *i.e.* the State of Gujarat.

135. The Commission has categorically held in various cases that the agreement/ practice/ decision established under Section 3(3) of the Act raises a presumption of AAEC, which has to be rebutted by the OP contravening party by proving the *proviso* to Section 3(3). The burden of proof is upon the OPs to show that there is no AAEC and there are efficiency justifications for enforcing the practice of NOC for appointment of stockists/distributors in the State of Gujarat. Though OP-1 to OP-4 have claimed that NOC practice has not caused any AAEC in the market, no evidence was furnished by them in support of this claim. OP-1 to OP-4 have also not provided any evidence to establish how NOC practice has proved beneficial to the distribution channel and given the opportunity of free and fair trade to the pharmaceutical traders. Clearly, OP-1 to OP-4 have not been able to rebut the presumption that arose against them.

136. In view of the above, the mandatory requirement of NOC, as alleged by the IPs in the present case, stands established by the evidence on record, against the Federation/OP-1 and its district units, *namely*, Amdavad Chemists Association/OP-2, SCDA/OP-3 and CDAB/OP-4. The Commission notes that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market and it amounts to an anti-competitive practice, in violation of the provisions of Section 3(3)(b) read with Section 3(1) of the Act. In view of the foregoing, the Commission concludes that these associations have contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

***Issue 2: Whether the allegations of the Informants regarding denial of supply of pharmaceutical products and stockistship by pharmaceutical companies, arraigned as OPs, for not having obtained NOC from OP-1 and/or its constituent association, OP-2 to OP-4, are substantiated by facts and evidence? If yes, whether such conduct contravenes the provisions of the Act?***



सत्यमेव जयते



137. Before dealing with the role of pharmaceutical companies, the Commission observes that, in many previous orders, the Commission has clarified that stockist appointment by pharmaceutical companies should be done at their own discretion guided by commercial judgment. In the cases of *Sudeep P.M. & Ors. V. AKCDA* (Case No. 54 of 2015, decided on 31<sup>st</sup> October, 2017) and *In Re: Reliance Agency And Chemists and Druggists Association of Baroda* (Case No. 97 of 2013, decided on 04<sup>th</sup> January, 2018), the Commission has categorically stated that appointment of stockists is the right of every pharmaceutical company and the same should be based on commercial wisdom and fair market practices. Practices like the NOC not only replace the commercial business decision of pharmaceutical companies by the decisions of these trade associations, but also affect the distribution chain by bringing inefficiencies in the distribution channels. Further, considering the peculiar nature of pharmaceutical industry and its impact on the end-consumers, the Commission advised the pharmaceutical companies to approach the Commission for a proper legal recourse for problems created by the associations.
138. However, the DG has found evidence against a few pharmaceutical companies who were complying with the directions of OP-1 to OP-4 for appointment of stockists, their termination *etc.*
139. Before dealing with the said evidence against the pharmaceutical companies against whom contravention has been found by the DG, the Commission notes that there were various pharmaceutical companies who were arraigned as OPs but against whom no evidence was found during investigation for indulging in the practice of NOC. Such companies were rather able to establish that their refusal to supply pharmaceutical drugs/products to the Informants was based on their own commercial judgment and not motivated by directions/threat of any association. Many of these pharmaceutical companies also filed exoneration requests in response to the investigation report forwarded to them.



140. The Commission notes that sub-clause (a) of Clause 28 of the DPCO, 2013 creates an obligation on a pharmaceutical company/ distributor to sell drugs/ medicines *unless* there is a ‘good and sufficient reason’ to refuse sale. However, this does not mean that the pharmaceutical company is obligated to supply products to all stockists/wholesalers who possess a licence. Refusal by a manufacturer to supply goods to a wholesaler/stockist or a retailer for the reason that supplies are channelled through a distributor or stockist is recognised as a ‘*good and sufficient reason*’ as per the clauses of DPCO. The DG concluded that to advise any firm to procure goods from a well-established supply chain of pharmaceutical companies also does not amount to refusal of sale. Further, the DG was convinced that the refusal by these companies was on account of justified/commercial reasons and the same cannot be attributed to non-production of NOC by the Informants. The Commission notes that rather, these OPs were able to demonstrate, with the help of documentary evidence, regular supply and appointment of Informant(s) as stockists. Such appointments were delayed on account of internal evaluation of respective pharmaceutical company, fulfilling which the Informants were appointed as stockists. Thus, the Commission concurs with the finding of the DG with respect to the following OPs, that they were not indulging in any anti-competitive conduct:

- a) Cipla Ltd.
- b) Galderma India Pvt. Ltd.
- c) Glaxo SmithKline Pharmaceuticals Limited
- d) M/s. S.K. Agencies, C&F Agent of Glaxo SmithKline Pharmaceuticals Ltd.
- e) Lupin Ltd.
- f) M/s. S.K. Brothers, C&F Agent of Lupin Ltd.
- g) Johnson and Johnson Pvt. Ltd.
- h) Kanchan Pharma Pvt. Ltd., C&F Agent of Johnson and Johnson Pvt. Ltd.
- i) Intas Pharmaceuticals Ltd.
- j) M/s. M.B. Enterprises, C&F Agent of Galderma India Pvt. Ltd. and Intas Pharmaceuticals Ltd.
- k) Unichem Laboratories Ltd.
- l) M/s. Shah Uni Agency, C&F Agent of Unichem Laboratories Ltd.



- m) Alkem Laboratories Ltd.
  - n) Aristo Pharmaceuticals Pvt. Ltd.
  - o) Unison Pharmaceuticals Pvt. Ltd., and
  - p) M/s. K.B. Corporation, C&F Agent of Unison Pharmaceuticals Pvt. Ltd.
141. The Commission holds that the evidence on record does not suggest any anti-competitive conduct on the part of the aforesaid entities. Their exoneration requests are also disposed of accordingly.
142. The DG, however, found contravention against the following pharmaceutical companies:
- i. Mankind Pharma Ltd. and its C&F Agent, Quality Life Sciences Pvt. Ltd.
  - ii. Glenmark Pharmaceutical Ltd. and its C&F Agent M/s. B.M. Thakkar & Co.
  - iii. Cadila Healthcare Ltd. and its C&F Agent M/s Rimi Distributors
  - iv. Divine Saviour Pvt. Ltd. and
  - v. Hetero Healthcare Ltd.
143. The evidence with regard to these pharmaceutical companies has already been dealt with in detail in Issue No. 1. The same is not reproduced hereunder in detail. The findings of the Commission, are however, elucidated in the ensuing paragraphs.

**Mankind Pharma Ltd. and its C&F Agent, Quality Life Sciences Pvt. Ltd.**

144. IP-4 had placed an order with Mankind through its C&F Agent on 14<sup>th</sup> March, 2015, in response to which Mankind had directed IP-4 to approach the wholesale distributor/ stockist at Vadodara to procure the requisite products. IP-4 again pursued the matter wherein it conveyed to Mankind that being a wholesaler, it would not purchase the products from another wholesaler of Mankind. Mankind, in its letter dated 05<sup>th</sup> June, 2015, intimated that there is no requirement of a new stockist and the drugs may be procured from M/s Allied





Trade Corporation, its dealer at Vadodara. The Commission finds no infirmity in the response given by Mankind.

145. Further, the email dated 13<sup>th</sup> March, 2015 sent by Shri Jashvant Patel, President, OP-1 to Shri Bharat Shah of M/s Shah Medicines, relied upon by the DG, cannot be treated as an evidence against Mankind. Neither the said email was received by Mankind nor were the directions in the said email acted upon by Mankind. In the absence of such evidence, it is difficult to hold Mankind liable. However, the said email exchange will still hold as a good evidence against the Federation/Shri Jashvant Patel as an attempt was made to intervene with the stockist appointment.
146. Further, emails dated 04<sup>th</sup> June, 2015 and 05<sup>th</sup> June, 2015, sent by Shri Jashvant Patel to Shri Yogesh Hingorani, Director, Quality Life Sciences, cannot be attributed to Mankind, in view of the contention of Mankind that Quality Life Sciences had no authority to appoint stockists. Further, as a matter of record, Shri Yogesh Hingorani had never responded to those emails. There is no evidence to establish that these emails were forwarded by Shri Yogesh Hingorani to Mankind or that they were acted upon by Mankind in any manner. Quality Life Sciences placed on record a copy of an agreement dated 01<sup>st</sup> January, 2015 (hereinafter, 'Agreement'), *vide* which it was appointed as the stockist of Mankind. Clause 7 of the said Agreement clarifies that Quality Life Sciences is only a C&F Agent of Mankind and its role is limited to supplying goods to stockists, provided such stockists have been assigned stockistship code by Mankind. In view of this, Commission is of the view that evidence on record is insufficient to hold Mankind and/or Quality Life Sciences liable for any anti-competitive conduct.
147. Further, cross-examination of Shri Avesh Makrani, Mankind, by Mankind has cast doubts on the veracity of the audio recording between Shri Nayan Raval, Partner IP-3/IP-4 and Shri Avesh Makrani. The cross-examination of Shri Avesh Makrani by the counsel for Quality Life Sciences reveals that Shri Avesh



Makrani, along with other company representatives had gone to meet Shri Nayan Raval, upon assurance from his Senior Manager that if Shri Avesh Makrani is able to obtain proof of unauthorisedly procured supplies of Mankind's products by Shri Nayan Raval, credit for such sales will be given to Shri Avesh Makrani. During the said visit, purportedly Shri Dahyabhai Patel, Shri Nayan Raval's Partner, stated about the prevalence of NOC practice by Federation/associations. On the same evening, Shri Nayan Raval made a telephonic call to Shri Avesh Makrani, which was recorded, wherein Shri Avesh Makrani made comments regarding existence of NOC practice allegedly to please Shri Nayan Raval. During his cross-examination, Shri Avesh Makrani admitted that he has no basis/evidence to support whatever he stated in the conversation and that the said conversation was based on market rumours. His cross-examination further reveals that Shri Avesh Makrani was wanting to please Shri Nayan Raval so that the latter could divulge the name of the stockist through whom he was sourcing Mankind's products and trading the same in the market without authority.

148. In view of the insufficiency of evidence, the Commission finds it difficult to hold Mankind and/or its C&F Agent, Quality Life Sciences, liable for the contravention of the provisions of the Act.

**Glenmark Pharmaceutical Ltd. and its C&F Agent M/s. B.M. Thakkar & Co.**

149. Documents placed on record by Glenmark during the investigation contained data for appointment of new stockist at Ahmedabad prepared by the Distribution Department of the company during 2014-15. These contained information, in the specified format, regarding requirement of NOC and whether the same has been obtained or not. Further, as discussed earlier, the '*Checklist For Stockist Appointment*' in case of M/s Sanjay Agencies and M/s Dhruvi Pharma contained notings in the margin showing Glenmark's complicity with the Federation/Shri Jashvant Patel. These *Checklists* have been reproduced and discussed previously in Issue No. 1 and require no reiteration. Suffice to say



that the said evidence establish that Glenmark was facilitating the practice of NOC mandated by OP-1/Federation.

150. The Commission observes that ‘NOC required- obtained’ in summary sheets of M/s Dhruvi Pharma does not refer to Cluster Heads, as alleged by Glenmark, but clearly refers to NOC from Federation/ Association. This is substantiated by similar notings on the application of M/s. Sanjay Agency and Dhruvi Pharma Pvt. Ltd.. These notings being NOCs have also been corroborated from the statements of Shri Tapash Ranjan Paul and Shri Arun Poojari. During cross-examination of Shri Arun Poojari, by the counsel for Federation, Shri Arun Poojari has stated that company takes help of its own distributors to check credentials of its prospective stockists, but later has accepted Shri Jashvant Patel had called him about stockist’s credentials and the field officers may have verified credentials from association.
151. Glenmark has objected to DG’s reliance on said notings by stating that notings in the margins of two stockist appointment forms out of 14 stockists, which were appointed during 2014-15 and 2015-16, cannot be said to constitute a practice of asking NOC from the Federation. The Commission finds this objection unacceptable. Over the past years, the Commission has dealt with several cases involving the prevalence of NOC practice by the State/District level chemists and druggists associations.
152. Despite various orders by the Commission in similar cases with respect to the behaviour of chemists and druggists associations and pharmaceutical companies, these associations/pharmaceutical companies have not abstained from indulging in such anti-competitive conduct. Instead of desisting from such an activity, the associations are mandating the NOC requirement, either verbally (in order to avoid any documentary evidence/proof) or through camouflaged congratulatory/intimation/recommendation letters, with a view to hide the apparent anti-competitive behaviour behind these benign nomenclatures. By using these nomenclatures, the associations have tried to mislead the



Commission so as to avoid the legal consequences of their anti-competitive conduct. Considering the progression which is taking place from written to verbal NOCs, it is becoming increasingly difficult to find evidence in such cases. Therefore, the quality of the evidence should prevail over the quantity/number of such an evidence and the contention of Glenmark is rejected.

153. With regard to its C&F Agent, M/s B.M Thakkar & Co., the Commission notes that the audio clip of recorded conversation containing conversation between Shri Nayan Raval and Shri Dakshay Thakkar, relevant excerpts of which have been reproduced in Issue 1, reveals that 'NOC from Association' is required for stockistship.
154. The Commission notes that Shri Dakshay Thakkar admitted, before the DG, the conversation between Shri Nayan Raval and himself as well as the transcript submitted for the recorded conversation. The recorded conversation indicated the requirement of NOC in question being enforced by Glenmark through its C&F Agent, M/s B M Thakkar & Co. Thus, furthering the practices carried on by the Federation/CDAB amounts to an understanding/agreement between Glenmark/M/s B. M. Thakkar & Co. and the Federation/ Associations. The fact that the requirement of NOC/ consent of Association concerned (in this case CDAB) was repeated multiple times during the recorded conversation which indicates that it was necessary for appointment of stockists by Glenmark. The recorded conversation also bring out the active role played by M/s B M Thakkar & Company, C&F Agent of Glenmark, acting through Shri Dakshay Thakkar.
155. Thus, Glenmark and its C&F Agent, M/s B.M. Thakkar, by virtue of their arrangement/understanding with OP-1/OP-4, also become liable for the consequences of the anti-competitive effects that the NOC requirement has on the market. As such an agreement/understanding has an adverse impact on competition in the overall market for supply of medicines and drugs, the Commission holds them liable for entering into an anti-competitive



arrangement/understanding/coordination with OP-1/OP-4 in violation of the prohibition contained in Section 3(1) of the Act.

**Cadila Healthcare Ltd. and its C&F Agent M/s Rimi Distributors**

156. As highlighted in the previous part of this order, Cadila Healthcare Ltd. ('Cadila') and M/s Rimi Distributors, had filed a writ petition (W.P.(C) 2106/2018) before the Hon'ble Delhi High Court challenging the order of the Commission dated 16<sup>th</sup> January 2018, wherein their review/recall application and cross-examination has been dismissed. On 09<sup>th</sup> March, 2018, the Ld. Single Judge of the Hon'ble Delhi High Court, dismissed the said writ petition (W.P. (C) 2106/2018) holding that the parties can apply for review/recall of the *prima facie* order during investigation but not after the investigation report has been submitted by the DG to the Commission. Subsequently, Cadila and M/s Rimi Distributors filed an appeal against the order of the Single Judge dated 09<sup>th</sup> March, 2018 *i.e.* LPA 160/2018, along with Writ Petition WPC 2899/2018 challenging the constitutionality of Regulation 20(4) of the CCI (General) Regulations, 2009, as well as challenging the *suo-motu* power of the DG to investigate Cadila when there was no *prima facie* finding. The Division Bench of the Hon'ble Delhi High Court heard the parties on 18<sup>th</sup> April, 2018 and reserved the order in LPA 160/2018. The W.P. (C) 2899/2018 was allowed to be withdrawn at the request of the party with liberty to file fresh petition if need be. Considering that the Hon'ble Delhi High Court is yet to pass order in LPA 160/2018, the Commission decides to deal with Cadila and M/s Rimi Distributors separately, based on the order passed by the Division Bench of the Hon'ble Delhi High Court.

**Divine Saviour Pvt. Ltd.**

157. The Commission observes that the DG relied upon certain email exchanges between Shri Rakesh Shah, Director, Divine Saviour and the office bearers, including the President, of SCDA/OP-3. The main issue in these emails pertained to the pending dues of one M/s Beena Medical Agency to Divine



Saviours for which the latter was seeking the intervention of SCDA/OP-3. Throughout the proceedings, Divine Saviour maintained its stand that the intervention was sought only to resolve the dispute regarding pending payment and no anti-competitive element was involved in the said email exchanges.

158. The Commission has already dealt with the contents of the attachment with one of the emails, viz. letter dated 24<sup>th</sup> April, 2015, while deciding the involvement/role of OP-3 under Issue 1. The subject line of the said letter *i.e.* ‘*For the Appointment of New Stockist at Surat*’ as well as the contents ‘*....we would like to have your favour to grant a permission to appoint a new stockist in Sural in lieu of following points*’ are self-speaking. Further, permission to appoint new stockist was based on two ‘points’ by Shri Rakesh Shah. Firstly, it was stated the company was having low coverage in Surat and, secondly, the company highlighted its pending payment issues with the then existing stockist namely, M/s Beena Medical Agency. Later emails were also exchanged between Shri Rakesh Shah and Shri Pravin Vekariya, President, OP-3 on the same issue.
159. The Commission observes that though the issue of delayed payment may have been there at the time when intervention of SCDA was sought, such an intervention also reveals the dependence of pharma companies (Divine Saviour in this case) in taking their commercial decisions. Appointment of stockists should be a prerogative of pharmaceutical companies and such decisions should be taken on the basis of their product demand in the markets and other commercial considerations. However, contents of letter dated 24<sup>th</sup> April, 2015, shows that Divine Saviour was facilitating the practice of NOC mandated by SCDA. It was seeking NOC for appointment of new stockist and also consent of the association for terminating the stockistship of M/s Beena Medical Agency. Thus, it is apparent that the averments of pharma companies that stockist appointment is done on their own on need basis and they have complete discretion to choose their stockists, are shallow claims.



160. Thus, the Commission is of the view that Divine Saviour has indulged in an anti-competitive conduct by entering into and understanding/agreement with SCDA/OP-3 which has caused adverse impact in the market and rendered them liable under Section 3(1) of the Act.

**Hetero Healthcare Ltd.**

161. With regard to Hetero Healthcare, the Commission observes that there is an audio call recording dated 16<sup>th</sup> June, 2015, between Shri Yogesh Patel, Partner, IP-1 and Shri Bharat Pandya, Regional Sales Manager, Hetero Healthcare. Such call recording reveals the inability of Hetero Healthcare to appoint IP-1 as its stockist until and unless it obtains NOC from OP-1/OP-2. The relevant excerpts of the said call recording, at the cost of repetition, are provided below:

*Bharat: **But only Gujarat is such a state that their association had pulled me long** (Not allow /permit to distribute all to all division goods to stockiest)*

*Bharat: **And they allowed us on 2012.it means Gujarat Association is very strong.***

*[...]*

*Bharat: So, I told him that all responsibility of stockiest, but he told me that we want this .. only, otherwise we not go ahead.*

*Yogesh: It means need a N.O.C.?*

*Bharat: **Means he want that ahmedabad chemist & druggist ass. Write letter on their letter head that.***

*Yogesh: Yes.*

*Bharat: If you made stockiest then we (asso.) Had No objection.*

*Yogesh: So, in short that ...*

*Bharat: Or in short if they write we (ahmedabad chemist & druggist ass.) Not do any practice for N.O.C. requires to company. He want any of one letter in writing. In short he want clearance letter from Ahmadabad chemist & druggist association, this talked on last Monday.*

*[...]*

*Yogesh: So, he is asking for N.O.C. right*

*Bharat: **Yes, only one N.O.C. letter is short, which you have to make available.***

*[...]*

*Yogesh: It means it I want goods in regular way without any discrimination then I have to provide NOC of Ahmedabad chemist & druggist Association.*

*Bharat: Right... Right ...*

(emphasis supplied)





162. The aforesaid excerpts clearly establish how Hetero Healthcare was facilitating the NOC practice mandated by the Association. The dialogues in the conversation bring out that appointment of IP-1 during that time could not take place because of the absence of NOC by Amdavad Chemists Association (OP-2)/Federation (OP-1).
163. In its submissions, Hetero Healthcare has averred that during the period 2014-15, pharmaceutical industry was being coerced by various associations, compelling companies to seek their consent/NOC for appointment of stockists. In the midst of such a scenario, an inadvertent error crept in by one of the Regional Managers of Hetero Healthcare, *namely* Shri Bharat Pandya, while dealing with Mr. Yogesh Patel, Partner, IP-1. However, such a defence cannot be accepted. Denial of stockistship to IP-1 for want of NOC confirms that the practice continues to perpetrate in Gujarat because of the obstinacy of chemists and druggists associations and cooperation accorded by pharmaceutical companies.
164. In the result, the Commission concludes that there was an anti-competitive arrangement/understanding between Hetero Healthcare and OP-1/OP-2 in violation of Section 3(1) of the Act which has adversely affected the supply of drugs in the market.

***Liability of individuals under Section 48 of the Act***

165. Liability of individuals of the erring companies/association is enshrined under Section 48 of the Act. Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of this Act is a company (including a firm or an association of individuals), every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/firm/association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Further, the proviso to Section 48(1) of the Act entails





that such person shall not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the occurrence of such contravention. Thus, Section 48(1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/firm/association. Once Section 48(1) of the Act is triggered, it is for such person/officer/office bearer to then prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act.

166. Section 48(2) of the Act, on the other hand, attributes liability on the basis of the de-facto involvement of an officer. It states that '[n]otwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly'. In light of the provisions contained in Section 48(1) and 48(2) of the Act, the role of the office bearers/officials of the Federation and its district associations at Amdavad, Surat and Vadodara, and erring pharmaceutical companies to examine whether the evidence on record substantiates their liability for the anticompetitive conduct of their association.

***Shri Jashvant Patel, President, Federation (also Chairman, Amdavad Chemists Association)***

167. At the outset, it is noted that Shri Jashvant Patel was the President of the Federation/OP-1 and Chairman of Amdavad Chemists Association/OP-2 at the



relevant time period (*i.e.* 2015-2016) when the anti-competitive conduct by OP-1/OP-2 took place. The Commission has already discussed in detail the evidence/instances against OP-1/OP-1 under issue 1 which establishes that they were mandating the NOC practice prior to the appointment of stockists by the pharmaceutical companies. In most of the instances, Shri Jashvant Patel was actively involved in sending emails, issuing letters *etc.*

168. The DG had confronted Shri Jashvant Patel, President of Federation with all the evidence collected against him and OP-1/OP-2. However, besides bald denials, he could not produce any counter evidence to challenge the veracity of the evidence relied upon by the DG.

169. The Commission notes that majority of the evidence relied upon in this case was in the form of e-mails/letters sent by Shri Jashvant Patel which further show that he was actively involved in perpetrating the NOC practice in the State of Gujarat. Thus, based on these evidences, it can be safely concluded that besides his liability under Section 48 (1) of the Act for the position held by him, he is also liable under Section 48 (2) of the Act for his active involvement in the contravention found against Federation. Thus, the Commission holds him liable under Section 48 (1) as well as Section 48 (2) of the Act.

***Shri Pravin Vekariya, President, SCDA***

170. Shri Pravin Vekariya was the President of SCDA/OP-3 at the relevant time period when the anti-competitive conduct by OP-3 took place, and thus, responsible for the overall functioning of the association. During the course of investigation, the DG recovered emails from the official email account of SCDA/ OP-3. Of these, an email dated 24<sup>th</sup> April, 2015 was sent by Shri Rakesh Shah, Director of Divine Savior Ltd., to SCDA contained the subject as '*for appointment of new stockist at Surat*'. Another email dated 28.04.2013 was recovered *vide* which Shri Praveen Vekariya, President, SCDA conveyed his email address to Shri Rakesh Shah. The Commission has already concluded under Issue 1 that SCDA/OP-3, through its President, Shri Pravin Vekariya, had



intervened in the appointment of stockist to replace the existing stockist providing its consent. Besides bald denials, Shri Vekariya could not produce document or evidence to establish that he was not responsible for the conduct of his association. Thus, as per evidence and his conduct, his liability is made out on the basis of his position as well as his involvement and knowledge of the NOC practice under Section 48(1) as well as Section 48(2) of the Act.

***Shri V.T. Shah, President, CDAB and Shri Alpesh Patel, Secretary, CDAB***

171. The Commission notes that Shri V.T Shah and Shri Alpesh Patel held the position of President and Secretary of CDAB/OP-4 during the relevant time period when the anti-competitive conduct in Baroda/Vadodara took place because of the NOC practice mandated by CDAB. The Commission has already found CDAB to be indulging in the anti-competitive conduct under Issue No. 1. By virtue of their office they were overall incharge of the affairs of the Association. Despite opportunity, none of these officers could produce any evidence to show that they were not aware of commission of this practice or had taken any steps to ensure such practice is not indulged in by the Association. Thus, based on the key positions held by them, the Commission holds them liable under Section 48(1) of the Act.

***Shri Glenn M. Saldanha, Managing Director, Glenmark***

172. Shri Glenn M. Saldanha was the Managing Director of Glenmark at the relevant time period when the anti-competitive conduct by Glenmark took place. The contravention against Glenmark is found to be based on the documents placed on record which included data for appointment of new stockist at Ahmedabad prepared by Distribution Department of the Company during 2104-15, showing specified format information regarding requirement of NOC. Further, the 'Checklist For Stockist Appointment' also contained marginal notings establishing the NOC practice being followed by Glenmark. Thus, based on the position held by him, presumption of his liability for the contravention by his company arises. Despite opportunity, Shri Glenn M. Saldanha could not



establish as to how he was not aware or responsible for such practice. As the Managing Director he ought to have devised measures to ensure that the company, in which he holds a position of responsibility, is not facilitating the practice mandated by the Federation/Shri Jashvant Patel. As explained earlier, Section 48(1) of the Act is triggered when the party in contravention is a company (including a firm or an association of individuals) and a person/individual officer/office bearer is found to be in-charge of, and responsible for the conduct of the business of the contravening company/firm/association. Once Section 48(1) of the Act is triggered, it is for such person/officer/office bearer to then prove that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act. Since he has not been able to rebut the presumption, he is held responsible for the conduct of Glenmark under Section 48(1) of the Act, based on the position held by him during period of contravention.

***Shri Tapash Ranjan Paul, Manager (Distribution), Glenmark***

173. The Documents which contained notings of Shri Jashvant Patel's approval and data with respect to appointment of stockist was all prepared by Shri Tapash Ranjan Paul. The same has been accepted by him during deposition before the DG. Those notings clearly show that Glenmark was facilitating the NOC practice in complicity of the OP-1/OP-2. Therefore, based on his active involvement in respect of contravention found against Glenmark, he is held to be liable under Section 48(2) of the Act.

***Shri Arun Poojari, Senior Manager (Distribution), Glenmark***

174. The notings in the documents relating to appointment of stockist contained notings added by Shri Tapash Ranjan Paul based on the instructions of Shri Arun Poojari, which Shri Poojari had received through phone calls from Shri Jashvant Patel. The same was admitted by Shri Arun Poojari in his deposition



before the DG dated 08<sup>th</sup> June, 2016. Thus, based on his conduct in respect of contravention found against Glenmark, Shri Arun Poojari is held to be liable under Section 48 (2) of the Act.

***Shri V.S. Reddy, Vice President (Logistics and Distribution), Glenmark***

175. Shri V.S. Reddy was the Vice President (Logistics and Distribution), Glenmark at the relevant time period when the anti-competitive conduct by Glenmark took place. Being a senior official in the hierarchy of Logistics and Distribution department in Glenmark, it is highly unlikely that Shri V.S. Reddy could not be aware of the actual process of appointment of stockists and the role of Shri Jashvant Patel/ Federation. In this regard, it is apparent from the material available on record, including the deposition of Shri V.S. Reddy before the DG, that there was a wilful neglect on the part of Shri V.S. Reddy. Thus, he impliedly consented in the practice of obtaining NOC from Dhruvi Pharma Pvt. Ltd. and M/s Sanjay Agency. Accordingly, it is held that Shri V.S. Reddy is liable under Section 48(2) of the Act.

***Shri Dakshay Thakkar. Partner, B.M. Thakkar & Co., C&F Agent of Glenmark***

176. Shri Dakshay Thakkar was the Partner of M/S B.M. Thakkar & Co. at the time when anti-competitive conduct by his company took place. The call recording submitted by Shri Nayan Raval, Partner, IP-3/IP-4 of conversation between him and Shri Dakshay Thakkar dated 24<sup>th</sup> June, 2015 wherein Shri Dakshay Thakkar conveyed that NOC is required from chemist and druggists association in relation to process of appointment as stockists. Such evidence shows active involvement in addition to key position held by him making him responsible under Section 48(1) and also liable Section 48(2) of the Act for his active involvement in the contravention by M/s B.M. Thakkar & Co.

***Shri Bharat Pandya, Regional Manager, Hetero Healthcare Ltd.***

177. *Vide* call recording dated 16<sup>th</sup> June, 2015, submitted by Shri Yogesh Patel, Partner, IP-1, Shri Bharat Pandya told Shri Yogesh Patel that stockistship of



Hetero Healthcare cannot be offered until NOC is provided from the Association/ Federation to the company. Therefore, the conduct of Shri Bharat Pandya shows his active involvement in perpetrating the NOC practice mandated by the Association and he is thus, held liable under Section 48(2) of the Act.

***Shri M. Srinivas Reddy, Managing Director, Hetero Healthcare***

178. Shri M. Srinivas Reddy was the Managing Director of Hetero Healthcare at the relevant time period when the anti-competitive conduct by Hetero Healthcare took place. Despite opportunity, Shri M Srinivas Reddy was not able to demonstrate that the anti-competitive conduct took place without his knowledge or that he took adequate measures to avoid its occurrence. Therefore, based on the key position of Managing Director held by Shri M. Srinivas Reddy, it is inferred that he was in-charge of and responsible for the conduct of Hetero Healthcare at the relevant time, making him liable under Section 48(1) of the Act.

***Shri Rakesh Shah, Director, Divine Savior***

179. Shri Rakesh Shah was the Director of Divine Saviour at the relevant time period when Divine Saviour indulged in the anti-competitive conduct and thus, held a position of responsibility in the said company. Shri Rakesh Shah has not been able to demonstrate that the contravention by Divine Saviour was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention, in order to be absolved of liability under Section 48(1) of the Act. Rather, the email dated 24<sup>th</sup> April, 2015, recovered from the email dump of the President, SCDA, establishes that Shri Rakesh Shah sought permission of SCDA in relation to appointment of a new stockist by



Divine Savior. This evidence shows his active involvement in addition to the key position held by him, making him liable under Section 48(1) as well as Section 48(2) of the Act.

### Order

180. Section 27 of the Act empowers the Commission to issue certain specific order as well as and/or such other order or direction as it may deem fit in case of contravention of the provisions of Section 3 or 4 of the Act. Further, where a contravention of the Act is committed by a company, including a firm or other association of individuals, the Commission may also proceed under Section 48 of the Act to hold and penalise the individuals of such companies/ associations/ firms *etc.* guilty of the said contravention.
181. In view of the findings elucidated in the earlier part of this order, the Commission directs OP-1 to OP-4, Glenmark Pharmaceutical Ltd., M/s B.M. Thakkar & Co., Divine Saviour Pvt. Ltd. and Hetero Healthcare Ltd., including their office bearers/officials, who have been found to be liable under Section 48 of the Act, to cease and desist from indulging in the practice of mandating NOC, which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act.
182. Despite several orders of the Commission proscribing the anti-competitive practices of state and regional chemists and druggists associations in *inter alia* mandating NOC for appointment of stockists and stringent penalties imposed upon them, it is found that these associations are continuing to indulge in these practices. The Commission has recently imposed penalty on OP-1/Federation and OP-4/CDAB in *Case No. 97 of 2013* which was under investigation since 2014. However, the provisions of the Act and spirit of competition seems to be of least priority to these associations who only believe in disturbing the fair competition through their unfair means.



183. Thus, it is necessary that this anti-competitive conduct is penalised adequately to discipline not only the erring party for the said contravention, but to also create deterrence so as to prevent future contraventions of the Act. Accordingly, the Commission deems it appropriate to impose a penalty on OP-1 to OP-4 at the rate of 10% of their respective incomes based on their Income and Expenditure account for three financial years as filed by them which are shown hereinbelow:

**Income of OP-1, OP-2, OP-3 and OP-4**

Year	(In Rupees)			
	FGSCDA/OP-1	Amdavad/OP-2	SCDA/OP-3	CDAB/OP-4
2011-12	1,19,60,060	-	-	-
2012-13	99,81,832	-	-	-
2013-14	71,17,633	8,88,656	7,88,689	5,09,511
2014-15	-	3,99,452	15,88,245	4,83,646
2015-16	-	20,50,239	9,05,479	8,43,804
<b>Total</b>	2,90,59,525	33,38,347	32,82,413	18,36,961
<b>Average</b>	96,86,508	11,12,782	10,94,137	6,12,321
10% of Average Income	9,68,651	1,11,278	1,09,413	61,232

184. Resultantly, the following penalties, calculated at the rate of 10% of their average income, are payable by them:

**Penalty amount payable by OP-1, OP-2, OP-3 & OP-4**

	(In Rupees)			
	FGSCDA/OP-1 (in Rs.)	Amdavad/OP-2 (in Rs.)	SCDA/OP-3 (in Rs.)	CDAB/OP-4 (in Rs.)
<b>Amount of Penalty</b>	9,68,651/-	1,11,278/-	1,09,413/-	61,232/-

185. With regard to the individual liability of the office bearers of OP-1 to OP-4 in terms of the provisions of Section 48 of the Act, the Commission deems it





appropriate to impose penalties at the rate of 10% of their income based on their income tax returns (ITRs) for three financial years as filed by them as mentioned hereinbelow:

**Income of Office Bearers of OP-1, OP-2, OP-3 and OP-4**

(In Rupees)

Year	Jashvant Patel(President of OP-1/ Chairman of OP-2)	Shri Pravin Vekariya, (President of OP-3)	Shri V.T. Shah (President of OP-4)	Shri Alpesh Z Patel (Secretary of OP-4)
2011-12	3,56,000	-	-	-
2012-13	6,49,000	5,55,946	6,50,874	-
2013-14	8,59,327	6,14,372	2,03,377	5,65,046
2014-15	-	7,15,314	2,41,824	6,37,732
2015-16	-	-	-	6,23,565
<b>Total</b>	18,64,327	18,85,632	10,96,075	18,26,343
<b>Average</b>	6,21,442	6,28,544	3,65,358	6,08,781
10% of Average Income	62,144	62,854	36,535	60,878

186. Resultantly, the following penalties, calculated at the rate of 10% of their average income, are payable by them:

**Penalty amount payable by Office Bearers of OP-1, OP-2, OP-3 & OP-4**

(In Rupees)

	Shri Jashvant Patel(President of OP-1/ Chairman of OP-2)	Shri Pravin Vekariya, (President of OP-3)	Shri V.T. Shah (President of OP-4)	Shri Alpesh Z Patel (Secretary of OP-4)
<b>Amount of Penalty</b>	62,144/-	62,854/-	36,535/-	60,878/-



### ***Penalties on Pharmaceutical Companies***

187. With regard to the three pharmaceutical companies and the C&FA, the Commission deems it appropriate to impose penalties at the rate of 1% of their average income based on their financial statements of the three years as filed by them are mentioned hereinbelow:

#### **Revenue of Pharmaceuticals companies**

(Rupees in Lacs)

<b>Year</b>	<b>Glenmark Pharmaceutical Ltd.</b>	<b>B.M. Thakkar &amp; Co.</b>	<b>Hetero Healthcare Ltd.</b>	<b>Divine Savior Pvt. Ltd.</b>
2013-14	2,30,090.40	16.89	17,375.79	481.00
2014-15	5,08,560.20	21.85	21,396.26	562.79
2015-16	6,11,349.80	24.18	29,905.25	641.57
<b>Total</b>	<b>13,50,000.40</b>	<b>62.92</b>	<b>68,677.30</b>	<b>1,685.36</b>
<b>Average</b>	<b>4,50,000.13</b>	<b>20.97</b>	<b>22,892.43</b>	<b>561.78</b>
1% of Average Income	4,500.00	0.20	228.92	5.61

188. The Commission notes here that in the submissions made by Hetero Healthcare before the Commission, it has admitted contravening provisions of the Act, though it contends that this occurred due to confusions/ misunderstandings on the part of its Regional Manager and the same bears no resemblance to its policy in the matter. The Commission further notes the submission of Hetero Healthcare that it never refused to sell/supply its drugs to the Informant even during the alleged period and such inadvertence be considered only as a stray incident. Hetero Healthcare also assured the Commission that it would give clear instructions to all its field force in the matter to prevent any such incident in future.



189. In view of the above submissions of Hetero Healthcare, the Commission is of the opinion that due consideration needs to be given to the fact that Hetero Healthcare came forward before the Commission and admitted to its guilt of breaching the relevant provisions of the Act. In the same vein, the Commission also records its appreciation for aforesaid admission of Hetero Healthcare which requires encouragement. Therefore, the Commission opines that such cooperation on the part of Hetero Healthcare can be considered as a mitigating factor to provide to it certain remission in the penalty amount to be paid by it.
190. Therefore, in light of above mitigating facts and circumstances, the Commission considers it appropriate that a remission of 40% on the total penalty calculated as above be allowed to Hetero Healthcare Ltd. and thus, the penalty payable by Hetero Healthcare is calculated at Rs. 1,37,35,460/-.
191. Resultantly, the following penalties, calculated at the rate of 1% of their average income, taking into account remission given to Hetero Healthcare Ltd., payable by the pharmaceutical companies and the C&FA as mentioned hereinbelow:

**Penalty amount payable by Pharmaceutical Companies and C&F Agent**

(Rupees in Lacs)

	<b>Glenmark Pharmaceutical Ltd.</b>	<b>B.M. Thakkar &amp; Co.</b>	<b>Hetero Healthcare Ltd.</b>	<b>Divine Savior Pvt. Ltd.</b>
<b>Amount of Penalty</b>	4500.00	0.20	137.35	5.61



### Penalties on Officials of the Pharmaceutical Companies

192. With regard to the individual liability of the office bearers of the contravening pharmaceutical companies in terms of the provisions of Section 48 of the Act, the Commission deems it appropriate to impose penalties at the rate of 1% of their income based on their income tax returns (ITRs) for three years as filed by them as mentioned hereinbelow:

#### Income of Officials of Pharmaceutical Companies (Income in Rupees)

(Income in Rupees)

Year	Shri Tapash Ranjan Paul, Manager (Distribution) Glenmark Pharmaceutical Ltd.	Shri Arun Poojari, Sr. Manager (Distribution), Glenmark Pharmaceutica l Ltd.	Shri V.S. Reddy, Vice President (Logistic and Distribution) Glenmark Pharmaceutica l Ltd.	Shri Dakshay Thakkar, Partner, B.M. Thakkar & Co.
2012-13	9,05,581	9,75,143	32,50,793	10,57,137
2013-14	9,92,731	11,65,254	50,94,303	29,92,581
2014-15	11,53,211	14,74,443	47,66,234	26,88,217
2015-16	-	-	-	-
<b>Total</b>	30,51,523	36,14,840	1,31,11,330	67,37,935
<b>Average</b>	10,17,174	12,04,946	43,70,443	22,45,978
1% of Average Income	10,172	12,050	43,704	22,460

193. Resultantly, the following penalties, calculated at the rate of 1% of their average income, are hereby imposed upon them:



**Penalty amount imposed on Officials of Pharmaceutical Companies**

(In Rupees)

	<b>Shri Tapash Ranjan Paul, Manager (Distribution) Glenmark Pharmaceutical Ltd.</b>	<b>Shri Arun Poojari, Sr. Manager (Distribution), Glenmark Pharmaceutical Ltd.</b>	<b>Shri V.S. Reddy, Vice President (Logistic and Distribution) Glenmark Pharmaceutical Ltd.</b>	<b>Shri Dakshay Thakkar, Partner, B.M. Thakkar &amp; Co.</b>
<b>Amount of Penalty</b>	10,172/-	12,050/-	43,704/-	22,460/-

194. Before parting with the order, the Commission notes that the following individuals did not furnish their income tax returns despite specific directions and sufficient notice and reminders given by the Commission from time to time.

- i. Shri Glenn M. Saldanha, Managing Director, Glenmark Pharmaceutical Ltd.
- ii. Shri M. Srinivas Reddy, Managing Director, Hetero Healthcare Ltd.
- iii. Shri Bharat Pandya, Regional Manager, Hetero Healthcare Ltd.
- iv. Shri Rakesh Shah, Director, Divine Savior Pvt. Ltd.

195. It may be noted that *vide* the Commission's order dated 28<sup>th</sup> June, 2018, proceedings under Section 43 of the Act have already been commenced against the aforementioned four individuals by issuing to them a show cause notice. Accordingly, a separate order regarding penalty would be passed in respect of these individuals in due course.

196. The aforesaid other parties are directed to deposit the amount of penalty within 60 days of the receipt of this order.



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

**Sd/-  
(Devender Kumar Sikri)  
Chairperson**

**Sd/-  
(Sudhir Mital)  
Member**

**Sd/-  
(U. C. Nahta)  
Member**

**Sd/-  
(Justice G. P. Mittal)  
Member**

**New Delhi  
Dated: 12/07/2018**