

IN THE HIGH COURT OF DELHI AT NEW DELHI

(Ordinary Original Civil Jurisdiction)

C.S. (O.S.) 2475 of 2012

IN THE MATTER OF:

Natco Pharma Ltd.

...Plaintiff

Versus

Shamnad Basheer

...Defendant

S. No.	Particulars	Pages
1.	Written Statement on behalf of the Defendant, along with affidavit in support	

New Delhi
Date: September 29, 2012

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IN THE MATTER OF:

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...Defendant

WRITTEN STATEMENT ON BEHALF OF THE DEFENDANT

THE DEFENDANT MOST RESPECTFULLY SUBMITS AS UNDER:

PRELIMINARY OBJECTIONS:

1. It is stated that the instant plaint is liable to be returned in accordance with the provisions of Order VII Rule 10 of the Code of Civil Procedure, 1908, as this Hon'ble Court is not clothed with the jurisdiction to try and entertain the instant suit. Admittedly, the Defendant resides & works for gain at Kolkata, whereas the Plaintiff is admittedly carrying on business in Hyderabad through its registered office. It is stated that the cause of action does not arise within the territorial jurisdiction of this Hon'ble Court as the impugned articles were not published within Delhi. Furthermore, it is respectfully submitted that given that the subject / impugned articles were only carried on the website www.spicyindia.blogspot.in, accordingly the stated articles were not "published" within the territorial limits of this Hon'ble Court. It is settled law that mere access to a website does not give rise to an actionable claim under tort law. It is submitted that this proposition has been settled by a Division Bench of this Hon'ble High Court. The website in question namely www.spicyindia.blogspot.in is an

“online publication” and does not specifically target Delhi and consequently the Defendant cannot be said to have purposefully availed himself of the Jurisdiction of this Hon’ble Court by specifically targeting the territory of Delhi and by that extension the Jurisdiction of this Hon’ble Court. It is stated that the Defendant residing at Kolkata uploaded the article on the Internet at Kolkata.

2. It is stated that additionally the plaint is fatally flawed from a lack of material particulars disclosing a cause of action and is accordingly liable to be rejected on this ground alone. Respectfully and without prejudice to the Defendant’s assertion of jurisdiction, it is stated that the plaint fails to disclose the publication of the impugned articles within Delhi as is required by settled law. It is noteworthy that the plaint does not disclose who or which person or persons *“downloaded the articles at Delhi, read the same and expressed shock at reports”* allowing the Plaintiff to claim that the said defamation occurred in Delhi. The Plaintiff is therefore liable to be rejected on this ground also.

3. It is stated that the Plaintiff has singularly failed to discharge the burden cast by the Indian Evidence Act. The Defendant reserves its right to file a separate application under Order VII Rule 10 of the Code of Civil Procedure, 1908 seeking return/rejection of the plaint.

4. Additionally, the Plaintiff’s assertion that the mere fact that the suit C.S. (O.S.) No.2279 of 2009 (“**BMS Suit**”) is pending before this Hon’ble Court confers jurisdiction on the court has to be rejected outright for the following reasons:

A. The said argument is not a ground available under the Code of Civil Procedure, 1908 for a Court to assume jurisdiction in respect of any suit.

- B. The present defendant is not a party to the said BMS suit.
- C. Further, the Plaintiff itself has stated that the present suit is not connected in any manner with the BMS Suit and has an independent cause of action.

The Plaintiff itself has challenged the jurisdiction of this Hon'ble Court in paragraph 6 of its written statement in the BMS Suit. It is stated that the Plaintiff's statements are starkly contradictory with its stand in CS (OS) 2279/2009, wherein it claimed that the Hon'ble Court cannot exercise Jurisdiction as the Plaintiff (a) does have an office at Delhi and (b) does not carry on business at Delhi. The Plaintiff's contradictory statements reek of mala fide and reveal its propensity to engage in duplicity with a view to prevailing in court proceedings at any cost.

5. It is stated that the instant suit has not been instituted by a person duly authorized by the Plaintiff Company and is accordingly liable to be dismissed. It is respectfully stated that since the claim of defamation is predicated upon a claim that the Company stands defamed by the impugned articles, it is even more critical that the Company should at the outset have authorized the institution of the plaint. A perusal of the Resolution of the Board of Directors of the Plaintiff Company of Company shows that the signatory of the plaint in the instant suit was not authorized to institute the instant suit before this Hon'ble Court. It is stated that the signatory acting on behalf of the Plaintiff is merely authorized to "represent" the Plaintiff Company and sign and verify pleadings, affidavits petitions etc., and not to institute law suits on behalf of the Plaintiff.

6. It is further submitted that the present suit is bad for non-joinder of necessary parties. The Plaintiff alleges that the Defendant

colluded with Bristol Myers Squibb, Inc., to publish the allegedly defamatory posts on the website, www.spicyip.com ("**SpicyIP**"). However, the Plaintiff has failed to make Bristol Myers Squibb as a party to the present suit. It is also submitted that the Plaintiff claims that the Defendant's allegedly defamatory statements were published in the Economic Times, a Times of India publication. Here again, the Plaintiff has failed to make the Times of India/ Economic Times a party to the present suit. It is submitted that the present suit, as framed cannot be adjudicated without making the said party as a Defendant to the suit, as the prayers of the Plaintiff cannot be granted without these necessary parties. Hence, the present suit is liable to be dismissed *in limine* on this ground alone.

7. It is further submitted that the plaint is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 as it fails to disclose a cause of action against the Defendant. Apart from merely reproducing the various statements of the Defendant in the two impugned articles on SpicyIP, the Plaintiff has not made any attempt to demonstrate the falsity of these statements. Nowhere in the suit does the Plaintiff disclose as to why the impugned statements are obviously false or untrue or not based on facts or not representative of a fair comment on an existing set of facts. .

8. It is stated that the impugned statements made by the Defendant are justified being in the nature of 'Fair Comment' as is apparent from the following paragraphs:

(i). The present case is one where an allegation is made that the Defendant has written and posted on SpicyIP, allegedly defamatory statements/comments (set out in paragraphs 9, 10 and 12 of the plaint). The said

statements are not being reproduced herein for the sake of brevity.

(ii) Admittedly, SpicyIP is a website, which is academically oriented and caters to those interested in Intellectual Property law and policy. This website was founded by the Defendant in **2005**, and has received accolades since then for its in-depth and independent coverage of Indian intellectual property issues. Notably, a leading intellectual property magazine, Managing Intellectual Property (MIP) rated SpicyIP as one amongst the 50 leading IP personalities the world over in the year 2011-2012 (Managing Intellectual Property, 'Shaping the future of IP: Top 50', dated 13 June 2011.) A copy of the stated listing is filed in the proceedings and relied upon. The Defendant himself is an internationally reputed academic and leading commentator on Indian intellectual property issues.

(iii). The Defendant is currently the HRD Ministry Chaired Professor in Intellectual Property Law, West Bengal National University of Juridical Sciences (NUJS), Kolkata. Prior to this, he had been the Frank H Marks Visiting Associate Professor of IP Law at the George Washington University in Washington D.C. and also a research associate at the Oxford Intellectual Property Research Centre (OIPRC) at the University of Oxford. He is the founder of several initiatives including the following:

1. [IDIA](#) (Increasing Diversity by Increasing Access to Education), a pan-India student movement to promote

access to legal education in favour of underprivileged students.

2. [P-PIL](#) (Promoting Public Interest Lawyering), a forum that brings law students and lawyers together to achieve shared public interest goals through the instrumentality of the law.

He is also regularly consulted by the government and has deposed before Parliamentary Committees on a variety of IP issues. He has had a distinguished career in both practice and academia, both in India and abroad and his scholarly articles published in reputed international IP journals are routinely cited. He has many laurels and distinctions to his credit, a list whereof is set out in the curriculum vitae, which is filed with this written statement. His profile as appearing on the website of his University (National University of Juridical Sciences) is also filed herewith. The Defendant further submits that he has been allowed by the Hon'ble Supreme Court to intervene in the proceedings concerning *Novartis v. Union of India & Ors.*, SLP (c) Nos.20539-20549/2009 as an academic expert on the subject by way of its Order dated 09.08.2012. A copy of the order-dated 09.08.2012 is filed in the instant proceedings and relied upon. The Hon'ble Supreme Court is presently hearing arguments in the said matter.

(iv). Accordingly, on the issue at hand and any other IP issue of specific importance to India, the Defendant is eminently qualified and well placed to offer a fair comment. In making such a fair and objective comment on the Plaintiffs conduct, the Defendant is exercising his constitutionally guaranteed right to free speech.

It is submitted that the present suit is accordingly liable to be dismissed *in limine*.

(v). A perusal of the articles/posts in which the allegedly defamatory statements appear makes it abundantly clear that these statements are fair, well-reasoned and analytical comments, made without malice and based on facts found *inter-alia* in the very same pleadings filed by Natco in the BMS Suit.

(vi). It is stated that the subject matter of the BMS Suit is one of a high degree of public interest and concern to the general public as it involves issues of not only patent law and access to affordable medicines, but also of an allegedly weak drug regulatory regime and issues of drug patent linkage. The allegedly defamatory articles categorically record the following facts:

- a.** That a civil suit numbered as C.S. (O.S.) No. 2279 of 2009 had been filed against the Plaintiff herein by Bristol Myers Squib, Inc. ("**BMS**"), a pharmaceutical company that owns patent No.203937 in respect of an anti-cancer pharmaceutical drug known as DASATINIB. BMS alleged that Natco i.e. the Plaintiff herein had a pending drug marketing license with the DCGI and intended to launch a generic version of BMS's drug under the name DASANAT, thereby infringing BMS' patented invention.
- b.** In the BMS Suit, BMS prayed for a restraining order in a *quia timet* action, as BMS apprehended that the

Plaintiff herein was likely to launch the allegedly infringing drug, given that it had filed an application for marketing approval with the office of the Drug Controller General of India (DCGI).

- c. That the Plaintiff herein, in its written statement filed in the BMS Suit, responded to the above *quia timet* action by categorically stating that it had no intention of launching a generic version of Dasatinib. Specifically, the Plaintiff herein stated in paragraph 29 of its written statement that it does not "*intend to launch a generic version of DASATINIB under the brand name DASANAT.*" It further denied in paragraph 23 that "*...the Defendants have been advertising their generic version of DASATINIB under the brand name DASANAT. No such product is available with these Defendants.*"
- d. That contrary to the above assertions, Natco admittedly launched, in May-June, 2012, a generic version of DASATINIB, known as DASANAT.
- e. That further to an application for injunction filed by BMS in June 11, 2012, a co-ordinate bench of this Hon'ble Court, by way of its Order dated 13.6.2012 directed the Plaintiff herein as follows: "*The Defendant shall be bound by their statement taken by them in their written statement, particularly in paras 26, 27 and 29.*" It is noteworthy that paragraph 29 of the written statement of the Plaintiff's written statement encapsulates a categorical statement that "*It is denied that the*

Defendants intend to launch a generic version of Dasatinib under the name Dasanat."

- f. That, in response to an injunction application filed by BMS on June 21, 2012, the Plaintiff admitted that it had an application for marketing approval for a generic version of Dasatinib, pending before the DCGI at the time that its written statement was filed in 2009. Specifically, paragraph 6 of the Plaintiff's submission to the court notes: *"it is submitted that the suit filed by the Plaintiffs was itself premature in that it was filed when the Defendant had only applied for marketing license which activity is permissible in law."* However, far from disclosing the filing of such application for marketing license in its written submission filed in 2009, the Plaintiff herein specifically denied that it had any intention of launching a generic version of DASANITIB under the mark DASANAT.

9. Based upon the above facts recorded in the articles in question, the Defendant went on to take a view and offered his opinion by way of fair comment, that it was imprudent of the Plaintiff herein to have misled the court and denied any intention of launching the drug, particularly when it had a pending drug marketing application with the Drug Controller General of India (DCGI) at that very moment. Specifically, the Defendant noted in his articles as below:

"In a startling revelation, Natco admitted (albeit indirectly) that it had lied in its response to BMS's quia timet law suit, wherein BMS approached the Delhi High Court in 2009, apprehending imminent infringement of its patent covering Dasatinib, an anti

cancer drug.

In an earlier post, I noted that Natco may have committed a fatal legal blunder by stating on oath before the Delhi High court that:

"It is denied that the Defendants intend to launch a generic version of Dasatinib under the name Dasanat." (paragraph 27 of the Natco written statement).

I also noted that in the light of the fact that Natco went on to launch a generic version of Dasatinib under the name Dasanat in June 2012, its statement on oath effectively amounted to a blatant falsehood. As to whether or not this amounts to perjury under Section 340 of the CRPC is contentious. However it reeks of bad faith and is likely to prove prejudicial for Natco...

In a filing before the Delhi High Court yesterday, Natco admitted (albeit indirectly) that, at the time of BMS' quia timet action in 2009, Natco was actively pursuing a marketing application with the drug controllers' office (DCGI). I extract from its submission (paragraph 6):

"it is submitted that the suit filed by the Plaintiffs was itself premature in that it was filed when the Defendant had only applied for **marketing license** which activity is permissible in law."

In other words, given that Natco was actively pursuing a marketing license for Dasatinib before the regulator, its assertion that it had no intention of launching a generic version of Dasatinib was blatantly untrue. This damning admission is likely to prove prejudicial to Natco, not only in terms of it being seen as a bad faith litigant that took the court for a ride, but also in terms of its potential to be condemned as a contemnor.

No doubt, Natco was well within its rights to pursue a drug regulatory application before the Drug Controller, and our law makes it amply clear that the drug regulatory process is separate and distinct from the patent process and patent infringement claims cannot be used to hinder the drug regulatory process in any way. Why then did Natco have to vacuously claim that it had no intention of making the drug or launching it? It should have simply asserted its right to pursue a drug regulatory application without fear of patent infringement and gone on to claim that the patent was invalid.

I am still at a deep loss to understand as to why a legally savvy corporate such as Natco dug its own grave by making such an obviously false statement to a court. Was this negligence? Or did it have anything to do with our less than optimal regulatory structure and Natco's desire to avoid sensitising our court or any of us to potential malfeasance/misfeasance on the regulatory front. One hopes to find answers in the days to come.

This strong charge of bad faith and contempt may not impact the final outcome on the merits of the matter i.e. as to whether or not the patent is valid and as to whether or not Natco infringes. However, it is certain to impact Natco's reputation as a litigant, owing to the court seeing Natco as a bad faith litigant and contemnor."

The above statements make it amply clear that the Defendant expressed an independent academic view that was based on facts culled out from the very same pleadings filed by the Plaintiff. It is clear that the comments were fair, based upon facts, entirely of an academic nature and with no malice towards the Plaintiff herein, particularly since the Defendant has in the past, lavished praise on the Plaintiff herein for its bold compulsory licensing strategy, an aspect detailed in subsequent paragraphs of this written statement.

10. It is noteworthy that apart from highlighting the Plaintiffs' blatant misrepresentation to a court of law, the Defendants' articles discuss various other issues pertinent to the legal fight between BMS and the Plaintiff, including drug regulatory issues and the exploitation of drug regulatory loopholes by pharmaceutical companies an aspect highlighted in a recent report of the Department-Related Parliamentary Standing Committee On Health And Family Welfare, titled 'Fifty- Ninth Report On The Functioning Of The Central Drugs Standard Control Organisation (CDSCO)', dated May 2012. In pertinent part the impugned article notes:

"Apart from all of the above, this case is an interesting one to me personally, since I've begun looking more closely at our drug regulatory regime. The following questions arise:

1. What kind of license did Natco apply for (from the DCGI office) in 2009? Was this an application for permission to import, export or to manufacture and sell in India?

2. Did Natco finally procure this permission from the DCGI? If not, what accounts for the ensuing delay? Could it be that Natco failed to comply with DCGI pre-requisites for information and data/testing? Or worse still, could it be that that the DCGI deliberately delayed permission to Natco in a bid to erect a trade barrier? Or just that the DCGI is terribly understaffed and takes significant time to clear a single application, as noted in this damning Parliamentary committee report."

The articles are thus, balanced with regard to the issues presented and opinion accorded, based solely on facts found in the pleadings of the parties in the BMS suit and the orders passed therein. It is accordingly stated that all of the said statements/opinion appearing in the impugned article/s are based on the pleadings and orders, which are a matter of record and hence are protectable as fair comment, in accordance with settled law, both in India as also other common law jurisdictions such as the UK. In fact it is noteworthy that this Hon'ble Court has issued show cause notice, on the Contempt Petition filed, to the Plaintiff herein in the BMS Patent suit.

11. It is clear that the Defendant exercised due care and caution by examining the pleadings of the parties in the BMS Suit prior to expressing his views on the case and the conduct of the Plaintiff. His analysis and commentary turned significantly on the Plaintiffs' undertaking to the Court by way of its Written Statement, which is reflected in the Order of Hon'ble Single judge, dated 13.6.2012. At no stage did the Defendant make any statement about the Plaintiff's general conduct not concerned with the case or exhibit any malice towards the Defendant. The Defendant asserts his right as an academic and a citizen of India to make fair comments on legal disputes, in keeping with the spirit of fundamental guarantees under Articles 19 and 21 of the Constitution of India.

12. It is further pertinent to mention that the issue at hand is one of public interest since, as stated in the article appearing on SpicyIP on 31.07.2012, the Plaintiff is the first successful company to have been awarded a compulsory license by the Controller General of Patents after the TRIPs regime came into being. This effectively

places the Plaintiff at the forefront of the patent battle between drug originator companies and generic medicine companies, a battle that throws into sharp focus issues of pharmaceutical patents, drug regulation, innovation, access to medicines and public health. Countless articles and media reports on the above issues have been written and continue to be written. Hence, such legal disputes and the attendant conduct and litigation strategy of the parties is very much a matter of public interest.

13. It is also submitted that the dispute that is the subject matter of the BMS Suit was already in the mainstream media and public eye well before the Defendant wrote about it in SpicyIP. An article in the Economic Times dated July 13, 2012 had alerted readers to the various regulatory issues inherent in the regulatory approval obtained by Natco from the Uttarkhand state regulatory authority. The news item noted in particular as below:

"Hyderabad-based generic drugmaker Natco Pharma has started selling copies of global pharma major Bristol Myers Squibb's cancer drug Dasatinib, sold under the brand name of Sprycel, in the Indian market, after it got a marketing licence from the Uttarakhand government to sell a generic version of the drug. The move is sure to kick off a fresh controversy in the regulatory framework over patent issues."

"In the past, drug companies have approached the Drug Controller General of India (DCGI) to obtain manufacturing licences for selling drugs in the country. However, this is one of the rarest of rare

case, where a drug maker has applied for a licence of a patented product through a state government."

A true copy of this News Report titled '*Natco Pharma begins sales of Bristol Myers' cancer drug Dasatinib*', dated July 13, 2012 is filed in the proceedings and relied upon. When the above mentioned report is viewed in light of the recent Parliamentary Standing Committee Report highlighting a rigged regulatory regime routinely exploited by drug companies, a copy of which report has been filed in the proceedings and is relied upon, it is quite clear why there was high public interest in this case.

14. It is also pertinent to note that it was the Defendant who defended the Plaintiff's right to obtain approvals legitimately from a State authority and he is quoted in the said news report as stating:

"A patent expert said that Natco is well within its right to obtain a licence from a state government to sell the drug in the Indian markets. The regulator's only job is to look at safety and efficacy of drugs, and it is not obliged to look at validity of patents," said Shamnad Basheer, professor in Intellectual Property Law, National University of Judicial Sciences."

15. It is stated that the above deliberate suppression of facts and statements made in support of the Plaintiff by the Defendant in respect of the merits of the controversy at issue in the BMS Suit is indicative of Plaintiff's mala fide intentions. The Plaintiff is disentitled to relief on the ground of this suppression alone. The suppression becomes relevant in the light of the Plaintiff's baseless allegations that the Defendant's articles are biased in favour of BMS. The fallacy

of the said allegation is amply demonstrated by the above disclosures, which present the entire conspectus of the matter and Defendant's role as a neutral and academic commentator of drug patent and regulatory issues. In this regard, the Defendant wishes to vehemently object to and reject the Plaintiffs baseless allegation that the Defendant "colluded" with BMS with a view to assisting BMS in the case. In fact, a perusal of the very same articles that the Plaintiff labels as allegedly defamatory demonstrates that the Defendant also criticized the conduct of BMS in the very same proceedings. In pertinent part, his article on the SpicyIP website dated 2 August, 2012 notes:

"More worrying than Natco's fatal legal blunder is BMS' alleged attempt to sneak in drug patent linkage, despite our courts holding such linkage to have no valid legal basis in India. Natco alleges that BMS was behind a showcause issued by the Uttarakhand drug regulator to divest Natco of its regulatory approval.

Natco notes in paragraph 13 of its filing that:

"A perusal of the show cause notice dated 20.06.2012 clearly reveals that the notice was issued at the behest of the Plaintiff. Further, the drug licensing authority had issued a letter suspending the license of the defendants. This order was challenged in the High Court of Uttarakhand and High court has passed an order dated 25th July 2012, directing that the said order (of suspension of license) shall remain in abeyance. The Hon'ble High Court of Uttarakhand has remanded the matter to the Drug Licensing authority,

directing it to consider the reply of the defendant to the show cause notice and to pass a reasoned and speaking order after hearing the defendant.”

Given that drug patent linkage has been held to have no legal basis in India by both a single judge and an appellate division bench of the Delhi High Court (and effectively confirmed by the Supreme Court as well, which refused to admit the appeal from the Division Bench), BMS will have to answer to a serious charge of bad faith, if Natco's allegations are indeed true.”

The fact that the Plaintiff has chosen to conveniently ignore this part of the Article, which reflects the truly independent nature of the Defendants' analysis and observations, demonstrates the Plaintiff's mala fides. The Plaintiff's allegation of "collusion" is both baseless and malicious, with a view to painting a negative picture of the Defendant before the court. The Defendant reserves his right to initiate appropriate proceedings against the Plaintiff on this count.

16. It is stated that Plaintiff itself seeks to actively court the media from time to time and benefit from news reporting around its successful litigations such as the Bayer Compulsory licensing dispute. However, at the very same time, it attempts to crush and quell any statement that exposes its misgivings in such patent disputes. It is stated that the Plaintiff must open itself to critique, if it chooses to benefit from public attention on its various cases.

17. It is also noteworthy that SpicyIP articles deal intricately with the various nuances of intellectual property issues, and the website commands a sophisticated reader base including intellectual

property practitioners, academicians, researchers and other professionals interested in Intellectual Property issues in India.

18. Thus, for the reasons set out above, it is submitted that the present suit is liable to be dismissed *in limine*. The Defendant now proceeds to answer the specific averments made in the plaint, all of which are denied, unless specifically admitted to herein.

PARAWISE REPLY

1. The contents of paragraph 1 of the Plaint are denied. It is denied that the defendant has published any defamatory or libelous articles against the plaintiff in blogs, electronic media, newspapers or at all. It is denied that the defendant has violated the sub-judice rule and published articles, which are false, derogatory, defamatory, reckless, and callous or have caused incalculable damage to the plaintiff or as alleged at all.

2. The contents of paragraph 2 of the Plaint do not merit a response. It is, however, denied that Mr. Jagbir Sharma is authorized to file the present suit on behalf of the plaintiff or has the entire knowledge of all the facts surrounding the controversy, as alleged or at all. The remaining contents of the paragraph are denied and the plaintiff is put to strict proof thereof.

3. The contents of paragraph 3 of the Plaint are denied. The Defendant denies that he runs the blog, SpicyIP or that "he moderates or filters contents of the blog". The Plaintiff is put to strict proof hereof. The Defendant states that the blog mainly caters to an audience familiar with intellectual property concepts and not

to industry or professionals in general or to a "substantial portion of the public."

4. The contents of paragraph 4 of the Plaintiff are denied and the plaintiff is put to strict proof thereof.

5. The contents of paragraph 5 of the Plaintiff are a matter of record. However, the plaintiff's statement that "*The Plaintiff company after much research has developed its own process for preparing a polymorphic form of Dasatinib and same was sold by the Plaintiff Company. The Plaintiff Company believes that the product manufactured by it is different and not covered by Indian Patent No. 203937*" is denied and the Plaintiff is put to strict proof.

6. The contents of paragraph 6 and paragraph 7 of the Plaintiff are a matter of record. The statement of the Plaintiff in paragraph 6 that no order of injunction was passed by the Court is denied. It is noteworthy that Paragraph 29 of the written statement of the Plaintiff in the BMS Suit filed in 2009, carries a categorical statement that "*It is denied that the Defendants intend to launch a generic version of Dasatinib under the name Dasanat.*" On June 13, 2012, in response to a temporary injunction application filed by BMS alleging that the Plaintiff herein had introduced a generic version of Dasatinib under the brand Dasanat in the market, the learned single judge of the Delhi High Court, ordered Natco as follows: "*The Defendant shall be bound by their statement taken by them in their written statement, particularly in paras 26, 27 and 29.*" The very fact that the Court directed the Plaintiff to be bound by the averments made in its Written Statement indicates that it was restrained from acting contrary to the undertakings made therein. The Plaintiff itself admits in subsequent pleadings filed before this

court that it is effectively restrained by this Order. In paragraph 3 of its reply dated August 12, 2012 to Bayer's contempt petition, it states that "...it is submitted that the product Dasanat was manufactured and sold in May 2012. The first application for injunction was filed only in June 2012. And thereafter this Defendant has not manufactured any product nor acted against any order of this Honourable Court; hence no case of contempt lies against the Defendant."

7. The contents of paragraph 8 of the Plaintiff are denied in toto. It is vehemently denied that the Defendant, in collusion with Bristol Myers Squibb ("BMS") published scathing or defamatory remarks on SpicyIP ("Website") with a view to malign and degrade the reputation of the plaintiff or to cause prejudice to a fair, reasonable trial or interfere with the interest of justice. It is denied that the remarks in the articles of the defendant are derogatory or intended to lower the image of the plaintiff in the eyes of the public or as alleged at all. It is submitted that the Defendant has always been neutral and independent and has criticized both Natco and BMS in the very same article. Specifically, the Defendant took issue with BMS's attempts to force drug patent linkage and revoke the Plaintiff's drug manufacturing authorization in Uttarakhand. Further, the Defendant, has in the past, criticized attempts by BMS to effectuate drug patent linkage through its patent infringement suit against another generic company, Hetero Drugs for the very same patented drug (Dasatinib). Pertinently, the Defendant noted:

"From a policy perspective too, any such linkage is hugely problematic. Apart from issues of institutional competence, such linkage contravenes the very essence of

the Bolar provision, a patent defence that permits generic companies to safely generate regulatory data while the patent is in force and pursue their drug regulatory application process, so that no time is lost between the expiry of a patent and the entry of a generic product in the market. Such linkage also virtually results in the introduction of a "data exclusivity" like norm, a norm that a government committee (Satwant Reddy Committee) suggested, ought not to be introduced into India at this stage."

A true copy of this post titled '[Breaking News: Court Orders Indian Drug Controller to "Police" Patents](#)', dated 6 January, 2009 is filed in the instant proceedings and is relied upon. Therefore, the Plaintiffs allegation of collusion reeks of malafides and the Defendant reserves his right to take appropriate legal action against the Plaintiff for these utterly baseless statements.

8. It is also stated that the Defendant has, on several earlier occasions in the past, lavished praise on the bold strategy of the Plaintiff in applying for and procuring India's first compulsory license in the post TRIPS era. For instance, in his interview to a mainstream media publication, he praised Natco's strategy and his quoted as stating:

"...if the medicine is for the public, what good is it if the public cannot access it, says intellectual property expert Mr Shamnad Basheer. The judgment, a baby step for Natco, is, in fact, a giant leap for

rest of the generic pharmaceutical companies, he says."

This article titled "Natco ruling is a watershed" in the Hindu Business Line dated 28 February, 2012 is filed in the instant proceedings and relied upon.

9. In fact, even in one of the allegedly defamatory articles mentioned in the plaint, the Defendant states:

"For the longest time, Cipla ranked as our leading poster child for the debate on patents and access to affordable medicines...

The tables began turning early this year, when another Indian generic company, Natco filed India's first post TRIPS compulsory licensing application seeking to slash the patented prices of Bayers' patented anti-cancer drug, Nexavar. In the wake of the compulsory licensing decision, Natco catapulted to prominence as our national hero; a bold pharmaceutical company that refused to cave in to international pressure or to bed foreign partners, but insisted on pioneering the delivery of cheaper and more affordable drugs through a new "compulsory licensing" route."

10. The contents of paragraph 9 of the Plaint are denied. It is denied that the articles denigrates the reputation or lowers the esteem of the plaintiff in the eyes of the public. It is denied that the timing of the articles demonstrates that the publication of both the

articles is deliberate or intended to influence the course of the legal proceedings in C.S. (OS) No. 2270/2009 or as alleged at all. It is submitted that the articles are the personal views of an individual and do not amount to defamation. Furthermore, the plaintiff has not been able to demonstrate that the articles are prejudicial to the proceedings in C.S. (OS) No. 2270/2009. As noted earlier, SpicyIP on which the articles were published are read by a sophisticated audience comprising of intellectual property lawyers and the like and not the general public. The articles in no way interfere with the administration of justice, and they merely represent an academic assessment of the issue between the plaintiff herein and BMS, an assessment which is well within the purview of the right to free speech, a right that is constitutionally guaranteed to the Defendant.

11. It is submitted that the Defendant's opinion on the Plaintiff's conduct in misleading the court and pursuing a flawed legal strategy is predicated on facts found in pleadings submitted by the Plaintiff itself. In its written statement filed pursuant to the BMS suit in 2009, the Plaintiff denied any intention to launch a generic version of Dastatinib. In its subsequent response to an injunction application filed by BMS in 2012, it admitted, very expressly, that at the time of filing its written statement in 2009, it had a pending drug marketing license for a generic version of Dasatinib. By no stretch of imagination can the Defendants' view that Natco misled the court or that it was imprudent to have done so in a case of this importance and magnitude, be termed as defamatory or tending to cause prejudice to a fair, reasonable trial or interfering with the interest of justice. In fact, a perusal of the Plaintiff's own submissions to the court in the BMS suit after the publication of the allegedly defamatory statements makes it evident that the Plaintiff has filed what is essentially a vexatious and frivolous suit with a

view to desperately silencing an academic critic from highlighting the fact that it actively misled a court of law (by denying any intention to launch a generic version of Dasatinib when it had a pending application with the DCGI). The Plaintiff made certain admissions in two of its replies filed before this Hon'ble Court, the first being one filed on 26th July 2012 in response to BMS' application under Order 39 Rules 1 & 2 of the CPC and the second being one filed on 27.07.2012 in response to BMS' application under Order 39 Rule 2A. In both these pleadings, the Plaintiff expressly admitted that it had a pending marketing license at the time of filing its written statement in the main BMS suit in 2009 and noted in pertinent part that *"it is submitted that the suit filed by the Plaintiffs was itself premature in that it was filed when the Defendant had only applied for marketing license which activity is permissible in law."* However, very surprisingly, in its response to the contempt application filed by BMS, a response that was filed on 13 August 2012, after the publication of the allegedly defamatory pieces (which highlights this admission on the Plaintiff's part), it cleverly avoids any such admission and makes no mention of the fact that it had a pending DCGI application for marketing a generic version of Dasatinib at the time of filing its written statement in the BMS suit in 2009.

12. The contents of paragraph 10 do not merit a response, since the Plaintiff has not sought any specific relief on this count. However, it is respectfully submitted that there is no absolute bar on reporting of events or cases which are sub-judice and that the law permits fair comments to be made in relation to such events and cases. The defendant being an IPR specialist, has only proffered his personal views on the issue at hand, which amount to a fair comment in a matter of utmost public importance. It is denied that

the Hon'ble Court will be prejudiced by the articles published by the defendant. It is stated that the Plaintiff, by making such statements is trying to equate the Patent Suit to a criminal trial, even in relation whereto, the fair reporting of the proceedings is permitted, as recently held by the Hon'ble Supreme Court in the *Sahara* case. .

13. The contents of paragraph 11 of the Plaintiff are denied. It is denied that the defendant has published any defamatory comments as alleged or at all.

14. The contents of paragraph 12 of the Plaintiff are denied. It is denied that the articles disparage or degrade the reputation of the plaintiff company or as alleged at all. It is denied that the proceedings in C.S. (O.S.) 2279/2009 are misrepresented by the defendant or that the publications of the articles in question is deliberate or intended to defame the plaintiff or to influence the course of proceedings pending adjudication before this Hon'ble Court.

15. The contents of paragraph 13 of the Plaintiff are denied. It is denied that the articles present a one-sided version of the matter represented by BMS in C.S. (OS) No. 2279/2009 or that the defendant more or less tracks the sequence of facts and events as presented by BMS in the said suit. It is denied that the defendant did not make any independent enquiries into the matter or did not exercise any due care or caution or as alleged at all. It is denied that the assertions, comments and remarks made in the articles are false or incorrect. Furthermore, it is denied that the defendant has tried to conduct a trial by media or as alleged at all. It bears reiteration that the Defendant is a leading academic, and comments in that capacity to an informed audience. It is also stated that there

is no absolute bar on reporting matters or commenting fairly on them, when they are sub-judice. In any case, it is submitted that the Plaintiff's claims are not relevant in the instant proceedings, which is a case for defamation.

16. The content of paragraph 14 of the Plaintiff are mere repetition and are denied. It is denied that the defendant made irresponsible, reckless, scurrilous comments/remarks against the plaintiff or that the same lower or tarnish the image of the plaintiff in the eyes of the public. It is denied that the comments, assertions or remarks made in the article are deliberate or conscious or aimed at defaming the plaintiff as alleged or at all. The plaintiff is put to strict proof thereof.

17. The contents of paragraph 15 of the Plaintiff are denied and the Plaintiff put to strict proof. The plaintiff has not been able to show how the comments and remarks made on the Website have a deep impact on the reputation of the plaintiff, as alleged or at all.

18. The contents of paragraph 16 of the Plaintiff are mere repetition and are denied. The Plaintiff is put to strict proof thereof. It is stated that the Defendant is not a mere blogger, but a highly reputed academic with extensive expertise in intellectual property issues, who writes on the same, in academic journals, in newspapers such as the Indian Express and the Times of India, magazines and in legal websites and blogs, such as SpicyIP.

19. The contents of paragraph 17 of the Plaintiff do not merit a response, as this is an irrelevant issue in a lawsuit for defamation. It is submitted that the source of the pleadings is legitimate and from

a reliable source and the defendant will provide the Hon'ble Court with the source as and when requested by the Hon'ble Court.

20. The contents of paragraph 18 of the Plaint are denied. It is denied that the defendant is passing judgments or painting a negative image of the plaintiff regarding the pending suit. It is stated that the Defendant merely reacted to queries from news agencies as an expert in the field and nothing in the Defendants statements therein can be construed to be defamatory in nature. In fact this is itself borne out by the fact that the Plaintiff has not instituted separate legal proceedings or arrayed the stated news papers as Defendants in the instant suit and sought relief from this Hon'ble Court against the stated news papers. It is denied that the defendant has deliberately tried to subvert the course of justice with intent to influence or interfere with the course of proceedings to benefit BMS or as alleged at all. It is further denied that the defendant has given a distorted version of the facts in the case to the media or as alleged at all. It is denied that the defendant has published absolutely lopsided articles or tried to create a negative image of the plaintiff company or as alleged. It is denied that the defendant has tried to defame the plaintiff in connivance with the defendant or that it has tried to prejudice a fair and reasonable trial or as alleged at all. It is denied that the defendant has tried to tarnish the plaintiff or as alleged at all. The remaining contents of the paragraph under reply do not merit a response. It is submitted that the defendant is an IPR specialist and a professor and makes no personal gain from writing any defamatory articles. Furthermore, the articles are only an individual view and do not in any way amount to defamation as they only present the defendant's perception of the whole issue in C.S.(O.S.) 2279/2009. It is vehemently denied that several persons from the government,

medical and patient community called it enquiring about the articles published by the author. The Plaintiff is put to strict proof thereof.

21. The contents of paragraph 19 of the Plaint are mere repetition and are wholly denied. It is denied that the articles have caused incalculable loss to the plaintiff or its business and the plaintiff is put to strict proof thereof. As the defendant has only reported facts and expressed fair opinions on those facts, it cannot amount to defamation and the Plaintiff is not entitled to either a restraining order or damages.

22. The contents of paragraph 20 of the Plaint are denied. It is denied that the Plaintiff has suffered any damages what so ever. The Plaintiff's claim lacks even the barest of particulars to be reliable. The Plaintiff has offered no basis for calculating damages and accordingly such unsubstantiated claim is liable for out right rejection. The Plaintiff suit is an attempt to muzzle fair comments, a gross abuse of the process of this Hon'ble Cort and is liable to be dismissed.

23. The contents of paragraph 21 and 22 of the Plaint are denied. The plaintiff has not made out a cause of action as the defendant has not indulged in any defamatory or illegal activities against the plaintiff. The Plaintiff has not made any effort to indicate as to how the Defendant's independent analysis in the allegedly defamatory articles is without any factual basis.

24. The contents of paragraph 23 of the Plaint are denied and the plaintiff is put to strict proof thereof. It is stated that no part of the cause of action arises in Delhi and within the territorial jurisdiction of this Hon'ble court as the articles in question were uploaded at

Kolkata. There is no publication within Delhi as mere access to a website would not entail such minimum contacts to allow that the cause of action or a substantial and integral part of the cause of action has arisen within Delhi. The defendant accordingly denies that this Hon'ble Court is clothed with Jurisdiction to entertain and try the instant suit. The instant suit is liable to be returned for presentation before a proper court.

25. The contents of paragraph 24 of the Plaint are denied. It is submitted that the suit has been deliberately over-valued so as to invoke the jurisdiction of this Court. The Plaintiff is not entitled to any damages and as such this suit may be dismissed on this ground alone.

26. The contents of paragraph 25 of the Plaint are vigorously denied. The Plaintiff is not entitled to either an injunction or order for damages for reasons already set out in these pleadings.

PRAYER:

27. In the facts and circumstance of the present case, the defendant humbly prays that this Hon'ble Court:

- a) Dismiss the present suit filed by the plaintiff;
- b) Grant exemplary costs in favour of the Defendant and against the Plaintiff;
- c) Hold that the baseless suit filed by the Plaintiff amounts to a frivolous and vexatious one.
- d) Pass any other order this Hon'ble Court deems fit in the facts and circumstances of the present case.

It is prayed accordingly.

Defendant

Through

Kolkata

TMT Law Practice

Date: September 28, 2012