

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 30th May, 2019

Date of decision : 8th July, 2019

+

CS (OS) 410/2018

AMWAY INDIA ENTERPRISES PVT. LTD.Plaintiff

Through: Mr. Sudhir Chandra, Senior Advocate
with Mr. Sohan Singh Rana, Mrs.
Bindra Rana, Ms. Priya Adlakha, Ms.
Tulip De & Mr. Ashish Sharma, Ms.
Ruhee Passi, Advocates.
(M:9818202368)

versus

1MG TECHNOLOGIES PVT. LTD. & ANR.Defendants

Through: Mr. Sagar Chandra, Ms. Ishani
Chandra and Ms. Shubhie Wahi,
Advocates for D-1 (M:8130910708)
Mr. Sudarshan Rajan and Mr. Ramesh
Rawat, Advocates for D-2.
(M:9990865829)

WITH

+

CS (OS) 453/2018

AMWAY INDIA ENTERPRISES PVT. LTD.Plaintiff

Through: Mr. Sudhir Chandra, Senior Advocate
with Mr. Sohan Singh Rana, Mrs.
Bindra Rana, Ms. Priya Adlakha, Ms.
Tulip De & Mr. Ashish Sharma, Ms.
Ruhee Passi, Advocates.
(M:9818202368)

versus

ADINATH ENTERPRISES & ORS.Defendants

Through: Mr. Siddharth Batra, Ms. Garima

Sehgal and Mr. Vishwajeet Arora,
Advocates for D-2 & 3.

Mr. Prateek Tewari, Advocate for D-8
(M-8800576518)

Mr. Dayan Krishnan, Senior
Advocate, with Mr. Nitin Sharma,
Mr. Sanjeev Seshadri & Ms. Disha
Sharma, Advocates for D-9.
(M:9810621272)

WITH

+

CS (OS) 480/2018

AMWAY INDIA ENTERPRISES PVT. LTD.Plaintiff

Through: Mr. Rajiv Nayar, Senior Advocate,
with Ms. Priya Kumar, Mr. C.D.
Mulherkar, Mr. Shailabh Tiwari, Mr.
Tejas Chhabra and Mr. Chanakya
Diwedi, Advocates (M:9716989180)

versus

PIONEERING PRODUCTS AND ORS.Defendants

Through: Mr. Sandeep Sethi, Senior Advocate,
with Mr. Prince Pawaiya, Ms. Prema
Arora, Ms. Peri Surya Yashodhara
and Mr. Karan Chopra, Advocates,
GNP Legal, for Defendant no.3
(9549124005)

Mr. Saikrishna Rajagopal, Ms. Sneha
Jain, Ms. Savni Dutt, Mr. Devvrat
Joshi, Ms. Nilofar Absar and Ms.
Abhiti Vachher, Advocates, for
Defendant no.4. (9810621272)

Ms. Amita Gupta, Advocate, for
Defendant No.1 (9900064366)

WITH

+

CS (OS) 531/2018

AMWAY INDIA ENTERPRISES PVT. LTD.Plaintiff

Through: Ms. Priya Kumar, Mr. Shailabh Tiwari, Mr. C.D. Mulherkar, Mr. Tejas Chhabra, Mr. Chanakya Diwedi, Mr. Anand Chichra Advocates.

versus

FLIPKART INTERNET PVT. LTD AND ORS.Defendants

Through: Mr. Darpan Wadhwa, Senior Advocate with Mr. Ankur Sangal, Ms. Sucheta Roy, Advocates for D-1 (M:9654592881)

WITH

+

CS (OS) 550/2018

AMWAY INDIA ENTERPRISES PVT. LTD.Plaintiff

Through: Mr. Sudhir Chandra, Senior Advocate with Mr. Sohan Singh Rana, Mrs. Bindra Rana, Ms. Priya Adlaka, Ms. Tulip De & Mr. Ashish Sharma, Ms. Ruhee Passi, Advocates. (M:9818202368)

versus

BRIGHT LIFECARE PVT. LTD. & ANR.Defendants

Through: Mr. Sagar Chandra, Ms. Ishani Chandra and Ms. Shubhie Wahi, Advocates for D-1 (M:8130910708) Mr. Sudarshan Rajan and Mr. Ramesh Rawat, Advocates for D-2. (M:9990865829)

WITH

+

CS (OS) 75/2019

MODICARE LTD.

.....Plaintiff

Through: Mr. Amit Sibal, Senior Advocate with Ms. Pooja Dodd, Mr. Saksham Dhingra, Mr. Vinay Tripathi, Ms. Aditi Menon and Mr. Aman Singhal, Advocates (M:9811045646)

versus

AMAZON SELLER SERVICES PRIVATE LIMITED & ORS.

.....Defendants

Through: Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra, Ms. Sneha Jain, Ms. Savni Dutt, Mr. Devvrat Joshi, Ms. Nilofar Absar and Mr. Abhijit Vachher, Advocates for Defendant No.1 (M:9810621272)

AND

+

CS (OS) 91/2019

ORIFLAME INDIA PVT. LTD.

.....Plaintiff

Through: Mr. Balbir Singh, Senior Advocate, with Mr. Mahesh B. Chhibber, Mr. Karan Chopra, Ms. Mehak Khanna & Mr. S.N. Thyagrajan, Advocates (M:9818430581)

versus

DINENDER JAIN & ORS.

.....Defendants

Through: Mr. Jayant Mehta, Mr. Manav Kumar, Ms. Nupur & Mr. Sajal Jain Advocate for D-2 (M:9810233743)
Mr. Saikrishna Rajagopal, Mr.

Sidharth Chopra, Ms. Sneha Jain, Ms. Savni Dutt, Mr. Devvrat Joshi, Ms. Nilofar Absar and Mr. Abhijit Vachher, Advocates for Defendant No.6 (M:9810621272)
Mr. Waize Ali Noor (Central Govt. Pleader) for UOI (M:8527837602)

CORAM:
JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

I.A. 11335/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 410/2018 CS(OS) 453/2018 and I.A. 12419/18 (for stay) and 14613/18 (u/O VII Rule 11 CPC)

I.A.13159/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 480/2018

I.A.14402/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 531/2018

I.A. 14858/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 550/2018

I.A.1733/2019 (u/Order XXXIX Rules 1 and 2) in CS(OS) 75/2019

I.A.2238/2019 (u/Order XXXIX Rules 1 and 2) in CS(OS) 91/2019

S.No.	Contents	Para No.
A.	INTRODUCTION	1 - 3
B.	CASE OF THE PLAINTIFFS	
B1.	By M/s Amway India Enterprises Pvt. Ltd. in CS(OS) 410/2018, CS(OS) 453/2018, CS(OS) 480/2018, CS(OS) 531/2018 and CS(OS) 550/2018	4 - 21
B2.	By Modicare Ltd. in CS(OS) 75/2019	22 - 32
B3.	By Oriflame India Pvt. Ltd. in CS(OS) 91/2019	33 - 42
C.	CASE OF THE DEFENDANTS	

	C1.	By Amazon Seller Services Pvt. Ltd. in CS(OS) 480/2018, CS(OS)75/2019 and CS(OS) 91/2019	43 – 61
	C2.	By 1MG Technologies Pvt. Ltd. in CS(OS) 410/2018, and by Bright Lifecare Pvt. Ltd. in CS(OS)550/2018	62 - 63
	C3.	By Flipkart Internet Pvt. Ltd. in CS(OS) 531/2018	64 - 66
	C4.	By Jasper Infotech Pvt. Ltd. in CS(OS) 550/2018	67 - 72
	C5.	By other sellers	73 - 76
D.	SUMMARY OF LOCAL COMMISSIONERS' REPORTS		77
E.	SUBMISSIONS BY COUNSELS		78 – 79
	E1.	Submissions of the Plaintiffs	80 – 114
	E2.	Submissions of the Defendants	115 – 138
	E3.	Stand of the Union of India	139 – 141
F.	ANALYSIS AND FINDINGS		142
	F1.	Question (i) - Whether the Direct Selling Guidelines, 2016 are valid and binding on the Defendants and if so, to what extent?	143 – 174
	F2.	Question No. (ii) - Whether the sale of the Plaintiffs' products on e-commerce platforms violates the Plaintiffs' trademark rights or constitutes misrepresentation, passing off and results in dilution and tarnishes the goodwill and reputation of the Plaintiffs' brand?	175- 287

	F3.	Question (iii) - Whether the e-commerce platforms are “intermediaries” and are entitled to the protection of the safe harbour provision under Section 79 of the Information Technology Act and the Intermediary Guidelines of 2011?	288 – 305
	F4.	Question (iv) – Whether e-commerce platforms such as Amazon, Snapdeal, Flipkart, 1MG, and Healthkart are guilty of tortious interference with the contractual relationship of the Plaintiffs with their distributors/direct sellers?	306 – 318
G.	CONCLUSIONS AND RELIEF		319 - 337

A. INTRODUCTION

1. The old adage, which translates to “*with great power comes great responsibility*”, popularised by a famous movie based on a comic book series, in modern day world would be applicable to e-commerce platforms, which have penetrated all forms of trade, commerce and businesses. The contribution of e-commerce in providing accessible global platforms for traders, craftsmen, traditional artists, home designers, housewives etc., along with the credit for creation of large infrastructural facilities such as warehouses, transportation, etc., as also employment for thousands of people, is well acknowledged. However, there are certain safeguards that need to be followed so as to ensure that existing businesses and trades are not adversely impacted by the growth of e-commerce, without requisite checks in place. The present cases highlight the conflict that can arise between one such existing form of business/trade viz., Direct Selling Businesses and e-commerce platforms. The legal complexities in this

conflict involve Constitutional issues, intellectual property rights, information technology laws, consumer protection laws, contractual laws, law of torts, and other applicable guidelines.

2. A batch of seven suits raising overlapping issues were heard together. The same have been filed by three Plaintiffs viz., M/s Amway India Enterprises Pvt. Ltd. (*hereinafter*, 'Amway'), M/s Modicare Ltd. (*hereinafter*, 'Modicare') and M/s Oriflame India Pvt. Ltd. (*hereinafter*, 'Oriflame') against various entities who are either running e-commerce platforms or are sellers on the said platforms, in the following manner:

CS(OS) 410/2018 and I.A. No.11335/2018		
PLAINTIFF	DEFENDANTS	
Amway India Enterprises Pvt. Ltd.	D1	1MG Technologies Pvt. Ltd. – which runs the e-commerce website, www.1mg.com (<i>hereinafter</i> , '1MG')
	D2	Ghantakarn International
CS(OS) 453/2018 and I.A.s 12419/18 and 14613/18		
PLAINTIFF	DEFENDANTS	
Amway India Enterprises Pvt. Ltd.	D1	Adinath Enterprises
	D2	Beant Healthcare
	D3	Beant Buildwell (P.) Ltd.
	D4	Vivid Solutions
	D5	Ravinder & Co.
	D6	Raman Enterprises
	D7	Xecute India
	D8	Aarjav International
	D9	Jasper Infotech Pvt. Ltd. – which runs the e-commerce website www.snapdeal.com (<i>hereinafter</i> , 'Snapdeal')
CS(OS) 480/2018 and I.A.13159/2018		
PLAINTIFF	DEFENDANTS	

Amway India Enterprises Pvt. Ltd.	D1	Pioneering Products
	D2	Black Olive Enterprises
	D3	Cloudtail India Pvt. Ltd.
	D4	Amazon Seller Services Pvt. Ltd. – which runs the e-commerce platform www.amazon.in (hereinafter, 'Amazon')
CS(OS) 531/2018 and I.A. 14402/2018		
PLAINTIFF	DEFENDANTS	
Amway India Enterprises Pvt. Ltd.	D1	Flipkart Internet Pvt. Ltd. – which runs the e-commerce platform, www.flipkart.com (hereinafter, 'Flipkart')
	D2	Sehgal International
	D3	Apex Beauty Store
CS(OS) 550/2018 and I.A. 14858/2018		
PLAINTIFF	DEFENDANTS	
Amway India Enterprises Pvt. Ltd.	D1	Bright Lifecare Pvt. Ltd.
	D2	Kashvi Enterprises
CS(OS) 75/2019 and I.A.1733/2019		
PLAINTIFF	DEFENDANTS	
Modicare Ltd.	D1	Amazon Seller Services Pvt. Ltd. – which runs the e-commerce platform www.amazon.in
	D2	Laxmi Enterprises
	D3	Modicare DP Store
CS(OS) 91/2019 and I.A.2238/2019		
PLAINTIFF	DEFENDANTS	
Oriflame India Pvt. Ltd.f	D1	Dinender Jain
	D2	Cloudtail India Pvt. Ltd.
	D3	Vardhman Training Company
	D4	Kusum Enterprises
	D5	Wholesale Hub
	D6	Amazon Seller Services Pvt. Ltd. – which runs the e-commerce platform www.amazon.in

3. Since the issues are substantially overlapping, Ld. counsels appearing in these matters have all relied upon submissions made by each other on both sides. Hence the applications for interim relief and other applications, in all the seven suits are being disposed of by this common judgement.

B. CASE OF THE PLAINTIFFS

B1. By M/s Amway India Enterprises Pvt. Ltd. in CS(OS) 410/2018, CS(OS) 453/2018, CS(OS) 480/2018, CS(OS) 531/2018 and CS(OS) 550/2018

4. M/s Amway India Enterprises Ltd. - the Plaintiff, is the wholly owned subsidiary of Amway Corporation (now known as Alticor, Inc.), headquartered in Ada, Michigan, USA, founded in 1959 and is one of the world's largest direct selling companies in the world. Amway has filed the present suit seeking perpetual and mandatory injunction restraining the Defendants from committing tortious and illegal acts and indulging in unfair competition as also damages.

5. The case of Amway is that it is engaged in the business of manufacturing, marketing and selling skin care products, health care products, nutrition and supplements and other related products. It sells these products through a system of "Direct Selling". Under the concept of direct selling, Amway's products are sold through direct sellers under a Direct Seller's Contract. The said direct sellers undertake to market, distribute and sell Amway products and provide services appurtenant thereto, directly to consumers. These direct sellers are provided training periodically. The number of direct sellers of Amway are stated to be more than 5 lakhs. All the direct sellers generate income by marketing and selling Amway products to the consumers. They are also bound by a 'Code of Ethics', which governs

their conduct. Apart from sale through direct sellers, Amway also sells its products through its website, www.amway.in. The products of Amway are, thus, sold either by Amway directly online, or by these direct sellers, who are also known as Amway Business Owners (*hereinafter*, 'ABOs').

6. Amway manufactures its products at various manufacturing units in India. A large majority of Amway's products such as cosmetics, health products, nutrition products etc., bear a unique code on the upper cap of the products, as also on the internal seals. However, some products are sold without such codes. Amway also has a unique customer refund policy under which if the customer is not satisfied with the product, the same can be returned within 30 days, and a full refund can be obtained. Such refunds are available, even if 30% of the product has been used/consumed.

7. Through this direct selling model, Amway sells more than 130 Amway products to the end consumers. It claims that it has over 130 Sales Offices, 4 Regional Warehouses, 3 Regional Hubs and 34 city warehouses as well. Amway, also, submits that its products are not available for sale legitimately through any e-commerce or online portals or mobile apps. Sale on such platforms would be contrary to the '*Code of Ethics*' of Amway.

8. Amway relies on the Direct Selling Guidelines issued by the Government of India titled "*Direct Selling Guidelines, 2016*" dated 26th October, 2016 (*hereinafter*, '*Guidelines*'). It is Amway's case that the said Guidelines were issued by the Government in order to regulate the direct selling business and in the interest of consumers. The Guidelines define what is a "*Direct Selling Entity*", "*Direct Sellers*", "*Direct Selling*", etc and provides for a framework for conduct of direct selling business in India. As per the Guidelines, it is mandatory for the Direct Selling Entity to

provide a full refund or buyback guarantee on reasonable commercial terms, to its direct seller within 30 days. Direct Selling Entities, such as Amway, have to be the owners of the trademark or a service mark and their members are bound to strictly comply with the Guidelines. The Direct Selling Entity is expected to also enter into a specific agreement with the Direct Sellers, before enrolling them as part of the distribution network. Specific provisions are contained in the Guidelines for the conduct of the said business in consumer interest. One of the clauses of the Guidelines i.e., clause 7(6) requires that the sale of the products of the Direct Selling Entity on any e-commerce platform or marketplace would have to be done by “*any person*” only with prior consent of the Direct Selling Entity.

9. Thus, according to Amway, any sale of its products except in compliance with the Guidelines would be contrary to law. The grievance of Amway in the present cases is that various e-commerce platforms, who have been arrayed as parties in the present suit, are enabling sale of Amway branded products through their platforms, without their consent. The sellers/re-sellers on the said portals are also arrayed as Defendants in the present suit.

10. That Amway, acquired knowledge of sale of Amway branded products and various e-commerce platforms and found that various Amway branded products were being advertised, offered for sale and sold on the said platforms without Amway’s consent. This, according to Amway, was in violation of the Guidelines. Amway’s products were being sold at much cheaper prices than the market price, which according to Amway resulted in huge financial losses to it also direct sellers. Considering the manner, in which the products were being sold at such cheap prices, Amway also

apprehended that the goods may not be genuine and may in fact be counterfeit/tampered Amway products. Accordingly, Amway addressed a cease and desist letters to the said e-commerce entities bringing to their knowledge the following facts:

- That the trademark and tradename “*AMWAY*” was being used on e-commerce platforms without Amway’s consent;
- That neither the e-commerce websites, nor any of the sellers had obtained any consent from Amway for sale of Amway branded products on their platforms;
- That sale of Amway branded products on e-commerce websites was in violation of the Guidelines;
- That the sale of Amway branded products is also violative of Amway’s intellectual property rights, and also constituted tortious interference with Amway’s Direct Selling Agreements with its distributors;
- That the sale of Amway branded products in such a manner results in confusion amongst its consumers;
- That portrayal of the e-commerce websites being connected or affiliated with Amway is causing wrongful loss to Amway and wrongful gain to the e-commerce websites;
- That the use of the Amway trademark unauthorizedly on the said platforms, thus, amounted to infringement of Amway’s rights.

11. Thus, Amway called upon all the e-commerce websites to remove any reference to Amway on their websites including advertising Amway products and cease and desist from displaying any of Amway’s products on

the said portals. The said notice was also marked to various governmental authorities and Federation of Indian Chambers of Commerce and Industry (FICCI).

12. In response to the cease and desist notices of Amway, the e-commerce entities refused to comply with the requisitions of Amway, broadly on the following grounds:

- That they are `intermediaries' and are entitled to safe harbour under Section 79 of the IT Act;
- That they are merely `facilitators' of the transactions between the buyers and the sellers.
- That they are all in compliance with the IT Guidelines 2011 and have put in place adequate policies for exercise of due diligence;
- That they do not play an active role in the sale transactions;
- Amazon took the stand that the facilitation services offered by Amazon such as warehousing, logistics, fulfilment of orders etc. do not go beyond the scope of it being a marketplace and is well within the applicable regulatory framework.
- That the sellers were obligated to refrain from hosting, displaying, uploading, modifying, publishing, sharing, etc, any information that infringed a patent, trademark, copyright, proprietary rights, trade secrets, privacy rights, etc. Thus, the sellers were responsible for to ensure that they were authorised to sell the products they sold via Flipkart.
- That they are not required to take any authorization from Amway for selling its products.

- That they are duly indemnified from their sellers under specific agreements that the sellers have the rights to sell on the platforms;

13. The Food Safety and Standards Authority of India (*hereinafter*, 'FSSAI'), on 9th April, 2018, issued a letter to all major e-commerce entities operating in India, namely Flipkart, Amazon, Snapdeal, and Shopclues, asking them to stop sale of direct selling products, without consent of the Direct Selling Entities and in contravention of the Guidelines. However, the said letter was neither challenged nor complied with.

14. Since there was no effective redressal of its disputes Amway has filed the present suits. In addition to the reliance on the Direct Selling Guidelines, Amway, in its plaint, avers that the sale of its products, through such unauthorised channels such as e-commerce websites, is without its consent, and that it does not guarantee the authenticity and quality of such products. Further, tampering with and removal of the unique codes from the products, would also result in loss of reputation for Amway, and will affect its relationship with its Direct Seller, as also the consumers. It is stated that Amway products are being sold on Defendants' e-commerce platforms on a non-returnable basis, which is in stark contrast with the return policy of Amway, and this would lead to dilution of goodwill and reputation of Amway amongst its customers. Amway also alleges passing off by the Defendants as they seek to cash in on the goodwill, and reputation acquired by Amway, by either showing Amway as a '*featured product*' on its website, or showing Amway products in advertisements of the e-commerce websites. Further, sale of Amway products at a rate cheaper than the market price brings into question the genuineness of the products being sold through such e-commerce platforms. Sale of low-quality Amway products is not

only life threatening, but causes immense loss of goodwill to Amway. For all of the above reasons, the brand value of Amway is being diluted and eclipsed. Sale of Amway products in such an uncontrolled manner thus, exposes Amway to the risk of losing its license to conduct its business in India as a Direct Selling Entity.

15. Amway further alleges that the conditions for refund and return are also completely different, and in any event, partially used products are not returnable. However, in the case of Amway, 30% partially used products are returnable and entitled to full refund. The e-commerce portals describe the products with the name Amway along with image – in a manner so as to convey to the consumer that they are being sold by Amway. For example, the use of the expression “*by Amway*” appearing under the image of the product on the Amazon platform, gives an impression to the consumer that Amway is itself selling the product on the Amazon portal. On most of the portals, details of the sellers i.e. name, address, contact details and whether the said sellers are authorized distributors of Amway is not even mentioned on the website. In places where the seller’s name appears, the same is in a completely ambiguous manner from which it is not possible to find out the details of the seller viz., its contact details, address, email, phone numbers, its promoters and whether the seller is authorised or not. It is further averred that there are various levels of services provided by the e-commerce websites, wherein various additional services and add on features are provided by them. For example, ‘*Fulfilled by Amazon*’ and ‘*Flipkart Plus*’ category of products, wherein the portals also provide various additional services such as, warehousing, transportation, packaging, dispatch, customer services, etc to the seller. All the seller needs to do is provide the product to

the portal. The manner in which Amway products are being sold at such low prices also raises apprehension that counterfeit products may be sold by unscrupulous traders on e-commerce websites, which would be contrary to the public and consumer interest. It is thus pleaded that the sellers and the platforms are taking unfair advantage of the Amway brand name.

16. Amway, relying on the '*Excluded Products' List*', '*Banned Products' List*' and '*Terms of Use*', of the various e-commerce platforms, submits that as per their own policies, products being sold by a person not authorised by the trademark owner to sell the same, cannot be listed for sale. If a person is not an authorized re-seller, as designated by the manufacturer of the products or the distributor, the said product is excluded from being sold the said platforms. Further, if the seller has placed the product on the market without the consent of the trademark owner, then such products are also excluded. Amway, thus, relies on these clauses to submit that the distributors/sellers, who are not authorised by Amway, cannot be allowed to sell Amway branded products on e-commerce platforms. Amway also pleads that it has also received negative feedback from its customers, who have purchased from the Defendants, and have also complained that the products are duplicate/counterfeit in nature.

17. It is further pleaded that Amway representatives purchased various products from the Defendants, and it was noticed that the unique code was also erased/removed so as to make it difficult to track the ABO, if any, from whom the product may have been purchased. This further gave rise to an apprehension that the products are being tampered with by the sellers. According to Amway, none of the sellers, selling Amway branded products on e-commerce websites, are authorised or have any consent to sell Amway

products online. It is, thus, claimed that the manner in which Amway branded products are being sold on e-commerce platforms, clearly, shows that there is tortious interference with the Plaintiffs' contracts i.e. the Direct Selling Agreement and Code of Ethics, and that there is tampering of the products due to the removal of the unique code. The reputation of the products is being tarnished and interfered with, considering the large variance in the refund/return policy as also the warranty for the products. The reputation of Amway is also being affected due to change in prices of good, and brings the authenticity of the goods into question. Further, due to tampering/removal of the unique codes of Amway, even if the products were genuine, the Defendants do not qualify to claim the defence of Section 30 of the Trade Marks Act, 1999.

18. It is, further, stated that the sale of Amway products on an e-commerce platform and the mobile application is contrary to the approval dated, 4th August, 2004, granted by Government of India in favour of Amway, as also the undertaking submitted by Amway to the Government vide its letter dated 8th December, 2016. Thus, the sale of Amway products on e-commerce platforms is not merely violative of the Plaintiffs' rights, but also has the risk of exposing Amway to action by the Government for being in violation of its undertakings given to the Government of India, for being allowed to undertake direct selling business activities.

19. In the replication filed by Amway to Cloudbtail's Written statement, it is averred that Cloudbtail is an affiliate/associate of Amazon, and that it is a 49-51% joint venture of the Amazon group with M/s Catamaran Ventures through a joint venture company called M/s. Prione Business Services Pvt. Ltd. The documents to support this averment have been filed on record.

Thus, it is claimed that these two companies i.e. Amazon and Cloudbtail are intrinsically linked to each other. It is also averred that it is a matter of public knowledge that these two companies are closely linked with each other and that Cloudbtail being a group company or affiliate of Amazon and it being a re-seller on the Amazon platform as well, cannot hide behind the veil that it procures products from the sellers on the basis of warranties, given by the sellers. On the Amazon platform, Cloudbtail portrays itself as the seller, and hence is responsible for all the representations made on the platform. Cloudbtail is also responsible for violation of the Direct Selling Guidelines.

20. Thus, an injunction is sought restraining the Defendants from offering for sale or selling, advertising or displaying any Amway products or the products bearing the mark/name Amway and further from using the name Amway in any manner so as to show a connection with Amway either on the website or e-commerce platform or the mobile application.

21. The suits came to be listed before Court from time to time and ad-interim injunctions were granted. Local Commissioners were also appointed by the Court who visited the premises of the Defendants and submitted their reports.

B2. By Modicare Ltd. – in CS(OS) 75/2019

22. The case of Modicare is similar to that of Amway. However, Modicare does not have unique codes on its products. Modicare's case is that it is a Direct Selling Entity, as per the Guidelines, that operates in diverse business sectors such as Fast-Moving Consumer Goods (*hereinafter*, 'FMCG'), Food and Processing, Health Care, Agriculture, Personal Care, etc. Defendant No.1 is Amazon and Defendant Nos.2 and 3 are sellers on the

Amazon platform that were found to be selling Modicare products, which were meant to be sold only through Modicare's direct selling network.

23. Modicare is in the direct selling business and sells products related to varied fields such as health, nutrition, skin care, cosmetics, personal care, home care, food, beverage, etc. Modicare offers its products direct to consumers through its direct sellers, called Modicare Consultants, who have a binding contract with Modicare, through the Consultant Application Form, as well as the Modicare's Business/Code of Ethics. Modicare's Code of Ethics prohibits its Consultants to sell Modicare products through alternative methods of sale i.e., retail or online sales. For Modicare Consultants, there is no joining fee, no sales pressure and no requirement to maintain minimum inventory of products with them. In addition, on the basis of the sales by each Consultant, various incentives are offered to Consultants. Regular seminars and training workshops are held by Modicare for its Consultants.

24. It is submitted by Modicare that since inception, it has grown exponentially and has a Pan-India presence, catering to over 2700 cities in the country. It has over 100 products being sold by 1,00,000 active direct sellers. It also submits that its products are not available for sale legitimately through e-commerce or online portals or mobile apps. Further, Modicare offers a Customer Satisfaction Program which gives an irreversible 100% satisfaction or moneyback guarantee to its consumers. Such guarantee is applicable even if partially used products are returned to Modicare.

25. That sometime in June, 2016, Modicare found that several of its products were being offered for sale and sold on Amazon's platform, without its consent. It is the case of Modicare that the said sale was being facilitated by Amazon through its Fulfilled by Amazon service. Since no

seller details were available on Amazon, Modicare claims that to the best of its knowledge, Defendant Nos.2 and 3 were not its Consultants. Modicare then addressed an email to Amazon dated 5th October, 2016, pointing out the rampant sale of Modicare products on Amazon, without the consent of Modicare and that Amazon is not authorised to sell Modicare products on its platform. In response, Amazon simply redirected the representative of Modicare to file specific complaints qua each impugned product through its complaints' portal. Thereafter, the representative of Modicare requested to speak to a higher official to address its issue. On 13th January, 2017, Amazon responded to the email dated 5th October, 2016, and took the stand that it was only an intermediary, entitled to protection under Section 79 of the IT Act. It also claimed that it was not a party to any transaction on the said marketplace and it also does not control any transaction occurring on the said portal. Amazon also averred that it does not play an active role in manufacturing, marketing, pricing and selling or purchasing of the products and that it is a mere facilitator of the transactions between the buyer and the seller. Insofar as the Guidelines are concerned, Amazon stated that these were merely advisory guidelines, and could not be enforced against them. In response to the change in warranties on Amazon, it replied as under:

“5. Regarding your reliance on the difference in the return policies of Modicare and out Client, we would like to state that Modicare’s return policy is a warranty made to its customers, a contract which our Client is not privy to. Our Client’s return policy on beauty products is a matter of public knowledge, made in order to ensure the highest quality products are sold on its online market place.....”

26. Modicare then filed the present suit against Amazon, pleading that the

unauthorised sale of Modicare products on Amazon is impermissible, illegal, and unauthorised. The grounds taken by Modicare are similar to the grounds raised by Amway. Modicare also pleaded misrepresentation, change of warranties/guarantees, and return policies. It also pleaded that the customers of Modicare are also likely to get confused as to the source of the products being sold on Amazon, believing that the sale so being conducted has been consented to by Modicare, however, Modicare would not legitimately be able to answer them as to why the benefits of the Customer Satisfaction Program are not available to them.

27. It is submitted that there have been many customer comments on Amazon platform, showing dissatisfaction with Modicare products, and bringing into question the genuineness of the same. This severely impairs the goodwill that Modicare has been able to create and will cause irreparable loss to it.

28. Modicare, further avers that Amazon lists more than 700 products bearing the mark Modicare. This renders it impossible for Modicare to verify and ensure the authenticity of each and every product being sold. Further, the products are being sold on Amazon at hefty discounts, resulting in the declining sales of Modicare products, through its direct selling network. The sale of the products, at such low prices, according to Modicare, also raises a doubt as to the genuineness of the said products. Sale of counterfeit products being made available through Amazon, with no way of verifying the identity of the seller, could pose a huge risk to health and safety of its consumers as well, which in turn would cause damage to the reputation of Modicare. Thus, by concealing the contact details of the sellers, Amazon is facilitating rampant counterfeiting of the goods of

Modicare, and inducing sellers to illegally sell Modicare products. This amounts to tortious inducement of breach of contract by Amazon, causing Modicare Consultants to breach their contracts with Modicare. Lastly, it is averred that listing of Modicare products on Amazon is in contravention of the Legal Metrology Act and Legal Metrology (Packaged Commodity) Rules, 2011 (as amended in 2017), as Amazon is listing Modicare products, either without mention of MRP or with inflated MRP. This constitutes misrepresentation and is violative of applicable laws.

29. Further, Modicare claims that the large bundle of services being offered by Amazon for use of its platform, brings it out of the ambit of being an “intermediary” within the meaning of the term under the IT Act, and thus, the safe harbour provisions under Section 79 of the IT Act are not available to Amazon.

30. In view of the above, Modicare filed the present suit seeking permanent and mandatory injunction against Amazon and various sellers on Amazon from selling Modicare products, as also damages.

31. The suit was first listed on 5th February, 2019, on which date counsels for Modicare and Amazon were heard and ad-interim relief was granted in the following terms:

“19. The question as to the role that Amazon is playing in these sales is to be determined after pleadings are completed. For the time being, the Plaintiff has made out a prima facie case for grant of ad-interim protection. Accordingly, the following interim directions are issued:

(i) Defendant Nos.2 and 3, who are sellers on the Amazon platform, are restrained from selling, advertising, offering for sale or displaying Modicare products on www.amazon.in platform or Amazon

mobile app. Their products shall be taken down with immediate effect, and at least within 48 hours from today.

(ii) Samples of products sold by defendant nos 2 and 3 shall be supplied to counsels for the Plaintiff, who will file a report on the genuinity of the said products and whether the said products originate from M/s. Modicare.

(iii) Insofar as other the sellers, who may be advertising Modicare products on the Amazon platforms are concerned, a complete list of sellers along with their contact details viz., address, emails, phone numbers etc., shall be furnished by the counsels for Amazon to the counsels for the Plaintiff, who will then seek instructions as to whether any of the said sellers are actual and genuine distributors of the Plaintiff. The lists so exchanged shall be placed on record.

(iv) If the Plaintiff finds that the said parties are not actual distributors, it can notify Amazon and requisite steps shall be taken by Amazon within four weeks, to ascertain the source of the Modicare products with the sellers who are not direct distributors of Modicare. If the said sellers are unable to provide the details of the source of the products, upon intimation being given by the Plaintiff, the listings of Modicare products shall be taken down.

20. Amazon is directed to file a reply to the application under Order XXXIX Rules 1 and 2 CPC within 10 days. Rejoinder before the next date. Both parties are given liberty to approach the Court for any modification of this order. Questions as to the legality and validity of Direct Selling Guidelines and their applicability on e-commerce portals, like Amazon, would be considered after the reply is filed.”

32. Thereafter, on 12th March, 2019, a contempt application came to be filed by Modicare, alleging violation of order dated 5th February, 2019 by

Amazon, whereby it failed to provide Modicare with the seller details as was directed by the Court in paragraph 19(iii) of order dated 5th February, 2019. Various reminder emails were also sent to Amazon, which replied that it was a 'time consuming process'. But no application for extension of time was also filed. Despite passage of over a month, Amazon had failed to provide the complete sellers' details to Modicare, and accordingly, show cause notice was issued to Amazon as to why contempt action should not be initiated against it. However, on 14th March, 2019, tendering an unconditional apology, Amazon provided the seller details to Modicare and the contempt application was dismissed recording an undertaking by Amazon that it would provide any further details of sellers as pointed out to them by Modicare. The pleadings in the suit were completed, thereafter, and written statement came to be filed by Amazon.

B3. By Oriflame India Pvt. Ltd. – in CS(OS) 91/2019

33. The Plaintiff- M/s Oriflame India Pvt. Ltd. (*hereinafter, 'Oriflame'*) has filed the present suit seeking permanent and mandatory injunction restraining the Defendants from illegally selling Oriflame's products and for damages. The case of Oriflame is that it is engaged in the business of manufacturing and selling of cosmetics and wellness products through a network of its direct sellers called Consultants, who sell the products direct to consumer. It is the case of Oriflame that Defendant No.6 – Amazon, owner and operator of the e-commerce website www.amazon.in, on which Defendants Nos.1-5, and others are selling Oriflame products without authorization from Oriflame.

34. Oriflame over the years, has acquired immense goodwill through its direct selling business, both in India and globally. To safeguard consumer

interest, Oriflame offers a “*Guarantee of Excellence Claims Policy*”. As per the said policy, if a consumer is not happy with any of the products of Oriflame, he/she may return the product within 30 days from date of invoice, for a full refund or exchange subject to receipt of the product back by Oriflame, at the nearest branch of Oriflame. Refund can only be claimed after production of an invoice for the product generated by Oriflame. Oriflame relies on the letter dated 9th April, 2018 issued by FSSAI to various e-commerce entities, to state that Amazon had due knowledge of the obligations under the Guidelines.

35. It is further averred that Oriflame received numerous complaints from its consultants that Oriflame products are being sold on Amazon, at hugely discounted rates. Accordingly, Oriflame sent a legal notice dated 5th June, 2018, whereby it brought to the notice of Amazon, that the products of Oriflame are to strictly be sold strictly through direct sellers. Webpages bearing the name Oriflame were being displayed on Amazon’s platform, and Oriflame’s products were being sold on Amazon, despite the fact that Oriflame had not authorised any of its sellers to sell on e-commerce platforms. Thus, in view of the above and the Direct Selling Guidelines, it requested Amazon to remove and disable access to all links wherein the sellers are selling products unauthorisedly and wrongfully using the mark ‘Oriflame’.

36. Amazon, in response, vide letter dated 11th July, 2018 denied all allegations made in Oriflame’s notice. It averred that it was an intermediary and was entitled to protection of the safe harbour provisions under the IT Act. Thus, it cannot be made liable for listings posted by the sellers on its platforms, and the grievance of Oriflame lay with its sellers and not

Amazon. Interestingly, in the said response, Amazon called upon Oriflame to enrol in its 'Brand Registry Program' in the following terms:

“6. In the meanwhile, Our Client brings to your attention its 'Brand Registry Program'.” The said program has been created to assist third-party manufacturers/sellers, such as Your Client operating on its online marketplace, in protecting their intellectual property rights against violations and illegal misrepresentation. You may consider enrolling/signing-up for the said program in order to protect its intellectual property rights. Further information about the said program is accessible from 'https://brandservices.amazon.in'”

37. It is Oriflame's case that Amazon was legally obligated to act upon the legal notice sent to it to claim protection under the IT Act. It is not enough to simply claim to be an intermediary, if due diligence is not observed by the e-commerce platform.

38. That despite the notice being sent to Amazon, the products of Oriflame continued to be made available for sale on the Amazon platform. Accordingly, an employee of Oriflame, made a test purchase of the products from each of Defendant Nos.1-5. None of the Defendants were authorised to sell Oriflame products on any e-commerce platform. It is thus, alleged by Oriflame that Amazon is operating in collusion with the other Defendants to facilitate sale of Oriflame products on its website, so that it can earn profits.

39. Oriflame purchased Oriflame branded products from the Amazon platform, from Defendant Nos.1-5, whereby it was found that none of the sellers were Oriflame Consultants. Furthermore, the seller details only being made available at the generation of the invoice by Amazon, there was no way that Oriflame could verify the above fact without first purchasing the

impugned products from the Amazon platform. Since, Oriflame does not permit any sale via e-commerce platforms, such as Amazon, any listing of its products on the said platform are being done illegally and unauthorizedly.

40. Oriflame received numerous complaints from its consumers about the quality of Oriflame branded products sold on Amazon. This has caused immense harm to the reputation and goodwill acquired by Oriflame. Further, the products of Oriflame are being made available on the Amazon platform at inflated MRPs, which are then shown to be sold at hefty discounts. This constitutes gross misrepresentation, leading to duping of the consumer who is purchasing Oriflame products from Amazon.

41. Thus, left with no alternative, Oriflame filed the present suit seeking praying for grant of permanent injunction restraining the Defendants from selling any Oriflame products on any e-commerce platform without its consent, disclosure of complete contact details of all sellers, who are selling the products on the Amazon platform, along with damages and interest.

42. The suit was first listed on 13th February, 2019, on which date the counsels for Amazon entered appearance. The Court, on the said date, in light of the issues being urged in the said matter, issued notice to the Ld. ASG, Ms. Maninder Acharya, in order to seek the stand of the Union of India in respect of the legality and validity of the Direct Selling Guidelines, 2016. Thereafter, the matter came up for hearing on 14th February, 2019, whereby some arguments were addressed by the Ld. ASG, however, more time was sought to effectively address the Court. Ld. Counsel for Amazon stated that it had duly replied to the FSSAI letter dated 9th April, 2018 vide its response letter dated 10th May, 2018, whereby it informed the FSSAI that it was a mere intermediary, it did not sell any of the impugned products of

Oriflame on its portal, and the blame lay with the sellers. It also averred that the Guidelines do not apply to platforms such as Amazon, as the onus to obtain consent for selling the Oriflame products was not on Amazon, but on the sellers. Thus, it requested FSSAI to have a re-look at the interpretation given by it to the Guidelines. In view of the above submissions, the following ad-interim order was passed in the matter:

“15. The stand of Amazon in the above letter is that the responsibility of obtaining consent is that of the Direct seller and not of Amazon. Considering the overall facts, and the stand taken by Amazon in its letter dated 10th May, 2018, it is deemed appropriate to pass the following interim directions:

- a) Amazon to inform the Plaintiff as to the number of Direct sellers who are offering the Oriflame products for sale on its website within 4 weeks.*
- b) The Plaintiff to intimate Amazon if there are any unauthorised or objectionable products being offered for sale on Amazon’s platform.*
- c) Upon the same intimation being given, Amazon to enquire from the direct sellers on its platform if consent of the Plaintiff has been obtained by them. The said exercise be completed within four weeks after receiving intimation from the Plaintiff. Such sellers who have obtained permission from the Plaintiff may then be permitted to display their goods on Amazon’s platform. If no consent is obtained by the sellers, the URLs/listings of such sellers shall be taken down within two weeks thereafter.*
- d) If consent has not been obtained by Defendants Nos. 1-5, from the Plaintiff for offering for sale or selling Oriflame products on e-commerce platforms, they shall, upon receipt of notice and summons, remove their listings within 48 hours from the Amazon platform.”*

Thereafter, the other Defendants entered appearance in the matter. Written Statements have also been filed by Defendant No.2 – Cloudbail and Defendant No.6 - Amazon.

C. CASE OF THE DEFENDANTS

C1. By Amazon Seller Services Pvt. Ltd. in CS(OS) 480/2018, CS(OS)75/2019 and CS(OS) 91/2019

43. The defences raised by Amazon in its written statements are as under:
- a) Amazon is merely an intermediary under Section 79 of the Information Technology Act.
 - b) It has thousands of sellers and buyers, who transact on its platform. It does not manufacture, procure, produce, list, advertise, sell or price any of the products made available on its platform, including Plaintiffs' products. The same are listed by third-party sellers.
 - c) The information relating to the products including those pertaining to guarantees, warranties, return, refund policy etc. are uploaded by third-party sellers and not provided by Amazon.
 - d) That the sellers register on Amazon's platform and provide information including their addresses and other contact details and they are allotted a code for their listings.
 - e) That upon generation of the unique merchant ID and code for each seller they are permitted to list their products on Amazon's platform.
 - f) That the sellers determine the prices and discounts for each of the products including the title, description and images etc.
 - g) That a unique ID and password is allotted to the seller to manage its account. When a seller wishes to create its product, a specific form is filled giving all the details after which the listing is made live.

- h) That the invoice generated after purchase of the product gives the name, PAN number and GST registration number of the seller, through which the seller can be traced. The invoice bears the amazon.in mark/logo.
- i) It is further stated that apart from basic services, Amazon also provides additional services which are as under:
- Shipping service and *Fulfilled by Amazon* service: If the seller availed of these services, the seller would have to register Amazon's warehouse as its additional place of business and the products of the seller would then be stored, re-packaged, coded and despatched from the Amazon warehouse.
 - Amazon also provides services for enabling listings and refers to various service providers and third-party experts to create buyer friendly listings. These service providers can be accessed by the sellers for providing imaging, cataloguing, etc.
 - Under the *Fulfilled by Amazon* service, faster delivery of the products is done by Amazon due to the large resources of packing and shipping available at Amazon's disposal.
 - Amazon also provides after sales service in respect of queries pertaining to delivery of products, return/replacement of the products.
 - If a seller avails of *Fulfilment by Amazon*, then the said seller would be the first seller listed for a particular product, on the search results of Amazon. Such a seller also has a place of business at Amazon's warehouse, where a dedicated space is given to stock the products of the seller. Packaging of the

products is also done at the said warehouse, where Amazon's employees "assist" in the stocking and packaging. Shipping of the products is also done by Amazon through its affiliates and partners of Amazon. Returning of the products are also collected by Amazon. Repackaging and re-shipping is also done by Amazon.

- j) That the products of the Plaintiffs being sold on the Amazon platform are genuine and thus, the Plaintiffs cannot preclude the sellers from selling the same via the Amazon platform. Thus, the principle of exhaustion applies.
 - k) That there is no law that restricts resale of products at a discounted price. The Legal Metrology Act prohibits sale of products for a price over the MRP, but there is no restriction on sale below the MRP.
 - l) That as a policy, Amazon delists any products which are sold on its platform at an MRP higher than that of the product, upon being notified of the same. Thus, till Amazon, acquires actual knowledge of sale of products at a inflated MRP, it cannot de-list the product.
 - m) Further, the responsibility to ensure accuracy of MRP is placed on the manufacturer/seller and not the intermediary. Since the pricing of the products on the Amazon platform is left to the discretion of the sellers, the grievance of the Plaintiffs, on this count, lies with the sellers.
44. According to Amazon, all the services provided by it are that of a mere '*Facilitator*' and Amazon is not an active participant and that the providing of facilitation services does not take away the intermediary status of Amazon. Amazon claims that it only provides a marketplace for

integration of the sellers' goods and it does not consummate the sale between the seller and purchaser. It is further claimed that Amazon has no role in the sourcing of the products i.e. what is to be sold and how it is to be sold. The seller retains title to the products.

45. In case of *Easy Shipping service*, Amazon delivers the product through its affiliates at Amazon's risk but it is claimed that the control of the products is not passed to Amazon. Amazon offers support services through third parties for imaging, cataloguing, transportation, promotions, advertising, etc. The other services provided by Amazon through third parties are:

- *Amazon Fly*, a service which assists sellers in setting up accounts and listing of products. It assists third parties for registration of the brands on the Amazon marketplace, and to avail UPC and EAN exemptions, if the products have no standard IDS or Barcodes.
- *Amazon Boost* –management of day to day seller's central operation for optimizing sales.
- *Amazon Choice* – This is an automated feature which displays highly recommended products by buyers on the Amazon platform. This feature provided by Amazon is an automated system that displays the products on Amazon.

46. On the basis of the aforesaid pleas, it is averred by Amazon that it is only an intermediary as per the IT Act and the Intermediary Guidelines. It claims that as per Section 79 of the IT Act, it is only required to take down content, only once it receives actual knowledge that the content is infringing or is in violation of law. Such actual knowledge has to be in the form of a Court order under Section 79 of the IT Act, as per the dictum of the

Supreme Court in *Shreya Singhal v. Union of India (2015) 5 SCC 1* (hereinafter, '*Shreya Singhal*'). Amazon claims that it does not have any duty to police the online market place and it does not have to provide any filters to ensure compliance of Trademark laws or the Direct Selling Guidelines by third parties that are uploading content on its platform. The '*Excluded Products*' List' available on the Amazon website is admitted by Amazon. In respect of excluded products, the specific plea of Amazon is that that is a measure taken by it in good faith to further its business as a safe marketplace. The said list does not in any manner, take away the "safe harbour" protection from Amazon, and it is still entitled to the protection afforded to intermediaries under the IT Act. The information, so provided in the *Excluded Products*' list, is only for the guidance of the sellers.

47. Insofar as the Direct Selling Guidelines are concerned, Amazon claims that the same do not apply to it and that the Guidelines are not enforceable in law. The letter of FSSAI is denied as not being binding or applicable to Amazon.

48. It is also averred that Amazon is not liable either for infringement of trademark or any unfair trade practice. It admits that the return policy offered on the Amazon portal is not the same as that given by Plaintiffs'. Even the availability of the Plaintiffs' products on discounted prices are not the responsibility of Amazon, as Amazon does not price the products on the platform, but these are priced by the sellers who sell the products on its platform. Moreover, there is no prohibition in law in selling the products below the Maximum Retail Price.

49. It is further averred that merely because the bar code or any other code is not imprinted on the products, does not mean that the same are

counterfeit. On the legal issue of infringement of trademark, Amazon pleads that it takes down all illegal/infringing products from its website, upon receiving 'actual knowledge' of the same being sold on its platform, by means of a Court order.

50. Vide order dated 21st February, 2019 in CS(OS) 480/2018 and CS(OS) 91/2019, Amazon was asked to clarify the following two queries:

“(1) Whether at the time of dispatch of products by them, specific bar codes, unique to the intermediary, i.e., Amazon is affixed?”

“(2) Whether the site fulfilment centres, which are run or operated by Amazon, are used by the sellers for the purposes of obtaining GST or other tax registrations?”

51. An affidavit was filed by Amazon, dated 11th March, 2019 in CS(OS) 91/2019, in response to the above queries put by the Court. In the said affidavit, in response to the first query, it was stated as under:

“4. It is inaccurate to state that barcodes unique to the intermediary, i.e. Amazon are affixed to all products dispatched after a sale is concluded on the Amazon marketplace.

5. ASSPL offers the “Fulfilled by Amazon” (FBA) service to third-party sellers who list their products on www.amazon.in. Sellers that avail of ASSPL’s Fulfillment by Amazon service can store their products in Amazon fulfilment centres and are also given logistical support in delivery of their products, including by shipping the products expeditiously. Any entity which offers logistical support has to ensure that it has the ability to track the product through the fulfilment/ delivery process. Thus, in order to efficiently inventorize, store, and track a product which uses FBA services, like any store or courier facility, ASSPL uses the manufacturer barcodes. However, not

all manufacturers affix barcodes on their products. For efficient tracking, inventorization and sorting, these products must mandatorily carry a barcode that is auto-generated by the seller.

.....
8. *It is stated that the auto-generated barcode is merely required for tracking of the products sold by sellers using Fulfillment by Amazon service, to allow the products to be tracked through the fulfilment process. These barcodes only contain information that is necessary for tracking of a unit through the fulfilment/ delivery process which information is uploaded with respect to the product by the third-party sellers, such as Amazon Standard Identification Number (ASIN), product name and product condition. These auto-generated bar codes do not contain MRP or date of manufacture. Hence, even when affixing the auto-generated barcodes, ASSPL does not examine any product or select/ enter any information with respect to such product on the barcode.*”

52. In response to the second query raised by the Court on 21st February, 2019, Amazon stated as under:

“9. As stated, sellers using Fulfilment by Amazon service for delivery of products, store their products at Amazon’s fulfilment centres. Since, the products are stored and shipped from Amazon’s fulfilment centres, the relevant fulfilment centre where a seller chooses to store its goods must be added as an additional “place of business” for such seller, as per The Central Goods and Services Tax Act, 2017.”

53. Further, Amazon filed an additional affidavit dated 23rd April, 2019 in CS(OS) 480/2018, in response to the additional factual allegations made against it during the hearing of the suit. In the said affidavit, Amazon has provided a tabulated chart of all the services offered by it to sellers, under

various heads. The same is set out herein below:

“A tabulated birds-eye view of the broad services offered in different programs by ASSPL is provided below:

#	Program	Listing	Storage/ Warehouse	Transportation/ Delivery
1.	<i>Merchant Fulfilled Network (MFN)</i>	<i>Yes</i>	<i>No</i>	<i>No</i>
2.	<i>Easy Ship</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>
3.	<i>Fulfilled by Amazon (FBA)</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
4.	<i>Seller Flex</i>	<i>Yes</i>	<i>Partial assistance in inventory management No storage</i>	<i>Yes</i>

54. Amazon also claims that it has an infringement/notice and take down policy and grievance redressal officer, who is specifically appointed to deal with any Intellectual Property violations. It also states that it is integrated with the National Consumer Helpline, which is run by the Ministry of Consumer Affairs. Amazon admits that it offers various return/refund policies to the buyers, under different heads such as its Returns Policy, Return Pick Up and Self-Ship Guidelines, and Returns, Refunds and Replacement policy.

55. In case of *Fulfilled by Amazon* products, it offers an A to Z Guarantee Programme, which offers a complete refund to the customers in case of late delivery. Thus, Amazon claims that the logistical services and customer support services offered by Amazon are related to the seller’s products as many small sellers and individuals are unable to meet the demands of the

tech savvy customers.

56. The manner in which Amazon provides the details of sellers are through an electronic communications facility where a complainant can go to a Seller's Storefront and "Ask A Question" as to the details of the seller. Amazon also provides a snail mail facility, much like a P.O. Box service, which a buyer can use to contact the seller, under the help section or through the address on the invoice, which can be traced from the GST number.

57. The fees charged by Amazon for its various services, as per the affidavit dated 23rd April, 2019, are as under:

"D. Fees charged by ASSPL

35. *ASSPL does not collect any Fees on the sellers at the time of listing their products/ offers on the Amazon Marketplace. ASSPL charges Fees only after a product is sold. Broadly, the Fees charged by ASSPL to a seller comprises two or more of the following components:*

1. *A Referral Fee: This is broadly for the listing services offered by ASSPL and is dependant on the product category under which a product is listed. For example, the Referral Fee for the product category, "backpacks" is Five point Five percent (5.5%), whereas Referral Fee for "camera accessories" is Twelve percent (12%);*
2. *A fixed Closing Fee: This is broadly charged for the services provided by ASSPL subsequent to close of a transaction, for example, payment gateway, customer services, etc. and is dependant on the price of the product sold. For example, the Closing Fee for products priced below INR Two Hundred and Fifty (INR 250) is INR Two (INR 2), while the Closing Fee for products priced above INR One Thousand (INR 1,000) is INR Forty (INR 40); and*

3. Fulfillment fees (comprising (i) pick and pack charges, (ii) shipping fees, (iii) removal charges and (iv) storage fees), depending on the volume of the package and the distance across which the package is to be delivered. For example, the Fulfillment Fees to deliver a package under Five-Hundred grams (500 grams) anywhere within the country, would be INR Sixty Five (INR 65), while delivering the same package within the city limits, would be INR Twenty Seven (INR 27).

36. In addition to the above broad services (which includes listing, payment gateway, customer services, storage, shipping, pick up, removal, packaging), ASSPL also offers various other services such as technology integration for Seller Flex program users, labeling service (as discussed in the Affidavit dated 11.03.2019) for which, separate fee is charged basis seller's choice of services.

The Table below sets out details of the Fees charged to the MFN sellers, FBA sellers, Easy Ship sellers and Seller Flex sellers.

Seller Program	Services Subscribed	Fees
MFN MFN sellers store products in their own warehouses and directly ship products to the consumers once a consumer places an order.	- Listing of products on the Amazon Marketplace	- Referral Fee - Closing Fee
FBA FBA sellers store products in ASSPL's warehouses and use ASSPL's services for	- Listing of products on the Amazon Marketplace - Storage of products in ASSPL's warehouses	- Referral Fee - Closing Fee - Fulfillment Fees

<i>delivery</i>	- <i>Use of ASSPL's services for delivery</i>	
<i>Easy Ship Easy Ship sellers store products in their own warehouses but use ASSPL's services for delivery</i>	- <i>Listing of products on the Amazon Marketplace</i> - <i>Use of ASSPL's services for delivery</i>	- <i>Referral Fee</i> - <i>Closing Fee</i> - <i>Shipping Fees</i>
<i>Seller Flex Seller Flex sellers store the products in their own warehouses but use ASSPL's services for inventory management and delivery</i>	- <i>Listing of products on the Amazon Marketplace</i> - <i>Use of ASSPL's services for delivery</i> - <i>Use of ASSPL's proprietary software for inventory management</i>	- <i>Referral Fee</i> - <i>Closing Fee</i> - <i>Shipping Fee</i> - <i>Technology Fee</i>

*ASSPL's rate card and fees is completely transparent and available for viewing publicly. A review of the rate card would reveal that unlike what is being asserted by the Plaintiffs, ASSPL does not charge any commission on the sale of products but only charges fees for the services that the seller chooses to avail. the currently applicable Fee Schedule for Selling on Amazon as also the Rate Card are filed herewith as **Annexure L and M** respectively."*

58. Amazon, further, states that the amounts charged by it do not constitute 'commission' but in fact are merely service charges/fees for the various services it provides to the sellers on its platform. Thus, it is a mere facilitator. As per the fee structure, the various rates charged by Amazon are as under:

<i>Category</i>	<i>Standard Rate</i>
...	
<i>Beauty Products</i>	<i>3.00%</i>
<i>Beauty- Fragrance</i>	<i>15.00%</i>
<i>Luxury Beauty</i>	<i>14.00%</i>
...	
<i>HPC-Nutrition</i>	<i>9.00%</i>

If the seller chooses *Amazon Choice* or *Fulfilled by Amazon* and other services, then rates would be higher, as per the fee structure of Amazon.

59. As per the return policy of Amazon, beauty products are not returnable. Health and personal care products can be returned within 10 days, unless they are labelled as non-returnable. Oral care products are not returnable. It is argued that all of Amway's products would fall in one of these categories.

60. Responding to the additional documents, dated 18th February, 2019 filed by Oriflame in support of its case in CS(OS) 91/2019, Amazon states that since these documents find no mention in the plaint, and were easily accessible and available at the time of filing the plaint, Oriflame ought not to be allowed to place reliance on the same, and the same ought to be disregarded. However, Amazon, without prejudice to its rights and contentions, raised the following defences to the additional documents:

- That Oriflame's reliance on unfavourable reviews on the Amazon platform to establish the fact that Amazon had 'actual knowledge' of the nature of the goods being sold, is misplaced. The review feature is available on Amazon to enable the consumer to make an informed choice. However, the responsibility of listing the said products on Amazon's platform is on the seller, and the reviews no way can

impute liability on Amazon for illegally selling Oriflame products. There are millions of product listings on Amazon, and as many reviews, and Amazon cannot be expected to keep track of what each consumer is writing about a particular product.

- Further, the Oriflame products on the Amazon platform having poor reviews, also have similar reviews on Oriflame's own website.
- In respect of allegations of listing of Amazon's fulfilment centres as an "*additional place of business*" by the seller, Amazon contends that the same is a legal requirement under the Central Goods and Services Tax Act, 2017.
- In response to allegations of non-compliance with the Legal Metrology Act, and the Rules thereunder, Amazon maintains the position that its only a facilitator and it the sellers who determine the listing and pricing of goods on its platform.

61. Amazon, in its written statement, avers that Oriflame suppressed material information from the Court. It states that Oriflame had not contacted Amazon about sale of its products on Amazon only in 2018, but did so way back in 2015. In the communications received in 2015, Amazon was informed of unauthorised sale on its platform by Oriflame, and as a gesture of goodwill, at the time, had removed the impugned listings of the specific sellers from its website. The non-disclosure of this fact was done merely to fabricate a case against Amazon and paint it in a bad light before this Court. Thus, Oriflame has not approached this Court with clean hands, and Amazon prays that an adverse inference be drawn against it for the same.

C2. By 1MG Technologies Pvt. Ltd. in CS(OS) 410/2018, and by Bright Lifecare Pvt. Ltd. in CS(OS)550/2018

62. The stand of 1MG and Healthkart, in their written statements is that the Direct Selling Guidelines do not apply to e-commerce platforms. They do not have application on an all India basis, as only some states have implemented the same. Further, in CS(OS) 410/2018, 1MG states that the consumer complaint was sent by 1MG to Amway about the genuineness of its products. This, in fact, shows the *bonafides* of 1MG, which does not intend to pass off Amway products, in any manner whatsoever. It was because of 1MG's own action that Amway came to know of sale of its products on 1MG. This fact was concealed in the plaint. It is, further, stated that Amway's trademark rights get exhausted when the sale is made its ABO, who is the authorized distributor of Amway. The Plaintiff cannot, thereafter, raise any objection to the sale of genuine products on e-commerce platforms and its remedies are only against the ABO. Section 30 of the Trade Marks Act, protects 1MG and Healthkart, as sale of genuine products does not constitute infringement. 1MG and Healthkart, further claim that there is no change in the physical condition of the goods and the packaging. The details of the sellers are provided on the website which is easily accessible to everyone.

63. The Defendants, further argue that they are intermediaries under Section 2(1)(w) of the IT Act, and that they are compliant with all the provisions of the said Act, and are also ready and willing to assist right owners. The Defendants, further, do not alter or modify the information provided by sellers. The duty of an intermediary is only to take down the content upon receiving 'actual knowledge'. The primary policing has to be

done by Amway.

C3. By Flipkart Internet Pvt. Ltd. in CS(OS) 531/2018

64. The main defence of Flipkart, in its written statement was also that it is a mere facilitator and cannot be made responsible for user-generated content on its website. All listings and prices of the goods are determined by the sellers who are listing their products on Flipkart, and since Flipkart does not exert any control over the same, Flipkart cannot be made liable for any infringement caused by sale of such goods. Flipkart, being an intermediary, is compliance with all provisions of the IT Act, and Intermediary Guidelines, 2011, and is thus, entitled to the protection of the 'safe harbour' provisions under the IT Act.

65. Flipkart further pleads that as per its *Terms of Use*, the users of the Flipkart platform cannot host the display or share any information, which violates any of the Intellectual Property Rights, which infringes any patent trademark, copyright or any other law for the time being in force.

66. It is further pleaded that the Direct Selling Guidelines 2016 are not applicable to Flipkart and are only applicable to direct sellers and distributors. Flipkart observes adequate safeguards by first asking the seller if they are duly authorised to sell on e-commerce platforms and only when the seller represents that it is duly authorised, the listing of the seller is permitted. The obligation of identifying the URL to indicate an offending product lies on the Plaintiff and Flipkart cannot be asked to ensure that no Amway products are sold on its platform. Flipkart does not control the listing of the product in any manner. It admits that its refund policy is different from that of the Plaintiff. Under the '*Flipkart Assured*' programme, it provides speedy delivery of the product within a specified period and does

not give any other guarantees to the buyers. It is further averred that the alleged tampering or removal of unique code cannot be attributed to Flipkart as it is not involved in the buying or selling of products in any manner. Along with the Written statement Flipkart has placed on record its Terms of Use, 30-day replacement policy, Flipkart Infringement Verification Policy and the Buyer Protection Policy which show the complete compliance of the Intermediary Guidelines 2011. Thus, it is Flipkart's stand that it is not guilty of infringement or violation of any rights of Amway.

C4. By Jasper Infotech Pvt. Ltd. in CS(OS) 550/2018

67. The main defence of Defendant No.9 which operates the platform www.snapdeal.com, was similar to that of Flipkart. It claims that it is an intermediary under Section 79 and is entitled to safe harbour. It states that it has exercised due diligence under its own policies and terms of sale. It has already appointed a Grievance Officer, for dealing with any third party grievances. Snapdeal states that it has an e-commerce platform as also mobile application. Snapdeal claims that it is India's largest online market place with over 32 million plus products across 800 categories from domestic and international brands and retailers. It has more than 3,00,000 sellers on its platform. The sole responsibility for listing of a product on the Snapdeal platform is on the sellers and the transaction of sale is between the buyer and the seller. It states that it does not manufacture, sell, purchase, list, offer for sale, store and or price any of the products on its website www.snapdeal.com. It also does not initiate the transmission or select any content infringing or otherwise that is transmitted on the market place. It also does not exercise any creative editorial control over the listings. It does not connive with any of the sellers but provides a neutral platform. It also

does not provide direct or indirect assistance to the sellers. It relies on its *Terms of Use, Privacy Policy* and *Terms of Sale* which are published on its website and mobile application. It fully complies with the Intermediary Guidelines, 2011 by providing due diligence requirements. It is not obligated to monitor the market place for any listings which may allegedly infringe third party trademark rights. It has set up a Grievance Officer, to whom notices of infringement can be addressed. It does not have right, title or interest in any of the products listed on the website or the mobile application. All the grievances in respect of any products listed on its website, if any, have to be addressed only to the sellers. The plaint is merely an attempt to protect the direct selling business model, and an issue of trade channel conflict and nothing more. It is virtually impossible for Snapdeal to monitor and verify the authenticity of each and every product on its platform. The authenticity of the products, ought to be conducted by the Plaintiffs' only. It relies on the judgment of the Supreme Court in *Shreya Singhal (supra)* in support of its submissions.

68. It states that the reliefs sought for by Amway are nothing but an irrational expectation that all the Plaintiffs' product listings ought to be removed without any cross-checking as to whether they are infringing or not. Such a relief cannot be granted. However, upon receiving the order dated 14th September, 2018, the alleged listings were removed.

69. The mere difference in return policy and the alleged acts of the sellers in removing the unique codes may have given rise to an apprehension as to the genuineness of the products, by the Plaintiffs. However, there is no proof that the product is actually counterfeit. *Prima facie* evidence such as lab test reports ought to be submitted to the Grievance Officer to show that the

product is counterfeit and in such a case, Snapdeal is willing to disable access to such listings. The duty of Snapdeal is only to take down and not filter information of any third party. Sale of authentic products cannot be barred in view of Section 30 of the Trade Marks Act, 1999. Thus, Snapdeal is neither a necessary nor a proper party to the present suit.

70. In CS(OS) 453/2018, Amway had raised an issue that the ASCI had sought to take action against Snapdeal in view of the misleading representations being made in respect of Amway products on the Snapdeal platform. These facts are not denied by Snapdeal. Snapdeal admitted the receipt of legal notice dated 22nd September, 2017. However, it states that since the specific URLs showing infringement, were not mentioned, it did not take any action.

71. Snapdeal also admits that its Trust Pay policy is different from the Plaintiffs' return and refund policy. The product display page is actually populated by the seller. Snapdeal also does not inspect the goods which are being sold nor does it determine the price of the listed goods. Snapdeal, interestingly, makes following averments in its written statement:

“Without prejudice, the Defendant No.9 is ready and willing to delink the alleged infringer seller from the URL/listing and where required take down the impugned listings of the Plaintiff's Amway Products upon being notified by the Plaintiff with documents reflecting that such products are counterfeit. Further the answering Defendant is ready and willing to provide the contact details of seller upon appropriate directions of this Hon'ble Court.”

72. The above is a clear admission that clear details of the sellers are not

provided on the Snapdeal platform. Snapdeal cannot be made to monitor the authenticity of every product on its platform. It cannot be asked to filter third party information, and that it is neither a necessary, nor a proper party to the suit.

C5. By other sellers

i) By Cloudtail India Pvt. Ltd. in CS(OS) 480/2018 and CS(OS) 91/2019

73. Cloudtail is a seller on the Amazon platform. It is engaged in the trading of a variety of goods on the said platform with the aim to bringing quality products at affordable prices to its customers. Cloudtail avers that Amazon has a clear takedown policy. Cloudtail in fact relies upon the takedown policy of Amazon. It has a screening process before it associates with any seller or manufacturer, whereby it makes it mandatory for sellers to either furnish intellectual property registrations or obtain warranties as to genuineness of the said products.

74. In its written statement, the details of various vendor agreements with third parties have been mentioned. By virtue of the said agreements, Cloudtail claims that it obtains warranties from the said vendors, who have represented to it that they are licensed users of all intellectual property rights as well as materials. The said vendors grant a royalty free license for use of such intellectual property rights for selling and distributing the products through online platforms. It was on this basis that Cloudtail claims that it was selling the Plaintiffs' products. Cloudtail, further states that no products of the Plaintiffs were found at the premises of Cloudtail at the time of execution of the commission. Cloudtail, in fact, states that it is merely a re-seller of the products purchased from its various vendors.

ii) By Defendant Nos.2 and 3 in CS(OS) 453/2018

75. In the said suit, Defendant Nos. 2 and 3 have filed an application under Order VII Rule 11 CPC, seeking rejection of the plaint, on the ground that Amway itself sold its products through its website, www.amway.in/store and can be bought directly by a consumer, without having to go through interaction with a direct seller. Thus, since Amway is itself selling via e-commerce platform, it cannot preclude the other parties from doing the same.

iii) Other sellers in the suits

76. There are various sellers who have been impleaded in the various suits. Some of the sellers have settled, given undertakings and have returned the inventoried products back to the Plaintiffs. Other sellers have filed their written statements simply stating that they were authorised to sell and that they have procured genuine products from Plaintiffs' distributors or are themselves promoted by distributors of Plaintiff's products. None of the sellers filed any authorisations from the Plaintiffs permitting sale on e-commerce platforms.

D. SUMMARY OF LOCAL COMMISSIONERS' REPORTS

77. In all of the suits filed by Amway, in addition to ad-interim relief being granted by the Court, Local Commissioners were also appointed to visit the premises of the Defendants, to make an inventory of, and seize all impugned products bearing the mark AMWAY, as also to assess as to who was the source of the said products. A brief summary of the Local Commissioners' reports in the Amway suits, who visited the premises of the various sellers, who sold Amway products on e-commerce platforms, is as under:

- a) Some of the Defendants, whose addresses were procured from the websites of the e-commerce companies, were, in fact, not present at the addresses given on the invoices, and there was no alternate address available for them.
- b) All the Local Commissioners found a large number of Amway branded products at the premises of the Defendants. These premises included Amazon's warehouses, as also premises of the sellers themselves. Some of the Defendants were attempting to hide the Amway products, and had hid them in clandestine locations in their premises.
- c) The Local Commissioners also found thinners, and gluesticks at the said premises, and observed that the tampering/removal of the unique codes on the Amway products were taking place at the Defendants' premises. Upon enquiry from various Defendants, the Local Commissioners' observed that they accepted to tampering with the codes on the products, to avoid detection.
- d) The Defendants were not very candid about the source from where they procured the Amway products. Some of them gave very vague answers i.e., that the products were sourced from Chandni Chowk, however, refused to divulge the details of individuals they had procured the products from.
- e) Some of the Defendants claimed that they had sourced the products from the Amway website itself, and produced invoices from Amway, evidencing the same.
- f) It was found by the Local Commissioners, that a large number of Defendants, who were selling Amway branded products on e-

commerce platforms, were not their authorised ABOs, and they did not sufficiently declare the sources from whom they had procured the products. Only some of the sellers were ABOs of Amway, and even they did not fully disclose the sources from whom they received the products.

- g) The goods were then inventoried by the Local Commissioners and were released on *uperdari* to the Defendants.
- h) The Local commissioners took several photographs of the storing, packaging etc., In some photographs the Local Commissioners also captured the manner in which thinners were being used and the products were being tampered with.
- i) The Local commissioners also inspected account books and other records of the sellers and the platforms and placed on record the same along with their reports.

Some of the relevant findings in the Local Commissioners reports are discussed in the sections below.

E. SUBMISSIONS BY COUNSELS

78. A total of seven suits, involving Direct Selling Entities, who are Plaintiffs and different e-commerce platforms such as Amazon, Flipkart, Snapdeal, IMG, Healthkart were heard together. The Direct Selling Entities, who filed these suits are Amway, Oriflame and Modicare. In all the seven suits, the Plaintiffs prayed for an interim injunction restraining the e-commerce platforms and the sellers on their platforms from selling their products, without their consent. Overlapping issues have arisen and hence all the suits were heard together on the question of interim relief to be granted.

79. On behalf of various Plaintiffs, Mr. Sudhir Chandra, Mr. Rajiv Nayar, Mr. Balbir Singh, Mr. Amit Sibal, Ld. Senior Counsels and Ms. Priya Kumar, Ld. Counsel have made their submissions. On behalf of various sellers and e-commerce platforms, Mr. Sandeep Sethi, Mr. Darpan Wadhwa, Mr. Dayan Krishnan, Ld. Senior Counsels, Mr. Saikrishna Rajagopal, Mr. Jayant Mehta, Mr. Sagar Chandra and Mr. Siddharth Batra, Ld. Counsels have made their submissions. Considering the fact that the legality of the Direct Selling Guidelines was being questioned by the Defendants, notice was issued to Union of India in CS(OS) 91/2019 and Mrs. Maninder Acharya, Ld. Additional Solicitor General has made her brief submissions in the matter. Since the submissions are overlapping and are common in nature, the same are being recorded and dealt with together.

E1. Submissions of the Plaintiffs

80. On behalf of the Plaintiffs, it has been argued that the main plank of the Plaintiffs' business is the Direct Selling Guidelines, under which they enter into an agreement with their respective direct sellers, by whatever name called, who in turn sell the products direct to consumers. It is submitted that the Direct Selling Guidelines, which have been issued by the Ministry of Consumer Affairs, Food and Public Distribution, vide notification dated 26th October, 2016 regulates the Direct Selling Entities such as the Plaintiffs, and all such entities are bound by the same. It is further submitted that these Guidelines, specifically provide, in the interest of the consumers, that there shall be a specific Consumer Grievance Redressal Mechanism, which would be provided by the said entities. A Grievance Redressal Committee has to be constituted, which would have three officers of the said entity. The said committee would address all the

complaints of the said consumers. The Direct Selling Entity is obliged to provide the name of the purchaser and seller, delivery date of the goods and service, procedure for returning the goods and warranties of the goods, and mechanism for replacement. In view of these stringent measures that need to be adhered to by the Direct Selling Entities, the sale on e-commerce platforms of products of these Direct Selling Entities is also prohibited, except with prior written consent of the said entity. Thus, it is submitted that the entire business of the Plaintiffs could be severely jeopardized, if sale on e-commerce platforms is permitted in an unbridled manner.

81. Ld. counsels for the Plaintiffs further submit that the manner, in which products are being sold on the e-commerce platforms, without disclosing the name and contact details of the seller, clearly shows that the role of the platforms is not merely that of an intermediary. The e-commerce platforms, especially Amazon are, in fact, completely involved right from the listing of the products till final delivery, return, exchange of the product, etc. Amazon is also involved in advertising the Amazon platform by using images of Plaintiffs' products, in the regular print media, which is itself contrary to law.

82. It is further submitted that on the e-commerce platforms, in several entries of the Plaintiffs' products, the MRP of the product is incorrectly shown as being higher than what is mentioned on the product, and discounts are being claimed to be given in a completely misleading and unlawful manner.

83. It is further submitted that a complete change in the refund, return, guarantee and warranty policy of the Plaintiffs' products, clearly results in impairment of the products themselves, as the customer's trust in the

product is completely eroded. The sales of these products through unknown sellers on e-commerce platforms severely interferes with the contractual relations, which the Plaintiffs have with their various distributors. The sales of these products on e-commerce platforms thus results in tortious inducement of breach of contract, which the Plaintiffs have with their distributors. Though the direct sellers are bound by the *Code of Ethics* and seller agreements, which the Plaintiffs have, the same are being allowed to be breached by the sale on e-commerce platforms. In fact, the various services which are being provided by the platform and the charges being collected by them shows that they are much more than intermediaries. The said charges are being described as 'facilitation fee', but are in fact sales made for profits on the platforms. Despite platforms having being notified by the governmental authorities such as FSSAI, not to sell the products of the direct selling entities in violation of the guidelines, the platforms have chosen to violate them with impunity without raising any challenge to the Guidelines – thereby acquiescing to the same.

84. According to counsels for the Plaintiffs, the Direct Selling Guidelines have the force of law, as they have been introduced in exercise of executive powers under Articles 73 and 77 of the Constitution of India. The Guidelines having been in operation since 2016 and having not been challenged, at the *prima facie* stage, the same ought to be treated as being valid and legal.

85. Detailed submissions have been made by counsels in respect of Section 79 of the IT Act and Section 30 of the Trade Marks Act, 1999. On the latter, it is the common case of all the Plaintiffs that the use of the Plaintiffs' trade marks is not protected by Section 30 of the Act and in fact constitutes infringement, passing off and misrepresentation.

i) By Mr. Sudhir Chandra, Ld. Senior Counsel and Ms. Priya Adlakha, Ld. Counsels in CS(OS) 410/2018, CS(OS) 453/2018, and CS(OS) 550/2018

86. It is further submitted that in the case of Amway, a large number of Amway's products carry a unique code which allow products to be traced to their ABOs. The Plaintiffs have made large scale investment in manufacturing and distribution networks, and sale on e-commerce platforms could completely destroy the competitiveness of the Plaintiffs' business. It would also render a large number of ABOs, sub-distributors, and direct sellers completely jobless if unhindered e-commerce sale is permitted.

87. Direct Selling Entities such as the Plaintiffs are completely responsible for their ABOs and downstream distributors, and are finally answerable to the consumers. In fact, under the Guidelines, the states have to set up a mechanism for implementation of the said guidelines and a large number of states such as Rajasthan, Mizoram, Delhi, West Bengal, Orissa, Andhra Pradesh, Telangana, Sikkim and Tamil Nadu have already set up such mechanisms for ensuring compliance with the Guidelines. Any sale on e-commerce platforms, without the consent of the Plaintiffs, who are also owners of the brands, would result in violation of law, and expose the Plaintiffs to severe consequences. It is submitted that NCT of Delhi has also appointed a Nodal Officer to implement the Guidelines, within its territory.

88. In a large number of Amway's products, the unique code and QR code have been removed with the help of chemical thinners found in the premises of some of the direct sellers/E-commerce platforms by the Local Commissioners which itself shows that the products are being severely tampered with.

89. It is submitted that all the intermediaries cannot be treated alike. Platforms such as Facebook and eBay are different from e-commerce platforms. While inactive intermediaries are entitled to protection under Section 79 of the IT Act, actively participating intermediaries cannot seek protection under that provision. E-commerce platforms cannot be allowed to take advantages of businesses, earn profits in the form of commission, availing of service fee and facilitation fee under the garb of providing facilitation services, and simultaneously claim to be intermediaries. The line between the seller and the platform being totally blurred, the platforms must be made responsible.

90. It is further submitted that the rights of the Plaintiffs are based on the Direct Selling Guidelines and on torts. The Direct Selling Guidelines are binding law and in view of the undertakings given by the Direct Selling Entities, any violation has to be strictly curbed. Once the intermediaries have been informed of the contracts with the distributors, their persistent conduct of not taking down the Plaintiffs' products, clearly, shows that they are guilty of inducing breach of contract. On almost all of the platforms, the details of the sellers are not available.

91. Under Section 30 of the Trade Marks Act, products have to be lawfully acquired. If the products have been acquired in violation of the contractual stipulations, they would not be considered as having been lawfully acquired. Further, tampering of the unique codes and QR codes, change of return/refund policies/warranties, hiding of sellers' names, and contact details etc. clearly show that the products are being tampered with. In order to constitute tampering, it is not necessary that only the physical products need to be tampered with, but even if the conditions on which the

products are made available are changed, and the character of the products is impaired, it would be violative of Section 30. Since the excluded products' list, clearly, required the seller to be an authorised seller, under Amazon's own policy, the products deserve to be taken down.

92. The online sale, if any, of the Plaintiffs' products, is an extremely insignificant portion of the business, and is permitted only through the entities' own platform. Reliance is placed on *Viacom International Inc. v. Youtube, Inc.* 676 F.3d 19 to submit that wilful blindness to an illegality has to be equated to lack of due diligence.

ii) **By Mr. Rajiv Nayar, Ld. Senior Counsel and Ms. Priya Kumar, Ld. Counsel in CS(OS)480/2018 and CS(OS)531/2018**

93. It is submitted that none of the platforms dispute in their pleadings that they will not take down the impugned listings, upon being notified. Amazon's written statement, clearly, claims that it is an intermediary and is willing to take down the impugned listings, if the products are infringing. The excluded products' list itself shows that if the seller is not authorised to sell the product, the products would not be placed on Amazon's platform. The excluded products' list also clearly states that the sale of products is subject to applicable laws. Since Direct Selling Guidelines are applicable law, they will have to be accepted and implemented. Reliance is placed on *NDMC v. Tanvi Trading and Credit Pvt. Ltd.* 152 (2008) DLT 117 (SC) (hereinafter, '*NDMC v. Tanvi Trading*').

94. It is submitted that the prayer being sought that Direct Selling Guidelines ought to be declared not to be binding law, is a prayer that cannot be granted in these proceedings. Such a submission, if recognised, would have far reaching consequences on consumers and on States, which have

already implemented the said Guidelines. The core issue, in these cases, is that without the Direct Selling Entity's consent, the products cannot be sold on e-commerce platforms. It is further submitted that impairment can be, both physical and non-physical. If the Defendants do not agree to take down the products, it is a ground for grant of an injunction, and would also make the platforms amenable to penal action under Sections 72 to 78 of the IT Act. It is submitted that while Section 79 is a shield for Amazon, it also acts as a sword in the hands of the Court to enforce the duties of an intermediary, if the so-called intermediary does not abide by its duties.

95. It is further submitted that the platforms, if they are genuine intermediaries, ought to have no objection in taking down the products of the Plaintiffs, as the Plaintiffs had already intimated to the said platforms that the sales on these platforms are unauthorized and contrary to the contractual responsibility as also contrary to the binding Direct Selling Guidelines. It is further submitted that the intermediaries have to remain neutral and ought not to be permitted to raise substantive defences, inasmuch as, if such defences are allowed to be raised, it would clearly mean that they are no longer intermediaries, but are defending sale of the Plaintiffs' products on their platforms.

96. Specific reference is made to the *Fulfilled by Amazon* category of products, where the services provided by Amazon include storing, packaging, dispatching of free replacements, customer services, placing of fresh bar codes/QR codes on the products etc. Reference is also made to various customer reviews which appear on the Amazon platform wherein the customers have expressed severe dissatisfaction in the quality of the products as also the nature of value added services being provided. The

category of excluded products on Amazon itself shows that if the brand owner does not authorise the sale, such products have to be treated as excluded products as per Amazon's own policy.

97. It is further submitted that full control of the Amazon website is with Amazon. FSSAI regulates sale of food and food supplements and is the governmental authority relevant to the products in issue. Site fulfilment centres are being run by Amazon. The so-called third parties are all Amazon affiliates and are defined as Service Provider Network on Amazon. The platforms are not intermediaries and hence not entitled to the safe harbour under Section 79 of Information Technology Act.

98. The Local Commissioners' reports are vehemently relied upon to submit that the said reports, at the *prima facie* stage, show that the warehouses of all sellers are in fact Amazon's warehouses. There is no segregation seller-wise. The packing and dispatching is done at the said warehouse by Amazon's employees. The tracing back of the product, as per one of the Local Commissioners, shows that cash purchases have been made from unknown sources not related to the Plaintiffs, and the same are being simply backed up by agreements, which are completely farcical in nature. The connection between Cloudbtail and Amazon through M/s. Prione is well-established by one of the Local Commissioners, who visited Cloudbtail's premises.

99. It is, further submitted that even if the goods are genuine, Amway does not consent for the products to be sold on e-commerce platforms. Reliance is placed on the following judgements, in support of this argument:

- ***Cisco Technology Inc. v. Santosh Tantia 2014 (59) PTC 356 (Del)***
(hereinafter, 'Cisco Technology');

- ***Department of Electronics and Information Technology v. Star India Pvt. Ltd. [FAO(OS) 57/2015 decided on 29th July, 2016] (hereinafter, 'DEITY v. Star India');***
- ***CVS Corporation v. Zimo Davidoff SA 571 F. 3d 238 decided on 30th June, 2009 (hereinafter, 'CVS Corporation v. Zimo Davidoff');***

100. It is submitted that distribution of Amway's products are liable to be controlled by the company which is the trademark holder. Even if there is a difference in non-physical traits of a product, the trademark owner can seek an injunction. Reliance is placed on ***SKF USA Inc. v. International Trade Commission [Case No. 04-1460 decided on 14th September, 2005] (hereinafter, 'SKF USA Inc.')*** and ***Osawa & Co. v. B&H Photo 589 F. Supp. 1163 (1984) (hereinafter, 'Osawa & Co.')*** to submit that if any sale affects the reputation of the products, the same can be stopped. Ld. counsel relies on the adverse comments to Amway's products on Amazon's platform to urge that even if some customers are dissatisfied, it affects the reputation of the products.

101. In case of Cloudbail, the Court ought to lift the veil and hold that it is a seller connected with Amazon, as the Local Commissioner's report provides sufficient evidence to support such a finding.

iii) By Mr. Amit Sibal, Ld. Senior Counsel in CS(OS) 75/2019

102. It is submitted that the entire model of the Plaintiff's business needs to be borne in mind, as it renders support to a large number of consultants, distributors, dealers and direct sellers in urban and rural areas, including unemployed women, etc. The direct sellers offer 24% discounts to the downstream distributors, which is divided at different levels. In addition,

various rewards are given to the said distributors, which ensures adequate competition amongst the distributors, while providing a level playing field. In the case of Modicare, it is submitted that its products are not sold in shops except in saloons, and doctors' clinics and are not sold online except through Modicare platform.

103. If the level playing field is destroyed, it would hit at the business model of the Plaintiffs, as also interfere with all the contracts. The Modicare products' after sales' service and customer satisfaction program would also be disrupted and mutilated. The Guidelines do not impinge on any fundamental rights of the platforms. All that the Guidelines require is that the platforms should take consent, and sell the products as per the wishes of the brand owners/trademark owners in public interest. The Code of Ethics is clearly stipulated and has to be abided by all the distributors. A comparison of the after sales' service provided by the Plaintiffs and the Defendants shows that there is a huge gap between the two. The change of warranty conditions amounts to mutilation of the products. Change of terms of sales amounts to tampering and adulteration. Despite the fact that the platforms claim to be intermediaries, the details of the sellers are not given. Despite repeatedly being asked for details of the sellers in correspondence, the same was not forthcoming. Thus, insofar as the consumers are concerned, though products are shown to be Modicare products, they are faced with different warranties, different return policies, different refund policies and this clearly impairs the products. It is further alleged that while Amazon does not disclose the names of the sellers on the Indian platforms, internationally the details of all the sellers are not masked.

104. After filing of the suit, when Amazon disclosed the names of some of

the sellers (*but not all*), a large number of consultants, who were shown to be violating the sellers' agreements were terminated and it was found that 89 sellers on the Amazon platform were, in fact, not Modicare Consultants. Thus, there was a severe doubt as to the genuinity of the products itself. It is further submitted that as per the FDI policy, which is binding on all the e-commerce platforms, Press Note 2 of 2018 was issued, which stipulates that the platforms cannot keep inventories of the products. A *prima facie* case of tortious interference is made out as the platforms have knowledge of the Plaintiff's contracts. The details of the sellers are masked. There is active participation by the platforms and huge amounts of revenues are being earned. According to Modicare, public policy is enshrined in the Direct Selling Guidelines. It is not sufficient for the platforms to argue that the remedies of the Plaintiffs are contractual and that the Plaintiffs can claim damages for breach of contract from their respective seller, only. Considering that there are approximately 1.5 lakhs distributors, who are operating on the basis of contractual foundations, if the suppliers are not protected, then the level playing field would be destroyed. This would also destroy the integrity of the contracts entered into between the Plaintiffs with their Consultants.

105. It is further submitted that the website also makes severe misrepresentations, as the products are shown as originating from Modicare by using the expression "*by Modicare*". Customers have put up several critical reviews, which also results in dilution of brand equity. There is misrepresentation of the MRP. Fake discounts are being given. The platforms are also using meta tags of Modicare. If the Defendants knowingly and recklessly procure a breach, the tort of inducement of breach of contract

is established (*Aasia Industrial Technologies Ltd. v. Ambience Space Sellers Ltd. 1998 PTC (18) (DB) hereinafter, 'Aasia Industrial Technologies'*)).

106. Even in *Kapil Wadhwa & Ors. v. Samsung Electronics Co. Ltd. & Anr. MIPR 2012 (3) 0191 (hereinafter, 'Kapil Wadhwa DB')*, the 1d. Division Bench of this Court has held whether such sales are permissible, is a matter of policy and the policy, here, is established from the Direct Selling Guidelines. Reliance is placed on the legal position in European Union and the judgment of *Copad SA v. Christian Dior couture SA [C-59/08 decided on 23rd April, 2009] (hereinafter, 'Copad SA')*. It is submitted that since no consent has been given by the trademark owner, section 30(4) of the Trade Marks Act is triggered and hence exhaustion is not a defence.

107. Section 2(1)(w) of the IT Act was never meant to cover platforms such as Amazon. At best they were meant to cover situations such as those that arose in the *Kent RO Systems Ltd. and Ors. v. Amit Kotak and Ors. 2017 (69) PTC 551 (Del) (hereinafter, 'Kent RO SJ')*. It is submitted that only in those cases where the websites' role is limited to providing access to a communication system, the safe harbour provision applies.

108. As to the legality of the Direct Selling Guidelines, it is submitted that Article 19(1)(g) of the Constitution does not apply in this case. Wherever possible, the Guidelines have to be followed, as the platforms cannot claim a fundamental right to sell the Plaintiffs' products without their consent. (*Rai Sahab Ram Jawaya Kapur and Ors. v. State of Punjab AIR 1955 SC 549 (hereinafter, 'Ram Jawaya Kapur')*).

109. It is submitted that the platforms are in collusion with the so-called sellers and are in fact "*partners in sale*". The E-commerce platforms are

undertaking massive sales of the Plaintiffs' products. It is further submitted that Section 79 of the IT Act is not a mere defence, but is in fact an enforceable right. The language of Section 79 shows that there are duties imposed on intermediaries and the provision also stipulates as to when the intermediary would not be liable. If the intermediary does not fulfil the said conditions, it would be liable for the said acts and thus, Section 79 is not just a mere defence. The role of e-commerce platforms is not "*limited to provide access*". Hence, they are not intermediaries. Further, they are also not observing due diligence as mandated under Section 79. Section 79(3)(a) is wide enough to include inducement of breach of contract as improper conduct on behalf of an intermediary.

110. In the case of IMG, the details of the sellers are provided not on the landing page, but on a subsequent page. However, in the case of Amazon, no sellers' details are provided.

111. Invocation of Article 19(1)(g) is misconceived as fundamental rights are invoked only against the State. Under Article 19(6) reasonable restrictions can be imposed. There is no challenge to the Guidelines on the ground that they are unconstitutional or *ultra vires*.

iv) By Mr. Balbir Singh, Ld. Senior Counsel in CS(OS) 91/2019

112. It is urged that Article 13 is wide enough to include orders, Rules and instructions. All that it requires is authentication. As per the judgment in ***Ram Jawaya Kapur (supra)***, Direct Selling Guidelines have been duly notified in the Official Gazette. It is further submitted that Section 62 of Sales of Goods Act, 1930, clearly, stipulates as to how conditional sales are to be dealt with. If the rights of a buyer, who purchases a product, is curtailed by the terms of the contract, the doctrine of exhaustion would not

apply. It is only in the case of unconditional sales that exhaustion would kick in. Since there is unlawful acquisition, contrary to the conditions of sale, there is no consent. Moreover, the direct sellers of the Plaintiffs do not ‘*put the goods in the market*’. They are only passed down the distribution chain along with conditions. If the MRP is tampered with, if there is repackaging of goods and if new barcodes are put up, the same constitutes impairment of the products. (*L’Oreal SA v. eBay International [Case No. C-324/09 decided on 12th July, 2011]* (hereinafter, ‘*L’Oreal v. eBay*’)).

113. It is submitted specifically that Amazon is, in fact, a beneficiary and not an intermediary. It is further submitted that an “*additional place of business*” is required to be registered under GST law within the same State in order to merge the sale. An additional place of business cannot be in a different a Sate. Emphasis is also laid on the relationship between Cloutail and Amazon.

114. In conclusion, Mr. Balbir Singh. Ld. Senior Counsel submits that Amazon’s own policy including brand registry programme, and excluded products’ policy, ought to be enforced and the Plaintiffs’ rights ought to be protected.

E2. Submissions of the Defendants

i) Submissions by Mr. Sagar Chandra, Ld. Counsel in CS(OS)410/2018 and CS(OS) 550/2018

115. It is submitted by Mr. Sagar Chandra, Ld. Counsel appearing on behalf of 1MG and Healthcart that the Plaintiffs admit that the Defendants who operate the portals www.1mg.com and www.healthcart.com are intermediaries. He relies upon paragraph 42 of the plaint in CS(OS) 410/2018 and paragraph 51 of CS(OS) 550/2018. However, in view of the

Direct Selling Guidelines, it is the case of the Plaintiff that the Defendants cannot sell their products. Ld. Counsel submits that two questions arise in the present case, - (i) whether the Direct Selling Guidelines are applicable on the e-commerce platforms, and (ii) whether, because there is a violation of the Guidelines, the platforms shall no longer be treated as intermediaries. Ld. Counsel submits that the guidelines do not apply to intermediaries at all. The language of Clause 7(6) of the Guidelines and the Guidelines read as a whole makes it clear that the Guidelines apply only to Direct Selling Entities and their distributors/direct sellers. It is further contended that once there is lawful acquisition of the product, then, the only remedy for the Plaintiff is to proceed against their ABOs/direct sellers for breach of contract. If there is lawful acquisition, then consent of the owners is not needed to sell on e-commerce platforms. There cannot be a ban on all Amway products from being sold on the internet. The condition in the Direct Selling Guidelines which prohibits sale on e-commerce platforms is violative of Section 30 of the Trademark Act. It is submitted that internationally, Amway products are available on e-commerce platforms. Ld. counsel submits that the Direct Selling Guidelines are meant to regulate the Plaintiff and its business model cannot be used to prohibit legitimate businesses being conducted by the Defendants.

116. It is further submitted by Ld. Counsel for IMG and Healthkart that internationally, Amway products are sold on a B2B basis (business to business) and B2C basis (business to consumer). The Plaintiffs cannot have a grievance that the sale price is lower than the MRP as the agreement with the ABO itself permits the ABO to sell at a price lower than the MRP. The Plaintiff's agreement also provides that the title in the goods passes to the

direct seller and thus, the Plaintiffs cannot exercise control on the same. It is further submitted that even if IMG itself uploads the information of the products on its website, it is still entitled to protection of the safe harbour provision in the IT Act.

117. It is further submitted by Ld. Counsel that Amway is itself foraying into retail as is evident from two articles published in print media and thus the basis of the suit that the products are only sold through direct selling is misplaced as Amway is likely to expand quickly into brick and mortar stores.

ii) Submissions by Mr. Siddharth Batra, Ld. Counsel in CS(OS) 453/2018

118. It is submitted by Mr. Batra that the Plaintiff themselves are in violation of the Guidelines as they are selling Amway products on their own online platform. He relies upon specific purchases made on the Amway platform. It is, further, submitted that all the Amway products do not have a unique code as is being portrayed. In fact, pharmacists, retailer counters, etc. are also selling Amway products. Insofar as Defendants No. 2 and 3 in CS(OS) 453/2018 are concerned, they are not ABOs and they have already returned the seized products to Amway. It is submitted that the basis of the plaint is itself mis-founded because, if all Amway products do not have the unique codes and if products are being sold through retail chains and through the Plaintiffs' website then there can be no objection in the Defendants' selling genuine Amway products on e-commerce platforms.

119. Amway was given permission for conducting their business in India in 2004 vide letter dated 4th August, 2004, and as per the said letter, it cannot do any domestic retailing of the products. The purpose behind the

Guidelines was to protect the Direct Selling Entities from falling foul of the Price Chits and Money Circulation Schemes (Banning) Act, 1978 (*hereinafter*, 'PCMCS'), by indulging in Pyramid Schemes. Amway does not have any rights to sell its products on any e-commerce platform - even its own.

iii) Submissions by Mr. Saikrishna Rajagopal, Ld. Counsel for Amazon in CS(OS)480/2018, CS(OS)75/2019 and CS(OS)91/2019

120. On behalf of Amazon, it is submitted by Mr. Saikrishna Rajagopal, Ld. Counsel that the Direct Selling Guidelines are not law and hence they are not binding on Amazon. These are mere administrative instructions issued by the Government and do not create any rights beyond what is provided in the statute. The Plaintiffs cannot trace their right to sue under the Direct Selling Guidelines. Such administrative instructions cannot confer substantive rights on any party. It would require amendment in the laws. Moreover, the Guidelines are to be enforced by States and Union Territories and not by Civil Courts and hence, the suits are based on an incorrect premise. Since there is no contractual relationship between the Defendants and the Plaintiffs and they being third parties, it cannot be argued that the Defendants are bound by the Guidelines. Ld. Counsel relies on the following judgments:

- ***G.J. Fernandez v. State of Mysore, AIR 1967 SC 1753*** (*hereinafter*, 'G.J. Fernandez');
- ***Syndicate Bank v. Ramachandran Pillai & Ors. (2011) 15 SCC 398*** (*hereinafter*, 'Syndicate Bank')

121. It is further submitted by Amazon that it being only an intermediary, if the primary player i.e. the direct seller is itself not liable, then the

intermediary, which is a secondary player, cannot be held to be liable. At best, if the products are not genuine, the impugned listings can be directed to be taken down by Amazon.

122. It is submitted that the mischief sought to be addressed, leading to the framing of the Guidelines, in the first place, was completely different and had no relationship with enforcement of trademark rights or with the rights of intermediaries. The Division Bench judgment in *Kapil Wadhwa DB (supra)* lays down that under trademark law India follows international exhaustion and if the goods are lawfully acquired, there cannot be any restraint on further sale. So long as the goods are genuine and are not tampered with, there can be no bar to sell the goods. The plaint is not based on breach of the contract and the Plaintiffs' claim *right in rem*. Reliance is also placed on *Consumers Distributing Company Ltd. v. Seiko Time Canada Ltd. [1984] 1 RCS 583* (hereinafter, '*Seiko Time Canada Ltd.*').

123. It is further submitted by Amazon that it provides various support services, however, these support services by themselves do not mean that Amazon is no longer an intermediary. Services such as imaging, cataloguing, advertising, etc. are provided by a network of service providers who are recommended to the sellers by Amazon. There is no compulsion on the seller to avail the services of these parties. Even in *Amazon Choice*, Amazon doesn't choose the seller. It merely recommends the product. The fees charged by Amazon are only referral and closing fees which is in the range of 3% to 14% for differing kinds of products. The bar coding done by Amazon is for the purpose of efficient inventorisation. Such a bar code can also be generated by the seller from his own account. All the containers have a bar code. As per the FDI press note 2 of 2018, e-commerce platforms are

permitted and are entitled to provide facilitation and they still constitute intermediaries. Services of warehousing etc. can also be provided. Reliance is placed on the following judgments of US courts which hold that the role of Amazon is only that of an intermediary:

- ***Matrix Essential v. Emporium Drug Mart* 756 F. Supp. 280 (W.D. La. 1991) decided on 15th February, 1991 (hereinafter, 'Matrix Essential District Court');**
- ***Matrix Essentials v. Emporium Drug Mart* 988 F.2d 587 (5th Cir, 1993) decided on 19th April, 1999 (hereinafter, 'Matrix Essentials Court of Appeals');**
- ***Sebastian Intern v. Long Drug Stores* 53 F.3d 1073 (9th Cir., 1995) decided on 8th May, 1995 (hereinafter, 'Sebastian Intern');**
- ***Milo & Gabby v. Amazon.com Inc.* [Case No.2016-1290 decided on 23rd May, 2017] (hereinafter, 'Milo & Gabby v. Amazon');**
- ***Tre Milano, LLC v. Amazon.com* (hereinafter, 'Tre Milano, LLC')**
- ***Allstate New Jersey Insurance Company v. Amazon.com* [Civil Action No.17-2738 (FLW) (LHG) decided on 24th July, 2018] (hereinafter, 'Allstate New Jersey Insurance Company')**

124. The Plaintiffs are seeking reliefs in these cases which is beyond what the Single Judge in the ***Samsung Electronics Company Ltd. v. Kapil Wadhwa 2012 SCC OnLine 1004*** (hereinafter, 'Kapil Wadhwa SJ') even granted. If the relief sought for is granted, it would mean that there would not be even domestic exhaustion – let alone international exhaustion.

125. In respect of the Excluded Products' List, Amazon seeks to clarify that only when consent is needed for sale of a product on its platform, it is to be taken. The immunity which Amazon enjoys as an intermediary would

come to an end only if the sale is violative of any applicable law. Since the suits are not based on trademark rights, there cannot be any dilution or passing off.

126. In respect of FSSAI letter dated 9th April, 2018, Amazon's stand is that the said letter merely constitutes a direction by the Central Government and since in *Shreya Singhal (supra)*, the Supreme Court clearly clarified that "actual knowledge" can only be by way of a Court order, Amazon is not bound to implement the FSSAI letter. The said letter seeks to curb Amazon's fundamental rights under Article 19(1)(g) of the Constitution.

127. Insofar as the information/contact details of the sellers are concerned, if a purchaser wishes to contact the seller, the same is facilitated by Amazon. The requirement to disclose the seller's name, details, address, etc. is duly complied with at the time of purchase when the seller's name and the GSTIN number of the seller is provided. Any consumer can trace the seller by using the GSTIN number. Moreover, Amazon facilitates the contact with the seller through its website by the snail mail network established by it and hence there is complete compliance of the applicable guidelines.

128. The only direction that can be passed against the Amazon is for removal of the listings as directed in the judgment of *Kent RO SJ (supra)*. It is further submitted that the role of an intermediary and whether Amazon fulfils the said role and whether there is tortious interference with the contracts of the Plaintiffs with their direct sellers, are all to be adjudicated at the time of trial. A benefit flowing out of administrative instructions cannot form the basis of a suit and thus, it is submitted that no relief is liable to be granted to the Plaintiffs.

129. It is further submitted by the Ld. Counsel that if the Plaintiffs are not

able to demonstrate any infraction of law, even seller information cannot be insisted upon. A heavy onus rests on the Plaintiffs to show that the products being sold are not genuine. The Plaintiffs also cannot demand that the details of the sellers ought to be given upfront. In fact, the Plaintiffs have failed to implead the sellers whose information has already been supplied pursuant to the Court's orders. Mere sale outside the distribution channels of the Plaintiffs cannot be termed as being illegal. If the Plaintiffs have no rights, information of the sellers cannot be demanded.

130. Ld. Counsel, also places reliance on a recent judgment of the Bombay High Court being *Tips Industries v. Wynk Music Ltd. [Comm. Suit IP No. 114/2018 and Anr. decided on 23rd April, 2019]* (hereinafter, '*Tips Industries*') wherein the Government sought to issue a memorandum and clarify that Section 31D of the Copyright Act applies even to internet platforms. The Bombay High Court rejected the binding nature of the said memorandum issued by the Government. It is further submitted that even though Amazon provides logistics, storage and payment facilities, it still remains an inactive intermediary. Since the Direct Selling Guidelines have not been placed before Parliament, they do not have the force of law.

iv) Submissions by Mr. Dayan Krishnan, Ld. Senior Counsel, in CS(OS)452/2018

131. Mr. Dayan Krishnan, Ld. Senior Counsel appearing on behalf of Defendant No.9, Snapdeal submits that the Snapdeal platform has no control over the content on the platform. The packaging of the products is done by the sellers. Under Section 2(1)(w) of the IT Act, any service provided by an intermediary could include logistics, transportation, etc. Analysing Section 79 of the IT Act, it is submitted by Ld. Counsel that Section 79(3)(a) of the

IT Act requires *mens rea* to establish knowledge. There has to be proof adduced for each and every impugned listing on the Snapdeal website.

132. It is further submitted that Snapdeal has a proper take down policy which is referred to by Ld. Senior Counsel. Further, in compliance of the Intermediary Guidelines, a Grievance Officer has also been appointed by Snapdeal to address complaints of consumers. If the sale is held to be *ex-facie* illegal, then Snapdeal can only be directed to take down the listings. Reliance is placed on the judgment of the Division Bench in ***My Space Inc. v. Super Cassettes Industries Ltd. (2017) 236 DLT 478 (DB)*** (hereinafter, '*MySpace Inc.*') to argue that even where the Plaintiff had identified copyrights, the Court did not grant an injunction against the intermediaries. The only obligation imposed by the Courts on the intermediaries was to take down.

v) ***Submission by Mr. Sandeep Sethi, Ld. Senior Counsel for Cludtail in CS(OS)480/2018***

133. It is submitted by Mr. Sandeep Sethi, Ld. Senior Counsel appearing on behalf of Cludtail in CS(OS) 480/2018 that Direct Selling Guidelines do not constitute '*law*' under Article 13 of the Constitution. The Guidelines cannot restrict rights protected under Article 19(1)(g) of the Constitution. Under Article 19(6), reasonable restrictions can be imposed only by valid law. The Guidelines have no statutory basis and are mere executive instructions. Reliance is placed on two judgments of the Supreme Court in ***Bijoe Emmanuel v. State of Kerala (1986) 3 SCC 615*** (hereinafter, '*Bijoe Emmanuel*') and ***Union of India v. Navin Jindal (2004) 2 SCC 510*** (hereinafter, '*Navin Jindal*'). The Guidelines are mere executive instructions and are not binding.

134. It is further submitted on behalf of Cloudbtail that it procures the products from authorized sellers of Amway. Once there is a contract of sale, no condition can be imposed since the right of ownership in the property has passed. Once the sale is affected, the legal title of Amway seizes. Ld. Counsel relies upon Section 4(3), Section 19 and Section 20 of the Sale of Goods Act. A sale is an absolute transfer of title and hence any conditions or restrictions laid on the sale would be void. Ld. Counsel relies on *Canbank Financial Services Ltd. v. Custodian & Ors. (2004) 8 SCC 355* (hereinafter, 'Canbank Financial Services') and *Ramesh Chand Aggarwal & Ors. v. MCD 2006 (87) DRJ 273* (hereinafter, 'Ramesh Chand Aggarwal').

135. Insofar as the argument of tortious inducement of breach of contract is concerned, it is submitted that there are no pleadings to this effect in the plaint and the plea cannot be entertained orally. On a specific query, if the Defendants are willing to give a disclaimer as to the Amway products being sold not being from authorised distributors, if they are not recognised ABOs, Ld. Counsel's response was that no disclaimer can be inserted.

vi) Submissions by Mr. Jayant Mehta, Ld. Counsel for Cloudbtail in CS(OS)91/2019

136. Mr. Jayant Mehta, Ld. Counsel also appearing for Cloudbtail in suit no.91/2019, submits that the cause of action in this suit is merely cosmetic in nature. The grievance of the Plaintiffs is that the products are being sold at a huge discount and the Plaintiffs are unable to earn their super-normal profits. It is submitted that a business model cannot be a right in law. The cause of action for a suit can be based either in law, under a contract or jural relationship or under torts. No foundation has been laid by the Plaintiffs for

claiming any relief in torts. Insofar as contracts are concerned, there is no privity between Cloudbtail and Plaintiffs. The sale of the products being on a principal to principal basis and the title having passed, no further conditions can be imposed.

137. Reliance is placed on Clauses 6.9, 7.1 and 7.2 of the contract of Amway. Under Clause 7.1, the distributor needs to take written consent for making a sale on e-commerce platform. Such a condition is not enforceable in law and that too against a third party. The present suit is nothing but an attempt to seek a *writ of mandamus* for enforcement of Direct Selling Guidelines. So long as the sale is lawful under the provisions of the Trade Marks Act, no injunction can be granted. The monopoly granted under the Trade Marks Act is a limited monopoly which is protected, but the said monopoly cannot be stretched down the line to all sellers and distributors. Once the goods are in the stream of commerce, they cannot be interdicted. He relies on the decision of the Federal Court of Appeal at Ontario, Canada in *Smith & Nephew Inc. v. Dylex Ltd. [Case No. A-683-94 decided on 4th June, 1996]* (hereinafter, '*Smith & Nephew Inc.*'), in support of his arguments.

vii) Submissions by Mr. Darpan Wadhwa, Ld. Senior Counsel for Flipkart in CS(OS)531/2018

138. Mr. Darpan Wadhwa, Ld. Senior Counsel appearing for Flipkart submits that there is no basis in the plaint to allege that Flipkart is conspiring with the sellers in any manner. The sale is in fact not by Flipkart but by Defendant Nos.2 and 3 who are the actual sellers. They have, in turn, bought the products from two other sellers who are not direct sellers of the Plaintiffs. A failure by the Plaintiffs to "*reign in*" their own distributors and

ABOs cannot form the basis of a cause of action against the Defendants. The guidelines which were framed to protect consumer interest cannot be used against intermediaries. There is no plea of tortious interference in the plaint except in three places. In order to establish tortious interference, clear details ought to be provided and the plaint is, thus, lacking in material particulars to establish a tort.

E3. Stand of the Union of India

139. Mrs. Maninder Acharya, Ld. ASG submits that the background of the Direct Selling Guidelines, 2016 was to protect consumers and the direct selling business in India. It differentiated between Direct Selling businesses and Ponzi schemes. A Parliamentary sub-Committee report was given which concluded that Direct Selling Entities and their businesses ought to be protected as their activities were completely legal. The reason why the Government has termed them as being advisory in nature is to merely enable State Governments to carry out any modifications if required.

140. Insofar as their binding nature is concerned, the guidelines have been authenticated, approved and Gazetted under Article 77 of the Constitution of India. Till date and since the time the Direct Selling Guidelines were introduced in 2016, there has been no challenge to the same. The Direct Selling Guidelines have the force of law, as the power exercised to frame them is not arbitrary or perverse. It is a settled position in law that all executive action is taken in the name of the President, though, the gazette may actually not say so. The guidelines are duly authenticated and are binding. Reliance is placed on *Gulf Goans Hotels Co. Ltd. v. Union of India (2014) 10 SCC 673* (hereinafter, 'Gulf Goan Hotels Co. Ltd. '), *Zalam Singh v. Union of India [W.P.(C) 185/1968 decided on 20th December,*

1968] (hereinafter, '*Zalam Singh*'), and *Delhi International Airport Ltd. v. International Lease Finance Corporation and Ors. (2015) 8 SCC 446* (hereinafter, '*DIAL v. ILFC*').

141. Ld. ASG has also handed over to the Court a report of the Standing Committee titled Efficacy of Regulation of Collective Investment Schemes Chit Funds etc. In fact, the background material to the said Guidelines shows that the Committee considered the significant contribution of the Direct Selling business to the Indian economy. It noted that the direct selling industry consisting of Amway, Tupperware, Oriflame, Herbalife and Hindustan Unilever Limited gives employment to over 6 million people as of 2014.

F. ANALYSIS AND FINDINGS

142. In the background of above submissions, facts and pleadings, the following four questions arise for adjudication in the present cases:

- i) Whether the Direct Selling Guidelines, 2016 are valid and binding on the Defendants and if so, to what extent?
- ii) Whether the sale of the Plaintiffs' products on e-commerce platforms violates the Plaintiffs' trademark rights or constitutes misrepresentation, passing off and results in dilution and tarnishes the goodwill and reputation of the Plaintiffs' brands?
- iii) Whether e-commerce platforms are "*intermediaries*" and are entitled to protection under the safe harbour provided in Section 79 of the Information Technology Act and the Intermediary Guidelines of 2011?

- iv) Whether e-commerce platforms such as Amazon, Snapdeal, Flipkart, 1MG, and Healthkart are guilty of tortious interference with the contractual relationship of the Plaintiffs with their distributors/direct sellers?
- v) What is the relief to be granted?

F1. Question (i) - Whether the Direct Selling Guidelines, 2016 are valid and binding on the Defendants and if so, to what extent?

143. All the Plaintiffs rely on Direct Selling Guidelines, 2016 while seeking relief in the present cases. Specific reliance is placed on clause 7(6) of the said Guidelines, which reads as under:

“Clause 7(6) – Any person who sells or offers for sale, including on an e-commerce platform/ marketplace, any product or service of a Direct Selling Entity must have prior written consent from the respective Direct Selling Entity in order to undertake or solicit such sale or offer.”

144. The contentions of the Plaintiffs have already been recorded above. The background of these Guidelines as is evident from the documents placed on record by the Ld. ASG, is that they were framed in consumer interest. The background of the Guidelines is contained in the guidelines itself and is set out herein below:

**“MINISTRY OF CONSUMER AFFAIRS, FOOD
AND PUBLIC DISTRIBUTION
(Department of Consumer Affairs)
NOTIFICATION
New Delhi, the 26th October, 2016**

G.S.R. 1013(E).—*The Government constituted on consisting an Inter-Ministerial Committee representatives from Ministry of Finance, the*

Department of Industrial Policy and Promotion, Department of Legal Affairs, Department of Information Technology and Ministry of Corporate Affairs, besides representatives of State Governments of Delhi, Andhra Pradesh and Kerala to look into the matters concerning the direct selling industry.

Based on the deliberations of the Inter- Ministerial Committee and consultations with the Stakeholders, the model guidelines for States & Union Territories on direct selling, have been formulated for protecting the legitimate rights and interests of Industry and Consumers. It is envisaged in the guidelines that the State Governments will set up a mechanism to monitor/supervise the activities of Direct Sellers, Direct Selling Entities regarding compliance of the guidelines for Direct Selling.

Any direct selling entity, conducting direct selling activities, shall submit an undertaking to the Department of Consumer Affairs by 9th December, 2016 stating that it is in compliance with these guidelines and shall also provide details of its incorporation. Being enforcement agencies, the State Governments & Union Territories may take necessary action to implement these guidelines. The Guidelines are available on the website www.Consumeraffairs.nic.in.

*Enclosure: Model Guidelines on Direct Selling
English and Hindi*

*With proforma for declaration Undertaking are
attached.”*

145. The contention of the Plaintiffs is that the guidelines bar the sale of goods sold through Direct Selling, on e-commerce platforms, and the same is binding on all e-commerce platforms and their sellers.

146. On the other hand, the contention of the Defendants is that the Direct Selling Guidelines are not law and they are merely advisory in nature. They

are merely a model framework for State Governments and Union Territories to come out with an actual legal mechanism to enforce the same. They are not binding in nature. It is further urged that the Direct Selling Guidelines are not law under Article 13 of the Constitution of India as they impinge upon Fundamental Rights of the platforms and the sellers on the platforms, guaranteed under Article 19(1)(g) of the Constitution. Since the guidelines do not trace their origin to any statutory provision, and were also not placed before Parliament for ratification, they are not binding. Both sides have relied upon various case laws in support of their submissions.

147. The first and the foremost question, that arises, is whether any right under Article 19(1)(g) of the Constitution is impinged by the issuance of these guidelines.

148. In *Ram Jawaya Kapur (supra)*, the Supreme Court was dealing with a challenge raised by publishers of textbooks, to executive instructions. The case of the publishers was that the Government's decision by means of a notification whereby publishers were eliminated from the process of printing and publishing textbooks, for government schools, was violative of Article 19(1)(g) of the Constitution. The Government earlier followed a procedure under which publishers were allowed to print and publish approved textbooks by paying 5% royalty to the government. However, by the impugned notification, the government took upon itself the task of publishing and printing by merely paying 5% royalty to the authors of the said textbooks. This step, according to the publishers, violated their right to print and publish textbooks. The Supreme Court held that textbook publishers cannot claim a Fundamental Right to publish textbooks for the government. There was no law preventing printing and publishing books,

generally, by the said publishers. If the government is giving aid to schools and as part of the said process wishes to publish its own textbooks, the publishers cannot claim a vested right to continue to publish textbooks. The Supreme Court analysed the meaning of executive instructions and held that the residue of govt functions which are neither legislative nor judicial, constitute executive functions. It is not necessary for a law to be in existence for the powers of the Executive to be exercised. The Supreme Court, further, clearly, held that every executive instruction need not trace its origin to a statute. The Government is entitled to conduct its business by means of executive instructions. Unless and until fundamental rights are impinged, the rigours of Article 13 of the Constitution need not be satisfied. Relevant extracts from the judgment of *Ram Jawaya Kapur (supra)* are set out below:

“12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is

clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.

.....

17. *Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus, when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.*

18. *In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due appropriation Acts were passed. For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Article 298 of the Constitution. In these circumstances, we are unable to agree with Mr. Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.*

19. *These discussions however are to some extent academic and are not sufficient by themselves to*

dispose of the petitioners' case. As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution. On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is: What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalization of the text books for the school students?"

It is thus a settled legal proposition that Fundamental Rights can be curtailed only by valid law as per Article 13 of the Constitution of India but exercise of executive powers, where there is no impinging of Fundamental Rights, cannot be questioned, even if the same is not traceable to a statute. To the same effect are the two judgements cited by the Defendants viz., ***Bijoe Emmanuel (supra)*** and ***Navin Jindal (supra)***.

149. In ***Gulf Goan Hotels (supra)***, the Supreme Court was dealing with a challenge to environmental guidelines which were issued in the form of directives, one notification and orders by different authorities from time to

time. The Petitioners in the said case were owners of hotels and resorts in Goa, which were facing demolition. It was claimed by them that the bunch of regulations/rules which were being enforced and cited against them were not law, as the same were not in existence, when the said hotels/resorts were built. The Supreme Court in the said context, went into the question of what constitutes law, and held as under:

“15. The question ‘what is “law”?’ has perplexed many a jurisprudence; yet, the search for the elusive definition continues. It may be unwise to posit an answer to the question; rather, one may proceed by examining the points of consensus in jurisprudential theories. What appears to be common to all these theories is the notion that law must possess a certain form; contain a clear mandate/explicit command which may be prescriptive, permissive or penal and the law must also seek to achieve a clearly identifiable purpose. While the form itself or absence thereof will not be determinative and its impact has to be considered as a lending or supporting force, the disclosure of a clear mandate and purpose is indispensable.”

150. The Supreme Court further observed in the context of Article 77 of the Constitution, that if the law is not duly authenticated and promulgated, then it would not be binding. In the said case, since the subordinate legislation was not published in the manner it was to be customarily recognised in the official channels, and since the guidelines were not gazetted, it was held that the same was not valid law.

“24. It will not be necessary to notice the long line of decisions reiterating the aforesaid view. So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be

as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette (B.K. Srinivasan v. State of Karnataka) [(1987) 1 SCC 658]. Admittedly, the “guidelines” were not gazette.”

151. In the case of **NDMC v. Tanvi Trading (supra)**, the Supreme court was considering the validity of LBZ (‘Lutyens’ Bungalow Zone’) guidelines, which were being used by the NDMC for sanctioning of plans in the LBZ zone. The argument of the Petitioner was that these guidelines did not have the force of law, as they were not notified either under the DDA Act or the NDMC Act. In this context, the Supreme Court observed as under.

“9. Even assuming that the LBZ guidelines are not relatable to the DD Act or the NDMC Act, the Central Government undoubtedly could, in exercise of executive power introduce these guidelines. At this stage, it would be instructive to refer to the extent of executive power of the Union as provided in Article 73 of the Constitution. Article 73 inter alia provides that, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. The Parliament has enacted the Delhi Development Act, 1957 and the New Delhi Municipal Council Act, 1994. Article 73 does not define what an executive function is, neither does it mention the matters over which the executive power is exercised. The extent defined in Article 73 is not exhaustive. The Union Government has power to issue executive directions relating to the matters dealt with under the DD Act, 1957 and the NDMC Act, 1994, though the directions contrary to the provisions of those Acts cannot be issued.”

152. The Supreme Court, in the context of these guidelines, also considered that the issuance of these guidelines was in public interest and hence the guidelines were to be followed scrupulously by the authorities as well as the owners of the bungalows. Para 14 is relevant and reads as under:

“14. Thus, the contention urged on behalf of the respondents that the guidelines being without authority of law, should be ignored, cannot be accepted. It is well to remember that while construing the LBZ guidelines the Court will have to take notice of public interest sought to be protected by the guidelines because if the guidelines had not been scrupulously followed as has been admittedly done since 1988, the LBZ area of Delhi would never have remained the bungalow area as visualised in the Master Plan and within no time skyscrapers would have come up in the LBZ seriously affecting the low density character of the area.”

153. In **Zalam Singh (supra)**, the Supreme Court held that Article 77 of the Constitution is not a mandatory provision, but is directory. Authentication need not be in a particular form. So long as the document is authenticated in some manner, the same is sufficient. Every notification need not be specifically mentioned that it is being issued in the name of the President. In this judgment, it was held that in the context of Article 77 of the Constitution, any kind of ‘*hair-splitting*’ ought to be avoided.

154. In **DIAL v. IFCI (supra)**, the Supreme Court found that the decisions taken in a minutes of meeting, which were neither confirmed or approved by the minister concerned, nor notified or authenticated, and also not communicated to the persons concerned, would not have the force of law under Articles 73/77 of the Constitution. In para 24 of the judgment, the

Supreme Court holds that any decision having a financial implication, ought to have been finalised by the ministry officials with the relevant authorities and thereafter, the concurrence of the finance ministry ought to have been obtained. The minister concerned, as per the rules of business, ought to have approved the minutes, and only then could the said minutes have the force of law.

155. In the back drop of the above case law, the present facts need to be considered. The Direct Selling System is a unique system, which has now been prevalent in India for several years. The fulcrum of this system is the sale by distributors/sub-distributors/sellers directly to the consumers. The Government thought it fit to regulate the Direct Selling System by issuing the Direct Selling Guidelines of 2016.

156. The background of the issuance of these guidelines was that the direct selling business was being hit by the PCMCS Act. The said Act failed to distinguish between genuine direct selling activities from illegal money circulation schemes. This resulted in victimization of the Direct Selling Entities by the State police authorities under the provisions of the PCMCS Act.

157. An Inter-Ministerial Committee was then constituted in July, 2012 to examine the various issues plaguing the direct selling and multi-level marketing entities. The constitution of the said committee was considered necessary owing to the large-scale employment that was being provided by the direct selling industry to the tune of almost 6 million people.¹ The

¹ Current estimates of employment generated by the Direct selling industry in India – In 2017, the industry is stated to have generated employment for approximately, 50 lakh people. This number is set to rise to 1.8 crore by the year 2025. Source: <https://www.timesnownews.com/business-economy/companies/article/direct-selling-companies-in-india-set-to-generate-nearly-2-crore-jobs->

Direct Selling industry, at that time, as recorded in the report, was paying annual taxes of approximately Rs.1000/- crores. The Inter-Ministerial Committee, which was constituted under the chairmanship of the Secretary, Ministry of Consumers Affairs, held meetings from time to time. It was considered necessary to have separate guidelines to regulate the Direct Selling industry, similar to the guidelines adopted by the Government of Kerala. Parallely, the Standing Committee on Finance, submitted its 21st Report on “*Efficacy of Regulation of Collective Investment Schemes (CIS), Chits Funds, Etc*”, which had members from almost all the political parties, both from the Lok Sabha and Rajya Sabha. The said committee considered the representations of the Indian Direct Selling Association (IDSA)² and other Direct Selling Entities including Amway. After considering the said representations, the Committee finally recommended as under:

“In their deposition before the Committee, the Indian institute of Corporate Affairs (IICA), Ministry of Corporate Affairs, presented a “Whitepaper on Regulation of Direct Selling in India”. They also presented an exposure draft of a legislation that distinguishes between Ponzi/pyramid schemes and legitimate direct selling companies and proposed a mandatory regulatory and registration process for the direct selling industry in India. Given that there is considerable ambiguity in identifying Ponzi/pyramid schemes and distinguishing them from legitimate Direct Selling businesses, there is merit in considering

[by/278175](#), last accessed on 8th July, 2019.

² The members of IDSA are – Amway India Enterprises, Altos Enterprises Ltd., AMC India Direct Selling Pvt. Ltd., Avon Beauty Products India Pvt. Ltd., 4Life Trading India Ltd., Blulife Marketing Pvt. Ltd., DXN Marketing India Pvt. Ltd., Enagic India Kangen Water Pvt. Ltd., Glaze Trading India Pvt. Ltd., Herbalife International India P. Ltd., International Marketing Corporation Pvt. Ltd., Jeunesse Global India Pvt. Ltd., K-Link Healthcare (India) Pvt. Ltd., Lyoness India, Modicare Ltd., Oriflame India Pvt. Ltd., PM International India Pvt. Ltd., Tianjin Tianshi India Pvt. Ltd., Tupperware India Pvt. Ltd., Unicity Health Pvt. Ltd., and Zillon Life.

the findings of the “Whitepaper on Regulation of Direct Selling in India” by IICA. Most importantly, the exposure draft in the IICA Whitepaper proposes a statutory provision under Section 5 of the draft that defines a Pyramid Scheme. This definition seems to provide, as evidenced from their legal research on Indian and international jurisprudence, an objective ‘smell test’ for law enforcement agencies to apply at the time of investigation. It is hoped that this will lead to more timely detection and efficacious investigations. The Committee would recommend that the Ministry of Finance, Ministry of Corporate Affairs and Ministry of Consumer Affairs consider the IICA whitepaper and more specifically, the exposure draft and establish a regulatory framework and compulsory registration process for all Direct Selling businesses in order to provide an oversight mechanism as to whether they are legitimate direct selling businesses or Ponzi/pyramid schemes.”

158. Pursuant to the above recommendations, an Inter-Ministerial Committee was constituted under the chairmanship of the Secretary, Department of Consumer Affairs. The said Committee considered the advantages of the Direct Selling industry, recommendations from various other ministries including DIPP, DEITY, Department of Corporate Affairs, etc. The general consensus was that Direct Selling ought to be distinguished from Ponzi schemes and Pyramid Schemes. Legislations from various countries including USA, UK, China, Malaysia, Singapore, and Japan were also considered and finally, the Guidelines were issued on 26th October, 2016. After issuance of the Guidelines, the same was notified in the official gazette.

159. The Ld. ASG, has also submitted that at the relevant point of time

internal trade was under the Department of Consumer Affairs under the Allocation Business Rules, however, with effect from 27th January, 2019, the same has been transferred to Ministry of Commerce and Industry.

160. The Direct Selling Guidelines, 2016 were issued by the Inter - Ministerial Committee with the following objective:

**“MINISTRY OF CONSUMER AFFAIRS, FOOD
AND PUBLIC DISTRIBUTION
(Department of Consumer Affairs)
NOTIFICATION**

**Advisory to State Government / Union Territories:
Model Framework for Guidelines on Direct Selling**

The guidelines, may be called the Direct Selling Guidelines, 2016. These re issued as guiding principles for State Governments to consider regulating the business of “Direct Selling” and Multi-Level marketing (MLM) and strengthen the existing regulatory mechanism on Direct Selling and MLM, for preventing fraud and protecting the legitimate rights and interests of consumers”

161. The said Guidelines, though initially issued as Advisory were duly gazetted and have also been implemented in a large number of states namely Rajasthan, Mizoram, West Bengal, Orissa, Andhra Pradesh, Telangana, Sikkim and Tamil Nadu. In Delhi a nodal officer has been appointed to implement the Guidelines. Thus, though the initial terminology used to describe these executive instructions was ‘Guidelines’, with the issuance of the gazette notification and the implementation of the same by various States, they constitute binding executive instructions. The notification issued by the Government in the official Gazette is a General Statutory Rule (‘GSR’). Thus, these are not merely advisory in nature but have force of law.

162. The Direct Selling Guidelines cast various obligations on Direct Selling Entities, some of which are as under:

“Model Framework for Guidelines on Direct Selling
Clause 1. Definitions:

.....
Clause 2. Conditions for the setting up of Direct Selling business:

.....
Clause 3: Conditions for conduct of Direct Selling Business

Every Direct Selling entity shall comply with the following conditions:

1. It shall be the owner, holder, licensee of a trademark, service mark or any other identification mark which identifies the entity with the goods to be sold or supplied or services to be rendered;

2. It shall issue proper identity document(s) to its Direct Sellers;

3. (a).....

(b) The details of Direct Sellers shall include and not be limited to verified proof of address, proof of identity and PAN;

4. It shall maintain proper and updated website with all relevant details of the entity, contact information, its management, products, product information, product quality certificate, price, complete income plan, terms of contract with direct seller and complaint redressal mechanism for direct sellers and consumers. The website should have space for registering consumer complaints and should ensure that grievances are addressed within 45 days of making such complaints;

5.6. 7.....

8. Notwithstanding the distribution system adopted by a direct selling entity, the Direct Selling Entity shall be responsible for compliance of these Guidelines by any member of its network of direct selling, whether such

member is appointed directly or indirectly by the Direct Selling Entity.

.....
Clause 4: Conditions for Direct Selling contract between Direct Seller/Distribution and Direct Selling Entity:

.....
Clause 5: Certain obligations of Direct Sellers

1.
2. At the initiation of a sales representation, without request, truthfully and clearly identify themselves, the identity of the direct selling entity, the nature of the goods or services sold and the purpose of the solicitation to the prospective consumer;
3. Offer a prospective consumer accurate and complete explanations and demonstrations of goods and services, prices, credit terms, terms of payment, return policies, terms of guarantee, after-sales service;
4. Provide the following information to the prospect/consumers at the time of sale, namely:
 - a) Name, address, registration number or enrollment number, identity proof and telephone number of the direct seller and details of direct selling entity;
 - b) A description of the goods or services to be supplied;
 - c) Explain to the consumer about the goods return policy of the company in the details before the transaction;
 - d) The Order date, the total amount to be paid by the consumer along with the bill and receipt;
 - e) Time and place for inspection of the sample and delivery of good;
 - f) Information of his/her rights to cancel the order and/ or to return the product in saleable condition and avail full refund on sums paid;
 - g) Details regarding the complaint redressal mechanism;

Clause 6 : Relationship between Direct Selling Entity and Direct Seller:

.....
Clause 7 : Conduct for the Protection of Consumer:

1. Direct Sellers and Direct Selling Entity shall take appropriate steps to ensure the protection of all private information provided by a consumer;
2. Direct Sellers and Direct Selling Entity shall be guided by the provision of the Consumer Protection Act, 1986;
3. All complaints received over phone, email, website, post and walk-in should have a complaint number for tracing and tracking the complaint and record time taken for redressal;
4. Every Direct Selling company shall constitute a Grievance Redressal Committee whose composition, nature of responsibilities shall include but not limited to:
 - a) The Grievance Redressal Committee shall consist of at least three officers of the Direct Selling entity;
 - b) The Grievance Redressal Committee shall address complaints and inform complainants of any action taken;
 - c) Complaints may be made by any member of the general public against a Direct Seller of the company, an employee or any other officer of the entity;
 - d) All such grievances will be resolved directly by the Direct Selling Entity;
5. The direct selling entity shall provide information to the consumer upon purchase which shall contain:
 - (a) the name of the purchaser and seller;
 - (b) the delivery date of goods or services;
 - (c) procedure for returning the goods; and
 - (d) warranty of the goods and exchange /replacement of goods in case of defect. Provided that no Direct Seller shall, in pursuance of a sale, make any claim that is not consistent with claims authorized by the Direct Selling Entity.

6. Any person who sells or offers for sale, including on an e-commerce platform/marketplace, any product or service of a Direct Selling Entity must have prior written consent from the respective Direct Selling Entity in order to undertake or solicit such sale or offer.

Clause 8: Prohibition of Pyramid Scheme & Money Circulation Scheme:

.....
Clause 9: Appointment of Monitoring Authority:
.....”

163. As per the said Guidelines, the Direct Selling Entities also have to give an undertaking to the Government in the following terms:

“PROFORMA OF UNDERTAKING

Part - C

(UNDERTAKING)

I/We, in the capacity of of the company/firm declare that we are compliant with the following:

(a) We do not promote a Pyramid Scheme, as defined in Clause 1(11) or enroll any person to such scheme or participate in such arrangement in any manner whatsoever in the garb of doing Direct Selling business.

(b) We do not participate in Money Circulation Scheme, as defined in Clause 1(12) in the garb of Direct Selling of Business Opportunities.

(c) We are compliant with all the remaining aspects mentioned in the guidelines issued vide F. No.21/18/2014-IT (Vol-II) dated 9th September, 2016 by the Department of Consumers, Ministry of Consumer Affairs, Food and Public Distribution and shall also provide such details as may be notified from time to time.”

164. Thus, the entire direct selling business is a regulated trade/business. It is not unusual for businesses to be regulated, owing to their unique character

and impact. Some businesses are regulated due to health concerns, some are regulated to maintain law and order, some are regulated in consumer and public interest. The Direct Selling Business is one such trade, which has been regulated after enormous deliberation and discussions took place, including consideration by a parliamentary committee. Whenever any trade is regulated, the right to carry on business cannot be invoked. The Supreme Court has held that no infraction of fundamental rights could be claimed by:

- Regulation of publishing of government textbooks in *Ram Jawaya Kapur (supra)*;
- Regulating minimum wages in *U. Unichoyi & Ors. v. State of Kerala AIR 1962 SC 12*;
- Restricting sale of medicines used in government hospitals and dispensaries from public sector manufacturers only in *Indian Drugs & Pharmaceuticals Ltd. & Ors. v. Punjab Drugs Manufacturers Association & Ors., (1999) 6 SCC 247*; and
- Issuing directions for compulsory packaging of specified commodities in jute packaging material in *Dalmia Cement (Bharat) Ltd. v. Union of India (1996) 10 SCC 104*, to name a few.

165. Similarly, in *NDMC v. Tanvi Trading (supra)*, the guidelines issued to regulate construction in the Lutyens Bungalow Zone were held to be not violative of the fundamental rights and were, hence, binding. Recently, in *Union of India v. Moolchand Khairati Ram Trust AIR 2018 SC 5426*, the Supreme Court held that a condition imposed by a circular that free treatment ought to be given to weaker sections of society, in hospitals where the land has been leased out by the L&DO, was not a restriction on the right to carry on the medical profession and was valid and binding.

166. Ld. Counsels for the Defendants have also placed reliance on the judgments of the Supreme Court in *G.J. Fernandez (supra)* and *Syndicate Bank (supra)*. In the case of *G.J. Fernandez (supra)*, while deciding the validity of the Mysore Public Works Department Code, the Supreme Court, duly recognised the power of the States under Article 162 to give executive instructions, but stated that “*that will not make such instructions statutory rules which are justiciable in certain circumstances.*” The Court held that even if there is a breach of such statutory instructions, that by itself, would not confer a right on any person to seek quashing of orders in breach of such instructions. However, this case is distinguishable from the facts in the present case, as the Code sought to be challenged in *G.J. Fernandez (supra)*, were in the nature of government regulations to regulate conduct of its employees. They were not duly notified and gazetted in the manner in which the Direct Selling Guidelines have been done in the present case. Further, the Direct Selling Guidelines operate in a field of its own. No statute, currently in force, envisages regulation of the Direct Selling Business. In fact, a specific exception was carved out by the executive for the Direct Selling Entities, by the Government, thereby giving recognition to their business model. Thus, the above judgment has no application in the facts of the present case.

167. Even in the case of *Syndicate Bank (supra)*, the guidelines, which sought to regulate arbitrary eviction of genuine tenants, were held to be not enforceable as they were held to be inconsistent with the provisions of the governing statute i.e., the Public Premises Act. It is a well-settled principle of law, that guidelines/executive orders/decisions cannot be in derogation of the express provision of a statute. Thus, this case also does not aid the

Defendants' case.

168. The judgment of the Bombay High Court in *Tips Industries (supra)* would not be applicable in the present case, as in the said judgment, the Court was dealing with a memorandum which according to it was issued contrary to the express language of the Copyright Act. Under Section 31D, the provision itself, was titled as “*Statutory license for broadcasting of literary and musical works and sound recording*” and a reading of the provision and the Rules made it applicable only to television and radio broadcasting. The memorandum issued by the Government sought to extend the application of Section 31D to internet broadcasting as well, which the Court held would not be binding, as it was only a guideline. The facts of judgment in *Tips Industries (supra)* are, clearly, distinguishable from the facts of the present case. Thus, owing to the nature of certain businesses, regulations are issued from time to time.

169. In the present case, the Direct Selling Guidelines, owing to the unique nature in which Direct Selling operates, merely, require the e-commerce platform to obtain consent of the Direct Selling Entity before offering for sale or selling the products of Direct Selling Entity on their platforms. E-commerce platforms cannot claim a Fundamental right to sell products which are only meant to be sold through direct selling. It would not be correct to argue that these Guidelines are not binding on e-commerce platforms. Though, the Guidelines are issued to regulate the Direct Selling industry, the wording of Clause 7(6) of the said Guidelines is clear i.e. it applies on “*any person who sells or offers for sale*”. This would take within its ambit, all sellers of goods on e-commerce platforms. The sellers on such platforms cannot claim that they have a fundamental right to sell the goods

of Direct Selling Entities without their consent. Their fundamental right to do business is not impinged in any way. In the case of products sold only by Direct Selling the guidelines require consent prior to sale on e-commerce. The Direct Selling business being unique in nature and the Government having considered it to be fit for being regulated in consumer interest and public interest, the sellers on these platforms are bound to abide by the said guidelines.

170. Moreover, e-commerce platforms have been repeatedly notified of the Direct Selling Guidelines since the time they were issued in 2016. The FSSAI notified the platforms on 9th April, 2018 which reads as under:

*“FDA Bhawan, Kotla Road,
New Delhi – 110002*

Dated the 9th April, 2018

To

The CEOs

Flipkart/ Amazon/ Snapdeal/ Shopclues

***Sub: Violation of Direct Selling Guidelines, 2016 issued
by the Department of Consumer Affairs-reg.***

Sir/Madam,

Indian Direct Selling Association (IDSA) has brought to the notice of FSSAI the sale of health supplements and food items produced by the Direct Selling Entities being sold on e-commerce portals without their prior written consent. In this regard, IDSA has drawn attention to the Model Guidelines on Direct Selling, 2016 issued by the Department of Consumer Affairs (DCA) under Ministry of Consumer Affairs, Food and Public Distribution wherein Clause 7(6) (Conduct for the Protection of Consumer) of the said Guidelines specifically stipulates that “any person who sell or offers for sale, including on an e-commerce platform/market place, any product or service of a Direct Selling Entity must have prior written consent from the

respective Direct Selling Entity in order to undertake or solicit such sale or offer.”

2. *In view of the above, any e-commerce sale of a DSE product has to have their prior written consent. In the interest of maintaining the food safety chain, e-commerce entities may ensure that the products of DSEs sold or offered through their e-portals have prior written consent of concerned DSEs as per the guidelines of DCA.*

*Yours sincerely,
Sd/-
(Garima Singh)
Director (RCD)
Tel.23220990”*

171. The Department of Consumers Affairs has also notified the platforms of the existence of these Guidelines. Moreover, in the case of one of the foreign Direct Selling entities, it is one of the conditions of approval to set up a manufacturing facility that the Direct Selling entity i.e., Amway would:

- Manufacture a specific range of products such as Personal care and cosmetic range; home care range; nutrition and wellness range; surfactants etc.;
- Import certain further products;
- Not undertake any domestic retail trading of the products in any form.

172. Thus, the Guidelines are in line with the conditions under which companies like Amway have been permitted to conduct direct selling business in India. The Direct Selling Entities have notified the e-commerce platforms of these Guidelines. Despite repeatedly having been cautioned and being notified of the Guidelines, the platforms have chosen not to challenge the same, as they are well aware of the background of the issuance of these Guidelines and the *raison d’etre* behind the same. The platforms

are also well aware that they are bound to enforce these Guidelines which reflect the current public policy and have deliberately chosen to only set up the alleged illegality and non-binding nature of these guidelines only by way of defence.

173. At the interim stage, the fact that the Guidelines have been in operation since 2016, the same having been repeatedly notified to e-commerce platforms, who have chosen not to challenge them and the broader public/consumer interest behind the said Guidelines sought to be safeguarded, persuade this Court to hold that they are binding in nature as they do not impinge on any Fundamental Rights of either the sellers or the platforms. Moreover, the Guidelines fully regulate the conduct of business by Direct Sellers who are bound by them. If platforms are permitted to violate the Guidelines, the Direct Selling Entities will be left with no remedies to enforce a binding law. The Guidelines have been duly issued and have been authenticated by a gazette notification, as required. It is, accordingly, held that the Direct Selling Guidelines are binding on e-commerce platforms and the sellers on the said platforms.

174. The effect of the said guidelines being binding, would be, that the sellers/platforms would have to take consent of the Direct Selling Entities to offer, display and sell the products of Direct Selling Entities on their platforms, in compliance with clause 7(6) of the Guidelines.

F2. Question No. (ii) - Whether the sale of the Plaintiffs' products on e-commerce platforms violates the Plaintiffs' trademark rights or constitutes misrepresentation, passing off and results in dilution and tarnishes the goodwill and reputation of the Plaintiffs' brand?

175. The Plaintiffs in each of the suits are the owners of their respective

trademarks – Amway, Modicare and Oriflame. The use of the said marks and control over the products bearing the said marks, would exclusively vest with the respective owners, in accordance with law. None of the Defendants challenge the ownership rights of the Plaintiffs in the respective trademarks. The question that, therefore, arises is as to whether the Plaintiffs can control or seek to regulate the sale of their respective products on e-commerce platforms and whether the Defendants have a right in law, as envisaged under Section 30 of the Trade Marks Act to continue to sell the Plaintiffs' products.

176. It is a matter of common knowledge that unless there is any prohibition in respect of sale of a product, all products can be sold through e-commerce platforms. However, there are two exceptions – First, there should be no prohibition in selling the same and Secondly, the condition of goods ought not to be impaired and the goods ought not to be tampered with in any manner. The Plaintiffs, are engaged in a unique business called Direct Selling business, under which the Plaintiffs' products are distributed and marketed through a dedicated distribution channel. All the distributors/sellers who sell the Plaintiffs' products procure the same under specially executed contracts with the Plaintiffs companies. Under the said contracts, the said distributors/sellers are prohibited from selling the products in retail stores and e-commerce websites. There is no doubt that, title to the products passes immediately upon the sales by the Plaintiffs to the distributors/sellers, however, the latter are bound by the contracts which are executed with the Plaintiffs and have to adhere to the same. Thus the passing of title to goods is conditional in nature.

177. The conditions of contracts and the Codes of Ethics which govern the

relationships between the Plaintiffs with their Distributors are set out below:

i) Amway's Code of Ethics and contracts with distributors

178. Whenever a distributor/direct seller signs up with Amway, the seller has to enter into a direct selling contract, which includes the terms and conditions, sales and marketing plan, and 'Code of Ethics of Amway Direct Sellers-Rules of Conduct', refund policy and quality assurance standards contained in the application form. The Direct Selling contract requires sellers to abide by the terms and conditions contained in the above document. Specifically, the direct seller agrees and undertakes as under:

- That the purchase of Amway products shall be for the purpose of sale to the consumers.
- That the seller is entitled to sales' commission on the basis of retail sales volume and contributions by other direct sellers within its group.
- That the direct sellers cannot sell in retail stores or e-commerce websites, except in beauty salons, health clubs, doctor's clinics, etc.
- That the direct seller cannot indulge in repackaging or relabelling of Amway products.
- That whenever there is a sale made, there shall be a written sales receipt.
- That the product refunds are closely monitored and customers' complaints have to be forwarded to Amway.
- That the direct sellers shall not indulge in any unlawful or deceptive trade practices.
- That the direct sellers are prohibited from exporting the products.

- That the direct sellers are prohibited from indulging in manipulation of the Amway marketing plan and cannot indulge in stacking.
- That no misrepresentation of Amway sales and marketing plan shall be done by the direct sellers.
- That the direct seller shall ensure that the trademark of Amway is duly protected.
- That the direct sellers shall not indulge in improper advertising of Amway products.
- That the title to the products passes to the direct seller upon purchase from Amway.

179. Some of the clauses of the Code of Ethics are relevant and are reproduced herein below:

“4.3

Retail Stores and E-commerce websites:

Amway does not permit Direct Sellers to display/sell its products/ literature through retail stores and e-commerce websites.

No Direct Seller shall sell or permit Amway Products or services to be sold or displayed in retail stores (this shall include non-Amway e-commerce websites), schools, fairs, ships or military stores; nor shall he or she permit any Amway product to appear in such locations even if the Amway product or services themselves are not for sale. No Amway literature shall be displayed in retail establishments. A Direct Seller who works in or owns a retail store must operate his or her Amway business separate and apart from the retail store. Such Direct Sellers must secure customers and deliver products them in the same manner as Amway Direct Sellers who have no connection with a store. Other types of retail establishments, which are not technically stores, such as barber shops, beauty shops,

or professional offices, etc., likewise may not be used to display Amway Products, information about Amway services, or Amway literature. Further, Direct Sellers may not use mass communication methods such as television merchandising channels, computer networks, national or international advertising, etc., to secure Amway customers.

.....

4.5

No Repacking/ Re labelling of Amway Products.

Direct Sellers shall not repackage, or otherwise change or alter any of the packaging labels of Amway products.

...

4.7

Customer Product Refunds:

Direct Sellers shall advise Amway of any customer complaint and provide copies of all correspondence and details of all conversations regarding the complaint.

4.7.1 Direct sellers are not authorised to make any type of offer or compromise or render Amway liable for any complaint or product return.

4.7.2 Whenever a customer requests Product Refund service within the stated period, the Direct Sellers shall immediately offer the customer the choice of (a) refund of money paid as per Amway's then current product refund policy, (b) exchange for a like product, or (c) full credit for exchange with another item.

4.7.3 Direct Sellers hereby indemnify Amway for any losses, claim, legal actions, suit, etc. (including Amway legal fees) which are filed or which originate because of any failure by the Direct Seller to observe this rule."

180. Thus, all persons, who purchase the products of Amway, are bound by the code of ethics and terms and conditions contained therein. There is a

specific embargo on sale in retail stores and e-commerce websites. The Code of Ethics forms an integral part of the direct selling contract entered into by Amway with its distributors/sellers.

ii) Modicare's Code of Ethics and contracts with distributors

181. Modicare Consultants acknowledge that the '*Modicare Conduct of Business Rules and the Code of Ethics*' are part and parcel of the agreement, and agree to abide by the same. Specifically, the Modicare Consultant agrees and undertakes as under:

- That the Modicare products are for the purposes of sale to the consumer.
- That the seller is entitled to a commission on the basis of the amount of sales by it.
- That the direct sellers cannot sell in retail stores or e-commerce websites, except in beauty salons, health clubs, doctor's clinics, etc.
- That the direct seller cannot indulge in repackaging or relabelling of Modicare products.
- That the seller cannot promote or sell non-Modicare products as Modicare products.
- That whenever there is a sale made, there shall be a written sales receipt of the same prepared by the seller.
- That the product refunds are closely monitored and customers' complaints have to be forwarded to Modicare.
- That the direct sellers shall not indulge in any unlawful or deceptive trade practices.

- That the direct sellers are prohibited from indulging in manipulation of the Modicare marketing plan.
- That no misrepresentation of Modicare sales and marketing plan shall be done by the direct sellers.
- That the direct seller shall ensure that the trademark of Modicare is duly protected.
- That the direct sellers shall not indulge in improper advertising of Modicare products.

182. Some of the clauses of the Code of Ethics are relevant and are reproduced herein below:

“2.1 The Code of Ethics requires direct selling through personal interaction with the consumers. Use of alternative methods of selling - like retail or online sale is contrary to fundamental principles of Direct selling and disturbs the level playing field. Modicare is committed to providing equal opportunity to all Modicare Consultants and hence prohibits sale or display of Modicare products and services at places where goods are sold.

2.2 Rules governing misrepresentation and indemnity: As a Modicare Consultant, you shall not -

2.2.1. Sell Modicare products at a price higher than the Maximum Retail Price (MRP)

2.2.2. Misrepresent in any way the price, quality, performance or availability of Modicare products or services

2.2.3. Promote or misrepresent non-Modicare products as Modicare products

Consultants shall indemnify Modicare on account of any costs or damages that may arise from the breach of the above.

...

2.5. Rules regarding changing or modifying current packaging:

Modicare prohibits you from deleting any material from, adding any material to, adding extra words, labels, or other materials on and altering or detaching any label from the product/literature.

Modicare products must be sold in the form and packages provided by Modicare and must not be decanted, repacked or otherwise altered from the said form and packages.

.....

...7. Customer Satisfaction Program

We observe an irreversible 100% Satisfaction Guarantee on our products, wherever specified. This assures that consumers of Modicare products will be satisfied with their purchases.

According to this,

i.) If a Customer is not completely satisfied, he/she may return the product to the Modicare Consultant for a 100% refund for the product within 7 days of original purchase.

ii.) A Modicare Consultant can return such products back to the company within 30 days of its purchase. The Product Refund Policy is applicable on saleable products as well as partially used products, wherein not more than 25% of the product has been used.

Modicare Consultant shall advise Modicare of any customer complaint and provide copies of all correspondence and details of all conversations regarding the complaint. Modicare Consultants are not authorized to make any type of offer or compromise or render Modicare liable for any complaint or product return.

Whenever there is a request from a customer for honoring the Company Satisfaction Guarantee, the Modicare Consultant shall offer to the customer the choice of:

- *Full refund of the purchase price paid*
- *Exchange with the same or another product of equivalent value.*

.....”

183. Thus, all persons, who purchase the products of Modicare, are bound by the code of ethics and terms and conditions contained therein. There is a specific embargo on sale in retail stores and e-commerce websites. The Code of Ethics forms an integral part of the direct selling contract entered into by Modicare with its distributors/sellers.

iii) Oriflame’s Code of Ethics and contracts with distributors

184. Oriflame Consultants acknowledge that the ‘*Code of Ethics and Rules of Conduct*’ are part and parcel of the agreement, and agree to abide by the same. Specifically, the Oriflame Consultant agrees and undertakes as under:

- That Oriflame products are to be sold to consumers by the Consultants.
- That the seller is obligated to keep records of products consumed and sold by them.
- That the seller is entitled to sales’ commission on the basis of amount of Oriflame products sold by it.
- That the direct sellers cannot sell in retail stores or e-commerce websites, except in beauty salons, health clubs, doctor’s clinics, etc.
- That the direct seller cannot indulge in repackaging or relabelling of Oriflame products.
- That whenever there is a sale made, there shall be a written sales receipt.

- That the customer complaints have to be forwarded to Oriflame, and the product returns must be done in strict compliance of Oriflame's return policy.
- That the direct sellers shall not indulge in any unlawful or deceptive trade practices.
- That the sellers have no rights over the trademarks, logos and name of Oriflame.
- That the direct sellers are prohibited from indulging in manipulation of the Oriflame's direct selling business.
- That no misrepresentation of Oriflame sales and marketing plan shall be done by the direct sellers.
- That the direct seller shall ensure that the trademark of Oriflame is duly protected.
- That the direct sellers shall not indulge in improper advertising of Oriflame products.

185. Some of the clauses of the Code of Ethics are relevant and are reproduced herein below:

“5.8 No Oriflame Consultant shall sell to, sell in, demonstrate, or display Oriflame products in any retail outlet, web shop, and auction platform such as EBay or the like. No Oriflame Literature may be sold or displayed in such retail outlets. Establishments which technically are not retail outlets, such as beauty parlors, may be used as venues to display, but not sell the products.

...

5.11 Under no circumstances is any person authorised to repackage or in any way alter the packaging or labelling of the products. Oriflame

products are to be sold in their original packaging only.”

186. Thus, all the persons, who are enrolled as Consultants by Oriflame, and any other person who purchases Oriflame products, are bound to not make any retail sales, online sales of Oriflame’s products. Repackaging of the products is also impermissible. There is a specific embargo on sale in retail stores and on auction websites such as eBay and web shops.

187. All the Plaintiffs are also members of the Indian Direct Sellers’ Association, which has also specified its own code of practice.

188. In the background of these stipulations, the manner in which the products of the Plaintiffs find their way to the platforms of the Defendants, would have to be finally adjudicated at the time of trial. However, none of the e-commerce platforms is able to unimpeachably vouch for the fact that all the products on their platforms, bearing the Plaintiffs’ marks, are genuine and authentic as also that they are not tampered with or impaired. The platforms merely state and argue that the products have passed through various distribution channels and are showcased by the sellers on their own who have represented to the platforms that they are genuine. In order to bind the sellers, the platforms have executed contracts with them with necessary warranties that they are duly authorised and that the products are genuine. Therefore, they argue that the responsibility of these products vests with the sellers and not on the platforms themselves.

189. Some of the sellers who are impleaded in the present suits, were revealed as being distributors of the Plaintiffs’ in different *avatars*, but were listing their products under different names. A majority of them are third parties, who have clearly procured the products through unauthorised

channels. The products may have changed several hands before reaching the sellers who then list them on the e-commerce platforms. Many of the sellers – Defendants, in these suits, have given undertakings not to sell the Plaintiffs' products on e-commerce platforms and have also returned the goods that were seized by the Local Commissioners. However, the platforms themselves state that the rights of the Plaintiffs as the trademark owners are exhausted upon the first sale taking place and hence, the Plaintiffs cannot stop the sale of genuine products on e-commerce platforms.

190. A perusal of the documents shows that e-commerce platforms have the following features in respect of the sale of products of Direct Selling Entities like the Plaintiffs:

- i) They offer their own refund and return policy for the Plaintiffs' products.
- ii) They also offer various other facilities such as allowing sellers to engage a network of third parties to manage their accounts to conduct imaging and cataloguing of the products;
- iii) Some of the platforms provide storage, transportation, packaging, delivery, payment mechanisms, etc. for the products being sold on its portal, if value added services are availed by the sellers such as *Fulfilled by Amazon, Amazon Choice, Flipkart Assured, Featured Products List, Snapdeal models of sale*;
- iv) IMG and Healthkart also provide '*Authentic Products*' and '*100% Authenticity Guarantee*' of the products on their platforms, respectively;
- v) Amazon also advertises the Plaintiffs' products in its own advertisements in various news and print media;

- vi) The website of Amazon uses expressions such as “*by Amway*”, “*by Modicare*” and “*by Oriflame*” to suggest that these products originate from the Plaintiffs. Other platforms use the full name of the Plaintiff companies or the images of the products themselves along with the product names which bear the trade mark prominently;
- vii) On several of the products of Amway, which are sold with unique codes and QR codes, the products are available on the platforms without the said codes. In fact most sellers were found to be tampering and removing the QR codes and unique codes of Amway’s products, deliberately as is evident from the Local Commissioners’ reports;
- viii) The details of the sellers are not clearly mentioned on the platforms and in any event, there is no method in which either Amway or a consumer can ascertain as to whether the seller is a genuine distributor of the Plaintiffs’ products;
- ix) In all the platforms, since no contact details of the sellers are provided, no direct contact can be established with the sellers. All queries are routed through the platforms themselves. Further if details are to be obtained of the sellers, the Plaintiffs would have to purchase the products – which also is not a guarantee to obtain the sellers full details. For example, in Amazon only the GSTN or some other bare detail may be available;

191. The grievance of the Plaintiffs is that the Plaintiffs have their own unique quality control clauses and also provide for warranties, refunds and returns which are consumer friendly. The divergence in the Return and Refund policies can be seen from the following:

i) Plaintiffs' refund and return policies

192. **Amway** - Customers of Amway's products can return the product within 30 days from the date of delivery of the product, in order to claim a full refund. Refund is also available if the products are partially used (30% used) provided the original invoice, generated by Amway is available.

193. **Modicare** – It observes an irreversible 100% Customer Satisfaction Guarantee. Refund is available for a saleable product, as also for a partially used product (25% used), provided the invoice is produced. Upon receiving a request, the Modicare Consultant will either offer a full refund to the customer, or offer to exchange their product, with the same or another product of equivalent value.

194. **Oriflame** - A customer can return the product within 30 days from the date of invoice for a full refund, if the same is accompanied with the invoice.

ii) Defendants' refund and return policies:

195. **Amazon** - The policy applies to all products sold on Amazon irrespective of the sellers and the return and refund policy of the manufacturers. Amazon's return and refund policy is quite vague and only limited return and refund is available. Several products are marked as non-returnable which include products of the Plaintiffs, such as Health and Personal Care, Nutrition, Beauty and other products. In the case of Amazon, the products have to be returned in the original condition with price tags, user manual, original box, packaging, etc. as originally delivered. Used products are not returnable.

196. **Flipkart** - The return policy is of the seller and there is also a 30-day return policy in place of Flipkart, which can be bypassed by the seller, if it

so wishes to allow the return of its product. Used products cannot be returned. The original box/packaging should not be damaged.

197. **Snapdeal** - Products are eligible for return only if it is so provided on the product page. The request for refund and return has to be raised within seven calendar days from the delivery. There should be no damage to either to the product or packaging and used products cannot be returned.

198. **IMG** - Products can be returned only within seven days of the delivery. Partially consumed products are not eligible for return. After lapse of seven days from date of purchase, return is fully at the discretion of the platform.

199. **Healthkart** - Return and refund policy is available only if the product page provides so. Return/refund can be requested only within 14 days and the product has to be unused, tags, boxes, packaging has to be intact. There cannot be any damage to the product or to the packaging.

200. The question thus is whether under such circumstances, e-commerce platforms or the sellers are entitled to the benefit of Section 30 of the Trade Marks Act which recognises the principle of 'Exhaustion of trade mark rights'. Under this principle, the trade mark owner's rights are exhausted upon the first sale of the product being made. This is also known as the 'First Sale' doctrine in some jurisdictions. There are three types of Exhaustion – domestic exhaustion, regional exhaustion and international exhaustion. As per the settled legal position, India follows international exhaustion. Regional exhaustion is followed in countries which together are considered to be single markets such as the European Union.

201. Enormous reliance is placed by the Defendants on the judgment of the Delhi High Court in *Kapil Wadhwa DB (supra)* which holds that India

follows international exhaustion. On the strength of this judgement it is argued that the products being genuine, even if the unique codes/QR codes are removed, even if the warranties/return and refund policies are changed, the Plaintiffs would not have any right in law to control advertising, distribution and sale of the products after the initial first sale. The submission is that once the title in the product has passed from the Plaintiffs to the distributor/direct seller who purchases it from the Plaintiffs, the Plaintiffs cannot seek to control the downstream distribution and sale of the products.

202. The legal position in India is also encapsulated in Sections 29 and 30 of the Trade Marks Act. The said provisions are extracted below:

“29. Infringement of registered trade marks.— (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

....

(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which -

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive

character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

(6) For the purposes of this section, a person uses a registered mark, if, in particular, he—

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.

30. Limits on effect of registered trade mark.—

(1) Nothing in section 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use—

(a) is in accordance with honest practices in industrial or commercial matters, and

(b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

(2) A registered trade mark is not infringed where—

(a) the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services;

(b) a trade mark is registered subject to any conditions or limitations, the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market or in relation to services for use or available or acceptance in any place or country outside India or in any other circumstances, to which, having regard to those conditions or limitations, the registration does not extend;

(c) the use by a person of a trade mark—

(i) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk or which they form part, the registered proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark; or

(ii) in relation to services to which the proprietor of such mark or of a registered user conforming to the permitted use has applied the mark, where the purpose and effect of the use of the mark is to indicate, in

accordance with the fact, that those services have been performed by the proprietor or a registered user of the mark;

(d) the use of a trade mark by a person in relation to goods adapted to form part of, or to be accessory to, other goods or services in relation to which the trade mark has been used without infringement of the right given by registration under this Act or might for the time being be so used, if the use of the trade mark is reasonably necessary in order to indicate that the goods or services are so adapted, and neither the purpose nor the effect of the use of the trade mark is to indicate, otherwise than in accordance with the fact, a connection in the course of trade between any person and the goods or services, as the case may be;

(e) the use of a registered trade mark, being one of two or more trade marks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration under this Act.

(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of—

(a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or

(b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

(4) Sub-section (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.”

203. Section 29 deals with infringement of trademarks and Section 30 sets

out what is not infringement. The Court, thus, needs to determine whether sale by e-commerce platforms or any of the other sellers on the e-commerce platforms, who are not directly linked with the Plaintiffs in any manner, is valid and legal, if the products are genuine and the same is protected by Section 30 of the Trade Marks Act. Factually, whether the conduct of e-commerce platforms is protected by Section 30 or not and thus whether they are guilty of infringement of trade marks, passing off, misrepresentation and dilution is in issue.

204. The Plaintiffs who are Direct Selling Entities manufacture, sell and distribute these products through their own distribution networks. The said products are sold either through the said distribution networks or on the Plaintiffs' own online platforms. The products of the Plaintiffs are unlike other manufacturers and sellers whose products are distributed, advertised and sold in the mainstream retail stores. The isolated situations wherein the Plaintiffs' product may have found their way to pharmacists or retail stores is a matter to be adjudicated at trial. There is, however, no doubt that the Plaintiffs and other similar Direct Selling Entities have adopted a unique method of distributing and selling their products. In order to determine the legal issues, the nature of use of the marks on the platforms, the policies of the platforms, the condition of goods being sold on the platforms etc., need to be considered.

iii) Product Listing Features of the E-Commerce Websites

205. A perusal of the website print outs of the platforms, where Plaintiffs' products are listed, reveals the following features:-

1) On the Amazon Platform

The screenshot displays the Amazon product page for Amway Nutrilite Daily - 120N Tablets. The product image shows a white bottle with a label that reads "NUTRILITE Daily MULTIVITAMIN AND MULTIMINERAL (NUTRACEUTICAL) 1 SERVING, 1 TIME A DAY 120N (TABLETS)". The price is listed as 1,895.00, with a note that it is "FREE Delivery". The page also features a "LIMITED QUANTITY" warning, stating that the order quantity is limited to 3 units per customer. A handwritten signature "T/c &" is present at the bottom left of the screenshot.

Example of an Amway product as displayed on Amazon

A perusal of the above entry shows that the consumer initially enters the Amazon platform by searching for the Plaintiffs' products under the name "Amway". A perusal of the product listing from Amazon shows that:

- When the consumer chooses a specific product, the image of the product and the manner of depiction thereof clearly does not give any clarity as to whether the same is sold by Amway or some other seller.
- The manner of use of the images of the product and the expression “*by Amway*” clearly conveys to the consumer that this is a product being sold by Amway.
- The above image contains, in small print, the sentence “*sold by Health Aura. 4.7 out of 5/450 ratings and fulfilled by Amazon*”. There are no details as to who Health Aura i.e., the seller is. There are no contact details, address, phone number, email, etc. There is also no clarity as to whether Health Aura is an authorized distributor of genuine Amway products or not.
- The expression “*fulfilled by Amazon*” clearly shows that Amazon is guaranteeing the quality of the product. In the “*fulfilled by Amazon*” feature, the admitted position is that Amazon provides storage for the products, helps storage of the products, packaging, customer services, and returns. Amazon charges a specific fee for the FBA service.
- The above image also shows that the Plaintiffs’ products, being sold on the Amazon platform, are sold on a non-returnable basis. This is in stark contrast to the return and refund policy of the Plaintiffs as per which, the consumers, who purchase this very product through the Plaintiffs’ distribution network are entitled to return/refund, even upon partial use.

2) **On the Flipkart Platform** – An Amway product listing is as follows:

Amway Nutrilite Glucosamine HCL With Boswellia (120N Tablets) (120 No)
 4.3 ★ 472 Ratings & 47 Reviews

₹2,150 ₹3,089 30% off
 Hurry, Only a few left!

Bank Offer 10% Instant Discount on Masteicard for First Online Payment T&C
 Bank Offer Extra 5% off* with Axis Bank Buzz Credit Card T&C

Delivery 110001 Change
 Delivery by 9 Oct, Tuesday | Free
 View Details

Quantity 120 No

Highlights Vitamin C Supplements Services No Returns Applicable
 Capsules Form Cash on Delivery available
 Suitable For: Non-vegetarian
 Pack of 1

Seller NurtureHouse 4.2 ★
 View more sellers starting from ₹2,150

Flipkart Plus
 Shop for ₹250 = Earn 1 coin
 Max 10 coins per order
 Know More

Description
 NUTRILITE® Glucosamine HCl with Boswellia is an exclusive formula, contains Glucosamine a nutritional 'Building Block' that supports healthy joints. Other ingredients include Bromelain, a natural enzyme derived from pineapple and Boswellia, to help support normal joint function. NUTRILITE Glucosamine HCL also contains NUTRILITE Acerola Concentrate and Lemon Bioflavonoids Concentrate providing additional benefits of phytonutrients. This helps you keep on the go. NUTRILITE® Glucosamine HCl with Boswellia it could start with mild stiffness in the morning or creaking, cracking joints we age, we feel more and more of these effects in our joints. NUTRILITE® Glucosamine HCl with Boswellia helps you to maintain normal joint health. This exclusive formula contains: 1. Glucosamine a nutritional 'Building Block' that supports healthy joints & stimulates the production of cartilage. 2. Boswellia is a gum resin which helps to reduce swelling in the joints. 3. Bromelain, a natural enzyme derived from pineapple, and Boswellia to help support normal joint function. 4. Boswellia & Bromelain together help reduce pain & inflammation. 5. NUTRILITE Acerola Concentrate and Lemon Bioflavonoids Concentrate provide additional advantages of phytonutrients. With NUTRILITE Glucosamine HCl with Boswellia ENJOY FREEDOM OF MOVEMENT

Specifications

In The Box
 Sales Package 120

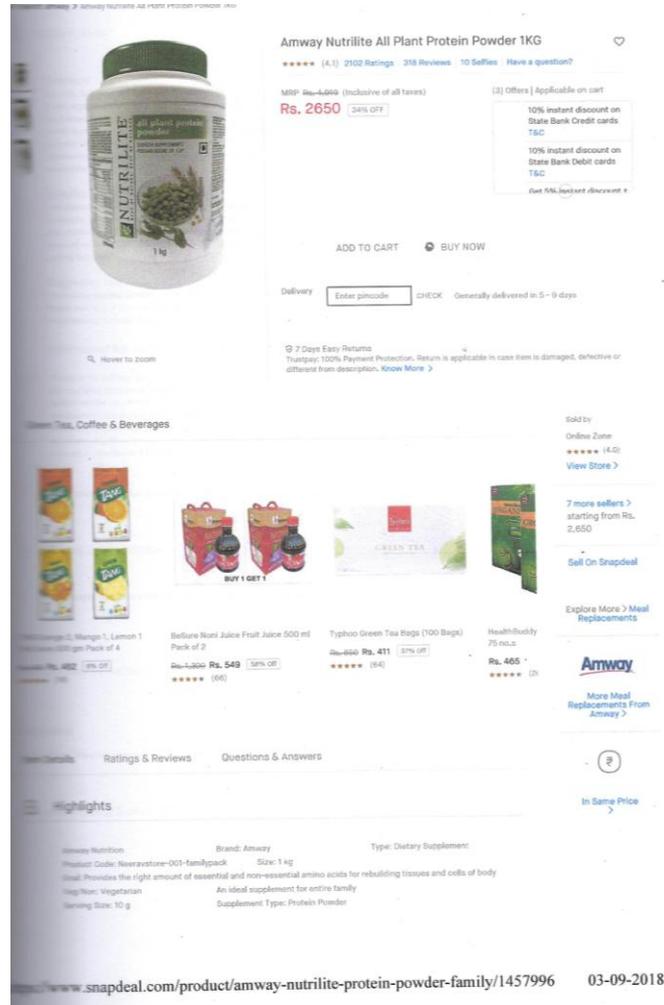
General
 Brand A
 Model Name, N
 Model Number A
 Quantity 1
 Type V
 Read More

Example of an Amway product as listed on Flipkart.

The following aspects can be seen from the listing on Flipkart:

- The image and the name of the product is prominent.
- The seller is shown as one M/s. Nurture House without any details.
- The product is non-returnable.

3) **On the Snapdeal Platform** - one of the Plaintiffs' products is displayed as below:

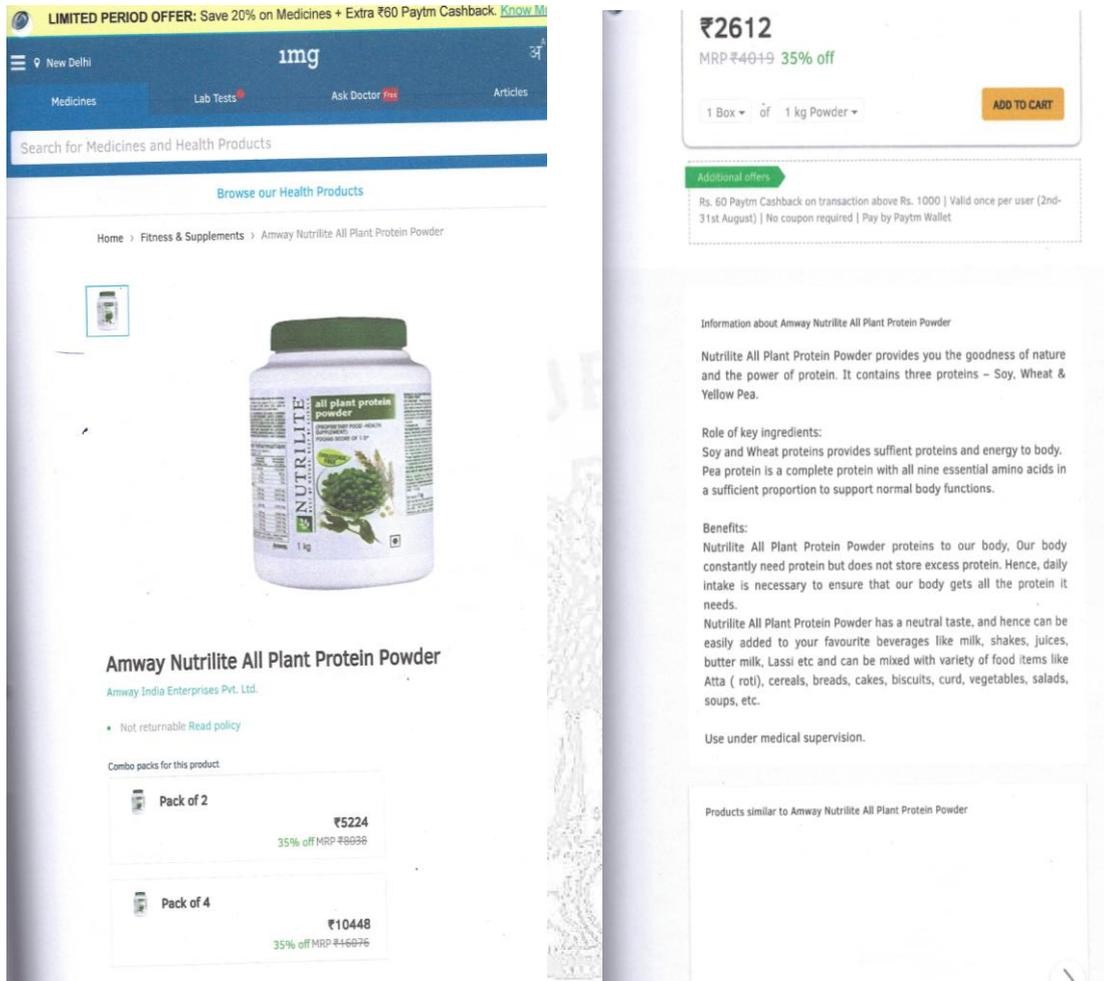


Example of an Amway product on Snapdeal

The product listing has the following features:

- Product image is displayed prominently
- Name of the product is prominent with use of the mark
- Seller name is not even conspicuous. Here the seller is M/s. Online zone, which is displayed in small font on the bottom right side of the landing page.
- Use of the AMWAY logo is very prominent on the right side.

3) **On the 1MG Platform** - the landing page shows an image as under:

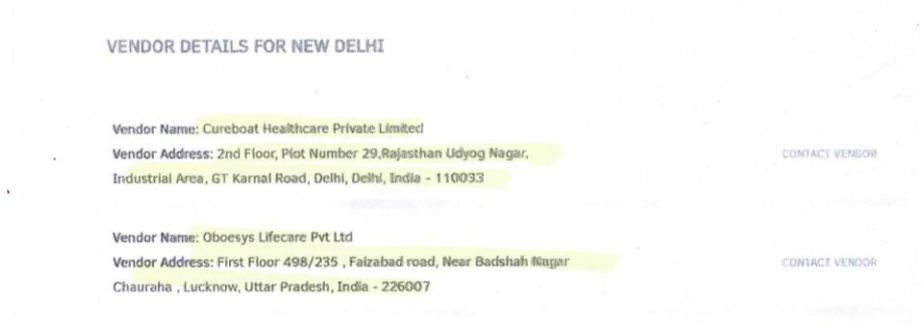


Example of an Amway Product displayed on 1MG

The listing has the following features:

- Product image is prominent
- Product name is prominent
- Name of Amway India Enterprises Pvt Ltd is used below the name of the product
- The product is shown as a non-returnable product.

206. However, on IMG, at the bottom of the listing, if the tab 'Licensed pharmacy' is clicked, the seller's details are given for example in the following manner:



Vendor Details as Appearing on IMG

207. It is clear from the above that all the platforms display the products prominently with the image. The Plaintiffs' product names, logo, etc., are prominently used. IMG also uses the name of the plaintiff itself prominently. The landing page does not give any details as to who the seller is. Any customer looking at the images would be clearly led to believe that the products originate from the manufacturers.

iv) Findings of the Local Commissioners:

1) Local Commissioners' Reports in CS(OS) 480/2018

a. Local Commissioner who visited the premises of Defendant No.1 – M/s Pioneering Products.

208. The premises of M/s. Pioneering Products, which was one of the sellers on the Amazon platform, at J-4, Block-B1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, was visited by the Local Commissioner. The address of this premises was the same as that of Defendant No.2. The same was a warehouse under the control and was being operated by Amazon – Defendant No.4. It was found that a large

number of Amway branded products were being packed there. Several products of Amway were also being re-packed and labelled. Many of them did not contain the bar code and the unique code. The Local Commissioner asked the representative of Amazon to delineate/segregate the products belonging to Pioneering Products, to which he replied that such a segregation was not possible as the products were stored at the warehouse according to type of the product and not on the basis of the seller. The relevant portion of the Local Commissioner's report is set out herein below:

“8. That the inventory list of the products bearing the impugned mark was prepared. When I asked representative of Defendant No.4 to segregate the products carrying impugned mark as per their respective sellers, then he responded that such segregation could not be possible as the products were stored according to their product type.”

209. Amway goods found at the premises were inventoried by the Local Commissioner. Images of the Amway products at this warehouse are set out below:



Amway goods found at the Amazon warehouse used by two sellers



Images showing removal of seals & repackaging at Amazon Warehouse

210. The relevant extract of the Local Commissioner's report dated 12th

October, 2018 is as under:

“5. That at around 11:45 am, we entered the aforesaid premises after keep waiting for long time and after being compelled to complete the formalities. Upon entering the premises we found that the said premises is under the control/ being operated by Amazon Sellers Services Pvt. Ltd. Further while conducting the search I found various impugned products bearing mark “AMWAY” getting packed to be dispatched to their respective buyers.

.....
7.I found good quantity of impugned products duly packed, labelled with the impugned mark “AMWAY”. Upon further inspection it was also found that there were some quantity of products which were tampered with and does not contain the “Barcode” which are affixed by Amway as informed by the representative of the Plaintiff. During the course of inspection upon opening up of two difference sealed packages of the products I found that one of those product package did not contain the “Unique Code” and found to be tampered with. The Photographs of the said products having impugned mark “AMWAY” or found tampered were captured and are annexed herein as ANNEXURE- ‘B’

b. Local Commissioner who visited the premises of Defendant No.2 – M/s Black Olive Enterprises.

211. The premises of M/s. Black Olive, which was one of the sellers of Amway products on Amazon was the same as that of Defendant No.1. The same was a warehouse under the control and was being operated by Amazon – Defendant No.4. The Local Commissioner reported as under:

“6. At around 11:45 am after completing all the formalities, we were allowed to enter the premises and we came to know that the aforesaid premises was under the control of Amazon Seller Services Pvt. Ltd.

We also found hoardings and boards of Amazon.in from this it became evident that the premises belonged to Defendant No.4.

7. We entered the ground floor and upon searching we found impugned products bearing the mark "AMWAY", which were being packed for dispatching it to the buyers."

212. The Local Commissioner found various products bearing the mark Amway, which were being packed and dispatched to the consumers. However, the area floor manager was insistent that the premises did not house any Amway products. The officers who were present, represented to the Local Commissioner that there were no Amway products in the premises, whereas the inspection by the Local Commissioner found a sizeable number of Amway products, which were then inventoried by the Local Commissioner. All the Amway products were then sealed and left on *superdarinama*. Account books were also inspected, which revealed that there were purchase orders, inbound shipment email addressed by Amazon to Defendant No.2 and delivery challans exchanged between Defendant No.2 and Amazon India. The actual product price of Defendant No.2 was, thereafter, obtained from the inspection of the accounts. At this premises, a total of 408 Amway products including Nutrilite products were found. The photographs annexed with the Local Commissioner's report show that the premises had the board of amazon.in. It was a proper warehouse and there were a large number of cartons of Amway products found at the premises.

c. Local Commissioners who visited the premises of Defendant No.3 – M/s Cloutail India Pvt. Ltd.

213. Two Local Commissioners were appointed to visit the two premises of Defendant No.3 – M/s Cloutail India Pvt. Ltd. (*hereinafter, 'Cloutail'*),

identified by the Plaintiff. The Local Commissioner, who visited the premises of Cloudbtail at H-9, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi - 110044, found that the premises was almost empty and only some products sold by an entity by the name M/s. Prione, which was a sister concern of Cloudbtail, were stored there. The material found at the said premises showed that Prione described itself as a “Catamaran and Amazon Venture” and some of the material also used Prione and Cloudbtail in conjunction. Visiting cards of officials of Prione, which bore the name of Amazon were also procured from the premises of Cloudbtail.

214. In the Paharganj office of Cloudbtail at 3048-3050, Bhagat Singh Street No.1, Chunamandi, Paharganj, New Delhi - 110055, the Local Commissioner did not find any Amway products. The premises was being managed by a third party namely M/s. Bantom Laboratories Ltd. The inventory of Amway products, which were sold, was provided to the Local Commissioner. This was a facilitation centre of Cloudbtail. Copies of some invoices relating to Amway products were also provided. In this report, the Local Commissioner learnt that Amway products were sold from Bhagirath place by a Mr. Vinit were obtained by Mr. Rishabh Jain and his father Mr. Sudesh Jain, who did not have any bills to show the purchase as it was a cash transaction. Relevant portion of Local Commissioner’s report is set out below:

“8. That upon further enquiry, he informed that before managing this facilitation centre, he used to supply goods to the godowns of M/s Cloudbtail India Pvt. Ltd. (since February, 2017). He further stated that he himself started managing a centre (facilitation

centre) after July, 2018, for the Defendant Company (M/s Cloutail India Pvt. Ltd.). He voluntarily provided copies of those invoices pertaining to M/s Cloutail India Pvt. Ltd. which related to Amway products (prior to the running of the fulfilment/facilitation centre) and the same were annexed to the On-site Report. On being enquired about the source of products, he apprised that he bought the goods which were supplied to the Defendant (M/s Cloutail India Pvt. Ltd.) under the invoice dated 10.09.2018 (pertaining to Amway products) from one Mr. Vinit (9818520001, 8076740670) who operates from Bhagirath Place, New Delhi. Mr. Rishabh Jain stated that he did not have any bills for the said transaction as the purchase was made in cash. He stated that his servants purchased the goods when a purchase order is received. Mr. Rishabh Jain further stated that he could not satisfy the complete purchase order (Relating to Amway products annexed with the On-site Report) and only supplied the goods which he could purchase at that point of time.

9. Thus, from the information and documents received from the site, it is apparent that even though no Amway goods/products were found on the site, it is clear that the Amway goods/products had been sold to the Defendant No.3, as late as September, 2018 which were in turn, stated to be purchased from Bhagirath Palace, as mentioned above.....”

215. One of the other Local Commissioners who visited the premises of Cloutail found that the premises was being run by one M/s Bantom Laboratories, who was a seller on the Amazon platform. He informed the Local Commissioner that he supplied Amway products to Cloutail and that he had purchased the products from one Mr. Vinit from Bhagirath Palace in cash. He did not have any bills as the purchase was made in cash. Thus, the

source of the Amway products being sold by Cloudbtail could be traced back in the following manner:



216. From the above chain of sale, which became evident through the Local Commissioner's report, it is clear that the products being sold on the Amazon platform by various sellers cannot be legitimately traced back to the Plaintiffs or any of its distributors. Thus, the source of the Amway products at the above warehouse was itself suspect. This also shows that the sellers who are purportedly selling the products are basically working for Cloudbtail and do not have any basis to provide warranties as to the quality and genuineness of the products.

217. The images above show that all the Amway products, even if belonging to different sellers were stacked/packed together in shelves/cartons. The inner seal of the products was broken prior to the product being dispatched and this process of breaking the inner seal, removing the QR code, and re-sealing the products was taking place at the warehouse purportedly belonging to the sellers, whereas in fact it was being run by Amazon. New bar codes were being affixed on the products. Breaking of the inner seal, as is visible from the photograph was in fact exposing the contents and it is not clear as to what are the quality control standards being adopted during such exposure and there is also no

supervision. The kind of tools that are used for opening the seal, whether they are hygienic, sterilised etc., is also not clear – considering these are beauty and health products. Use of thinners to remove the code which is on the inner seal also involves spillage of the thinner into the contents of the product and may in fact result in adulteration of the product.

2) Local Commissioner’s report in CS(OS) 531/2018

Local Commissioner who visited the premises of Defendant No.2 – M/s Sehgal International.

218. The Local Commissioner visited the premises of M/s. Sehgal International, which was one of the sellers on the Flipkart platform, at S-2/104A, Old Mahavir Nagar, New Delhi – 110018. At the said premises, the Local Commissioner initially faced resistance from the proprietor of Defendant No.2, Mr. Rohit Sehgal, however, who later cooperated. On the first floor of the said premises, it was found that a large number of Amway branded products were available there. Several products of Amway were also being packed. Many of them did not contain the bar code and the unique code. The Local Commissioner then made the inquiries from Mr. Rohit Sehgal who informed that he procured products from the Amway website as he was a distributor. But in order to hide his identity he confirmed to the Local Commissioner that he was removing the Codes on the products. Upon being questioned about tampering with the products, Mr. Sehgal replied as under:

“Mr. Sehgal informed that he tampered with the bar code for the purposes of privacy before selling the Impugned Products.”

219. Amway goods found at the premises were, thereafter, inventoried and released on *superdari* to the Defendant. From the premises of Defendant No.2, a total of 340 goods bearing the Amway mark were procured.

3) Local Commissioners' report in CS(OS) 410/2018

220. The Local Commissioner who visited the office of 1MG, found that the premises was merely a virtual office and there was no goods kept there. Vide a separate order, another Local Commissioner was appointed to visit a second premises of 1MG, the address of which was procured at the time of execution of the first local commission. The said Local Commissioner collected data of all sellers who were selling Amway products on the 1MG platform. The Local Commissioner also collected various agreements executed by 1MG with its vendors.

221. The Local Commissioner who visited the seller – Defendant No.2's premises found a large inventory of Amway products there. This commissioner stated that the products were being purchased directly from Amway. Defendant No.2, known as M/s Ghantakarn International, was actually run by a person, called Mr. Pankaj Jain, who himself claimed to be an Amway ABO. The Local Commissioner was informed by the wife of Mr. Pankaj Jain that the code on the Amway products is removed, using thinners, gluesticks and feviquick. The Local Commissioner also found that the aluminium paper seal inside the cap was also opened and resealed, and in some products, the internal seal was tampered completely. There were some cartons which were lying ready for dispatch and the when the same were opened by the Local Commissioner, it was found that the products in the box did not contain the code. Relevant extracts of the Local Commissioner's report are as under:

“9. Upon inspection of the godown, the undersigned found packets containing bottles of thinner, gluessticks and feviquick. Upon enquiry, wife of Pankaj Jain, who was present in the godown informed the undersigned that the code on the bottles of AMWAY Products are removed with it. She further informed that the distributor asks them to remove it. Pankaj Jain was separately asked the same question and he denied the same and stated that the thinner was used for painting. The undersigned sealed the bottles of thinner, gluessticks and feviquick in a box and prepared an inventory of the same.

10. On a further inspection of the godown on the ground floor, the undersigned found boxes containing various categories of AMWAY Products. An inspection of certain bottles revealed that the code was removed by the thinner and the aluminium/paper seal inside the cap of the said bottles were opened and re-sealed using adhesive. For some bottles the internal seal was tampered completely and the undersigned also found some bottles where the seal was intact. Therefore, a comparison of what the seal was initially and post tampering can easily be seen. The comparison of the same has been video recorded and the CD for the video recording is Annexure LC2-3. Photographs evincing the said difference and also the entire godown are Annexure LC2-4(Colly.)”

11. The undersigned also found some boxes being ready for dispatch with packaging tape of IMg. Upon opening the same with the permission of Pankaj Jain, it appeared that the products in the box also do not contain the code and the bottles are re-sealed. The comparison is available in photographs as well as the video. When asked initially, the proprietor said the invoices were not available, however, the undersigned found some

cartons having invoices. The same were sealed alongwith the invoices and inventory was prepared.”

222. The Local Commissioner has placed on record the images of bottles with open seals and tampered seals. In the video of the Commissioner placed on record, the Local Commissioner is showing that largely the products being sold by Defendant No.2, have their seals broken and re-sealed, and the products being sold are half-empty. One such screen shot, is as under:



Screenshot showing tampered Amway product being sold by the defendant who is a seller on 1MG

4) Local Commissioner’s report in CS(OS) 550/2018

Local Commissioner who visited the premises of Defendant No.2 – M/s Kashvi Enterprises.

223. The premises of M/s. Kashvi Enterprises, which was one of the sellers on the Healthkart platform, at 56R, New Colony Basement, Opposite Mehta Showroom, Near Sector -7 Extension, Gurgaon-122001 was visited by a Local Commissioner. Local Commissioner observed that it comprised of a

godown, which was being used to stock products from various Direct Selling Entities, to be sold on Healthkart and Snapdeal. It was also observed by the Court Commissioner that the staff of Defendant No.2 was engaged in the packaging of direct selling products of various entities. The Local Commissioner was informed that there were no Amway branded products in the warehouse, however, upon further inspection, the Local Commissioner found three bottles of Amway Nutrilite Daily and Amway All Plant Protein Powder, which were clandestinely stacked. Thereafter, the Local Commissioner entered the back side of the warehouse, where she found large quantities of Amway products, hidden behind a dysfunctional washing machine. Upon enquiring about the said products, from the Defendant's representative, the Local Commissioner was informed that they had stopped selling the products for the past six months. This statement was however, found to be false, as the Local Commissioner found a product of Amway which was manufactured in September, 2018. To determine the source of the products, the Local Commissioner perused the stock list of Defendant No.2 and observed as under:

*“On further inspection of the godown, I also found the logistics of the AMWAY products. On the perusal of the said logistics, it was found that the said AMWAY products had been ordered online and sold through various e-commerce websites. The photocopies of the said logistics have been taken record and have been annexed as **Annexure P-9.**”*

224. Upon enquiry from Mr. Vinod Kumar, the representative of Defendant No.2, about his activities on e-commerce websites, the Local Commissioner observed as under:

“17. It was further informed by Mr. Vinod Kumar that he is in possession of the agreements entered into by defendant no.2 with different e-commerce companies, including defendant no.1. Mr. Vinod Kumar further admitted that he has been listing the AMWAY products on the e-commerce websites, and that the payment by the customers is made directly with the e-commerce websites, including defendant no.1. Mr. Vinod Kumar stated that the e-commerce websites charge a commission fee and the final payment is made to the seller by the e-commerce websites after deducting the said commission fee.

18. On further enquiry, Mr. Vinod Kumar also informed me that the listing of AMWAY products is wholly made by the e-commerce websites including defendant no.1. He claimed that he has not listed the AMWAY products himself but has only added his inventory of AMWAY products (including dimensions thereof) to the existing listings made by the e-commerce websites.

19. That is was further claimed by Mr. Vinod Kumar that he was ignorant of the fact that the sale of AMWAY products found in the godown is not allowed, as he was never informed about this fact by the e-commerce platforms including defendant no.1. However, Mr. Vinod Kumar revealed that e-commerce platforms like Amazon and Flipkart had sent mails a few days back informing that the said of AMWAY products is not allowed on the said platforms anymore.”

Finally, the Local Commissioner inventoried the impugned goods and released them on *superdari* to the Defendant.

5) Local Commissioners’ report in CS(OS) 453/2018

225. There were nine Local Commissioners who were appointed in the suit against Snapdeal. A summary of the Local Commissioners’ reports at the premises of the Defendants:

- A large number of Amway products were found at the premises of Defendants.
- The Local Commissioners found thinners and gluesticks at the premises of the said Defendants.
- Goods were being packaged at the premises of the said Defendants.
- All seized goods were thereafter, inventoried and released on superdari.
- The Local Commissioner, who visited Defendant No.2, found that several of the products were expired and were leaking. Defendant No.2 claimed that he purchased the Amway products from Bhagirath Palace.
- A large inventory of Amway goods were found at the premises found of the Defendants and tampered products were also found.

226. Snapdeal provided the Local Commissioner with all its agreements and policies. A complete list of sellers of Amway products on the Snapdeal platform was also provided to the Local Commissioner, which showed that there were a total of, approximately 600 sellers of Amway products on the Snapdeal platform.

227. One of the Defendants i.e. Defendant No.5 refused to cooperate with the Local Commissioner, however, Amway products were found at its premises. He was also selling Amway products on Amazon.

228. In the premises of Defendant No.4, thinners, adhesive products were also found and the Amway products had seals/caps which were tampered. Defendant No.4 was selling products on Snapdeal, Flipkart, Amazon, Healthkart. A photograph of the products being de-sealed and re-sealed at the premises of Defendant No.4 is as under:



Image showing tampering of products at the defendant's premises

229. At the premises of Defendant No.6, large quantities of Amway products were found. None of the Defendants were willing to disclose the source from where they had obtained the products. Only vague details revealed, i.e., the products being from Chandni Chowk and Bhagirath Palace.

230. The Local Commissioner was specifically directed to do an examination of the inventoried goods to check their uniqueness and to scan their unique codes. In the case of Defendant No.8, the Local Commissioner found that the date of invoice was prior to the date of manufacturing of the

product. The unique codes were also tampered with so that they were untraceable.

6) Conclusion of all Local Commissioners' Reports

231. On an overall perusal of the Local Commissioners' reports, it is clear that there is large scale tampering of goods that is taking place. The same is blatant and in fact has been carried out in warehouses owned by the platforms as well. Even a big seller like Cloudbail, which is allegedly related to Amazon, and which is itself responsible for the products it sells on the Amazon platform does not follow any quality control inasmuch as it could not trace the source of the products to Amway. The purchases by Cloudbail clearly appeared to be from suspicious sources. In almost all cases, the sellers are tampering with the seals of the goods and are resealing the products using thinners, glues, etc. In some sellers' premises, it is noticed that the products are also half empty. Thus, under the garb of selling genuine products, completely tampered products are being sold on e-commerce platforms and the platforms were not even willing to take notice of the same after being notified by the Plaintiffs. In the case of Amazon, the tampering was happening in its own warehouse which is completely uncondonable.

232. The Plaintiffs have also relied upon various consumers who have expressed dissatisfaction in the products purchased on the Amazon platform. The reviews for the Oriflame Wellness Omega Product, written by the consumers in Suit No.91/2019, includes comments such as:

Customer Reviews of Oriflame products on Amazon

“Duplicate Oriflame! DO NOT BUY IT”

“Absolutely rubbish. I love oriflame and i am

regular consumer of oriflame products. This Kajal doesn't even run smoothly on your waterline, forget about the intense black color, it smells bad too. Just to my horror, I can't return it. Save yourselves from buy this Kajal here.

“Not a original product. It’s not Oriflame. Some local brand. Quality is really bad and this isn’t eligible for return either.”

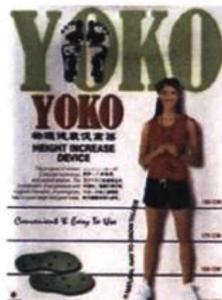
“I hated this product a lot it doesn’t even last for 5 sec and gave my eye itch soo bad product and soo local quality soo disappointed....”

“Very bad. The kajal that was delivered was dry and not even a single day I was able to use it.”

“Totally fake product pls don’t buy.”

(Reproduced from page 56 Of plaintiffs documents dated 18th February, 2019)

233. In the Oriflame suit, the Plaintiff has also pointed out that the listings attribute Oriflame mark to completely unconnected products, as well. One illustration of the same is depicted below:



Oriflame Optimals Oxygen Boost Face Blotting Tissues

by JAPAN MANUFACTURE

140 ~~299~~

You Save: 159 (53%)

FREE Delivery

3

5% back up to ₹25 using BHIM UPI
See Details

Product bearing the mark YOKO being attributed to Oriflame on the Amazon Website

The above is a product of some other brand called YOKO which is attributed to Oriflame in the description.

v) **Intellectual Property Protection and Listing Policies of the Defendant – e-commerce platforms.**

234. The platforms also claim to have policies in place which are in compliance with the Intermediary guidelines of 2011. A review of the said policies is set out below which shows that the platforms are not in compliance with their own policies.

1) **Amazon Seller Services Pvt. Ltd.**

235. Under the Amazon's Business Solutions Agreement, Amazon obtains a license from the sellers. The said clause reads as under:

*““Your Materials” means all Technology, **Your Trademarks, Content, Required Product Information,** data, materials, and other items provided or made available by you or your Affiliates to Amazon or its Affiliates.”*

4. License

You grant us a royalty-free, non-exclusive, worldwide, irrevocable right and licence during the Term and for as long thereafter as you are permitted to grant the said licence under applicable Law to use, reproduce, perform, display (public communication), distribute, adapt, modify, re-format, create and exploit derivative works of, and otherwise commercially or non-commercially exploit in any manner, any and all of Your Materials, and to sublicense the foregoing rights to our Affiliates and operators of Amazon Associated Properties; provided, however, that we will not alter any of Your Trademarks from the form provided by you (except to re-size trademarks to the extent necessary for presentation, so long as the relative proportions of such trademarks remain the same) and will comply with your removal requests as to specific uses of Your Trademarks (provided you are unable to do so using the standard functionality made available to you via

the applicable Amazon Site or Services); provided further, however, that nothing in this Agreement will prevent or impair our right to use Your Materials without your consent to the extent that such use is allowable without a licence from you or your Affiliates under applicable Law (e.g., fair use under copyright law, referential use under trademark law, or valid licence from a third party).

5. Representations

You represent and warrant to us that: (a) if you are a business, you are duly organized, validly existing and in good standing under the Laws of the territory in which your business is registered and are a resident of India for income tax purposes every financial year; (b) you have all requisite right, power and authority to enter into this Agreement and perform your obligations and grant the rights, licences and authorizations you grant hereunder; (c) you and all of your subcontractors, agents and suppliers will comply with all applicable Laws (including but not limited to procuring and maintaining applicable tax registrations) in your performance of your obligations and exercise of your rights under this Agreement; and (d) you and your financial institution(s) are not subject to sanctions or otherwise designated on any list of prohibited or restricted parties or owned or controlled by such a party, including but not limited to the lists maintained by the United Nations Security Council, the US Government (e.g., the US Department of Treasury's Specially Designated Nationals list and Foreign Sanctions Evaders list and the US Department of Commerce's Entity List), the European Union or its member states, or other applicable government authority.

S-7. Control of Site

Notwithstanding any provision of this Agreement, we will have the right in our sole discretion to determine

the content, appearance, design, functionality and all other aspects of the Amazon Site and the Selling on Amazon Service (including the right to re-design, modify, remove and alter the content, appearance, design, functionality, and other aspects of, and prevent or restrict access to any of the Amazon Site and the Selling on Amazon Service and any element, aspect, portion of feature thereof (including any listings), from time to time) and to delay or suspend listing of, or to refuse to list, or to de-list, or require you not to list any or all products on the Amazon Site in our sole discretion.”

236. Similar terms exist on the other platforms which are termed as ‘Terms of Use’ ‘Facilitation agreements’ etc., Thus, all the platforms are conscious of the fact that they require licences to use the trademarks of the manufacturers and the same is obtained from sellers who themselves have not right to licence the Plaintiffs’ marks.

237. Amazon’s policies on “Prohibited Content” and “Intellectual Property Violations” provide that any products which are mentioned in the “Excluded Products’ List” are prohibited for sale from Amazon’s website. The following products are described as excluded products, which means that they are not fit to be sold on the Amazon platform:

“Excluded products means:

17. Any product for which you either are not an "authorised reseller" (as designated by the product's manufacturer or distributor) or do not provide to customers the manufacturer's standard warranty therefor;

18. Any product that is placed on the market without the consent of the relevant brand or trademark owner;

238. Further, while expanding on what constitutes Intellectual Property

Violations, that could be reported, it is clearly stipulated that all products ought to be authorized and licensed for sale `as a retail product'. The said clause reads:

“Intellectual property violations

.....

Unauthorized and unlicensed merchandise: All items displayed on our Site must be commercially produced and authorized or licensed for sale as a retail product...

239. Moreover, Amazon also recognizes exclusive and selective distribution agreements entered into by sellers, however, it does not recognise the violation of the said agreement to constitute infringement, and categorises it as a dispute between the manufacturer and the retailer. Thus, a conjoint reading of *Excluded Products' List, Exclusive or Selective Distribution Clause, Prohibited Content*, and the *Intellectual Property Violation Policy* of Amazon, clearly shows that as per Amazon's own policies, products sold on its platform have to be authorized or licensed for sale from the manufacturer. Further, the seller cannot sell the products if the same are not meant to be sold in the retail market. If the manufacturer does not consent for sale on its platform, the same would fall within the *Excluded Products List* and would, hence, constitute *Prohibited Content*.

240. In fact, Amazon does not recognize the doctrine of international exhaustion which is clear from the following clauses:

“Prohibited Content

Sellers are expected to conduct proper research to ensure that the items posted to our website are in compliance with all applicable laws. If we determine that the content of a product detail page or listing is prohibited, potentially illegal,

or inappropriate, we may remove or alter it without prior notice. Amazon reserves the right to make judgments about whether or not content is appropriate.

Any product listed in the Excluded Products list in the Seller Participation Agreement is prohibited for sale on the Amazon.in site. Additionally, sellers are prohibited from listing the following products on Amazon.in: Cell Phones including Service, Magazines and Newspapers, Tobacco and Alcohol, Adult Toys, Gift Cards and Gift Certificates, Prescription Medication, Guns and Ammunition, Photo Processing.

***Counterfeit merchandise:** Products offered for sale on Amazon.in must be authentic. Any product that has been illegally replicated, reproduced or manufactured is prohibited.*

Prohibited Content

- *Items not intended for distribution within India: Products that are specifically manufactured for, and identified as "not for distribution within India" cannot be sold on Amazon.in. This includes the following; imported text books, non-Region 5 DVDs, and non-PAL format videotapes.*

Intellectual Property Violations

- ***Counterfeit merchandise:** Products displayed on our website must be authentic. Any product that has been illegally replicated, reproduced or manufactured is prohibited."*

Thus, even genuine products from foreign countries not meant to be sold in India cannot be listed on Amazon.

2) Flipkart Internet Pvt. Ltd.

241. The policies of other platforms are similar in nature. For eg., in the case of Flipkart, the clauses read as under:

“Use of the Website

You agree, undertake and confirm that Your use of Website shall be strictly governed by the following binding principles:

1. You shall not host, display, upload, modify, publish, transmit, update or share any information which:

.....

(c) is misleading in any way;

(h) infringes upon or violates any third party’s rights (including, but not limited to, intellectual property rights, rights of privacy (including without limitation unauthorized disclosure of a person’s name, email address, physical address or phone number) or rights of publicity);

(t) infringes any patent, trademark, copyright or other proprietary rights or third party’s trade secrets or rights of publicity or privacy or shall not be fraudulent or involve the sale of counterfeit or stolen products;

(u) violates any law for the time being in force;

(v) deceives or misleads the addressee/users about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(w) impersonate another person;

(aa) shall not, directly or indirectly, offer, attempt to offer, trade or attempt to trade in any item, the dealing of which is prohibited or restricted in any manner under the provisions of any applicable law, rule, regulation or guideline for the time being in force. ”

Thus, if any trademark owner complains to Flipkart that its products are being unauthorizedly sold on its platform, then Flipkart would have to take down the said products as per its own policy.

242. Flipkart also has a *Flipkart Infringement Verification (FIV)-Reporting Listing Violations* policy, which allows reporting of violations of IP rights, under which Flipkart is not only bound to remove the infringing products,

but even unlicensed products. This, clearly, shows that as per its own policy, Flipkart was bound to remove Amway products, when Amway reported violations of its rights and Direct Selling Guidelines. Relevant extracts of Flipkart's *Flipkart Infringement Verification(FIV)-Reporting Listing Violations* policy are as under:

“Flipkart Infringement Verification (FIV)-Reporting Listing Violations

Flipkart has put in place Flipkart infringement Verification process so that intellectual property owners could easily report listing that infringe their rights. It is Flipkart's interest to ensure that infringing products are removed from the site, as they erode Buyer and good Seller trust.

If you are a Verified Rights Owner and want to report a listing issue, see Flipkart's FIV Note: Only the intellectual property rights owner can report potentially infringing products or listings through FIV. If you are not the intellectual property rights owner, you can still help by getting in touch with the rights owner and encouraging them to contact us.

If your listing was removed through FIV, and you believe that your listing was removed in error, please contact us.

Flipkart does not and cannot verify that Seller have the right or ability to sell or distribute their listed products. However, Flipkart is committed to removing infringing or unlicensed products once an authorized representative of the rights owner properly reports them to Flipkart.”

Further, despite the various verifications which Flipkart claims to be requiring from its sellers, one of the sellers of Amway products was, in fact, not traceable i.e. Defendant No.3. This itself shows that the source of the product is not foolproof, and in fact is quite suspect.

3) Jasper Infotech Pvt. Ltd. (Snapdeal.com)

243. As per the *Terms of Use* of Snapdeal, the seller has to undertake, “*not to host, display, upload, transmit, update, any information or content that infringes any trademark, patent or copyright*”. In the event, a third party finds its IP rights are being violated, it can invoke the take-down policy. The *Standard Terms of Sale*, contains a clause to the following effect:

“2.3 With respect to the sale of Product by Seller to the Buyer, the Seller hereby represents and warrants to the Buyer that:

- *Seller has the right to sell the Products to the Buyer on or through the Website;*
- *Buyer shall have and enjoy quiet possession of the Products;*
- *Products shall be free from any charge or encumbrance in favor of third party;*
- *Buyer shall be entitled to all the warranties and other collaterals to the Product or as generally made available by the manufacturer or seller or the Product;*
- *Product shall meet the description and specification as provided on the Website.”*

244. Products as per Snapdeal’s *Banned Products* list cannot be sold through the Snapdeal website. The said list includes counterfeit goods, and goods/materials infringing any IP rights, as also grey market products, and also any prohibited items as per law.

4) 1MG Technologies Pvt. Ltd.

245. A perusal of the facilitation agreement entered into between 1MG with its sellers shows that 1MG’s website is operated and managed by 1MG. It provides necessary back end infrastructure, either directly or through third

parties, such as the call centres, order management system, and communication with the end customers. Clauses 3 & 4.1 to 4.6 of the said agreement are relevant and are set out below:

“3. COMPANY OBLIGATIONS

3.1 The Company shall upload on the Website, the Products that the Retailer stocks and wishes to exhibit and offer for sale on the Website along with the relevant Product Details.

3.2 Upon the End Customer placing an Order for any of the Products offered for sale on the Website by the Retailer, the Company shall receive the Orders for the Products (on behalf of Retailer and only in the capacity of an entity that provides access to an online platform for purchase and sale of Products) and pass on the Order Details to the Retailer within a period of [12 (Twelve)] hours from the time of receipt of the confirmed orders from the End Customer for fulfillment of such order.

3.3 The Company shall be responsible for collecting all payments in case of cash on delivery, on behalf of the Retailer, due from the End Customer under the said Invoice and shall remit the same to the Retailer in accordance with Clause 7.4 of this Agreement.

3.4 The Company shall collect the amount paid by the End Customer on the Website through payment gateway on behalf of the Retailer and remit the same to the Retailer in accordance with Clause 7.4 of this Agreement.

4. RETAILER OBLIGATIONS

4.1 The Retailer shall obtain and maintain all corporate authorizations and all other applicable governmental, statutory, regulatory or other consents, licenses, authorizations, waivers or exemptions required for the Retailer under applicable Laws to enter into and perform its obligations and offer for sale and dispense the Products to the End Customer or as otherwise required for the

performance of its obligations under this Agreement and it represents that all such corporate authorizations and all other applicable government, statutory, regulatory or other consents, licenses, authorizations, waivers or exemptions have been obtained and are valid and subsisting throughout the Term of this Agreement.

4.2 The Retailer shall inform the Company of the list and quantity of Products (along with its relevant details/additional details that may have been requested by the Company), that the Retailer wishes to offer for sale through the Website (“Product List”). The Retailer shall also maintain inventory details and regularly update the Product List maintained with the Company at such intervals and in a manner deemed necessary or requested by the Company.

4.3 The Retailer shall ensure that the Product Details contained on the Website with respect to any Product listed by it is true and correct and not misleading or false including with respect to the availability of the Product with the Retailer.

4.4 The Retailer shall, upon receiving the Order Details, review and ensure of the compliance with the provisions of applicable Laws. The Retailer shall keep the Company duly indemnified from any action initiated by any government authority or third party based on non-compliance by the Retailers with its obligation as herein contained.

4.5 Upon receiving the Order Details, the Retailer shall duly inform the Company of its ability to fulfill the order of the End Customer. In the event the Retailer is unable to process the order, due to unavailability of Products ordered by the End Customer or any other reason, the Retailer shall promptly and in no event later than [four (4)] hours from the receipt of the Order Details from the Company, notify the Company in writing about its

inability to process the order and the reasons thereof. Upon receipt of such notice, the Company may in its sole discretion be free to take any step it deems necessary for the processing of the order, including passing on the order to any other retailer or vendor of the Products.

4.6 Notwithstanding the foregoing, in case the Retailer confirms the order, then in such case, the Retailer shall send the acceptance of the End Customer order to the Company and upon intimation by the Company to the End Customer of such confirmation, the order of the End Customer shall become binding on the Retailer. Upon the order of the End Customer becoming binding, the Retailer shall dispense the ordered Products, to the third party delivery/logistical service provider appointed by the Company for delivery to the End Customer.”

246. From the above, it is clear that 1MG uploads the products on its website, which the retailer wishes to exhibit and offer for sale, along with the relevant product's details. The orders are received by 1MG on behalf of the seller. The payment is collected by 1MG, on behalf of the seller, through its own payment gateway, and the same is remitted to the seller, in terms of the agreement.

247. The obligation of the seller includes that all the necessary permissions and consent have to be obtained by the seller. The seller shall ensure that the product listing is not misleading or false. If a seller is unable to make the supply, 1MG can step in and pass on the order to a different seller. The seller has the option to use the logistical network appointed by 1MG for delivery of the product. In respect of IPR, clauses 4.16 and 4.17 of the facilitation agreement are relevant and are set out below:

“4.16 It shall be the sole responsibility of the Retailer to ensure that the Products sold to the End Customers do not infringing upon the Intellectual Property Rights or other proprietary rights or similar rights of any third party, and for any breach or violation of such Intellectual Property Rights or other proprietary rights, it shall be solely liable and responsible.

4.17 The Retailer agrees and acknowledges that if the Retailer is found to be indulging in providing false or misleading information or the sale/1 of Products with Defect then the Company may initiate civil and/or criminal proceedings against the Retailer and the Company may, at its sole discretion, disqualify/bar the Retailer from selling the Products on the Website.”

248. As per the above clauses, the seller has to ensure that it does not impinge upon any IP rights of any third parties. IMG also charges a facilitation fee for rendering its services, and providing a platform for sale of goods. One of the representations, which the seller has to agree to is –

“9.2 Additional Representations and Warranties of the Retailer:

In addition to the representations and warranties contained in Clause 9.1 (Representations and Warranties of Either Party), the Retailer hereby represents and warrants to the Company and undertakes as follows:

.....

(vi) It has legally obtained, purchased, acquired the Products for sale and it is legally authorized and licensed to sell/offer the Products for sale to the End Customer;

(vii).....

(viii) It shall not deliver any Products to the End Customers which:

- (a) do not correspond with the description contained in the Product Details as stated on the Website against such Product;*
- (b) are not of the same quality and standards as mentioned in the Product Details on the Website;*
- (c) are expired, banned, counterfeit, fake, imitation, fabricated, spurious, obtained by way of illegal or unlawful means;*
- (d) do not serve the purpose for which the Products are meant as described on the Website;*
- (e) have a Defect, are damaged or of lower quality;*
- (f) are not in accordance with applicable Laws, which shall include but not be limited to any deliveries without a valid prescription etc.”*

249. From the above, it is clear that if any product has been illegally obtained or if the seller is not legally authorized to sell, then such products cannot be sold on the 1MG platform. Even fabricated products, spurious products, expired products or those obtained by unlawful or illegal means, cannot also be sold.

250. 1MG, at the time when the present suit was filed, did not disclose the details of the sellers on its platform. However, during the course of submissions it has submitted that it has now started disclosing the details of all the sellers. When a user clicks on the product, and seeks details of the seller, the same is then visible. The phone numbers, email address and any other mode of contacting the seller, is, however, not always made available and any buyer would have to go through 1MG in order to contact the seller.

5) Bright Lifecare Pvt. Ltd. (Healthkart)

251. A perusal of the Terms and Conditions of Healthkart reveals that it is being operated and run by the Healthkart, which even provides various

support services and back end services to its vendors, to enable sale on Healthkart. It obtains from its sellers all necessary warranties to ensure that the products sold on its platform are genuine. Based on the said warranties, given by the vendors, Healthkart provides “100% Product Authenticity Guarantee” on its platform. Relevant Clauses of the Terms and Conditions of Healthkart, are as under:

- *We don't run the promotions that prompt users to initiate a purchase, download, or other commitment without first providing all relevant information and without obtaining the users' explicit consent promotions that represent our services in a way that is not accurate, realistic, and truthful;*
- *All products sold on healthkart.com through our sellers are genuine. All sellers listing their products on healthkart.com are required to enter an agreement to list and sell only genuine products. And sellers determine the prices of the products they sell. We guarantee the condition of the item you buy when you purchase from sellers on healthkart.com. However this guarantee is not applicable for manufacturing defects;*
- *HealthKart strives to provide accurate products, services and pricing information, typographical and other errors may occur. In the event that a product or service is listed at an incorrect price or with incorrect information due to an error in pricing or product or service information, HealthKart may, at its discretion, either contact User for instructions or cancel the User's order and will notify the User about such cancellation;*
- *HealthKart shall have right to modify the price of a product or service any time, without any prior information;*

.....

Usage Restrictions:.....

You are not permitted to host, display, upload, modify, publish, transmit, update or share any information on the Website that

- *Belongs to another person and to which you do not have any right to;*
- *Infringes any patent, trademark, copyright or other proprietary rights;*
- *Violates any law for the time being in force.*

.....”

252. In addition to the Terms and Conditions as stipulated above, Healthkart also enters into a *Facilitation Agreement* with its vendors, before allowing them to use its platform for sale of their products. Relevant clauses of the said *Facilitation Agreement* are as under:

“4.4 The Vendor agrees and undertakes to ensure that the Company may pick the Product(s) from the Vendor and for delivery to the End Customer for an on behalf of the Vendor are accompanied with invoice, delivery challans, guarantee card, instruction manuals, free materials, etc., and other such relevant documents as are required under applicable laws or is generally provided with such Products (on case to case basis). It shall be the sole responsibility of the Vendor to ensure that the requirements of applicable laws, i.e., including but not limited to the FSSAI, Legal Metrology, Drugs and Cosmetics Act etc., relating to sale and transportation of healthcare/nutraceuticals products are complied with at all times in respect of the sales made by the Vendor in connection with this Agreement.

4.5 The Vendor shall settle any and all issues arising between the manufacturer of such Products, if any, the Vendor and the End Customers as required or deemed necessary by the Company, to the satisfaction of such End Customer, without involving the Company in any

manner, whatsoever. For the avoidance of doubt, if is clarified that the Company shall not be liable in any manner whatsoever for any dispute or issue arising between the Vendor, manufacturer of such Products or the End Customer, as the case may be, in relation to, the sale and/or consumption of the Products. In case of any dispute between the Vendor and End customer, the company shall assist Vendor to resolve such dispute at the cost of Vendor.

4.7 It shall be the sole responsibility of the Vendor to ensure that the Products sold to the End Customers do not infringe upon the Intellectual Property Rights or other proprietary rights or similar rights of any third party It is further agreed that the Vendor shall be solely responsible for obtaining any approvals, permissions, licenses for the sale of the product on the Website (as already represented)

4.8 It shall be the sole responsibility of the Vendor for delivery of goods to the customer, customer satisfaction and of the warrantee/guarantee of the goods and to ensure that the goods shall not be in defective and or damaged conditions. Company shall not be liable for delivery of any such damaged or defective goods.”

253. The obligation of the seller includes that all the necessary permissions and consent have to be obtained by the seller. The seller shall ensure that the product listing is not misleading or false. As per the above clauses, the seller has to ensure that it does not impinge upon any IP rights of any third parties. Healthkart also charges a facilitation fee for rendering its services, and providing a platform for sale of goods.

254. A review of the above contracts and policies makes it clear that those products for which the seller is not an authorized seller would not be liable to be sold on any of the platforms. If the seller does not have consent of the

relevant brand or the trademark owner, such a product would also be an excluded product. Such products cannot be displayed and listed on the e-commerce platforms as per their own policies. IMG and Healthkart are in fact taking it upon themselves to provide authenticity guarantees without verifying the genuinity of the product.

255. The manner in which the products are depicted and are linked to the Plaintiffs, the image of the product being shown and the fact that the refund and return policy is completely substituted/changed, clearly shows that the Plaintiffs' grievances against the platforms are not completely unfounded. The customer reviews, which are illustratively relied upon, show that enormous damage is also being caused to the reputation and goodwill of the brand of the Plaintiffs'. The Local Commissioner's reports also reveal that there is serious apprehension of tampering with the products itself at, either the sellers' premises or the platforms' warehouses, and the apprehension of the Plaintiffs that the QR codes and the unique codes are being deliberately obliterated is also not misplaced and unfounded. The Plaintiffs cannot turn a blind eye to the sale of their products on the platforms when there is a serious threat not only to their business but also to their products and the equity enjoyed in them. There is a serious threat to the reputation of the products and if the same are permitted to be sold unchecked, there may be enormous dilution and tarnishment of the Plaintiffs' products and brand equity.

256. The marks are also completely diluted as there is uncontrolled use under the cloak of 'genuinity'. The Plaintiffs have no way of acquiring knowledge as to which of the products on the platforms are genuine, as the seller details which are exhibited on the websites are either completely

absent or extremely cryptic in nature. They conceal more than they reveal. The details of the sellers, their addresses, contact persons, etc. - nothing is available on the platforms. Under such circumstances, the Plaintiffs pray that none of their products be permitted to be sold on the said platforms as there is a severe apprehension that the products could be unauthorised, fake, counterfeit and tampered with. At the *prima facie* stage, the Court has considered the evidence on record and it clearly reveals that the Plaintiffs' rights are under severe threat.

257. The Defendants have all argued and relied upon Section 30 of the Trade Marks Act and have also relied upon the judgment of the Division Bench in ***Kapil Wadhwa DB (supra)***. The said judgment of the Division Bench was rendered in completely different circumstances, wherein the Division Bench proceeded on the basis that Samsung did not allege that the condition of the goods is being impaired in any manner. This is recorded in para 73 of the judgment which reads as under:

“73. It is not the case of the Respondents that the Appellants are changing the condition of the goods or impairing the goods which are put in the foreign market by Respondent No.1 or its subsidiary companies abroad. What is pleaded is that the physical features of the printers sold abroad are different from the features of the printers sold in India. But this is irrelevant as long as the goods placed in the International market are not impaired or condition changed.....”

258. In the facts of ***Kapil Wadhwa DB (supra)***, the Division Bench held in respect of Section 30 of the Trade Marks Act as under:

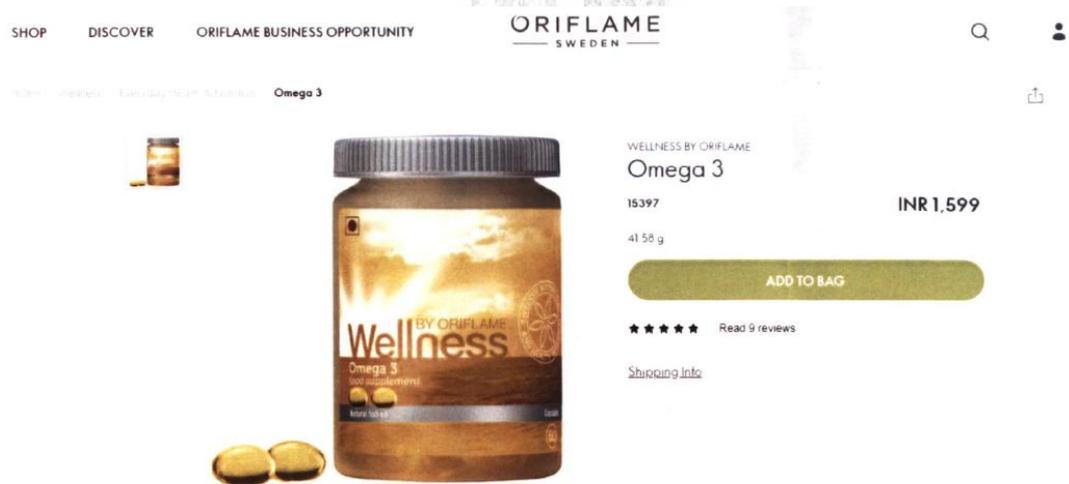
“68. With reference to sub-section 4 of Section 30 of the Trade Marks Act 1999 it would be relevant to note that further dealing in the goods placed in the market

under a trade mark can be opposed where legitimate reasons exist to oppose further dealing and in particular where the condition of the goods has been changed or impaired. With respect to physical condition being changed or impaired, even in the absence of a statutory provision, the registered proprietor of a trade mark would have the right to oppose further dealing in those goods inasmuch as they would be the same goods improperly so called, or to put it differently, if a physical condition of goods is changed, it would no longer be the same goods. But, sub-section 4 of Section 30 is not restricted to only when the conditions of the goods has been changed or impaired after they have been put on the market. The section embraces all legitimate reasons to oppose further dealings in the goods. Thus, changing condition or impairment is only a specie of the genus legitimate reasons, which genus embraces other species as well. What are these species? (i) Difference in services and warranties as held in the decisions reported as 423 F.3d 1037 (2005) SKF USA v. International Trade Commission; 35 USPQ2d 1053 (1995) Fender Musical Instruments Corp. v. Unlimited Music Center Inc.; 589 F. Supp. 1163 (1984) Osawa & Co. v. B&H Photo. (ii) Difference in advertising and promotional efforts as held in the decisions reported as 70 F. Supp 2d 1057 Pepsi Co. Inc. v. Reyes; 589 F. Supp. 1163 (1984) Osawa & Co. v. B&H Photo. (iii) Differences in packaging as held in the decision reported as 753 F. Supp. 1240 (1991) Ferrerro USA v. Ozak Trading. (iv) Differences in quality control, pricing and presentation as held in the decision reported as 982 F.2d 633 (1992) Societe Des Produits Nestle v. Casa Helvetia. (v) Differences in language of the literature provided with the product as held in the decisions reported as 423 F.3d 1037 (2005) SKF USA v. International Trade Commission; 70F. Supp 2d 1057 Pepsi Co. Inc. v. Reyes; 816 F.2d 68, 76 (2nd Cir.

1987) *Original Appalachian Artworks Inc. v. Granada Electronics Inc.*” (Emphasis added)

259. Thus, as per the above extract from the judgement in *Kapil Wadhwa DB (supra)* impairment of goods need not be mere physical impairment. Even differences in services and warranties, differences in advertising and promotional efforts, difference in packaging, difference in quality control, pricing and presentation have all been held to be impairment of the products.

260. The platforms are completely changing the warranties/return/refund policies. They are providing authenticity guarantees even to products that are tampered and impaired. In some cases, prices of the products are also being changed. One such illustration is set out herein below wherein the MRP of the Oriflame product being sold on Amazon is shown as being higher than the actual MRP of the product and a fake discount is being offered on the Amazon platform:



Oriflame’s website showing Rs.1,599/- as MRP



Oriflame product shown on amazon website with higher MRP ie., Rs.1699/- discounted to Rs.1274/-

261. The above images clearly show that the MRP is being shown as Rs.1699/- when the actual MRP of the product is only Rs.1599/-, and is being sold at Rs.1274/-. The product is also non-returnable. In respect of the above product, because it is under the FBA category, it has been stored, packed and dispatched by Amazon. Customer service is provided by Amazon and a fresh bar code has also been put by Amazon on the product before being dispatched. The seller's name is not visible, and the price has been changed. The product is non-returnable. Fake discounts are being shown. The expression 'Sold by grooming women' does not give any clarity as to who the seller is and where it is from. No details are provided. In fact, a first look at the listing gives an impression to the consumer that the product is being sold by Oriflame by use of the expression **"Oriflame**

Wellness Omega 3, 60 capsules by Oriflame". The images that have been extracted above are meant to show illustratively, the manner in which the MRPs are being artificially increased to give an impression that higher discounts are being given.

262. The Plaintiffs, who are the brand owners and manufacturers of these products cannot be held to not have any control over such misuse of their products, product images, brand names, selling policies, etc. The doctrine of exhaustion cannot give legitimacy to such tampering and mutilation of the products themselves. The brand equity is considerably diluted by such unbridled sales from unauthorized sources, especially when platforms are not willing to take responsibility for the sale on the ground that they are intermediaries and when the so-called sellers are unknown, untraceable, unauthorised and dubious. The details of the sellers would not be known to the consumers. Consumers would also not know how to contact the sellers. The consumers would then have to proceed on a 'Sherlockian venture' to trace the sellers and considering that there are hundreds and thousands of listings of the Plaintiffs' products on the various platforms, the tracing of these sellers could be virtually impossible. Even after the suits were filed, despite specific directions, details of all the sellers of the Plaintiffs' products on the various platforms have not been provided. In one case even the details that were provided to the Plaintiffs was after considerable lapse of time. The doctrine of exhaustion cannot condone such unauthorized sale of products that are tampered, conditions are changed, are being wrongly priced and the genuineness of which is in severe doubt.

263. Further, the images of tampering of the seal which were revealed during the execution of the local commissions also raises apprehensions that

the manufacturing and expiry dates of these products, which are beauty and health products could also be tampered with and there could also be severe repercussions on the wellbeing of consumers if expired products are allowed to be sold on the platforms, after using thinners, removing the codes and without any accountability whatsoever.

A. International position on liability of e-commerce platforms & exhaustion/first sale doctrine

264. The case laws cited from international jurisdictions by the respective parties do not require detailed discussion, inasmuch as there is consistency to the extent that changing of warranties and return policies would be violative of the trademark rights of the Plaintiffs. Under different factual circumstances, Amazon has been held to be not liable and has been held to be intermediary. The manner in which Amazon displays the listings of the products in those jurisdictions are not before the Court and neither are the respective jurisdiction's product liability laws.

US position

265. In *Milo & Gabby v. Amazon (supra)*, the Plaintiff designed "Cosy Companion" pillowcases, knockoffs/counterfeits of which were being sold on the Amazon platform in the United States of America. Milo & Gabby LLC brought a case against Amazon USA for infringement of its intellectual property rights. In this case, however, it was argued by the Plaintiff that Amazon steps into the shoes of the seller as well, when third party sellers list goods on its platform. The Court, rejecting this claim of the Plaintiff, even for FBA services being offered by Amazon, held that since Amazon never acquired title to the goods of the Plaintiff, it could not be termed as a "seller" of the goods. Further, Amazon's additional services merely

facilitated sale and made it easier for the third party sellers to consummate the sale. This, case, however, has no application here, as the question before the Court here is not whether Amazon is the seller of the goods but whether its defence under Section 30 is valid or not especially when there is tampering of the goods happening in warehouses under its own control as also seller details are not fully revealed on the platform itself. The situation in the US may be completely different. Even in *Tre Milano v. Amazon (supra)*, relied on by Ld. Counsel for Amazon, the question was whether Amazon qualified as a direct infringer of the Plaintiff's IPR. Thus, this case, as well, is distinguishable on facts. Same is the position in *Allstate New Jersey Insurance Co. (supra)*.

266. Ld. Counsel for Amazon, also places reliance on *Matrix Essentials District Court (supra)* and *Matrix Essentials Court of Appeals (supra)*, to argue that any party that lawfully acquires genuine goods of the Plaintiffs, cannot be precluded from selling the same, merely on the ground that they are being sold outside the distribution network of the Plaintiff. However, in this case, the Court observed that there was no legitimate consumer confusion that was taking place in respect of the goods of the Plaintiff being made available by the Defendant. Further, the goods being sold by the Defendant were being sold merely in two stores owned by it, whereby the consumer could easily look and verify the genuinity of the goods. This is not the case with e-commerce platforms. Here, a consumer makes a purchase based on the images available on the website, as also the representations being made on the said website. There is no way for the consumer to be aware if the goods being sold to it are genuine or not based only on this factor. Thus, in the present case, since there is a stark difference between the

policies of the Plaintiffs, and the policies adopted by Amazon, there is greater likelihood of consumer confusion being caused.

267. Reliance was also placed on *Sebastian Intern (supra)*, whereby a manufacturer of hair care products sold its products exclusively through professional salons. The Defendant – Longs, purchased and re-sold the Plaintiff's products, leading to filing of the suit. The Court discussed the scope of the "first sale" rule, and stated that by restricting distribution of its products, the Plaintiff was trying to bypass the "first sale" rule, according to which, the rights of a producer to control its trademarked product does not extend beyond the first sale of the product. The Court rejected the argument of the Plaintiff on grounds of consumer confusion and pertinently, held as under:

"1076.....The "first sale" rule is not rendered inapplicable merely because consumers erroneously believe the reseller is affiliated with or authorised by the producer. It is the essence of the "first sale" doctrine that a purchaser who does no more than stock, display and resell a producer's product under the producer's trademark violates no right conferred upon the producer by the Lanham Act. When a purchaser resells a trademarked article under the producer's trademark, and nothing more, there is no actionable misrepresentation under the statute."

268. The above judgment also does not come to the aid of the platforms. As can be seen from above, the "first sale" rule is applicable only when a purchaser re-sells the goods of the producer, and stocks and displays the goods, but does NO MORE. In the present case, the e-commerce platforms do more than just stock and display the goods of the Plaintiffs, under their trademarks. They change the warranties/guarantees of the products; the

return policy of the products are different, and the unique codes, which enable Amway to trace their products, which are also tampered with. Further, as can be seen from the report of the Local Commissioner, Amazon undertakes the removal of the codes, and re-packages the products, attaches its bar codes, dispatches the goods, and undertakes customer service as well. It cannot be said that Amazon is merely stocking, displaying and reselling Amway products. Moreover, it is not even clear as to whether the products are the Plaintiffs' products or not as there is not source connection that Amazon is able to show. Thus, the above judgment also does not come to the aid of Amazon.

269. In *Consumer Distributing Company v. Seiko Time Canada Ltd (1984)1 R.C.S.*, the Canadian Supreme Court held that Seiko watches which are genuine could be sold in Canada even if they are not supported by international guarantees. So long as the same were genuine products, the doctrine of passing off would not be attracted. The Supreme Court observes as under:

“ ...

Any expansion of the common law principles to curtail the freedom to compete in the open market should be cautiously approached. This must be the path of prudence in this age of the active legislative branch where the community's trade policies are under almost continuous review. This by no means calls for judicial abdication of the role of adjusting the common law principles relating to proper trade practices to the ever-changing characteristics and techniques of commerce.”

270. From the above extract, it is clear that if proper trade practices are not adopted, common law principles need to be adjusted, to mould in the ever-

changing circumstances and techniques of commerce. While there is no doubt that a genuine, untampered product could be sold by a seller in the market if there is no impairment and the conditions of the product are not changed, the Court cannot condone misuse of a mark, dilution of a mark, tarnishment of a mark and impairment of a product in the manner as has been narrated hereinabove.

271. In stark contrast to the above case laws, recently, the US Court of Appeals for the third circuit in ***Heather R. Oberdorf & Anr. v. Amazon.com Inc*** [Case no. 18-1041 decided on 3rd July, 2019] has taken a completely divergent view as to the liability of Amazon under the product liability laws of the State of Pennsylvania. In the judgment dated 3rd July, 2019, the Court has considered the role of Amazon in effecting sales and third-party vendor's products. After discussing the role of Amazon in a case of sale of a dog collar which caused damage to the Plaintiff's eye, the Court has held that Amazon would be treated as a seller under the said laws. The Court also observed that the third party vendor is, in fact, untraceable both to the Plaintiff and Amazon in the said case. The Court held that Amazon exerts "*substantial market control over product sales*". In view thereof, the Court has also held that the safe harbour provision under the Communications Decency Act, 1996, ('CDA') does not extend to Amazon. The observations of the Court are -

"Amazon Marketplace

Amazon is the world's most valuable retail company. Its website is an online marketplace where Amazon retails its own products as well as those of more than one million third-party vendors. These third-party vendors decide which products to sell, the means of shipping, and product pricing. For its part,

Amazon lists the products on the Amazon Marketplace, collects order information from consumers, and processes payment. In exchange for these services, Amazon collects fees from each third-party vendor.

In order to use Amazon's services, a third-party vendor must assent to Amazon's Services Business Solutions Agreement. This Agreement governs every step of the sales process.

Once a third-party vendor has assented to the Agreement, the vendor chooses which product or products it would like to sell using Amazon's website. This choice is, with some notable exceptions, left to the discretion of the vendor. Among the exceptions are products that Amazon determines are illegal, sexually explicit, defamatory, or obscene.

When the third-party vendor has chosen a product that it wants to offer on Amazon's website, the vendor provides Amazon with a description of the product, including its brand, model, dimensions, and weight. Pursuant to the Agreement, the vendor must also provide Amazon with digital images of the product, as well as other information such as shipping and handling options, product availability, in-stock status, and any other information reasonably requested by Amazon.

Based on this information, Amazon formats the product's listing on its website. This function, too, is provided for in the Agreement, by which Amazon retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them. In fact, the Agreement grants Amazon a royalty-free, non-exclusive, worldwide, perpetual, irrevocable right and license to commercially or non-commercially exploit in any manner, the information provided by third-party vendors.

The third-party vendor can then choose which, if

any, of Amazon's other services it will use in conjunction with listing its product on Amazon's website. For example, Amazon offers "Amazon Clicks," an advertising service in which Amazon highlights and promotes the vendor's product to customers. Amazon also offers a "Fulfillment by Amazon" service, in which it takes physical possession of third-party vendors' products and ships those products to consumers. Otherwise, the vendor itself is responsible for shipping products directly to consumers.

The listed price for the product is chosen by the third-party vendor, subject to one exception: Vendors may not charge more on Amazon than they charge in other sales channels. Nor, according to the Agreement, may third-party vendors offer inferior customer service or provide lower quality information about products than in other sales channels. To the extent that third-party vendors need to communicate with customers regarding their orders on Amazon, they must do so through the Amazon platform.

With these preliminaries completed, Amazon lists the product online and sales begin. As customers make purchases on Amazon's website, Amazon collects payment and delivers order information to the third-party vendor. At checkout, the customer can choose any shipping method offered by the third-party vendor, and any promises made by the vendor with respect to shipping date must be met. Amazon ensures compliance with this obligation by requiring the vendor to send Amazon shipping information for each order. In addition, vendors have a powerful interest in providing quality products and ensuring timely delivery, as Amazon allows shoppers to publicly rate the vendors and their products.

In exchange for its role in the transaction, Amazon collects two types of fees: one is a commission, typically between seven and fifteen percent of the

overall sales price; the other is either a per-item or monthly fee, depending on the third-party vendor's preference. At least once every two weeks, Amazon remits all sales proceeds, minus fees, to the vendor. Pursuant to the Agreement, Amazon is classified as the third-party vendor's "agent for purposes of processing payments, refunds, and adjustments ... receiving and holding Sales Proceeds on your behalf, remitting Sales Proceeds to Your Bank Account, charging your Credit Card, and paying Amazon and its Affiliates amounts you owe"

Throughout each step of the sales process, Amazon may at any time cease providing any or all of the Services at its sole discretion and without notice, including suspending, prohibiting, or removing any listing. Amazon also retains other important privileges. For example, Amazon can require vendors to stop or cancel orders of any product. If Amazon determines that a vendor's actions or performance may result in risks to Amazon or third parties, it may in its sole discretion withhold any payments to the vendor. Furthermore, Amazon requires that its vendors release it and agree to indemnify, defend, and hold it harmless against any claim, loss, damage, settlement, cost, expense, or other liability.

.....
Neither Amazon nor Oberderf has been able to locate a representative of The Furry Gang, which has not had an active account on Amazon.com since May 2016.

.....
..... However, Amazon fails to account for the fact that under the Agreement, third-party vendors can communicate with the customer only through Amazon. This enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. There are numerous cases in which neither Amazon nor the party injured by a defective

product, sold by Amazon.com, were able to locate the product's third-party vendor or manufacturer.

In this case, Amazon's Vice President of Marketing Business admitted that Amazon generally takes no precautions to ensure that third-party vendors are in good standing under the laws of the country in which their business is registered. In addition, Amazon had no vetting process in place to ensure, for example, that third-party vendors were amenable to legal process.

.....
Although Amazon does not have direct influence over the design and manufacture of third-party products, Amazon exerts substantial control over third-party vendors. Third party vendors have signed on to Amazon's Agreement, which grants Amazon "the right in [its] sole discretion to . . . suspend[], prohibit[], or remov[e] any [product] listing," "withhold any payments" to third-party vendors, "impose transaction limits," and "terminate or suspend . . . any Service [to a third-party-vendor] for any reason at any time." Therefore, Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so.

.....
Moreover, Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation. Amazon's website, which Amazon in its sole discretion has the right to manage, serves as the public-facing forum for products listed by third-party vendors. In its contract with third-party vendors, Amazon already retains the ability to collect customer feedback: "We may use mechanisms that rate, or allow shoppers to rate, Your Products and your performance as a seller and Amazon may make these ratings and feedback publicly available." Third-party vendors, on the other hand, are ill-equipped to fulfill this function, because

Amazon specifically curtails the channels that third-party vendors may use to communicate with customers: “[Y]ou may only use tools and methods that we designate to communicate with Amazon site users regarding Your Transactions”

.....
.....Amazon claims that it cannot be considered a “seller” because it does not take title to or possession of the products sold by third-party vendors. The court held in Hoffman that under Pennsylvania law a participant in the sales process can be held strictly liable for injuries resulting from defective products, even if the participant does not take title or possession of those products.

.....
.....Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers. Amazon’s involvement, in other words, resembles but also exceeds that of the sales agent labeled a “seller” in Hoffman.

.....
..... It is of little consequence whether Amazon is a “seller” for purposes of other states’ statutes, as each of those statutory schemes is based on distinct language and policy considerations.

.....
The CDA states, in relevant part, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

.....
For the above reasons, we hold that (1) Amazon is a “seller” for purposes of § 402A of the Second Restatement of Torts and thus subject to the Pennsylvania strict products liability law, and (2)

Oberdorf's claims against Amazon are not barred by § 230 of the CDA except as they rely upon a "failure to warn" theory of liability."

272. The above recent judgment of the US court of appeals shows that the court considers the role of Amazon as being much more than just of a intermediary. It not only plays an active role in the sales process, but also has substantial monetary stake in the same. The above case law shows that the jurisprudence on the standing of e-commerce platforms depends on the fact situations and varying views are being expressed by different courts, at this stage.

European position

273. The position in Europe however appears to be slightly different. Article 7 of the EC Directive 89/104/EEC dated 21st December, 1988 which is similar to Section 30 of our Act, reads as under:

"1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market."

274. In ***Copad SA (supra)***, the European Court of Justice held that sale of Dior branded products to discount stores outside the selective distribution network set up by Dior is likely to damage the reputation of the mark. The Court has then observed as under:

"47 Even though it follows that, in such circumstances, the proprietor of the trade mark cannot

plead that the contract was wrongly implemented in order to invoke, in respect of the licensee, the rights conferred on him by the trade mark, the fact remains that, contrary to Copad's submission, the licence agreement does not constitute the absolute and unconditional consent of the proprietor of the trade mark to the licensee putting the goods bearing the trade mark on the market.

...

52 *By its third question, the referring court asks whether, where a licensee who puts luxury goods on the market in contravention of a clause in a licence agreement is deemed to have done so with the consent of the proprietor of the mark, that proprietor can nevertheless rely on that clause to oppose further commercialisation of the goods, on the basis of Article 7(2) of the Directive.*

53 *Dior and the French Government submit that the sale of goods bearing the Christian Dior mark to a discount store outside the exclusive distribution network constitutes damage to the reputation of the mark that justifies the application of Article 7(2) of the Directive. Copad and the Commission, by contrast, submit that the sale of such goods to discount stores does not damage the reputation of the trade mark.*

54 *In this respect, it must first be recalled that, according to the settled case-law of the Court referred to in paragraph 19 of the present judgment, use of the adverb 'especially' in paragraph 2 of Article 7 of the Directive indicates that alteration or impairment of the condition of marked goods is given only as an example of what may constitute legitimate reasons (Bristol-Myers Squibb and Others, paragraphs 26 and 39, and Parfums Christian Dior, paragraph 42).*

55 *Accordingly, the Court has already held that damage done to the reputation of a trade mark may, in principle, be a legitimate reason, within the meaning of Article 7(2) of the Directive, allowing the proprietor of*

the mark to oppose further commercialisation of luxury goods which have been put on the market in the EEA by him or with his consent (see Parfums Christian Dior, paragraph 43, and Case C-63/97 BMW [1999] ECR I-905, paragraph 49).

56 It follows that where a licensee sells goods to a discount store in contravention of a provision in the licence agreement, such as the one at issue in the main proceedings, a balance must be struck between, on the one hand, the legitimate interest of the proprietor of the trade mark covered by the licence agreement in being protected against a discount store which does not form part of the selective distribution network using that trade mark for commercial purposes in a manner which could damage the reputation of that trade mark and, on the other hand, the discount store's legitimate interest in being able to resell the goods in question by using methods which are customary in its sector of trade (see, by analogy, Parfums Christian Dior, paragraph 44).

57 Therefore, should the national court find that sale by the licensee to a third party is unlikely to undermine the quality of the luxury goods bearing the trade mark, so that it must be considered that they were put on the market with the consent of the proprietor of the trade mark, it will be for that court to assess, taking into account the particular circumstances of each case, whether further commercialisation of the luxury goods bearing the trade mark by the third party, using methods which are customary in its sector of trade, damages the reputation of that trade mark.

58 In this respect, it is necessary to take into consideration, in particular, the parties to whom the goods are resold and, as the French Government submits, the specific circumstances in which the luxury goods are put on the market.

59 In the light of the foregoing, the answer to the

third question is that, where a licensee puts luxury goods on the market in contravention of a provision in the licence agreement, but must nevertheless be considered to have done so with the consent of the proprietor of the trade mark, the proprietor of the trade mark can rely on such a provision to oppose a resale of those goods on the basis of Article 7(2) of the Directive only if it can be established that, taking into account the particular circumstances of the case, such resale damages the reputation of the trade mark.”

Thus, in Europe, it was held if the sale damages the reputation of the trade mark, then the trade mark owner could oppose sale of the same.

275. Recently, a Court in Milan, in *Landoll S.r.l. v. MECS S.R.L. [G.R. No. 44211/2018 decided on 18th December, 2018]* held that in the case of luxury articles with justifies adoption of a system of selective distribution, the trademark owner could prevent sales on e-commerce platforms. The relevant extract of the said judgment is extracted herein below:

“4. If therefore the distribution system set up by LANDOLL S.r.l. appears absolutely legit, it has now to be evaluated if the reference to that system can be considered appropriate to exclude the application of the principle of Community exhaustion, as per art. 5, paragraph 1, Italian penal code, since it includes legitimate reasons which can justify the opposition of the trademark owner to a further marketing of the products in question, as per paragraph 2 of the same disposition.

The case-law of the Community Courts (Court of Justice EU, sentence 23.4.2009, case C-59/08) confirmed that the existence of a selective distribution network can be re-included among the “legitimate reasons” standing against the exhaustion, provided that the product marketed is a luxury article or of prestige which justifies the choice of adopting a system

of selective distribution and that exists an effective prejudice to the luxury and prestigious image of the brand as result of its being marketed by third parties extraneous to the selective distribution network in question.

Consequently, in presence of the above mentioned conditions, the trademark's owner can oppose, with the action of counterfeiting, the resale of his products by parties who don't belong to his network of selective distribution, even though the same parties purchased the articles from licensors or authorized dealers.

In this specific case, to the already detected legitimacy of the selective distribution system which characterizes the distribution of products bearing NASHI and NASHI ARGAN trademarks, it can be added the evaluation of the existence of an effective prejudice to the image of luxury and prestige of the same, which emerges from the scrutiny of the modality of displaying and showcasing the products to public adopted by MECS s.r.l. both on his e-commerce platform (see doc. from 16 to 19 fasc. ric.) and on his website (doc 21 fasc. ric.), that demonstrate, because of the manner they are showcased, the complete assimilation to any other generic product of the same sector, even of lower quality. To that, we can add that the defendant doesn't provide for any warranty regarding the professional usage of these products.

Therefore, it has to be confirmed that the sales offer of these products by the defendant has not been executed as per the above mentioned modalities, since they didn't put in action in the specific the principle of exhaustion of the rights of the trademark's owner after their first introduction into the market, and consequently that conduct integrates the violation of the appellant's rights on his own trademarks, as per art. 20, lett. A), of Italian Penal Code. (Emphasis added"

276. The Court of Milan, again in *L’Oreal Italia SPA v. IDS International Drugstore Italia SPA* [G.R. No.38739/2018 decided on 19th November, 2018], held as under:

“According to Regulation UE 330/2010, selective distribution system means a distribution network where the supplier commits himself to sell the goods or services specified in the agreement, directly or indirectly, only to distributors who have been selected on the base of specified criteria and where these distributors commit themselves to not sell these goods or services to resellers not authorized to operate within the territory supplier has allocated to this system. In this regard, the case law of the Court of Justice (see CGUE sentence of 6th December 2017, case C-230/16). Clarified that article 101 TFUF has to be interpreted in the sense that a selective distribution network of luxury products mainly designed to safeguard the luxury image of these products complies with the above mentioned provision, provided that the choice of resellers happens under objective criteria of a qualitative nature, established indistinctly for all the potential resellers and applied in a non-discriminatory manner, and that those criteria don’t go beyond what is needed.

... ..
At this regard, it is observed that, on the basis of what emerges from the photos produced by the plaintiff and not contested by the counterpart (among them, see in particular doc. 46), it is possible to affirm that lillapois sales points don’t look suitable to safeguard the image and luxury aura of the products in question; their appearance is of sales points resembling a discount, with neglected fittings within scarcely lit spaces, with shelves and racks too close to each other showcasing to public products of different nature, from detergents to toilet paper, from articles for personal hygiene to kitchen articles, sometimes just placed on the floor, as

*in the case of Lillapois sales point in Bareggio.
The adopted modalities of offer and sale seem to be in contrast with the qualitative standards that L'Oreal's authorized distributors are requested to follow, and they have to be considered harmful to the prestige of the brand itself, a requisite requested by the case-law of the Community Court to consent to the owner to inhibit an additional sale by an unauthorized reseller (Court of Justice, C-3377795, Case Dior against Evora, 4.11.1997)."*

B. Indian position on liability of e-commerce platforms & exhaustion/first sale doctrine

277. A perusal of Section 29 shows that while it is perfectly permissible for the seller of a product to use a trademark to signify the source of the products - if the products are genuine, it cannot at the same time, indulge in any conduct which would result in taking unfair advantage of the distinctive character of the mark. Further, if the use by the seller is detrimental to the reputation of the mark, the mark is stated to be infringed. Use of a mark in meta-tags or in advertising without the consent of the proprietor is also violative of trademark rights of the owner. Section 29(6) is categorical that if a person uses a mark or affixes the mark on the packaging, puts the product in the market or stocks them or offers them for sale or even uses the mark in advertising, it would constitute infringement. To be able to use the mark for purposes such as packaging, offering for sale, selling, use in advertising, etc., consent of the proprietor would be required.

278. Section 29(8) also makes it clear that if any advertising of a mark takes unfair advantage of the mark or is detrimental to its distinctive character even without a sale taking place, there is infringement. While Section 30(3) could come to the aid of a person who wishes to sell the goods

in the market or otherwise deal in them, if the products are genuine, the same does not mean that there can be unhindered and unbridled use of the mark in the form of affixation on the packaging, exposing the products for sale, offering the goods for sale, using in advertising, especially when there is a grave apprehension that the products are being impaired and their condition is being changed. Thus, changes in warranties, refund/return policies, changes in packaging, removal of codes of the products, and any other conduct that causes damage to the reputation of the mark and is likely to undermine the quality of the mark would constitute '*impairment*'.

279. Even if it is presumed that the responsibility of the products being sold on the platforms are that of the seller, there can still be no justification for use of the trade marks by the platforms in their advertising, promotion, sale offers and in the meta-tags, so that the product listings on the platforms are thrown up on search results. In fact, illustratively, in the FBA program, the sale itself being consummated by Amazon on behalf of the sellers, the responsibility cannot, thus, be washed away as the website and the platform is purely under the control of Amazon and is managed by it. Similar is the case with the other platforms that provide warehousing, transport and other logistical facilities. In order to be able to use the Plaintiffs' marks, for the purpose of advertising, promotion and to depict the Plaintiffs as the source of the products, on the websites, the products have to be genuine, untampered and consent would be required. In the absence of the same, there is clear infringement of the Plaintiffs' trademarks and the doctrine of exhaustion does not come to the aid of the Defendants. The use of the Plaintiffs' marks clearly constitutes 'USE' under Section 2 (2)(c) of the TM Act, 1999 which is the reason why the platforms obtain licenses for the

marks from the sellers and warranties that they are authorised and that the products are genuine. These licences are themselves FAKE because the so-called licensors are not the owners of the marks nor do they have any permission to licence the marks. What is not owned cannot be licensed. Sellers have no rights if owners have not given consent.

280. Considering the manner in which the Plaintiffs have conducted their businesses, through direct selling and through a controlled distribution channel and network, the sale on e-commerce platforms by itself could result in impairment of the Plaintiffs' mark/ business and hence be treated as an exception to the principle of exhaustion. The sale on e-commerce platforms of the Plaintiffs' products would be infringement of the Plaintiffs' trademark rights as the Defendants are also using the Plaintiffs' trademarks, their trade names for promotion of the products, sale of products, display of products, and advertising of the products in a manner that is detrimental to the distinctive character and reputation of the Plaintiffs' marks. The platforms are also indulging in conduct falling under Section 29(6) of the Trade Marks Act as they are affixing the marks on the products, packaging the same and putting the same in the market for sale. Amazon is specifically using the Plaintiffs' mark Amway in advertising, without actual knowledge that the said products being sold on its platform are genuine or not and whether they are tampered with or not.

281. None of the sellers have been able to show any consent given by the Plaintiffs for sale of the products on the platforms. The sellers are in fact going out of the way to hide their identity. The manner in which the Plaintiffs' products are portrayed on the websites also constitutes misrepresentation. Removal of the codes is also taking place in warehouses

controlled by Amazon and the other platforms.

282. It has been vehemently contended that the present suit is not based on violation of trademark rights. While it may be true that the complaints are not structured like a traditional trademark complaint would be, the same does not mean that the Plaintiffs do not complain of violations of trademark rights. A perusal of for example, paragraphs 32, 34, 38, 39, 40, 48, 49 in CS(OS) 480/2018, with similar averments being made in the other suits, shows that one of the legal basis for seeking an injunction against sale of products by the sellers and on the e-commerce platforms is that the trademark rights of the Plaintiffs are being severely impaired, Plaintiffs' marks are being misused and the reputation is being tarnished/diluted. The allegations in the complaint are clearly based on provisions akin to misrepresentation in the context of passing off and dilution, as also violation of trademark rights as stipulated and protected under Section 29 of the Trade Marks Act, 1999. Moreover, the defence of Section 30 has been set up by the Defendants only because they are aware that if the said defence fails, the use of the Plaintiffs' marks results in infringement.

283. Further, a perusal of Section 30 of the Trade Marks Act shows that in order for the defence under it to succeed, the persons who have lawfully acquired the goods should be identifiable. The platforms and/or their sellers should be persons claiming "*under or through*" such identifiable persons. Further, the conditions of the goods ought not to be changed or impaired with after the Plaintiffs have put the goods in the market.

284. Kerly's Law of Trade Marks³, while dealing with exhaustion of trade

³ Kerly's Law of Trade Marks and Trade Names by James Mellor, QC, David Llewelyn, Thomas Moody-Stuart. David Keeling, Iona Berkely, 15th Edn., 2011, Sweet and Maxwell, §16-079.

mark rights in fact opines on the basis of case law that the term “*put on the market*” in effect means “*released into the market by an act of sale*”. However, the same has various subtleties. The term “*put on the market*” cannot be read literally – it would depend on which “*market – Wholesale or Retail etc.,*” The commentary also quotes from the ECJ’s observation in ***Peak Holding AB v. Axolin-Elinor AB***⁴ which held that “*A sale which allows the trade mark proprietor to realise the economic value of his trade mark exhausts the exclusive rights conferred.....*”

285. Broadly, applying these principles, presuming the goods are genuine, the Plaintiffs have only ‘put the goods in a market’ which is niche i.e. Direct Selling market, subject to conditions. The ‘economic value’ would only be realised if the products are sold in the manner that they are meant to be sold. Sale on the e-commerce platforms in the manner sought to be done in the present cases is clearly leading to erosion of the economic value of their trade marks. In none of these cases is there any person who has been shown as the lawful acquirer of the products and seller of the Plaintiffs’ products without tampering and with consent from the trade mark owner, for sale on e-commerce platforms. Neither of the platforms, nor any of the sellers can claim rights through the said identified persons. Lawful acquisition of the goods has, therefore, not been established at the *prima facie* stage. In fact, the Local Commissioner’s reports show that the source of the products is highly nebulous and hazy. There are no documents on record to support lawful acquisition of these products.

286. Moreover, a perusal of the product listings and the manner in which the expressions ‘by Amway, ‘by Oriflame’, ‘by Modicare’ and the full name

⁴ *Peak Holding AB v. Axolin-Elinor AB (C-16/03) [2005] E.T.M.R. 28*

of the Plaintiffs, use of the logo, name of manufacturer etc., are used on the landing pages also show that the first impression that a consumer gets is that these products are being offered for sale by the Plaintiffs. A consumer cannot be expected to be so discerning so as to look at the fine print, to decipher that the sale of a product of the Plaintiffs is not by an authorized seller but by a third party who may or may not be authorized. When a consumer is expected to look at the product listing in such depth, that by itself constitutes misrepresentation as to the source of the products. The entire purpose of a trademark is that it signifies a specific source and if the source of the product is itself being either obliterated or even being hazed in any manner, the same would be deceitful and result in confusion for the customer. In order to constitute violation of trademark rights even ‘*initial interest confusion*’ is sufficient – even if a sale is not consummated. This is clear from the judgment of the Division Bench in ***Baker Hughes Ltd. v. Hiroo Khushalani (1998) 74 DLT 715*** where the Court held as under:

“54. I have given my anxious consideration to the submissions of the learned counsel for the defendants on this aspect of the matter. There can be an informed class of purchasers who have a degree of knowledge and a sense of discrimination more substantial than that of an ordinary purchaser, but the mere fact that the customers are sophisticated, knowledgeable and discriminating does not rule out the element of confusion if the trade marks/trade names/corporate names of two companies are identical or if the similarity between them is profound. In several cases it has been held that initial confusion is likely to arise even amongst sophisticated and knowledgeable purchasers under a mistaken belief that the two companies using the same corporate name, trading name or style are inter-related. It is the awakened

consumers who are more aware of the modern business trends such as trade mark licensing, mergers, franchising, etc. It is this class of buyers who are likely to think that there is some sort of association between the products of two different companies when they come across common or similar trade names or corporate names or trading styles used by them. The sophistication of a buyer is no gurantee against likely confusion. In some case, however, it is also possible that such a purchaser after having been misled into an initial interest in a product manufactured by an imitator discovers his folly, but this initial interest being based on confusion and deception can give rise to a cause of action for the tort of passing off as the purchaser has been made to think that there is some connection or nexus between the products and business of two disparate companies.”

287. On a totality of the facts, it is held that use of the mark by the sellers and by the platforms is violative of the Plaintiffs’ trademark rights and the Defendants’ are not entitled to the defence under Section 30. The manner of sale on the e-commerce platforms also constitutes passing off, misrepresentation and dilution/tarnishment of the Plaintiffs’ marks, products and businesses.

F3. Question (iii) - Whether the e-commerce platforms are “intermediaries” and are entitled to the protection of the safe harbour provision under Section 79 of the Information Technology Act and the Intermediary Guidelines of 2011?

288. The question that arises under this head is as to whether the e-commerce platforms are entitled to the protection of safe harbour under Section 79 of the IT Act as intermediaries. Section 79 of the IT Act reads as under:

“INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

79. *Exemption from liability of intermediary in certain cases.-*

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression “third party information” means any

information dealt with by an intermediary in his capacity as an intermediary.”

289. The concept of an intermediary, as the expression itself denotes, means a person or an entity, which is in between two other persons. An online market place or an e-commerce platform would be an intermediary, if it is in between the buyer and the seller, such as:

Seller ↔ Intermediary ↔ Buyer

290. The buyer and the seller have to be identifiable persons. The intermediary ought to be acting as a bridge between the said two persons, i.e. a passive platform, which merely brings them together. In the case of passive platforms such as auction websites where the users upload their wares to sell the same, or the users upload their photographs for being viewed, the platform plays no role. The issue, however, becomes more complex in the case of an online marketplace or an e-commerce platform which are not merely passive players but in fact are massive facilitators. Platforms provide warehousing, logistical support, packaging, delivery services, payment services, collection gateways etc., Specifically, in the case of Amazon, it admittedly provides the seller (*if there is one*), A to Z services, such as:

- (a) Assisting in creating listing of the products;
- (b) Assisting in photographing the products, in all its views and dimensions.
- (c) Assisting in cataloguing the products;
- (d) Accepting the products in its warehouse in the case of Amazon's FBA services;
- (e) Providing a warehouse to those sellers, who need one.

- (f) Adding bar codes on the products and stacking them product wise and not seller wise.
- (g) Repackaging the products with Amazon packing.
- (h) Providing transport for the sellers to send products to Amazon's warehouse;
- (i) Providing assistance to the sellers in managing bookings from seller's location through Amazon's Seller Flex.
- (j) Assisting in creating a payment portal;
- (k) Subjecting the products to refund/return policies of Amazon;
- (l) Changing the warranties of the products;
- (m) Advertising the products in Amazon advertisements.
- (n) Providing special discounts and benefits for select customers subscribing to their prime feature;
- (o) By using the brands of the manufacturer in meta tags so that the Amazon website listing shows up on top on search engines.
- (p) Preparing the product for delivery;
- (q) Delivering the product;
- (r) Accepting cash upon delivery;
- (s) Retaining service charges/fees as per their tariff charts;
- (t) Transmitting the balance to sellers;
- (u) Charging for various additional services being offered, such as logistics, packing, transportation etc.
- (v) Allowing its affiliates Cloudtail and Prione to use its warehouses;
- (w) Having common/overlapping employees with its sellers such as Cloudtail and Prione as is evident from the visiting cards of employees at the Amazon warehouse;

291. Ld. counsels for the platforms submit that providing these services does not take the platform outside the ambit of an intermediary, as, in terms of the FDI Press Note No.2 of 2018, issued by Government of India in respect of FDI in e-commerce, e-commerce entities could provide business to business (B2B) services. Paragraph 5.2.15.2.2 defines e-commerce. It distinguishes between an inventory-based model of e-commerce and a marketplace-based model of e-commerce. The definitions clause of the said policy is relevant and is extracted below:

“5.2.15.2.2 Definitions:

i) E-commerce- E-commerce means buying and selling of goods and services including digital products over digital and electronic network.

ii) E-commerce entity- E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under Section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

iii) Inventory based model of e-commerce- Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

iv) Marketplace based model of e-commerce- Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller.”

292. It is claimed that the platforms are involved in a marketplace-based model and are entitled to act as facilitators. Thus, the platforms could continue availing the safe harbour provisions despite providing these

facilities. Under the said policy, other terms that are stipulated, are as under:

“ii) Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.

iii) E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.

.....
x) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm’s length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfillment, logistics, warehousing, advertisement/marketing, payment, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.”

293. Inssofar as Section 79 of the IT Act is concerned, the provision itself as contended by the Plaintiffs would not merely be a defence, but would also create enforceable rights for parties, who are affected by non-compliance of the provisions by intermediaries. If intermediaries have to be exempt from liability, they ought to satisfy the conditions contained in Section 79(2) and should not fall foul of Section 79(3) of the IT Act.

294. The scheme of Section 79 of the IT Act is clear. In order for a party/

platform to be entitled to the exemption from liability, the said party must merely be hosting/listing third party information/data or providing a communication link only. The said third party has to be clearly identifiable on the platform. The exemption would not apply if the role of the intermediary is not limited for providing access to a communication system. The exemption would also apply only if the intermediary is not involved in initiation of the transmission, selecting the receiver of the transmission, and does not modify the information. In the context of e-commerce, the role of the marketplace, which provides the services enumerated above, would, therefore, have to be understood in this context.

295. The FDI Press Note 2 of 2018, which permits facilitation by e-commerce marketplaces, would require to be considered once the actual role of these intermediaries is established. At this stage, there is *prima facie* evidence to show that the role of the platforms is not completely passive. In ***Christian Louboutin SAS v. Nakul Bajaj & Ors. 2018 (76) PTC 508 (Del)*** this Court has held on the interpretation of Section 79 of the IT Act as under:

“66. An analysis of the said Section shows that an intermediary is not liable for third party information, data, links hosted on the platforms. However, Section 79(2) and 79(3), qualify the manner in which the said protection is granted to intermediary. The protection is not absolute. Under Section 79(2)(b) the intermediary should not

- initiate the transmission,*
- select the receiver of the transmission and*
- select or modify the information contained in the transmission.*

67. If any of the above is done by the intermediary, it may lose the exemption to which it is entitled. It extends under the circumstances contained in the

provision itself which are:

a) Under 79(2)(a), if mere access is provided through the communication system to the third party or if there is temporary storage or hosting of the information;

b) Under 79(2)(b)(i), if the platform is not responsible for initiating the transmission, i.e., placing the listing on the website;

c) Under 79(2)(b)(ii), if the platform is not involved in selecting the persons who receive the information;

d) Under 79(2)(b)(iii), if the platform does not have the power to select or modify the information;

e) Under 79(2)(c), the platform has the obligation to observe overarching due diligence.

68. Section 79(1) is also qualified by sub-Section 79(3). The exemption under Section 79(1) would not apply if a platform is an active participant or is contributing in the commission of the unlawful act. The words conspired, abetted, aided or induced have to be tested on the basis of the manner in which the business of the platform is conducted and not on a mere claim by the platform. Section 79(3) has two dimensions i.e., Section 79(3)(a) and Section 79(3)(b). The latter relates to having a policy to take down information or data or link upon receiving information. However, the former is an integral part of the exemption granted under Section 79(1). Section 79(3)(a) limits the exemption only to those intermediaries i.e. platforms and online market places who do not aid or abet or induce the unlawful act. Any active contribution by the platform or online market place completely removes the ring of protection or exemption which exists for intermediaries under Section 79.”

296. The provisions of Section 79(2)(c) of the IT Act, therefore, gain importance. As per this Section, due diligence would have to be observed by the intermediaries in terms of setting up proper policies for IPR protection and for taking down of objectionable content in terms of the Intermediary

Guidelines, 2011. Any information, which infringes patent, trademark, copyright or other proprietary rights, would be required to be taken down as per the due diligence provisions of the Intermediary Guidelines, 2011. The relevant portion of the Intermediary Guidelines, 2011 are set out below.

*“3. **Due diligence to be observed by intermediary** — The intermediary shall observe following due diligence while discharging his duties, namely : —*

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that —

a).....

b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

c).....

d) infringes any patent, trademark, copyright or other proprietary rights; (e) violates any law for the time being in force;

e) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

f) impersonate another person;”

297. From the above, it is clear that if any content on the marketplace

violates trademark or other proprietary rights, the same would have to be taken down upon receiving notice. As per the Intermediary Guidelines, 2011, the marketplaces have to publish the rules and regulations and policies and they are bound to implement the same. The policies of the various platforms, as discussed in the previous section themselves require the sellers to be 'authorised' and require warranties from the sellers that the goods are genuine. They also take a trade mark licence to use the marks on their respective platforms. The Policies have to more than mere 'Paper policies'. They have to be implemented in right earnest. All the policies require the sellers to be authorised and not to be infringing any IP rights.

298. This Court has held above that the use of the Plaintiffs' marks and the sale of the products without the consent of the Plaintiffs is violative of the Plaintiffs' trademark rights and results in passing off and misrepresentation and dilution. The sale of the Plaintiffs' products, also violates the Direct Selling Guidelines, which are valid and binding.

299. The judgement of the Supreme Court in *Shreya Singhal (supra)* also expects compliance from intermediaries and has held in respect of due diligence as under:

“121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the

Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

.....

122. *Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).*

.....

124. *In conclusion, we may summarise what has been held by us above:*

.....

124.3. *Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly,*

the Information Technology “Intermediary Guidelines” Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.”

300. In *Myspace Inc. (supra)* the website, upon being issued a notice to take down the infringing content, immediately took down the said content and had also placed a copyright filter in order to prevent further infringement. Further, the MySpace platform had installed a notice and take down procedure which provided for a copyright owner to send a notice to the platform for taking down the content. Apart from the said procedure, three safeguard tools had also been installed on the MySpace platform including Hash Block Filter, Take Down Stay Down and Rights Management Tool. Under such circumstances, the Ld. Division Bench had held that My Space was entitled to the safe harbour under Section 79 of the IT Act and had passed the following directions:

77. To summarize the conclusions, it is held as follows:-

(a) Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. Accordingly, it is held that proviso to Section 81 does not preclude the affirmative defence of safe harbor for an intermediary in case of copyright actions.

(b) Section 51(a)(ii), in the case of internet intermediaries contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled.

(c) In case of Internet intermediaries, interim relief has to be specific and must point to the actual content, which is being infringed.

78. In light of the above discussion impugned

order of the learned Single Judge is set aside and is substituted with the following relief:

(i) The plaintiff Super Cassettes shall provide an updated catalogue of "specific" works in which it holds copyright along with the location/ URL of such work on the appellant Myspace"s website to the appellant as and when SCIL detects infringement.

(ii) On receiving such notice from the plaintiff SCIL, the appellant/MySpace shall within 36 hours remove/ block access to such content, in accordance with Rule 3 (4) of the Intermediary Guidelines Rules of 2011.

(iii) MySpace shall also keep an account of all such content removed pursuant to such requests as well as other details such as the number of viewings (wherever mechanisms exist to track such action) of such content, till it is removed, the advertisement revenue earned from it (proportionately) etc. to enable calculation of damages, at the trial stage"

301. In order for the platforms to be entitled to get safe harbour as per the *Myspace Inc. (supra)* case, they have to observe strict adherence to their own *Excluded Products' List, Prohibited Content* policy and the *Intellectual Property Violations* policy, without which they would be running foul of Section 79 of the IT Act, read with the Intermediary Guidelines, 2011.

302. Ld. Counsels for the Defendants have also placed heavy reliance on a recent judgment a Ld. Single Judge of this Court in *Kent RO SJ (supra)*, whereby, in a matter involving design infringement by the e-commerce platform, eBay, it was argued by the Plaintiff, that measures should be taken by eBay to regulate uploading of content on its website, and affirmative action should be taken to curb infringement on its platform. The Ld. Single

Judge, had held that eBay is entitled to protection under the “*safe harbour*” provisions under the Act. The Ld. Single Judge, further, held that the Legislature never intended for intermediaries to undertake policing of their website. All that is required under the provisions of the IT Act and the Intermediary Guidelines, 2011, is for the intermediaries to declare policies that they have put in place, warning users/sellers on their website from undertaking any infringing activities. Thus, in light of the said provisions, the e-commerce platforms cannot be made liable for infringing the design of the Plaintiffs. The suit was dismissed by the Ld. Single Judge. However, the Ld. Division Bench in appeal in ***Kent RO Systems Pvt. Ltd. & Anr. v. eBay India Pvt. Ltd. [FAO(OS)(COMM) 95/2017 decided on 1st May, 2017]*** observed as under:

“5. This Court has considered the submissions. The observations made by the learned Single-though ostensibly in the course of a discussion on the application for a temporary injunction, virtually foreclosed the plaintiffs' right to prove if and how the knowledge threshold required by virtue of Section 79(3)(b) of the Information Technology Act, has been met with. Whilst the defendant eBay has a point in highlighting the distinction between the nature and bundle of rights that a copyright proprietor possesses as opposed to a design registrant and also the nature of web portal involved in MySpace (supra) and the present case, at the same time, the complete preclusion of the plaintiffs' rights to prove that eBay's conduct betrayed its knowledge of infringement should not in our opinion be foreclosed.

6. In view of our observations, this Court is of the opinion that the plaintiffs may proceed to establish in the course of the trial by way of appropriate evidence as to whether and if so how the knowledge threshold

mandated by Section 79(3)(b) was satisfied to render eBay liable as alleged by it. Of course, eBay's right to refute the plaintiffs' contentions both in law and on facts are also kept open. The appeal is partly allowed in the above terms. All rights and contentions of the parties are reserved."

303. Thus, the Division Bench placed enormous importance on the lack of knowledge of a platform which is crucial for enjoying the 'safe harbour'. In effect therefore, the Ld. Division Bench did not accept on a demurrer the contention that eBay is an intermediary and is not liable in any manner. More so, the eBay platform is considerably different from the platforms in the present cases which are e-commerce platforms and online market places. eBay is merely an auction website. Thus, the factual circumstances in ***Kent RO (supra)*** are considerably different.

304. The question as to how the platforms are providing the value-added services and whether they are performing an active role in the same, would have to be finally adjudicated at trial. However, the bare minimum that they would be required to do to avail the exemption under Section 79(2)(c), would be to observe due diligence required under Section 79(2)(c) of the IT Act.

305. Thus, in order for the platforms to continue to enjoy the status of intermediaries, subject to adjudication at trial, the due diligence requirements would have to be met and complied with, as per the Platforms' own policies, and as per the Intermediary Guidelines, 2011. Non-compliance with the Platforms' own policies would take them out of the ambit of the safe harbour.

F4. Question (iv) – Whether e-commerce platforms such as Amazon, Snapdeal, Flipkart, 1MG, and Healthkart are guilty of tortious interference with the contractual relationship of the Plaintiffs with their distributors/direct sellers?

306. A perusal of the codes of conduct followed by the Direct Selling Entities shows that they operate in a specific framework, which is also regulated by the Direct Selling Guidelines. All of them have given their undertakings to the Government to be bound by the Guidelines, which have been framed in consumer interest. It would be apt to mention, at this stage, that the Plaintiffs' businesses are extremely niche in nature and are regulated businesses selling regulated products such as cosmetics, nutritional supplements, food products etc., They are similar to regulated products such as medicines, liquor, etc.

307. These contracts/guidelines and codes of ethics etc., were all notified to the e-commerce platforms when the Plaintiffs came across their products being sold on the said platforms. In response to these notices, all the platforms took the stand that they are intermediaries and the sales are, in fact, done by the sellers on their platforms. Thus, despite being notified of the contracts and the responsibilities of the distributors including the 2016 Guidelines, none of the platforms agreed to take down the Plaintiffs' products. One of the platforms i.e., Amazon when being notified by Oriflame, pulled down Oriflame's products in 2015 but again started displaying them. Thus, the display, offering for sale, sale of the Plaintiffs' products has been a conscious act of the e-commerce platforms to not accede to the requisitions of the Plaintiff. In fact, the platforms have shifted from their neutral position of intermediaries and have defended their acts on

merits by arguing that they have Fundamental Rights that cannot be impinged. It is further submitted by them that the principles of exhaustion permit them to make sales of these products on their platforms. What is surprising is that their stand in the present cases is contrary to their own policies, as discussed above.

308. The submission of the counsels for the Plaintiffs is that the continued display of advertising and sale of their products on Amazon, and the offering of various value-added services such as *Fulfilled by Amazon*, *Amazon Choice*, *Amazon Flex*, *Easy Shipping*, *Flipkart Plus*, *Flipkart Assured*, *Featured Products IMG*, etc., in respect of the products of direct selling entities, and the fact that no further verifications or Plaintiffs' consent letters are insisted upon from the sellers, in fact, entices and induces downstream distributors/sellers, and others who purchase the products from the Plaintiffs to breach their contracts and obligations with the Plaintiffs and offer products for sale directly or indirectly on their platforms. This, according to the Plaintiffs, constitutes inducement by these platforms of breach of the Plaintiffs' contracts, with their distributors and sellers.

309. On the other hand, it is the case of the platforms that they are not directly involved in the sale of these products and it is the sellers themselves, who are displaying, offering and selling the Plaintiffs' products on its platform, as they are merely '*intermediaries*'. Even additional services being offered by the platforms, do not constitute inducement of any breach as the platforms are approached by the sellers and not the other way round.

310. The tort of inducement of breach of contract traces back its origin to the 19th century. The tort is enforced in a manner in which performance of contractual obligations are insisted upon even by third parties, who are not

privity to the contracts. Under this tort, initially malice was required to be established for imputing liability. However, as Salmond and Heuston⁵ puts it, the tort is now broad enough to include any interference with contractual relationships. The relevant extract is set out herein below:

“The tort had its origin in the action for enticing away the servant of another. In Lumley v. Gye, it was held that such an action lay even when the contract, the breach of which has been procured was not one of service in the strict sense of the term. It was, however, for some time believed that the principle so established was confined to cases where (i) the defendant’s action was malicious and (ii) the contract in question was one to render exclusive personal services for a fixed period. But now it is perfectly well established that the scope of the action is not limited in either of these ways. Indeed, the modern cases indicate that the tort has become so broad as to be better described as unlawful interference with contractual relations.”

.....
Proof of malice in the sense of spite or ill-will is unnecessary.....”

311. The interference with contractual relationships need not only be direct, but it could also be indirect interference. As held in *Aasia Industrial Technologies (supra)*, if any party procures breach of a contract, that is sufficient to constitute inducement of the breach, and make them liable under the tort. The relevant portion of the judgment of the Bombay High Court, is as under:

“16. Thus it is to be seen that the tort of inducing breach of contract, as now developed in England is that if the act of third party, either by persuasion,

⁵ *Salmond & Heuston on the Law of Torts*, R.F.V. Heuston and R.A. Buckley, 20th Edn., Universal Book Traders, page 358.

inducement or procurement results in breach of a contract, the third party would have committed an actionable interference with the contract. Again so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either if with knowledge of the contract, he does an act which if done by one of the parties to it, would have been a breach. Of this type of interference the case of G.W.K. Ltd. (supra) affords a striking example. If, instead of persuading B of unlawful action against him, A brings about the break of the contract between B and C by operating through a third party. A may still be liable to C, provided unlawful means are used. The act of the third party may be against the will of both and without the knowledge of either. It must however be with the knowledge of the contract. But the plaintiff is not obliged to prove that the defendant knew the precise terms of the contract breached; it is enough if the defendant's knowledge is sufficient to entitle the Court to say that he has knowingly or recklessly procured a breach. Proof of malice in the sense of spite or ill-will is unnecessary. It is no justification for the defendant to say that he had an honest doubt whether he was interfering with the plaintiff's contract, or that he acted without malice or in good faith. It is enough to show that the defendant did an act which must damage the plaintiff; it need not be proved that he intended to do so. It is certain that justification is capable of being a defence to this tort, but what constitutes justification is incapable of exact definition. It has been said that regard must be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure it, the relation of the person procuring it to the person who breaks the contract, and the object of the person procuring the breach..”

312. In *Balailal Mukherjee & Co. (P) Ltd. & Ors. v. Sea Traders Pvt. Ltd. & Ors.* 1990 SCC OnLine Cal 55 another case which recognised this tort, a single Judge of the Calcutta High Court, observed as under:

“13. Mr. Mukherjee appearing in support of the application relied strongly on the observations of Lord Denning in the off cited Court of Appeal decision in the case of Torquay Hotel Co. Ltd. v. Cousins reported in LR (1969) 2 Ch. Div. In that decision Lord Denning observed:

The principle of Lumley v. Gye (1853) 2 E. & B. 216 is that each of the parties to a contract has a “right to the performance” of it : and it is wrong for another to procure one of the parties to break it or not to perform it. That principle was extended a step further by Lord Macnaghten in Quinn v. Leatham(1901) AC 495, so that each of the parties has a right to have his “contractual relations” with the other duly observed. “It is,” he said at page 510. “a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.....”

After reviewing the case laws, the Court held that the conduct of one of the brothers, who was a partner in the partnership firm, to induce breach by a Japanese customer of its contract with the firm, constituted a tort and the injunction was granted.

313. In the context of the present cases, e-commerce platforms such as Amazon, Flipkart and Snapdeal, carry out substantial sales of consumer products from their platforms. They have invested heavily in logistics and creation of a large network of suppliers, third party service providers, delivery personnel and warehousing facility, logistical support, etc. The said parties ought to be conscious of the sellers, whom they permit to operate on

their platforms, and the kind of products that are being sold. They are not merely passive non-interfering platforms, but provide a large number of value-added services to the consumers and users. Upon being notified by the Plaintiffs of unauthorised sales on their platforms, they have a duty to ensure that the contractual relationships are not unnecessarily interfered with by their businesses. In the case of Amazon for example, the Intellectual Property policy, excluded products' list etc., clearly shows that there is a policy in place, that only authorised sellers can put up their products on the Amazon platform for sale, with the consent of the brand owners. The notices issued by the Plaintiffs, clearly, notified the platforms, who were offering the Plaintiffs' products, *inter alia*, as under -

- First, that the sellers did not have the consent of the Plaintiffs to sell their products on e-commerce platforms;
- Secondly, the products were also not authorised for sale on e-commerce platform;
- Thirdly, the sale was contrary to Direct Selling Guidelines;
- Fourthly, the sales were interfering with maintenance of customers' confidence in view of various other features, such as warranties, refund policies and violation of trademark rights;
- Fifthly, the representations on the Defendants' website were also misleading and causing confusion to the consumer;
- Sixthly, the action of portraying the Plaintiffs as a business affiliate, the Defendants were causing wrongful loss to the Plaintiffs;
- Seventhly, advertisements being run by Amazon with the Plaintiffs products causes confusion in the mind of the consumer;

- Eighthly, the value-added services being offered, take it out of the ambit of being called a mere intermediary.

314. Despite receiving these notices, the response of the platforms was dismissive to say the least. They merely washed their hands off of all the irregularities and illegalities that were taking place on the ground that they were intermediaries. They also did not seek to have a fruitful discussion with the Plaintiffs to ensure that the contracts of the Plaintiffs with their distributors are fulfilled and their business integrity is maintained. As one author writing on tortious interference with contracts⁶ observed -

“Tort protection against interference with contract promotes society’s interest in commercial stability in two areas not adequately protected by the existence of traditional remedies against breach. First, and most obviously, the tort may encourage the formation of some contracts by giving a promisee’s interests added protection. Second, and most importantly, the mere existence of tortious interference liability articulates society’s interest in contractual integrity, and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy. These two effects of tortious interference liability should be distinguished. In the first, society’s interest in commercial stability is closely identified with protecting the economic expectations of individual plaintiffs. In the second, society’s interest may be distinct from the interest of an individual plaintiff.

In one sense, then, tortious interference liability may provide a threshold level of anti-competitive protection, without which some contracts would not be formed. Tortious inference liability offers a prospective promisee some hope of deterring third

⁶ John Danforth , “Tortious Interference with Contract: A Reassertion of Society’s Interest in Commercial Stability and Contractual Integrity”, *Columbia Law Rev.*, Vol. 81, No.7, pp 1491.

parties who would induce a breach of the promisee's contract and cause him possibly immeasurable harm. Also, the tort promises some additional compensation for measurable damages that may arise from an induced breach; the tort opens the potentially deep pocket of the interferer and it allows a potentially larger, tort measure of recovery. These considerations would be particularly encouraging to a party contemplating the formation of a highly speculative contract.

.....
By expressing society's interest in the integrity of contract, and by making contracts marginally more reliable, the tort implicitly encourages strangers to a given contract to plan their own commercial activity by relying on the terms of that contract. Thus, the tort facilitates the ability of contracts to stabilize commercial activity - to provide economic predictability not only for the parties to a contract but also for strangers. In an interdependent, industrial economy without central planning, this attenuated effect of contracts is arguably crucial for a coordinated allocation of future resources. Thus, society's interest in the formal integrity of contract, per se, is quite distinct from any interest society may have in the most efficient allocation of the goods and services underlying a particular contract.

But by expressing society's interest in contractual integrity, the existence of tortious interference liability may deter some contract breaches and, most importantly, may encourage strangers to rely on the contracts of others. In a highly interdependent market economy, where contractual expectations intertwine and generate new expectations and where future planning requires anticipating the performance of contracts to which one is a stranger, society has a general interest in maintaining commercial stability by

encouraging those who would rely on the contracts of strangers and by discouraging those who would willfully induce contract breaches.”

315. The tort of inducement of breach of contract and tortious interference with contracts is a well-recognised tort. However, the application of the said tort has to evolve with the changing practices of society including the commercial world. E-commerce platforms have an obligation, upon being notified, to ensure that they do not induce breach of contracts in any manner. The least that ought to have been done is adherence to their own Intellectual Property Protection Policies and other policies such as ‘*Excluded products’ list*’, ‘*Banned Products’ List*’, and ‘*Terms of Use*’. The internal policies themselves being clear, the non-insistence of Plaintiff’s consent from the sellers who wish to display the Plaintiffs’ products on the platform, and non-insistence of authorization or documents showing that the seller on the platform was duly authorised to sell, by itself, constitutes inducement of the breach. Moreover, even after being notified the platforms refused to take down the products and insisted that only if the Plaintiffs establish that the products are counterfeit, they would be taken down.

316. In the world of commerce and trade, e-commerce is here to stay. It has changed the dynamics of the conduct of businesses. The companies and entities, which run e-commerce platforms, have a greater obligation to maintain the sanctity of contracts, owing to the sheer magnitude and size of their operations. When an e-commerce platform is notified of existing contracts and violation of the same on its platform, the least that the platform would have to do would be to ensure that it is not a party, which encourages or induces a breach. The manner, in which e-commerce

platforms operate, makes it extremely convenient and easy for ABOs/distributors/direct sellers to merely procure the products from the Plaintiffs and defeat the purpose of the contractual obligations by selling in the grey market to unidentified persons, who may, thereafter, put them in the e-commerce stream, without any quality controls. In this manner, such ABOs/distributors/sellers may sell outdated products, expired products, damaged products and hide behind the cloak of the platforms themselves. Since none of the platforms, except IMG, to an extent, are even disclosing the complete details of the sellers, they offer a comfortable refuge for parties breaching their contracts with the Plaintiffs. This refuge by itself constitutes inducement.

317. The preservation and maintenance of the integrity of commercial contracts is a necessity in the modern day world. If society is permitted to induce or encourage breach of commercial contracts and the aggrieved persons are left only with their remedies of specific performance or damages by the persons breaching the contract, it would result in complete dissipation of contractual integrity. The legal system has to work towards preservation and compliance with contractual terms and not encourage violation of the same.

318. The minimum conduct expected of the platforms is adherence to their own policies, which they have failed to do in the present case. Thus, this Court has no hesitation in holding that the continued sale of the Plaintiffs' products on the e-commerce platforms, without the consent of the Plaintiffs, results in inducement of breach of contract, and tortious interference with contractual relationships of the Plaintiffs with their distributors.

G. CONCLUSIONS AND RELIEF

319. The above discussion, clearly shows that at the *prima facie* stage, the apprehension of the Plaintiffs that the products are being sourced through unauthorised channels and that the products are tampered, conditions changed and impaired, is completely valid. All the e-commerce platforms have obtained warranties from their respective sellers that their products are genuine. However, most of the Local Commissioners who have visited the various premises of the sellers and the platforms have seen that the products are being tampered with by removal of the codes, removal of the inner seal. Thinners and glues are being used to remove the codes and the products are being re-sealed, may be even under unhygienic conditions. In some cases, expired products are being given new manufacturing dates. Such tampering and impairment is, clearly, violative of the Plaintiffs' statutory and common law rights. Moreover, the manner in which the Plaintiffs' marks, logos, company names, product images, etc. are all being used is clearly misleading to a consumer inasmuch as the sellers' names are not fully disclosed. Contact details are not disclosed. The consumer, would find it extremely difficult to contact a seller. Consumers cannot be expected to do a fine and detailed examination to find out the actual source and if the source is authorised by the manufacturer. When a consumer is expected to look at the product listing in such depth, that by itself constitutes misrepresentation as to the source of the products. Moreover, the consumers of the Plaintiffs' products are also direct consumers who are used to a particular quality of products, special warranties and guarantees etc., Even if the seller's name is found out, there is no way to know how to contact the seller. The only easy mode of contacting is through the e-commerce platform itself and the same

can be time-consuming for any consumer. The product reviews also show that the product and brand reputation is severely jeopardised. The response of the platform to the product reviews is that such reviews are there even on the Plaintiffs' own platforms. However, such reviews on the Plaintiffs' platforms are not the concern of the platforms and in any case the platforms cannot have a justification to further aggravate or add to such reviews by selling unauthorised products on their platforms.

320. The platforms are also allowing their own warehouses to be used by multiple sellers. In the said warehouses, products are being stacked and they are being opened, re-sealed by the platforms' own employees and the platforms are not willing to take responsibility for the same. All the e-commerce platforms claim to be intermediaries, who are entitled to safe harbour under Section 79. All the platforms have their own policies, which broadly state that they respect the Intellectual Property Rights of trademark owners and that upon any grievance being raised, they are willing to take down. The Policies of all the platforms clearly are simply 'Paper policies' which are clearly not being adhered to as the facts of these cases go to show. They are a mere lip-service to the Intermediary Guidelines of 2011. None of the platforms are insisting on any of the sellers obtaining consent of the Plaintiffs for sale of their products on the e-commerce platforms, where their own policies require them to do so. Unless and until, the sellers are authorized by the Plaintiff, they cannot be allowed to sell the Plaintiff's products on Defendant's e-commerce platforms. The platforms were not candid in their pleadings. The impression sought to be given was that the sellers are fully responsible for the listing, refund/return policies, packaging and sale. In reality, it is the contrary, as is evidenced by the various

documents and the reports of the Local Commissioners. Platforms decide the return/refund policies and are also helping sellers to mask their real identity by not insisting and not providing all the details of the sellers in a transparent manner.

321. The argument of exhaustion completely fails as there is large-scale impairment of the goods as also misrepresentations being made on the platforms. Conditions of the goods being sold on the e-commerce platforms has been changed. The MRPs are shown to be higher in some cases. Wrong attribution of product names is also happening on some of the platforms. The source of the products listed on the platforms are suspect. The listings are also misleading as they use the Plaintiffs' product images, marks, logos, names, etc. giving an impression that the products are sold by the Plaintiffs themselves. The consumer is not being told that the seller is not authorised by the Plaintiffs, to sell the said products. A consumer would, literally, require investigative capabilities to trace the actual seller.

322. The Direct Selling Guidelines were issued in 2016. They are binding on the Plaintiffs who have given undertakings to the government. The Plaintiffs are also being subjected to scrutiny by authorities such as ASCI. MRPs are being artificially inflated, leading to consumer disputes for the Plaintiff.

323. Further, not a single seller has been able to produce a direct connection with any of the Plaintiffs or any consent given by the Plaintiffs for sale on e-commerce platforms. In all cases, the sellers are taking enormous efforts and steps to 'mask' their identity and to 'hide' the source of the products. Some of the sellers are not traceable. The Plaintiffs face severe jeopardy to their businesses, as the sale on e-commerce platforms if

not stopped, poses a threat to their right to carry on business itself.

324. The Direct Selling Guidelines are law. While the Defendants' platforms and sellers insist on their Article 19(1)(g) rights being jeopardised, what is lost sight of is the fact that the Plaintiffs' right to carry on business is being affected. It is being jeopardized in view of the large-scale violations on the e-commerce platforms. Further, the rights of genuine consumers are being affected, as is evident from the various comments, which consumers have put up on these platforms, after purchasing the Plaintiffs' products from the said platforms. Insofar as the sellers themselves are concerned, many of them have given undertakings and have agreed for injunctions being passed. The other sellers who are themselves listed on the platforms have to assume responsibility for the products and establish that they are genuine. None of them have been able to establish that the products are genuine and not tampered with or impaired. They have also not been able to show as to how they granted licences of the Plaintiffs' marks to the e-commerce platforms.

325. The principles of Order 39 Rules 1 and 2 are well-established. If the Defendants are allowed to sell the Plaintiffs products during the pendency of the suits, by the time the suits reach evidence, trial is conducted, and final judgment is rendered, if no injunction is granted, the Defendants may completely erode the business of the Plaintiffs. There is a reasonable apprehension that the direct distribution network of the Plaintiffs may be affected. As per their own policies, sale on e-commerce platforms of unauthorised, tampered products is impermissible. The same could also completely destroy the goodwill of the Plaintiffs. The Plaintiffs consumers may be forced to abandon these products owing to large scale quality issues

of products purchased through e-commerce platforms. Further, the Plaintiffs may also be called into question by various governmental authorities, for being in violation of the Direct Selling Guidelines and for permitting misrepresentations being made, as the e-commerce platforms are not willing to assume any responsibility. The return/refund policies adopted by the platforms are in complete contradistinction to the Plaintiffs return/refund policy. Since the Plaintiffs' products are sold through direct selling channels, the return/refund policies are made consumer friendly and the dilution of these policies by itself constitutes impairment and change of conditions. The Plaintiffs have therefore established a *prima facie* case. Balance of Convenience is in favour of Plaintiffs. Irreparable injury would be caused to Plaintiffs, their businesses, and all those who depend on Plaintiffs' successful business, such as employees, distributors/direct sellers, agents, and finally the consumers, if interim relief is not granted.

326. Thus, the Plaintiffs are entitled to interim reliefs during the pendency of the suits, in the following terms:

I.A. 11335/2018 (u/Order XXXIX Rules 1 and 2 CPC) in CS(OS) 410/2018

327. The Plaintiff in the present suit is M/s Amway India Enterprises Pvt. Ltd. The injunction application, qua Defendant No.1 – M/s 1MG Technologies Pvt. Ltd., and Defendant No.2 – M/s. Ghantakarn International, is disposed of in the following terms:

- a) Defendant No.2, i.e., the seller is restrained by, an interim order of injunction, from advertising, displaying, offering for sale products of the Plaintiff, namely Amway products, on the e-commerce platform www.1mg.com or on the mobile application – 1MG, or

any other e-commerce platform or online mobile applications, without the consent of the Plaintiff - Amway.

- b) Defendant No.1 - 1MG Technologies Pvt. Ltd., is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff - Amway's products on its website www.1mg.com and mobile application – 1MG, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Amway products on the 1MG platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Amway, allowing sale of its products through e-commerce platforms, Defendant No.1, 1MG shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.
- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the 1MG platform or mobile application without its consent, then it shall give notice to 1MG for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours, by 1MG.

CS(OS) 453/2018 and I.A. 12419/18 (for stay) and 14613/18 (u/O VII Rule 11 CPC)

328. The Plaintiff in the present suit is M/s Amway India Enterprises Pvt. Ltd. The present suit already stands decreed against Defendant No.7 – M/s Xecute India vide order dated 26th November, 2018, and against Defendant No.1 – M/s Adinath Enterprises, and Defendant No.5 – M/s Ravinder & Co.,

vide order dated 10th January, 2019.

329. The injunction application, being I.A. 12419/2018, qua Defendant No.2 – M/s Beant Healthcare, Defendant No.3 – M/s Beant Buildwell (P.) Ltd., Defendant No.4 – M/s Vivid Solutions, Defendant No.6 – M/s Raman Enterprises, Defendant No.8 – M/s Aarjav International, and Defendant No.9 – M/s Jasper Infotech Pvt. Ltd. (Snapdeal) is disposed of in the following terms:

- a) Defendant Nos.2, 3, 4, 6, and 8, i.e., the sellers are restrained by, an interim order of injunction, from advertising, displaying, offering for sale products of the Plaintiff, namely Amway products, on the e-commerce platform www.snapdeal.com or on the mobile application – Snapdeal, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Amway.
- b) Defendant No.9 - M/s Jasper Infotech Pvt. Ltd., which runs the website, www.snapdeal.com and mobile application - Snapdeal, is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff - Amway's products on its website www.snapdeal.com and mobile application – Snapdeal, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Amway products on the Snapdeal platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Amway, allowing sale of its products through e-commerce platforms, Defendant No.9, Snapdeal shall, clearly, provide the name, address and contact details of the said sellers,

including the telephone numbers, email address, etc., in a prominent manner, along with the product description.

- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Snapdeal platform or mobile application without its consent, then it shall give notice to Snapdeal for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours, by Snapdeal.

330. Insofar as I.A. 14613/2018, filed by Defendant Nos.2 and 3 under Order VII Rule 11 CPC is concerned, in light of the facts and circumstances of the case, and the findings given above, the Defendants have failed to make out a case for rejection of the plaint, at this stage. The I.A. is accordingly, dismissed in the above terms.

331. List the suit, being CS(OS) 453/2018 for hearing on 24th September, 2019, along with all connected matters.

I.A.13159/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 480/2018

332. The Plaintiff in the present suit is M/s Amway India Enterprises Pvt. Ltd. The present suit already stands decreed against Defendant No.2 - Black Olive Enterprises Ltd. vide order dated 26th November, 2018. The injunction application, qua Defendant No.1 – M/s Pioneering Products, Defendant No.3 – M/s Cloudtail India Pvt. Ltd., and Defendant No.4 – M/s Amazon Seller Services Pvt. Ltd., is disposed of in the following terms:

- a) Defendant Nos.1 & 3, i.e., the sellers are restrained by an interim order of injunction from advertising, displaying, offering for sale products of the Plaintiff, namely Amway products, on the e-commerce platform www.amazon.in or on the mobile application -

Amazon Online Shopping, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Amway.

- b) Defendant No.4 - Amazon Sellers Services Pvt. Ltd. is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff - Amway's products on its website www.amazon.in and mobile application Amazon Online Shopping, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Amway products on the Amazon platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Amway, allowing sale of its products through e-commerce platforms, Defendant No.4 - Amazon shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.
- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Amazon platform or mobile application without its consent, then it shall give notice to Amazon for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours by Amazon.

I.A.14402/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 531/2018

333. The Plaintiff in the present suit is M/s Amway India Enterprises Pvt. Ltd. The injunction application, qua Defendant No.1 – M/s Flipkart Internet Pvt. Ltd., Defendant No.2 – M/s Sehgal International, and Defendant No.3 –

M/s Apex Beauty Store, is disposed of in the following terms:

- a) Defendant Nos.2 & 3, i.e., the sellers are restrained by an interim order of injunction from advertising, displaying, offering for sale products of the Plaintiff, namely Amway products, on the e-commerce platform www.flipkart.com or on the mobile application - Flipkart Online Shopping, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Amway.
- b) Defendant No.1 – M/s Flipkart Internet Pvt. Ltd., is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff - Amway's products on its website www.flipkart.com and mobile application Flipkart Online Shopping, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Amway products on the Flipkart platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Amway, allowing sale of its products through e-commerce platforms, Defendant No.1 - Flipkart shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.
- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Flipkart platform or mobile application without its consent, then it shall give notice to Flipkart for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours, by Flipkart.

I.A. 14858/2018 (u/Order XXXIX Rules 1 and 2) in CS(OS) 550/2018

334. The Plaintiff in the present suit is M/s Amway India Enterprises Pvt. Ltd. The injunction application, qua Defendant No.1 – M/s Bright Lifecare Pvt. Ltd., (Healthkart), and Defendant No.2 – Kashvi Enterprises, is disposed of in the following terms:

- a) Defendant Nos.2, i.e., the seller is restrained by an interim order of injunction from advertising, displaying, offering for sale products of the Plaintiff, namely Amway products, on the e-commerce platform www.healthkart.com or on the mobile application - Healthkart, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Amway.
- b) Defendant No.1 – M/s Bright Lifecare Pvt. Ltd., which runs the website www.healthkart.com and mobile application – Healthkart, is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff - Amway’s products on its website www.healthkart.com and mobile application - Healthkart, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Amway products on the Healthkart platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Amway, allowing sale of its products through e-commerce platforms, Defendant No.1 - Healthkart shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.

- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Healthkart platform or mobile application without its consent, then it shall give notice to Healthkart for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours, by Healthkart.

I.A.1733/2019 (u/Order XXXIX Rules 1 and 2) in CS(OS) 75/2019

335. The Plaintiff in the present suit is M/s Modicare Ltd. The injunction application, qua Defendant No.1 – M/s Amazon Seller Services Pvt. Ltd., Defendant No.2 – M/s Laxmi Enterprises, and Defendant No.3 – M/s Modicare DP Store is disposed of in the following terms:

- a) Defendant Nos.2 & 3, i.e., the sellers are restrained by an interim order of injunction from advertising, displaying, offering for sale products of the Plaintiff, namely Modicare products, on the e-commerce platform www.amazon.in or on the mobile application - Amazon Online Shopping, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Modicare.
- b) Defendant No.1 - Amazon Sellers Services Pvt. Ltd. is restrained from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff – Modicare’s products on its website www.amazon.in and mobile application Amazon Online Shopping, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Modicare products on the Amazon platform/mobile application.
- c) In case of the sellers, if any, who produce consent given by the

Plaintiff-Modicare, allowing sale of its products through e-commerce platforms, Defendant No. 1 - Amazon shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.

- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Amazon platform or mobile application without its consent, then it shall give notice to Amazon for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours by Amazon.

I.A.2238/2019 (u/Order XXXIX Rules 1 and 2) in CS(OS) 91/2019

336. The Plaintiff in the present suit is M/s Oriflame India Pvt. Ltd. The injunction application, qua Defendant No.1 – Mr. Dinender Jain, Defendant No.2 – M/s Cloutail India Pvt. Ltd., Defendant No.3 – M/s Vardhman Training Company, Defendant No.4 – M/s Kusum Enterprises, Defendant No.5 – M/s Wholesale Hub, and Defendant No.6 - M/s Amazon Seller Services Pvt. Ltd. is disposed of in the following terms:

- a) Defendant Nos.1 to 5, i.e., the sellers are restrained by an interim order of injunction from advertising, displaying, offering for sale products of the Plaintiff, namely Oriflame products, on the e-commerce platform www.amazon.in or on the mobile application - Amazon Online Shopping, or any other ecommerce platform or online mobile applications, without the consent of the Plaintiff - Oriflame.
- b) Defendant No.6 - Amazon Sellers Services Pvt. Ltd. is restrained

from displaying, advertising, offering for sale, selling, facilitating repackaging of any of the Plaintiff – Oriflame’s products on its website www.amazon.in and mobile application Amazon Online Shopping, except of those sellers who produce written permission/consent of the Plaintiff for listing of the Oriflame products on the Amazon platform/mobile application.

- c) In case of the sellers, if any, who produce consent given by the Plaintiff-Oriflame, allowing sale of its products through e-commerce platforms, Defendant No.6 - Amazon shall, clearly, provide the name, address and contact details of the said sellers, including the telephone numbers, email address, etc., in a prominent manner, along with the product description.
- d) If the Plaintiff finds during the pendency of the suit that any of the sellers have displayed its products on the Amazon platform or mobile application without its consent, then it shall give notice to Amazon for taking down the listings of such sellers, which shall be duly taken down within a period of 36 hours by Amazon.

337. All the applications are disposed of in the above terms. No order as to cost.

PRATHIBA M. SINGH, J.
JUDGE

JULY 08, 2019/dk/Rahul/monika/dj