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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(COMM) 525/2023

SUN PHARMACEUTICAL
INDUSTRIES LTD & ANR.

..... Plaintiffs

Through: Mr. Sachin Gupta, Mr Ajay
Kumar, Ms. Swati Meena, Ms. Yashi
Agrawal, and Mr. Rohit Pradhan, and Mr
Manan Mondal and Ms. Gaurangi Sharma,
Adv.

versus

NUKIND HEALTHCARE P LTD & ORS. Defendants

Through: None

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

04.08.2023

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1. The plaintiffs, in this suit, alleges infringement, by the defendants, of their registered trademarks AZAX, ZIFEXIM, FERIMON, LESURIDE, FENAK, GABANTIN, MOX-CLAV and VOLINI. A tabular representation of the asserted marks and allegedly infringing marks may be provided thus:

	Plaintiffs' Trade Marks	Defendants' Trade Marks
1.	AZAX	AZEK
2.	ZIFEXIM	CEFIXM/ SEFIXIM/ SEFIXIME
3.	FERIMON	FERIWON
4.	LESURIDE	LISARIDE/ LESUPRIDE
5.	FENAK	YES FENAC
6.	GABANTIN	GABAWIN/GABARUTIN



7.	MOX-CLAV	UMOXYCLAV/ NUMOXYCLAV
8.	VOLINI	VOLIBEST

2. The plaintiffs claim to be the fourth largest generic pharmaceutical company in the world and the largest pharmaceutical company in India. The plaint also sets out the details of the sales figures of the plaintiffs' marks and the expenses incurred by the plaintiffs in the advertisements and promotion of their products to vouchsafe their reputation and goodwill.

3. So far as the aspect of user is concerned, the plaint states in paras 30 and 31 thus:

“30. It may be noted that the medicine under the impugned marks are not reflected in any of the relevant medical/ trade journals and to the best of Plaintiffs' knowledge it seems that the Defendant No.1 has recently adopted the present impugned marks. Further, the said medicine under the impugned mark are also not reflected in ORG IMS Research, which is considered as the Indian pharmaceutical industry benchmark for market data.

31. It may be noted that the Defendant No. 1 has filed applications for registration of the impugned trade mark UMOXYCLAV under application no. 5941965 dated 18.05.2023 claiming use Since 15/03/2017, in class 5 for goods claiming use since 03.12.2022, with goods and description as "*pharmaceutical and medicinal preparation dietetic substances for medicinal use*". The said applications are currently showing the status as '*Formalities Chk Pass*'.”

4. In view of the assertions in para 30 of the plaint that the defendants' marks are not reflected in any of the medical/trade journals and have recently been adopted, the aspect there is sufficient assertion regarding recent user, by the defendants, of the impugned marks within the meaning of para 5 of the judgment of the Supreme Court in *Wander Ltd. v. Antox India P. Ltd*¹. The Court is, therefore,

¹1990 Supp SCC 727
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proceeding on the premise that the impugned mark has not been used by the defendants, for any considerable length of time.

5. Insofar as the aspect of deceptive similarity is concerned, there appears to be a *prima facie* substance in the contention of the plaintiffs, as urged by Mr. Sachin Gupta, learned Counsel apropos the impugned marks FERIWON, LISARIDE/LESUPRIDE, YES FENAC, UMOXYCLAV/ NUMOXYCLAV and VOLIBEST. However, so far as the remaining marks are concerned, I deem it appropriate that the defendants may be permitted to file a response, as aspect of deceptive similarity between (i) AZAX and AZEK for azithromycin, (ii) ZIFEXIM and CEFIXM / SEFIXIM / SEFIXIME, for Cefixime and (iii) GABANTIN and GABAWIN/GABARUTIN for gabapentin are, *prima facie*, arguable.

6. In the circumstances, let the plaint be registered as a suit.

7. Issue summons in the suit. Written statement, accompanied by affidavit of admission and denial of the documents filed by the plaintiffs be filed within 30 days with advance copy to learned Counsel for the plaintiffs who may file replication thereto, accompanied by affidavit of admission and denial of the documents filed by the defendants within 30 days thereof.

8. List before the learned Joint Registrar (Judicial) for completion of the pleadings, admission and denial of documents and marking of exhibits on 6 October 2023, whereafter the matter would be placed before the Court for case management hearing and further proceedings.



I.A. 14387/2023 (Section 12A of the Commercial Courts Act, 2015)

9. In view of the judgment of the Division Bench of this Court in *Chandra Kishore Chaurasia v. R.A. Perfumery Works Pvt Ltd*², exemption is granted from the requirement of pre-institution mediation under Section 12A of the Commercial Courts Act, 2015.

10. The application stands allowed accordingly.

I.A. 14388/2023 (Exemption)

11. Subject to the plaintiff filing certified or legible copies of any dim or illegible documents within 30 days, exemption is granted for the present.

12. The application is disposed of.

I.A. 14389/2023(under Order XXXIX Rules 1 and 2 of the CPC)

13. This is an application by the plaintiff under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC), seeking *ex parte* interlocutory injunctive relief, inasmuch as a *prima facie* case of infringement of the plaintiffs' marks FERIMON, LESURIDE, FENAK, MOX-CLAV and VOLINI is made out.

14. Issue notice, returnable before the Court on 8 November 2023.

15. Reply be filed by the defendants within a period of four weeks with advance copy to learned Counsel for the plaintiffs, who may file rejoinder thereto, if any, within a period of four weeks thereof.

² 2022 SCC OnLine Del 3529
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16. Till the next date of hearing, the defendants shall stand restrained from manufacturing, selling or otherwise dealing with any pharmaceutical products using the marks FERIWON, LISARIDE/LESUPRIDE, YES FENAC, UMOXYCLAV/NUMOXYCAV and VOLIBEST.

17. Compliance with Order XXXIX Rule 3 of the CPC be effected in terms stated hereinafter.

I.A. 14390/2023 (under Order XXVI Rule 9 of the CPC)

18. This is an application under Order XXVI Rule 9 of the CPC for appointment of Local Commissioners to visit the following premises and inventorize and seize samples of the products containing the impugned marks.

19. Accordingly, this Court appoints (i) Mr. Rohit Khare, Advocate (Mob: 8779973095), (ii) Mr. Sagar Dhama, Advocate (Mob: 8383858794), (iii) Mr. Nikhil Palli, Advocate (Mob: 9811676973) and (iv) Mr. Rahul Khare, Advocate (Mob: 9643390002) as Local Commissioners to visit the premises on 9 August 2023 at 11 a.m, as per the following tabular statement:

Sl. No.	Names and Phone Nos. of Local Commissioners	Premises to visit
1.	Mr. Rohit Khare, Advocate (Mob: 8779973095)	Nukind Healthcare Private Limited BDO: Plot No. 68, DLF Industrial Area, Phase- I, Faridabad – 121003
2.	Mr. Nikhil Palli, Advocate (Mob: 9811676973)	Pharmaroots Healthcare Khasra No. 411, Village Tipra, PO Barotiwala, Tehsil Baddi, District Solan, Himachal Pradesh
3.	Mr. Rahul Khare, Advocate (Mob: 9643390002)	Orintus Biotech LLP Plot No. 18A, Industrial Park – IV, Bahadrabad, District Haridwar, Uttrakhand



4.	Mr. Sagar Dhama, Advocate (Mob: 8383858794)	Three B Health Care Limited Opp. Dental College, Rampur Road, Paonta Sahib, District Sirmour, Himachal Pradesh – 173025
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20. In each case, the commission shall be executed in the following terms:

(i) The learned Local Commissioners shall inventorize all products bearing the marks, FERIWON, LISARIDE/LESUPRIDE, YES FENAC, UMOXYCLAV, NUMOXYCLAV and VOLIBEST, as well as any equipment, ink, material or other material, which may be used for manufacturing the said products or affixing the said infringing labels. All such material, after inventorisation, shall be taken into custody and handed over to the defendants under *superdari* to be retained in safe custody and not be dealt with in any manner without the leave of the Court.

(ii) The commission shall be executed peacefully, without unnecessary disturbing the legitimate business activities at the premises concerned.

(iii) The defendants/occupants of the premises where the commission is being conducted, are also directed to cooperate with execution of the commission.

(iv) The proceedings of the commission shall be videographed at the expense of the plaintiffs so as to ensure the Court that there has been no unnecessary hindrance therein.

(v) Should it become necessary, for executing the commission, for the learned Local Commissioners to effect forced ingress into any premises, they shall be at liberty to do



so.

(vi) Should it become necessary, for the learned Local Commissioners to obtain police assistance for executing the commission, they are at liberty to do so and in that event, this order shall operate as directions to the police authorities to provide necessary assistance, so that the commission is executed without hindrance. In such an event, the copy of the present order shall be provided to the jurisdictional police authorities by the learned Local Commissioners concerned. The Registry is directed not to forward this copy to any police authorities on its own.

(vii) The plaintiffs would be entitled to depute one representative to accompany each of its local Commissioners during execution of the commission.

(viii) The learned Local Commissioners shall also take copies of books of accounts of the defendants pertaining to the aforesaid impugned marks and the products bearing the said marks, reflecting the manufacture, sale and returns therefrom, since the time the marks are in use. In case such accounts are maintained in electronic form or any Cloud platform, the necessary passwords or other information to enable the learned Local Commissioners to access the said material shall be provided by the occupants of the premises, where the commission is being executed. Any hesitancy or default in doing so, shall be treated as contumacious and wilful disobedience of the order passed today.

(ix) Consequent to execution of the commission, the learned



Local Commissioners shall file, before the Court, reports regarding execution of the commission as well as all data that they have collected and the videographed proceedings of the commission with the Registry of this Court within one week.

(x) Each of the Local Commissioners shall be entitled to consolidated fees of ₹ 1 lakh apart from travel to and fro and boarding and lodging, should it become necessary. Fees of the commission shall be payable in advance of execution thereof.

(xi) The commission shall be executed on 9 August 2023.

21. Let the copy of this order be not uploaded on the website of this Court till the filing of the reports by the learned Local Commissioners.

22. The application stands disposed of accordingly.

I.A. 14391/2023 (Advance service)

23. For the reasons stated in the application, the plaintiffs are exempted from the requirement of serving an advance notice on the defendants.

24. This application stands allowed accordingly.

25. *Dasti.*

C.HARI SHANKAR, J

AUGUST 4, 2023

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