

Sh. SANJIV JAIN
Commercial Court-03 District Judge
Room No. 24
Patiala House Courts
New Delhi

**In the Court of Shri Sanjiv Jain,
District Judge (Commercial Court)-03, Patiala House Courts
New Delhi**

CS (COMM) No. 973/2022

Wings Pharmaceuticals Pvt Ltd

D-6, Udyog Nagar Indl. Area
New Delhi-110041

... Plaintiffs

versus

Laborate Pharmaceuticals India Ltd

E-11, Industrial Area
Panipat, Haryana

.... Defendant

ORDER

17.12.2022

1. The plaintiff, Wings Pharmaceuticals Pvt Ltd has filed the suit for permanent injunction against the defendant, Laborate Pharmaceuticals India Ltd praying *interalia* as under:-

i) To restrain the defendant, its directors, proprietor or partners, their assignees in business, licensees, franchisee, distributors and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in medicinal or pharmaceuticals products or any other products under the mark SORE CARE or



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any other trademark/tradename/domain name as may amount to infringement of the plaintiff's trademark ORASORE registered under nos. 787554, 3506438 and 3506440;

ii) To restrain the defendant, its directors, proprietor or partners, their assignees in business, licensees, franchisee, distributors and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in the impugned ORASORE blue and white Dispenser, Mono Carton and Lami Tube packaging, trade dress or any other Carton packaging/Trade Dress as may be a colourable imitation or substantial production of ORASORE blue and white dispenser, Mono Carton and Lami Tube packaging/trade dress amounting to infringement of copyright of the plaintiff's registered under no. A-137528/2021;

iii) To restrain the defendant, its directors, proprietor or partners, their assignees in business, licensees, franchisee, distributors and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in pharmaceutical products under the impugned ORASORE blue and white carton packaging/trade dress or any other trade dress/packaging as may be colourable imitation or substantial reproduction of plaintiff's well known ORASORE blue and white Carton packaging/trade dress amounting to passing off its goods as those of the plaintiffs.



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iv)

v)

2. Alongwith the suit, applications U/o 39 Rule 1 & 2 CPC r/w Section 151 CPC and under Order 26 Rule 9 r/w Section 151 CPC have been filed for exparte ad-interim injunction and appointment of the Local Commissioner.

3. Briefly, the facts as alleged in the plaint are that plaintiff was the part of Wings Group which group has three business entities i.e. Wings Pharmaceuticals Pvt Ltd, Wings Biotech (now Wings Biotech LLP) and Wings Biotech LLP. Vide assignment deed dated 25.03.2022, Wings Biotech LLP and Wings Pharmaceuticals Pvt Ltd agreed to assign and transfer benefit, title interest and right along with goodwill of the business in the goods and services to the plaintiff. It is stated that over the years, plaintiff has grown phenomenally in segments like Acute, OTC, Life care, personal care and consumer care. It invented and adopted the trademark ORASORE in 1998 and has been using the same since then. Its products under the mark ORASORE are available in different



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variants including ORASORE gel, ORASORE mouth ulcer tablet and ORASORE dental gel etc. Its trademark ORASORE has been in use for treating mouth ulcers since the year 1998. It has marketed the brand name ORASORE through TV advertisements, danglers, posters, leaflets etc. It has number of trade dress in Blue and white packaging in other languages like Malayalam, Tamil, Hindi, Bengali etc. It has filed and obtained registration for the trademark ORASORE (word) under no. 787554 dated 14.01.1998, in class 5 for goods namely pharmaceutical and medicinal preparations on proposed to be used basis. The said mark is still valid and subsisting. Its group entity namely Wings Biotech also obtained registration for the trademark ORASORE MOUTH + First Aid under no. 3506438 dated 04.03.2017 in class 5 and ORASORE MOUTH + First Aid (Hindi) under no. 3506440 dated 04.03.2017 in class 3. The said trademark applications have now been assigned to the plaintiff.

4. It is stated that blue and white trade dress and device mark were developed and adopted by the plaintiff in the year 1998. At the time of adoption, no third parties were using any similar trade dress or combination of colours in the industry. Its blue



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and white packaging/trade dress including colour combination, get up, placement of features constitute singularly and collectively an original artistic work within the meaning of Section 2 (c) of the Copyright Act, 1957 and thus, it is entitled to copyright protection under the provisions of Section 14 of the Copyright Act. It also got registered copyright under no. A-137528/2021. It is stated that any unauthorized reproduction or imitation or use of such imitation by any unauthorized person would constitute infringement of its copyright under Section 51 of the Copyright Act which is liable to be enjoined under Section 55 of the said Act.


5. It is stated that the sales of plaintiff's blue and white carton packaging/trade dress in the year 2022-23 was Rs. 52,85,60,074/-. Its trademark ORASORE and ORASORE blue and white dispenser, Mono Carton and Lami Tube packaging/trade dress has acquired distinctiveness and enviable goodwill and reputation due to extensive, long and continuous use since year 1998. It is stated that its trade dress has been designed and developed to give it a Sleeker blue and the white trade dress and device mark were developed and adopted by it in the year 1998. It as a part of re-branding exercise, adopted the blue and white carton packaging/trade dress containing



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various distinctive devices. In 2009, on the ORASORE blue and white packaging, the style of writing ORASORE with a hiphphen along with tagline '*Quick Relief from pain mouth ulcers*' and मुँह में छालों की दर्द से तुरंत आराम with an image exhibiting an

actor, taglines in hindi with placement of . In the year 2015 and 2018, it incorporated certain changes as detailed in para 15 (b) and (c). It is stated that plaintiff's trademark ORASORE and ORASORE blue and white dispenser, Mono carton and Lame Tube Packaging trade dress have acquired a status of well known mark within the meaning of Section 2 (1) (zg) of the Trademarks Act, 1999.

6. It is alleged that defendant is engaged in the impugned activities of manufacturing and marketing of impugned product of the plaintiff. Its products are being advertized, listed and sold on their own as well as various other interactive e-commerce websites as detailed in para 27. It has unethically and unlawfully adopted the impugned mark SORE CARE and SORE CARE blue and white dispenser, Mono carton and Lami Tube packaging/trade dress. It is alleged that the defendant's impugned mark SORE CARE is visually, structurally and



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phonetically and deceptively similar to the plaintiff's registered trademark ORASORE and such use by the defendant constitutes infringement of plaintiff's registered trademark ORASORE under nos. 787554 dated 14.01.1998 in Class 5, ORASORE MOUTH + FIRST AID (word) under no. 3506438 dated 04.03.2017 in class 5 and ORASORE MOUTH + FIRST AID (HINDI) under no. 3506440 dated 04.03.2017 in Class 3. It is alleged that use of the impugned SORE CARE blue and white carton packaging/trade dress by defendant is colourable imitation and substantial reproduction of ORASORE, blue and white Carton packaging/trade dress in respect of its overall colour combination, lay out, placement and arrangement of features and devices.

7. It is alleged that the defendant has taken key elements of what registers in a common person's mind on seeing a product i.e. distinctive blue and white colour combination of the dispenser, mono carton and lami tube packaging/trade dress along with term '*two minute pain relief*' and '*SORE CARE pain relief gel for mouth ulcers*'. These features are strong enough to create confusion in the minds of a common person on account of imperfect recollection and overall similarity and idea conveyed



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by the trade dress and packaging of both the parties. It is stated that defendant's products manufactured and marketed by it under the impugned mark SORE CARE blue and white dispenser etc are visually and structurally deceptively similar to the plaintiff's trademark ORASORE, its formative variants along with blue and white dispenser etc which will directly and adversely affect its goodwill and reputation and it will amount to passing off the defendant's goods for those of the plaintiff which action is liable to be enjoined under Section 135 of the Trademarks Act. It is stated that defendant is competing with the plaintiff in the same field of activities, selling the identical products taking advantage of brand equity and goodwill built up by the plaintiff in the trade name/trade dress.

8. It is stated that plaintiff is not claiming complete and absolute monopoly over the use of single colour. It is averring that the specific and unique blue and white colour combination as a part of its dispenser etc/packaging/trade dress has imprinted itself on the subconscious minds of the consumers due to its prominence in the market and strategic marketing activities. It is alleged that irreparable harm would be caused to the plaintiff due to passing off and unfair competition practice by the



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defendant. A customer finds the defendant's products presuming it to be a product as that of the plaintiff and shall expect the same high standards which the plaintiff has strived to achieve for its products.

9. I have heard Sh. Sachin Gupta and Sh. Rohit Pradhan, Id. counsels for the plaintiff and perused the plaint and the documents.

10. Id. Counsel for the plaintiff reiterated what has been stated in the plaint. He submitted that present is a passing off action in relation to trade dress, get up, lay out, colour scheme and placement of distinctive features of the plaintiff's trademark ORASORE.

11. Reliance is placed on the judgment of the High Court of Delhi in the case of *Colgate Palmolive Company & Anr. V. Anchor Health and Beauty Care Pvt. Ltd.*, MANU/DE/1000/2003: 2003 (27) PTC 478 (Del). It was held:



"52. It is the overall impression that customer gets as to the source and origin of the goods from visual impression of color combination, the container, packaging etc. If illiterate, unwary and gullible customer gets confused as to the source and origin of the goods which he has been using for longer

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period by way of getting the goods in a container having particular shape, color combination words if the first glance of the article without going into the minute details of the colour and getup, it amounts to passing off. In other combination, getup or lay out appearing on the container and packaging gives the impression as to deceptive or near similarities in respect of these ingredients, it is a case of confusion and amounts to passing off one's own goods as those of the other with a view to encash upon the goodwill and reputation of the latter".

12. Ld. Counsel also produced the products to contend that the visual impression gathered from the trade dress of the competing products is that the trade dress, get up, lay out the color scheme and the placement of distinctive features of plaintiff ORASORE products have been substantially copied by the defendant. There is every likelihood that an unwary and gullible customer will get confused.

13. I have given my thoughtful consideration to the rival contentions and perused the documents.

14. A perusal of the documents reveals that the plaintiff is one of the leading manufacturers of pharmaceutical and consumer healthcare products. Over the years, it has grown in segments like acute OTC, life care and customer care. It has acquired

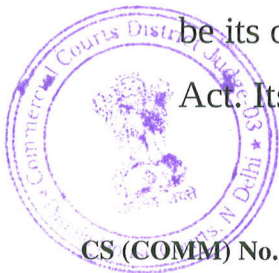


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goodwill and reputation over a period of time in the healthcare sector in India with a track record of growth spanning three decades. It has significant presence across the distribution channel with its products. It invented and adopted the trademark ORASORE in 1998 and has been using the same since then. As averred, its mouth ulcer gel being sold under the trademark ORASORE is an instant pain relief gel. Its products under the mark ORASORE are available in different variants. It has spent extensively for marketing its products. Distinctiveness of its packaging also acquires great significance as a source identifier of its goods. It has obtained registration for the trademark ORASORE in class 5 for the goods namely pharmaceuticals and medicinal preparations. Its trade dress has been designed and developed to give it a sleeker modern look which it adopted in 1998 and at that time, no third parties were using any similar trade dress or combination of colours in the industry.

15. The plaintiff has demonstrated its products/trade dress in para 15 (a), (b) and (c) and has also claimed its copyright stating to be its original artistic work under Section 2 (c) of the Copyright Act. Its sales figure in the year 2022-23 was Rs. 52,85,60,074/-.



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According to the plaintiff, its trademark and trade dress have acquired status of well known mark under Section 2 (1) (zg) of the Trademarks Act, 1999.

16. The plaintiff in para 26 has demonstrated that the defendant who is in the same field had filed an application for registration of the trademark SORE CARE with label in class 5 for the goods, pharmaceuticals and veterinary preparations claiming use since 21.08.2010. It has been alleged that defendant had filed only one unsigned stock transfer note dated 21.08.2010 of SORE CARE cream with the trademark application with an affidavit of use which is false and fabricated. It is stated that till date, the application has not been published and he intends to oppose the same if published qua the use of blue and white carton packaging/trade dress. In this case, as alleged, the defendant's impugned goods are being advertized on URLs/websites as detailed in para 27. The plaintiff has alleged that the defendant has unethically and unlawfully adopted the said mark infringing its copyright with intention to pass off its products as that of the plaintiff using unfair practice which is against the public interest. It is stated that the plaintiff came across to the defendant's products in the fourth week of November, 2022 under the impugned mark SORE CARE and



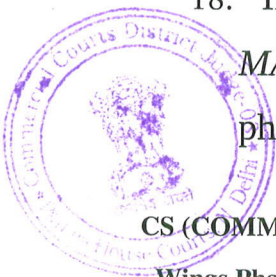
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trade dress of SORE CARE, blue and white dispenser, mono carton and lamitube packaging/trade dress being sold in the markets of Delhi, Connaught Place, Janpath, Khan Market etc in a clandestine manner without issuance of an invoice.

17. In this case, the counsel for the plaintiff has produced both the products and on comparative study, I find that defendant impugned product SORE CARE is visually and structurally similar to the plaintiff's registered trademark ORASORE. Its use may cause confusion and deception to the unwary customers. Use of the impugned SORE CARE blue and white carton packaging/trade dress by the defendant is colourable imitation to its overall colour combination, layout, placement and arrangement of features and device. It appears that the defendant has manufactured/marketed its products using the above tradename/trade dress which is visually and structurally deceptive, with a dishonest intention. It will directly and adversely affect the reputation and goodwill of the plaintiff's products in the market. It would also lead to unfair competition.

18. In the case of *Marico Ltd v/s Mukesh Kumar and ors*, MANU/DE/3084/2018, the court studied the comparative photographs of plaintiff's and defendant's products. In that case,



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plaintiff was not claiming exclusivity as a stand alone factor but in a combination of parts which included the blue colour. It was held that the blue colour was only a source identifier. In the case of *Colgate Palmolive Company (supra)*, it was held that colour in a trade dress can be so significant that in some cases even single colour can be taken to be a trademark to be protected in passing off action. The relevant portion of the said judgment reads as under:-

"60. In the case of passing off and for that purpose infringement of trademark which are already in existence, the second or for that purpose the subsequent comer has certain obligation to avoid unfair competition and become unjustly rich by encashing on the goodwill or reputation of the prior comer. They have to establish and bank upon on their own trade dress or distinctive features so as to establish their own merit and reputation and attract the attention of the purchasing public and if there are no substantial dissimilarities of marks, colour combination, getup or layout on the container or packing or covering of the goods of the prior comer these are likely to create confusion in the minds of customers between his goods and the goods of the prior comer in the market as underlying and hidden intention of the second comer is to encash upon the successful rival.

62. Significance of trade dress and colour combination is so immense that in some cases even single colour has been taken to be a trademark to be protected from passing off action. Colour combination is a trademark within the definition of the TMM Act as



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there is no exclusion in the definition. Even a single colour has been held to be a trade mark. There may be exception also. Exception is that where the colour cannot be protected as the blue colour is for the ink and red colour is for the lipstick. Red and white has nothing to do with the pink. Teeth as white line and gum as pink colour alone at least sometimes can meet the basic requirements as a trademark. Colour depletion theory is unpersuasive only in cases where a blanket prohibition is being sought."

19. In the case of *Baker V. Master Printers Union of New Jersey*, 47 USPQ 69 at 72 (D.N.J.1940), it was held that:

"The most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts. Few would be stupid enough to make exact copies of another's mark or symbol."

20. In the present case, plaintiff is the prior user of the mark ORASORE which it has been continuously using since 1998. Its trademark is registered and is valid and subsisting. Its trademark ORASORE and blue and white carton packaging/trade dress has acquired goodwill and reputation.

21. In the case of *N.R Dongre and Ors v/s Whirlpool Corporation and Anr*, (1996) 5 SCC 714, the plaintiff, who was the prior user of the mark 'WHIRLPOOL' which enjoyed a trans-border



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reputation, had instituted a suit for passing off action to restrain the defendant from manufacturing, selling, advertising or in any way using the trade mark 'WHIRLPOOL' or any other trade mark deceptively or confusingly similar to the trade mark of 'WHIRLPOOL' in respect of their goods. The defendants submitted that the washing machines produced by them costs less than 1/3rd the price of the washing machine marketed by the plaintiff; and the full description affixed on the washing machine leaves no room for any confusion in the mind of the buyer. It was held that where a rival, operating in the same trade name as the plaintiff's, prices his goods or services at significantly cheaper rates than the plaintiff, there is likelihood of irreparable injury to the plaintiffs' reputation and goodwill.

22. In the case of *Amritdhara Pharmacy v. Satyadeo Gupta*, AIR 1963 SC 449, it was held that since time immemorial the Supreme Court has consistently sounded a note of caution that the competing marks have to be compared keeping in mind an unwary purchaser of average intelligence and imperfect recollection.

23. In the case of *South India Beverages Private Limited v/s*



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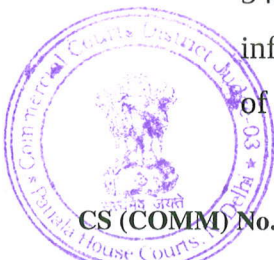
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General Mills Marketing Inc and Anr, 2014 SCC Online DEL 1953, it was held that:

“50. Consumers of any product do not deliberately memorize marks. They only retain a general, indefinite, vague, or even hazy impression of a mark and so may be confused upon encountering a similar mark. Consumers may equate a new mark or experience with one that they have long experienced without making an effort to ascertain whether or not they are the same marks. The consideration therefore is whether one mark may trigger a confused recollection of another mark. Thus, if the marks give the same general impression confusion is likely to occur.

53. The Courts have reiterated that the test for substantial similarity involves viewing the product in question through the eyes of the layman. A layman is not expected to have the same 'hair-splitting' skills as an expert. A punctilious analysis is not necessary. A layman is presumed to have the cognition and experiences of a reasonable man. Therefore, if a reasonable observer is likely to get confused between the two products then a copyright violation is said to take place.

54. Transposing the said principles in the context of trademark infringement, one may venture to assess similarity and likelihood of confusion between rival marks on the touchstone of the



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impression gathered by a reasonable observer, who is a layman as opposed to a connoisseur.”

24. From the averments made in the plaint and the documents placed on record, I find that the plaintiff has prima facie in its favour. The balance of convenience also lies in favour of plaintiff and if ad-interim injunction is not granted in favour of the plaintiff, and against the defendants, it will suffer irreparable loss and injury and damage in its business.

25. As a result, ad-interim injunction is granted in favour of the plaintiff and against the defendant restraining the defendant, its directors, proprietor or partners, their assignees in business, licensees, franchisee, distributors and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in medicinal or pharmaceuticals products or any other products under the mark SORE CARE or any other trademark/tradename/domain name which may amount to infringement of the plaintiff's trademark ORASORE registered under nos. 787554, 3506438 and 3506440; from dealing in the impugned ORASORE blue and white Dispenser, Mono Carton and Lami Tube packaging, trade dress or any other Carton packaging/Trade Dress as may be a colourable imitation or



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substantial production of ORASORE blue and white dispenser, Mono Carton and Lami Tube packaging/trade dress amounting to infringement of copyright of the plaintiff's registered under no. A-137528/2021; and from dealing in pharmaceutical products under the impugned ORASORE blue and white carton packaging/trade dress or any other trade dress/packaging as may be colourable imitation or substantial reproduction of plaintiff's well known ORASORE blue and white Carton packaging/trade dress amounting to passing off its goods as those of the plaintiff till 01.02.2023.

26. The plaintiff is directed to comply with the provisions of order 39 Rule 3 CPC within 15 days.

27. In respect to the prayer made u/o 26 Rule 9 CPC, **Ms. Akshya, Advocate, Enrol.No. D/2927/2018 Chambersofadv.akshya@gmail.com, Contact No. 9891959904** is appointed as the Local Commissioner to visit premises of the defendant at 31, Rajban Road, Nariwala, Paonta Sahib (H.P) its godowns, stores, branches, if any, and to seize the impugned goods etc. under the brand name SORE-CARE or SORE-CARE blue and white carton packaging/trade dress which is identical/deceptively similar to the plaintiff's



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related marks in relation to its impugned goods and business. Fees of the Local Commissioner is assessed at Rs. 1,25,000/- exclusive of travel expenses and tax to be paid in advance.

28. The commission shall be carried out preferably within 15 days from today after giving notice of the commission to the defendant at the spot. Local Commissioner to submit report within two weeks of the execution of the commissioner. The complete paper book be provided to the Local Commissioner by the plaintiff alongwith copy of this order well in time.
29. The Local Commissioner shall seize/take in custody all impugned goods bearing the brand name SORE-CARE or SORE-CARE blue and white carton packaging/trade dress or any other mark/logo which is identical and deceptively similar to the plaintiff's mark in relation to its impugned goods and business.
30. After preparing inventory of the material/ stock, the same be released to the defendants on Superdari or in case of non-availability of defendants, the seized material/stock may be given on Superdari to the representative of the plaintiff. The Local Commissioner shall sign the account books, if any, of the



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said defendants including ledger, cash register, stock register, invoice, books etc.

31. The Local Commissioner shall be at liberty to get the locks, if any, broken in execution of the duties as such.

32. On the request made by Local Commissioner, the concerned SHO shall immediately provide police aid to the Local Commissioner for smooth performance of duties as such.

33. The plaintiff/ applicant may also arrange for videography, photography, photocopy etc, if required.

34. The representative and counsel for the plaintiff may accompany the Local Commissioner.

Announced in open court

today i.e. 17.12.2022.



(Sanjiv Jain)

District Judge

(Commercial Court)-03

New Delhi/ 17th December, 2022

Commercial Court-03 District Judge

New Delhi

Patiala House Courts, N. Delhi

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