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BEFORE THE HON'BLE HIGH COURT OF MUDHIRAS

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IN THE MATTER OF:

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GUO.INC

... PLAINTIFF

VERSUS

BASILTRI.

... DEFENDANT

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SUIT No. CS(COMM) 199A/2017

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UNDER SECTION 104 OF THE PATENT ACT, 1970.

ON SUBMISSION TO THE HON'BLE HIGH COURT OF MUDHIRAS

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MEMORANDUM ON BEHALF OF THE PLAINTIFF

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**BOOKS**

- 1) N.R.SUBBARAM, PATENT LAW PRACTICES & PROCEDURES, (2<sup>nd</sup> Ed., Wadhwa Nagpur, 2007)
- 2) ELIZABETH VERKEY, INDIAN PATENT LAW, (2<sup>nd</sup> Ed., EBC, 2012).
- 3) M.B.RAO & MANJULA GURU, PATENT LAW IN INDIA, (Wolters Kluwer, 2015).
- 3) VERSHAVAHINI, INDIAN COMPETITION LAW, (Lexis Nexis, 2016).
- 4) R. WHISH & D. BAILEY, COMPETITION LAW, (8 th ed., 2015).
- 5) S.M. DUGAR, GUIDE TO COMPETITION LAW, (U.P. Mathur 5 th ed. 2010).
- 6) D.P. MITTAL, COMPETITION LAW AND PRACTICE, (Taxmann 3rd ed. 2016).
- 7) P. NARAYANAN, PATENT LAW, (Eastern Law House, 4<sup>th</sup> ed. 2013).

**ARTICLE & TREATISES**

- 1) Raghavi Viswanath, *Demystifying the Indian FRAND Regime*, 21 Journal of IPR 89, 89-95 (2016).
- 2) Yogesh Pai, *The Rational Basis for FRANDly Courts Denying Injunctive Relief for SEPs Infringement*, 19, Journal of IPR, 146, 146-156.
- 3) Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs, and Trademarks, 2013.

- 4) Discussion Paper on Standard Essential Patents and Their Availability on Frand Terms, Govt. of India. Dept. of Industrial Policy and Promotion Ministry of Commerce & Industry, 2016.
- 6) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1995.
- 7) Paris Convention Treaty, 1883.

### CASES

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**STATEMENT OF JURISDICTION**

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Basiltri has approached the Intellectual Property Appellate Board, Mudhiras ('IPAB' for short) u/s 117G<sup>1</sup> of Patent Act, 1970.

Guo Inc. has approached the Jurisdiction of the Hon'ble High Court of Judicature at Mudhiras u/s 104<sup>2</sup>.

Guo Inc. has invoked The Competition Commission of India ('CCI' for short) u/s 19(1) of the Competition Act, 2002.

Guo Inc. reserves its rights of challenging the jurisdiction of CCI as invoked by Basiltri as mentioned above.

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<sup>1</sup> Transfer of pending proceedings to Appellate Board. -All cases of appeals against any order or decision of the Controller and all cases pertaining to revocation of patent other than on a counter-claim in a suit for infringement and rectification of register pending before any High Court, shall be transferred to the Appellate Board from such date as may be notified by the Central Government in the Official Gazette and the Appellate Board may proceed with the matter either de novo or from the stage it was so transferred.

<sup>2</sup>No suit for a declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any court inferior to a district court having jurisdiction to try the suit: Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision.



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**STATEMENT OF FACTS**

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**RELEVANT FACTS** - Guo Inc., a company of widget manufacturer incorporated in the United States having large portfolio of standard essential patents is trying to license its SEP's with the Basiltri which is an Indian Co. So that Guo would be able to convince the rest of the Indian market. After various request made by Guo Inc., Basiltri finally agreed to meet in its office in Noida. And in the meeting Guo shared a sample list of SEP's.

**MUTUAL DISAGREEMENT** -Guo Inc. put forward its condition for negotiation. A) They asked Basiltri to sign confidentiality agreement before they show their claim chart. B) The offer made to Basiltri was for global portfolio which has over 200,000 patents as they have internal information that Basiltri is exporting to at least China. C) Royalty rate will be disclosed only after they sign confidentiality agreement. D) Guo will show essentiality and validity of not more than 3 patents. E) Guo will charge royalty on the end product of the net selling price. But Basiltri disagreed to the above conditions. A)Basiltri is advised that Guo rates are known to public so they do not need to sign confidentiality agreement. B) Basiltri is only willing to discuss license for Indian Patents. C) Basiltri is willing to charge royalty on the price of component and not on the end product. D) Basiltri is asking Guo to show essentiality and validity of all the patents. E) Basiltri finally agreed to sign confidentiality agreement for 6 months from 6 years. Basiltri has finally agreed to meet on 20<sup>th</sup> August, 2017. Guo Inc. have been given enclosed letter in which Basiltri is inviting the Indian widget manufacturer to increase their exports on June 20<sup>th</sup>, 2017. Before Basiltri is meeting Guo Inc.

**PROCEDURAL BACKGROUND:**

**A.** On August 18 MD (referred as Gopal) of Basiltri filed information against Guo Inc. before Competition Commission of India.

**B.**Gopal has also filed a revocation petition under the Intellectual Property Appellate Board.

**C.**Guo. Inc filed a suit for infringement of Indian patent no. 2222b, 2222e, 2222f and 2222g against Basiltri on 25<sup>th</sup> August, 2017. After Basiltri cancelled meeting on August 20 at the last minute before the Mudhiras High court.

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**STATEMENT OF ISSUES**

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- 1. WHETHER THE SUIT FILED BY GUO INC. IS MAINTAINABLE IN THE COURT OF LAW?**
  
  - 2. WHETHER THE REVOCATION PETITION IS MAINTANABLE UNDER IPAB?**
  
  - 3. WHETHER THE CCI HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.?**
  
  - 4. WHETHER THERE HAS BEEN ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, THE INVESTIGATION SHOULD BE ORDERED BY CCI OR NOT?**
  
  - 5. WHETHER THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHALL BE HELD TO BE VALID BY THIS HON'BLE COURT?**
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**SUMMARY OF ARGUMENTS**

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**1. THE SUIT FILED BY GUO INC. IS MAINTAINABLE IN THE COURT OF LAW.**

It is humbly submitted that there has been clear infringement by Basiltri of the patents held by Guo Inc. As the patents held by Guo Inc are Standard Essential Patent and the suit patents are prima facie valid. It also contended that the suit patents are not unpatentable subject matter as Basiltri has failed to provide any credible challenge. Therefore, Basiltri is liable for infringement of patents.

**2. THE REVOCATION PETITION IS NOT MAINTANABLE UNDER IPAB.**

The revocation petition filed by Basiltri is not maintainable as Basiltri is taking double stand by filing two separate petitions – under CCI for abuse of dominant position. And under IPAB for revocation petition. Which itself has trapped Basiltri by contrary stand.

**3. THE CCI DOES NOT HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.**

It is submitted that the application for exercising jurisdiction is not maintainable before this Hon`ble Court. The CCI lacks jurisdiction to commence any proceeding when the issue is regarding the infringement of patent by another party.

**4. THAT GUO HAS NOT ABUSED ITS DOMINANT POSITION**

Guo Inc. had not violated FRAND term by charging royalty rate on end product and asking Basiltri to sign confidentiality agreement. *Also* Even if it is assumed that Guo is in dominant position in a market, it has not abused its dominant position. Guo has not imposed any unfair and discriminatory conditions on Basiltri. Therefore, It has not abused its dominant position.

**5. THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHALL BE HELD TO BE VALID BY THIS HON`BLE COURT.**

It is humbly submitted that the interim injunction should be immediately granted as the three pillars of injunction lies in favor of Guo Inc. And the suit patents are prima facie valid, That the Basiltri failed to have credible challenge and the Guo Inc. have not violated FRAND terms. Therefore Guo Inc. is entitled for relief i.e issue of injunction under the act.

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**ARGUMENTS ADVANCED**

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**1. THE SUIT FILED BY GUO INC. IS MAINTAINABLE IN THE COURT OF LAW.**

*It is humbly submitted that there has been clear infringement of the patents by Basiltri as held by Guo Inc. **Firstly**, the patents held by Guo Inc are Standard Essential Patent; **Secondly**, the suit patents are prima facie valid, and **Thirdly**, the suit patents are not unpatentable subject matter **Fourthly**, Basiltri has failed to provide any credible challenge. Therefore, Basiltri is liable for infringement of patents.*

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**1.1 THE PATENTS HELD BY GUO INC ARE STANDARD ESSENTIAL PATENTS**

**A.**It is most respectfully submitted that all the patents held by Guo Inc are Standard Essential Patent (hereinafter 'SEP'). In cases where the technology adopted as a part of an essential standard is patented, the technology/patent is referred to as a SEP<sup>3</sup>. The use of a standard technology ensures that there is a uniformity and compatibility in communications network across various countries. Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry. In simple terms, standardization is the process of developing and implementing technical standards. Such technological standards are termed as SEP, when they are patented and for which there are no non-infringing alternatives<sup>4</sup>.

**B.** Therefore, it is a *Condincio sine qua non* i.e. an indispensable condition that if any manufacturer who wants to produce anything concerning patents of the patent holder, he must take prior license from the patentee itself, failing which may lead to infringement of patents. Similarly, in this case Basiltri has also produced and exported it's product to China without entering into a licensing agreement with Guo Inc and thus violating Section 48<sup>5</sup> for using their patents which are SEPs and are necessary to comply with for production of the patented product. The facts that Basiltri refrains from dealing in Foreign Patents Licensing and thereafter exports

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<sup>3</sup>Telefonaktibolaget LM Ericsson (Publ) v. CCI, W.P. (C) No. 463 of (2014), ¶ 9.

<sup>4</sup>Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericksson (publ), (2014) SCC Online Del. 2614.

<sup>5</sup>§ 48, Patent Act, 1970.

its goods to China are self-contradictory per se and show no bona fide intention. Therefore, Basiltri has infringed Guo Inc Standard Essential Patents.

**1.2 THE PATENTS PROVIDED BY GUO INC. ARE PRIMA FACIE VALID**

**A.** It is most humbly submitted that all the suit patents provided by Guo Inc are Prima Facie valid. It is also a rule of practice that if a patent is a new one, a mere challenge at the Bar would be quite sufficient for a refusal of a temporary injunction, but if the patent is sufficiently old and has been worked, the court would, for the purpose of temporary injunction, presume the patent to be valid one<sup>6</sup>. If the patent is more than six years old and there has been actual user it would be safe for the court to proceed upon this presumption<sup>7</sup>. The most cogent evidence for this purpose is either that there has been a previous trial in which the patent has been held to be valid, or that the patentee has worked and enjoyed the patent for many years without dispute<sup>8</sup>. The fact that the patent creates a statutory monopoly, of course, protects the patentee against any unlicensed user of the patented device and considering that a patent has been in existence for more than 5 years, the patentee must be treated as actual user and there is a presumption of its validity<sup>9</sup>. If the patents are more than 6 year old and there has been actual user, there must be presumption of validity of patent<sup>10</sup>.

**B.** It is also submitted that all the patents held by Guo Inc which were provided to Basiltri in the meeting held on 28 Jan,2017 are sufficiently old and hence may be presumed to be valid as per the rule of practice. All the patents are more than 10 years old, starting from the year 1997 to 2008 and therefore, satisfying the aforesaid "6 year rule of validity". It is also a general principle of law that if a patent is a new one, a mere challenge to its validity would be a sufficient defence but if the patent is an old one (like in this case) the court shall presume it to be valid<sup>11</sup>. The patentee is also the undisputed user of the Standard Essential Patents which is unchallenged in the court by the defendant himself. Thus, there is *Prima Facie* validity of the patents and hence Basiltri has infringed Guo Inc's Patents by not taking License to its Patents.

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<sup>6</sup>Bilcare Ltd. v. The Supreme Industries Ltd., (2007) 3 ICC 475 (Del).

<sup>7</sup>Boots Pure Drug Co. Ltd. v. May & Baker Ltd., (1947) SCC OnLine Cal 21.

<sup>8</sup>National Research Development Corpn. of India v. Delhi Cloth & General Mills Co. Ltd., AIR 1980 Del 132, ¶ 7.

<sup>9</sup> Bajaj Auto Ltd. v. TVS Motor Co. Ltd, (2008) (36)PTC417(Mad), ¶ 50.

<sup>10</sup>Telemeccanica & controls (I) Ltd. v. Schneider Election Industries SA, (2001) 94 DLT 865 (DB), ¶ 13.

<sup>11</sup>V. Manioka Thevar v. Star Plough Works, AIR 1965 Mad 327.

### **1.3 BASILTRI HAS FAILED TO PLACE ANY "CREDIBLE CHALLENGE"**

**A.** It is most humbly asseverated that Basiltri has also failed to demonstrate existence of "Credible Challenge" to the validity of any patents. Guo Inc. has already put *Prima Facie* validity of it's patent and Basiltri has also failed to place any Credible Challenge. Placing a credible challenge before the court is *condincio sin qua non* without presumption of which validity of Patents cannot be challenged. In order to raise such a credible challenge to the validity of a patent, even at an interlocutory stage, the Defendant will have to place on record some acceptable scientific material, supported or explained by the evidence of an expert, that the plaintiff's patent is prima facie vulnerable to revocation. The burden on the Defendant here is greater<sup>12</sup>.

**B.** The challenge had to be both strong and credible. Also, the defendant resisting the grant of injunction by challenging the validity of the patent is at this stage required to show that the patent is "vulnerable" and that the challenge raises a "serious substantial question" and a "triable issue"<sup>13</sup>. Person challenging the validity of patents must put forth a substantial question of invalidity to show that the claims at issue are vulnerable<sup>14</sup> and bears the onus of establishing that there is "a serious question" to be tried<sup>15</sup>. Even at an interlocutory stage a challenge is raised, then also "the onus lies on the party asserting invalidity to show that want of validity is a triable question."<sup>16</sup>

**C.** Going by these decisions and principles laid down by different courts in different cases it is safe to assume that unless and until a "Substantial Question" or "Credible Challenge" has been raised by the party challenging validity of such patents, such patents will be presumed to be valid within legal framework. Similarly, in this case Guo Inc has already provided it's validity abiding by the "Six Year Rule" and other parameters and unless a credible challenge is raised by the opposite party against the patents, the patents shall be presumed valid. Thus, the Suit for Infringement is maintainable in the court.

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<sup>12</sup>Strix Ltd. v. Maharaja Appliances Ltd., MIPR 2010 (1) 181.

<sup>13</sup>F Hoffman La Roche v. Cipla, 2016(65)PTC1(Del)

<sup>14</sup>EricoInt'lCorprn v. VutecCorprn U.S. Court of Appeals, 2007

<sup>15</sup>Australian Broadcasting Corpn. v. O'Neill, (2006) HCA 46 ;Beecham Group Ltd. v. Bristol Laboratories Pty Ltd., (1968) HCA 1.

<sup>16</sup>HexalAustralai Pty Ltd. v. Roche Therapeutics Inc., 66 IPR 325.

**2. THE REVOCATION PETITION FILED BY BASILTRI IS NOT MAINTAINABLE BEFORE THE “INTELLECTUAL PROPERTY APPELLATE BOARD”.**

*It is humbly submitted that the revocation petition filed by Basiltri is not maintainable as Basiltri is taking double stand by filing two separate petitions – **Firstly** under CCI for abuse of dominant position. **Secondly** under IPAB for revocation petition. Which itself has trapped Basiltri by taking contrary stand.*

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**A.** It is submitted that the conduct of the Basiltri would show the unwillingness to obtain a license on FRAND terms, meeting that was to be held between representatives of both the parties on 20<sup>th</sup> August, 2017 that the revised terms to be offered by Guo Inc. may be acceptable to Basiltri<sup>17</sup>. But Basiltri later on took a resile from the same and initiated proceedings before the IPAB and CCI against plaintiff at 18<sup>th</sup> August, 2017 i.e., while the licensing negotiation were still going on between the parties<sup>18</sup>. While giving the impression to Guo Inc. that Basiltri still has a bonafide interest in taking a license from Guo Inc. Basiltri never informed Guo Inc. that it is initiating or has initiated any proceedings before the IPAB and the CCI.

**B.** On one hand Basiltri gave the impression to Guo Inc. that it wanted to obtain a license for Guo(s) standard essential patents, and on the other hand it filed Complaint/Information before the CCI for abuse of dominant position and also filing Revocation Petition before the IPAB (taking two different self-serving stands)<sup>19</sup>. The said conduct of the defendant would show that there was no *bonafide* intention on part of defendant. Before the CCI, defendant's complaint is based on the premise that plaintiff is the owner of an essential patents to be used by any entity involved in manufacture of telecommunication devices. As a result, plaintiff enjoys a dominant position and is abusing the same by asking for excessive royalty rates. Before this Court in the present suit, it is alleged by defendant that the suit patents are invalid and are not essential in nature<sup>20</sup>. Also an admission made by a party in a pleading, even in a different proceeding, with regard to a different subject-matter but also against a different opponent<sup>21</sup> can be used as

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<sup>17</sup>Moot proposition, Page 5.

<sup>18</sup>Moot proposition, Page 6.

<sup>19</sup>Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Limited, MANU/DE/0774/2015.

<sup>20</sup>*Ibid*

<sup>21</sup>*Ibid*

evidence against such party in another proceeding<sup>22</sup>. Applying the said principles of law to the present case, it is evident that should the defendant be allowed to re-agitate, there may be a situation of parties approbating and reprobating at the same time which is impermissible. This plea is thus barred by principles of approbate or reprobate which is a facet of estoppels<sup>23</sup>. There are no subsequent events which have changed warranting re-adjudication of the matter. From the entire gamut of the matter, it appears that the suit patents are valid; they are corresponding patents in other countries. The defendant has infringed the same. Unless the suit patents are declared as invalid in revocation petitions filed by the defendant, the same cannot be allowed to be infringed by the defendant who is also unwilling to execute a FRAND licence<sup>24</sup>.

Therefore, in order to avoid execution of FRAND agreement and at the same time infringing the patents, the defendant had trapped himself in such a position by taking the contrary stand in different forum.

### **3. THE CCI DOES NOT HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.**

*It is submitted that the application for exercising jurisdiction is not maintainable before this Competition Commission of India. The CCI lacks jurisdiction to commence any proceeding when the issue is regarding the infringement of patent by another party<sup>25</sup>.*

**A.** As it is a case of negotiation of patents between two parties and patent being the subject matter of Patent act, 1970 which is a special act so it must be dealt under the provisions of patent act itself. Provisions regarding “avoidance of certain restrictive conditions” are specified in the said act<sup>26</sup>& if a case falls under the provision (which herein the case does not satisfy) various remedies are provided in the act itself. Hence, there is no need to refer any other law as patent act itself has sufficient provision regarding unfair practices.

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<sup>22</sup>Basant Singh vs. Janki Singh, AIR 1967 SC 341

<sup>23</sup>Bhaja Choudhury v. Chuni Lal, (1906) 11 C.W.N. 284, Giris v. Bepin, (1917) 27 C.L.J. 535

<sup>24</sup>Rama Charan v. Nimai Mandal, A.I.R. 1922 Cal. 114.

<sup>25</sup>Ericsson, *Supra Note 1*.

<sup>26</sup>§140, Patent act, 1970.



**B.** In a supreme court case it was held as - *ordinarily the general law must yield to the special*<sup>27</sup>. The Patents Act is a special act and contains comprehensive provisions for addressing all the matters including protecting the interest of public, the Competition Act has been enacted as a general law & complaint could not resort under the competition act for any alleged abuse of dominant position by a patentee<sup>28</sup>. "*Inconsistency would mean mutual repugnancy where acceptance of one would imply abrogation or abundance of the other*"<sup>29</sup>. If the patent act has the jurisdiction regarding the issue then the other law will automatically be repugnant. But the question arise here is that the section 60 competition act, 2002 provides an overriding proviso inconsistent with other law. But the Supreme Court considered the question whether the provisions of Life Insurance Corporation Act, 1956 would override certain provisions of the Companies Act, 1956. Under Section 446(2) of the Companies Act, 1956, the Company Court would have jurisdiction to entertain any suit or proceeding or claim against a company which is being wound up. Section 446 of the Companies Act, 1956 contains a non-obstante clause and its provisions would, thus, override other laws. However, the Supreme Court held that the Life Insurance Corporation Act being a special Act would override the provisions of the Companies Act and the Tribunal constituted under the Life Insurance Corporation Act, would have the jurisdiction to entertain any claim<sup>30</sup>. The Patents (Amendment) Act, 2002 received the Presidents' assent on 20th May, 2003<sup>31</sup>. Thus, in so far as the Amendments to the Patents Act introduced by the aforesaid Amendment Acts of 2002 and 2005 are concerned, the same would be construed as later enactments<sup>32</sup>. Also the Patents Act is a self-contained code<sup>33</sup>. Therefore, to be construed as forming a code complete in itself and exhaustive of the matters dealt with therein, and ascertain what their true scope is.

**C.** Thus, if there are irreconcilable differences between the Patents Act and the Competition Act in so far as anti-abuse provisions are concerned, the Patents Act being a special act shall prevail

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<sup>27</sup>Chairman, Thiruvalluvar Transport Corpn. v. Consumer Protection Council, (1995) SCC (2) 479, ¶ 6.

<sup>28</sup>General Manager Telecom v. M. Krishnan & Anr. JT, (2009) 11 SC 690; *Id.*

<sup>29</sup>Basti Sugar Mills Co. Ltd. v. State of U.P. & Anr., AIR (1979) SC 262, ¶ 23.

<sup>30</sup>Damji Valji Shah & Anr. v. LIC of India & Ors., AIR 1966 SC 135, ¶ 19.

<sup>31</sup>Ravulu Subba Rao v. CIT, AIR 1956 SC 604; Patel Naranbhai Marghabhai v. Dhulabhai Galbabbhai, (1992) 4 SCC 264; Syndicate Bank v. Prabha D. Naik, (2001) 4 SCC 713; CIT v. Mahendra Mills, (2000) 3 SCC 615.

<sup>32</sup>Shri Ram Narain v. The Simla Banking & Industrial Co. Ltd., AIR 1956 SC 614.

<sup>33</sup>Ericsson, *Supra Note 1.*

notwithstanding the provision of Section 60 of the Competition Act<sup>34</sup>. Also the expression 'reasonably affordable' would require the patentee to be sensitive and responsible to the commercial realities of the market and the issues sought to be agitated by Plaintiff as well as the reliefs sought fell squarely within the scope of the Patents Act and were, thus, outside the jurisdiction of CCI. Therefore, the High Court has the jurisdiction to decide all issues pertaining to patents. In the present case patent being a special act and having remedies for abuse of monopoly right given to the patentee CCI cannot hold the jurisdiction. Hence, the present case falls within the purview of Patents Act, 1970.

**4. THERE HAS BEEN NO ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, NO INVESTIGATION SHOULD BE ORDERED BY CCI.**

**4.1 GUO INC. HAD IMPLICITLY TRIED LICENSING ITS SEPs UNDER FRAND TERMS.**

*The council submits on behalf of plaintiff that it is prima facie valid that the plaintiff patent is a SEP patent. As it is de jure standards, in general, set by Standard Setting Organizations (SSOs)<sup>35</sup>. And likely in the present case it is set by SSO Paris. In case of Standard essential patents the patent holder to avoid any competition<sup>36</sup> & to avoid abuse of the dominant market position, such licenses must be made available under Fair, Reasonable and Non-Discriminatory (FRAND) term. Thus, this patent right is not absolute like rest of the patent rights<sup>37</sup>. And Guo Inc. had not violated FRAND term by- (1) Charging royalty rate on end product.(2) By asking Basiltri to sign confidentiality agreement.*

**4.1.1 CHARGING ROYALTY RATE ON THE END PRODUCT DOES NOT AMOUNT TO VIOLATION OF FRAND TERMS.**

**A.** The council humbly submits that charging royalty rate on the end product does not amount to violation of FRAND terms. As charging royalty rate on net selling price does not cause a rise in

<sup>34</sup>*Id.*

<sup>35</sup>Discussion Paper on Standard Essential Patents and Their Availability on Frand Terms, Govt. of India. Dept. of Industrial Policy and Promotion Ministry of Commerce & Industry, 2016, <https://mail.google.com/mail/u/0/#search/aryan+singhal/15ff370ef6d58891?projector=1>

<sup>36</sup>*Id.*

<sup>37</sup> Understanding patents, competition and standardization in an interconnected world, Telecommunication Standardization Bureau, ITU, 2014, <http://www.itu.int/en/ITU-T/ipr/Pages/Understanding-patents-competition-and-standardization-in-an-interconnected-world.aspx>

the “royalty rates to unjustly profit” from his dominant position and is not *royalty stacking*. The Defendant to pay the royalty on the chipset value (Herein referred as price of component) cannot be accepted in view of plaintiff's practice of charging Royalty on the device price is Non-Discriminatory (FRAND)<sup>38</sup>. That the Delhi High Court found that Ericsson's practice of charging a royalty based on the price of the downstream device is FRAND<sup>39</sup>. Court should also refer the Eastern District of Texas had ‘rejected that royalty should be based on chipset price<sup>40</sup>. The directions referred by Chinese Competition Authority (the National Development and Reform Commission, NDRC) gave with respect to Qualcomm's SEPs for 3G and 4G technologies, fixing the royalty rates as a percentage of the net selling price of devices incorporating 3G and 4G standards<sup>41</sup>.

**B.** Prima facie, its challenge at present is sham as the defendant from the very beginning 30<sup>th</sup> August 2016 was aware about the standard essential patent of the plaintiff, they could have flatly refuse to deal with the plaintiff from the day one on the grounds. It appears to the Court that even the Noida suit was filed by defendant in order to avoid execution of FRAND license. It was in fact filed by the defendant when both the parties were in active talks with each other for executing a FRAND license<sup>42</sup>. The aforesaid conduct of the defendant would show its unwillingness to seek a FRAND license in respect of the plaintiff's portfolio of SEPs and thus, it is submitted that Defendant is liable to be restrained from continuing its infringing activities. Hence, in Conformance to FRAND terms guarantee that the SEP holders do not abuse their dominant position in the market and the plaintiff tried licensing SEPs in a ‘fair, reasonable and non-discriminatory’ manner.

#### **4.1.2 THAT SIGNING CONFIDENTIALITY AGREEMENT DOES NOT VIOLATES FRAND TERMS.**

**A.** It is humbly asseverated that in the present case asking the licensee to sign confidentiality does not amount to violation of FRAND terms. It is submitted that plaintiff proposed for execution of confidentiality agreement with a view to facilitate the exchange of confidential information (claim chart mapping, infringement analysis etc.) which will aid and assist both the

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<sup>38</sup>Broadcom Corpn. v. Qualcomm Incorporated, 501 F.3d 297 (3<sup>RD</sup> Cir. 2007).

<sup>39</sup>Telefonaktiebolaget Lm Ericsson (Publ) v. Best IT World India Pvt. Ltd., MIPR 2015 (3) 1.

<sup>40</sup>CSRIO v CISCO, 809 F.3d 1295, 1299 (Fed. Cir. 2015).

<sup>41</sup>Telefonaktiebolaget LM Ericsson(PUBL) v. Xiaomi Technology &Ors., (2016) SCC OnLine Del 2404.

<sup>42</sup>Telefonktiebolaget LM Ericsson v. Lava International Ltd., MANU/DE/1171/2016.

parties in negotiating and executing a FRAND license. Execution of such an confidentiality agreement is a norm in the industry for the purpose of negotiating and executing a FRAND license as it helps parties to exchange their proprietary information. It is recognized that confidentiality agreement may be used to protect the commercial interests of both potential licensor and potential licensee during an Essential IPR licensing negotiation, and this general practice cannot be challenged<sup>43</sup>.

**B.**Therefore, it is important factor for both the parties for commercial transaction to make confidentiality agreement. And hence Guo Inc. had not violated FRAND terms.

#### **4.2 THERE EXISTS NO PRIMA FACIE CASE OF ABUSE OF DOMINANT POSITION**

**A.** It is submitted that there exist no prima facie case in the matter and CCI should not direct DG for any investigation under the Competition Act<sup>44</sup>. As the information filed<sup>45</sup> by the Basiltri is vague. The ascertainment of the relevant market is essential for analysing a case of abuse of dominance<sup>46</sup>. When determining what constitutes the relevant market, due regard must be given to both the *relevant product* as well as *geographic market*.<sup>47</sup> All those products or services which are regarded as interchangeable or substitutable by the consumer form part of the same relevant product market.<sup>48</sup> To determine the relevant product market, CCI has to take into account the characteristics, end-use of product, the existence of specialized producers, consumer preferences etc. The relevant product in the Instant case is “license for Standard Essential Patent”. The buyer of the product is largest manufacturer of Widgets in India.

**B.** With regard to the relevant geographic market, the functionality of SEPs in India. The Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.<sup>49</sup>

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<sup>43</sup>*Id.*

<sup>44</sup> § 26(1), Competition Act, 2002.

<sup>45</sup> § 19(1), Competition Act, 2002.

<sup>46</sup>Prints India v. Springer India Pvt. Ltd., Case 16/2010, ¶ 9 (CCI).

<sup>47</sup> §19(5), Competition Act, 2002.

<sup>48</sup> § 2(t), Competition Act, 2002.

<sup>49</sup>*In re, Shri Vinod Kumar Gupta v. Whats App Inc.*, Case 99/2016, ¶ 20 (CCI).

C. As in the instant matter the condition of signing the confidentiality agreement and then showing the essentiality and validity of the patents is the private policy of the OP and they do not want to disclose the matter of the patents to anyone and also want commitment from the prospective licensee to maintain the privacy of the SEP's Information. Therefore, there is no prima facie case before this hon'ble court.

**4.3 THAT GUO INC. HAS NOT ABUSED ITS DOMINANT POSITION IN THE MARKET**

A. A plain reading of Section 4(1) of the Competition Act indicates that it prescribes any enterprise from abusing its dominant position. Thus, for the purposes of Section 4(1) of the Act, an enterprise must be the one which is in a 'dominant position'. "An enterprise can be regarded as dominant if it enjoys/possesses a position of strength in the relevant market, which enables it to operate independently of the competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour".<sup>50</sup>

B. In any Event, even if Guo is dominant in the certain market, it is submitted that it has not abused its dominant position and therefore not violated Section 4 of the act. It is submitted that Guo has not indulged in any practice that resulted in denial of market access in any manner. As Guo had meet Basiltri on Feburay 27, 2017 for the deal.<sup>51</sup> In the meeting Guo shared the sample of SEPs for the widget standards set by Widget Standard Organisation, Paris.<sup>52</sup> In the meeting the Guo also discussed about the structure of the business deal in which they stated that they have 20000 Patents and essential that are essential to widget standard. They also asked Basiltri to sign the confidentiality agreement before Guo share their claim chart.<sup>53</sup> Guo also informed Basiltri that the royalty rates will be disclosed only after they sign confidentiality agreement.<sup>54</sup>

C. The infringer's refusal to negotiate a license is constructive rather than explicit, if an infringer refuses to sign a standard nondisclosure agreement (NDA). It is standard commercial practice for

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<sup>50</sup>Mrs. Nikunj Sisondia v. Chairman & Managing Director, Earth Infrastructure Ltd., (2017) 85 taxmann.com 367 (CCI).

<sup>51</sup>Moot Proposition, Page 2.

<sup>52</sup> Moot Proposition, Page 3.

<sup>53</sup> Moot Proposition, Page 3.

<sup>54</sup> Moot Proposition, Page 4.

parties entering into a license agreement to execute a mutual NDA.<sup>55</sup> The infringer of an SEP cannot refuse to execute an NDA and thereby stall the commencement of license negotiations. Such conduct by the infringer would constitute a constructive refusal to negotiate a license, and it would have the same effect as the infringer's express refusal to negotiate a license.

**D.** The infringer sometimes intentionally delays the license negotiations. Courts have found that prolonged infringement supports a finding of egregious infringement.<sup>56</sup> Similarly, evidence of the infringer's repeated misconduct favors enhancing the damages award.<sup>57</sup> Evidence that the infringer unduly delayed the timely execution of a license agreement increases the infringer's culpability.

**E.** To determine the reasonableness of the infringer's dilatory negotiating behavior, the finder of fact should examine whether the infringer "acted in accordance with the standards of commerce for its industry."<sup>58</sup> The more the infringer's negotiation conduct departs from industry practice, the more confidently the finder of fact may conclude that the infringer either intentionally infringed the SEPs or acted in reckless disregard of the SEP holder's rights, such that the infringer engaged in egregious infringement deserving an enhanced damages award. However, there is an important caveat, if the SEP holder faces pervasive infringement of its patents, the industry's overall pattern of intentional or reckless disregard for the SEP holder's rights cannot provide the infringer a defense against its own willful infringement.<sup>59</sup>

**F.** In the Instant case the Basiltri was also delaying in signing the confidentiality agreement. As discussed on February 27, 2017 the basiltri replied to the mail on 05<sup>th</sup> march 2017 in which they after consulting their lawyer think to negotiate on these terms, that they will discuss license of Indian patents only(1) that Guo will demonstrate validity and essentiality for each Indian patent(2) and they will not sign confidentiality agreement as according to them the rates are known publicly (3). After which they didn't replied to any of the mail till July, 2017. The

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<sup>55</sup>Convolve, Inc. v. Compaq Comput. Corp., 527 Fed.App'x 910, 915 (Fed. Cir. 2013); Radio Sys. Corp. v. Accession, Inc., 638 E 3 d 785, 788 (Fed. Cir. 2011); J. Gregorysidak, Enhanced Damages for Infringement of Standard - Essential Patents, 1 Criterion J. on Innovation 1101, 1113 (2016).

<sup>56</sup> Corp. v. Portec, Inc., 970 F.2d 816, 827 (Fed. Cir. 1992).

<sup>57</sup>J. Gregorysidak, *Supra Note*, 45.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

conditions applied by Guo are standard commercial practice to enter into the agreement. Hence, It cannot be said that Guo has abused its Dominant Position in the Market.

**G.**The term 'Royalty'<sup>60</sup> is defined as a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee. It is usually a payment of money but may be a payment in kind i.e. of part of the produce of the exercise of the right.<sup>61</sup> “The essential requirement is that the ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product”.<sup>62</sup>

**H.**In a case where the plaintiff was already placed on record the wherein the arguments were rejected that royalty<sup>63</sup> should be based on chipset price.<sup>64</sup>

**I.** In the instant case Basiltri have been uncooperative in signing the confidentiality agreement as well as agreeing to pay the royalty rates on the end use of the product and not on the component price of the product. Guo has also been served with the enclosed letter from Mr.Gopal in which he is talking about a meeting with all the widget manufacturers in India. Basiltri has also cancelled the meeting at the last moment which was supposed to be held on 20<sup>th</sup> August, 2017. It is the delay on their part which is not making it a conclusion to any deal between these two companies. i.e. Guo and Basiltri. Hence, Guo cannot be held violative of Section 4 of the Act for any kind of abuse of its dominant position.

**5. THAT THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHALL BE HELD TO BE VALID BY THIS HON'BLE COURT**

*It is humbly submitted that the interim injunction should be immediately granted as the defence has refused to obtain license on FRAND terms & started exporting the patented product due to which Guo Inc. is suffering huge amount of loss, and have violated the right of Patentee* <sup>65</sup>. **Firstly**, Guo Inc satisfies the prerequisites of invoking an injunction; **Secondly**, That the suit patents are prima facie valid. **Thirdly**, That the Basiltri failed to have credible challenge.

<sup>60</sup>Jowitt's Dictionary in English Law, 2nd Ed.

<sup>61</sup>Ripley & Co. Stevedoring & Holding Pvt. Ltd. Ors. v. The Board of Trustees &Ors., MANU/WB/1001/2015.

<sup>62</sup>Ericsson INC. v. D-Link System, INC. 773 F.3d, 1201 (2014).

<sup>63</sup>Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Ltd., MANU/DE/0774/2015

<sup>64</sup>General Manager, *Supra Note* 18.

<sup>65</sup>§, 48, Patent act, 1970.

*Fourthly, That the Guo Inc. have not violated FRAND terms. Therefore Guo Inc. is entitled for relief i.e. issue of injunction under the Act<sup>66</sup>.*

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**5.1 GUO INC SATISFIES THE PREREQUISITES OF INVOKING AN INJUNCTION.**

**A.** It is stated that the courts should consider the traditional four- factor test for issuance of an injunction, i.e existence of prima facie case, balance of convenience, irreparable injury and public interest and should grant an injunction on the basis of above mentioned factors<sup>67</sup>. In the present case, there has been a prima facie suit for infringement as the Basiltri without valid grant of license started exporting its product to China<sup>68</sup>. It has been about one year of negotiations during which the defendant misled the plaintiff and misused all the information and details given by the plaintiff which were provided by plaintiff with the view to facilitate the execution of a FRAND license agreement since the defendant never intended to sign any license agreement with plaintiff leaving it with no option but to file the present suit for infringement against defendant seeking permanent injunction<sup>69</sup>.

**B.** While considering the issue of balance of convenience, factors which like the following shall be considered:- The extent to which disadvantages to the party would be incapable of being compensated in damages in the event of succeeding trial of the opposite party<sup>70</sup>. In the present case, the plaintiff would have more dis-advantage as compared to the defendant. As herein Basiltri has started exporting to China already and if interim injunction is denied, then the rest of the market would also start manufacturing this will lead to huge loss and waste of having prima facie knowledge and research of the suit patent. Irreparable hardship is a separate distinct head wherein the Court of necessity has to examine and be satisfied about, while considering interlocutory applications for injunction<sup>71</sup>. Irreparable harm is a harm which cannot be remedied except through injunctive relief<sup>72</sup> and it cannot be compared in monetary terms. In the present case, the plaintiff claims to be holding a large number of patents for a wide variety of widgets SEP and not granting of interim injunction without proving invalidity of patent would cause

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<sup>66</sup> §108, Patent act, 1970.

<sup>67</sup> Franz Xaver Huemerv. New Yash Engineers, AIR 1997 Delhi 79.

<sup>68</sup> eBay v. MercExchange, (2006) 547 US 388.

<sup>69</sup> Ericsson, *Supra Note* 53.

<sup>70</sup> American Cyanamid v. Ethicon Ltd., 1975 (1) All.E.R 504 (HL).

<sup>71</sup> Hoffmann, *Supra Note* 11.

<sup>72</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007).



irreparable harm to the society as these patents are standard to form any kind of widget as set by the SSO. However, the injury to the public is that the public would be deprived of the Plaintiff's product who are not parties to the suit & would not be able to set the standard given by the SSO as it is the standard essential product which is necessary for every widget manufacturer to follow and will result and which damage cannot be restituted in monetary terms, is not only uncompensatable, it is irreparable. Thus, irreparable injury would be caused if the injunction sought for is granted.

### **5.2 THAT BASILTRI FAILED TO HAVE "CREDIBLE CHALLENGE".**

**A.** It is submitted that in order to raise a credible challenge to the validity of a patent, the Defendant will have to place on record some acceptable scientific material, supported or explained by the evidence of, that the Plaintiff's patent is prima facie vulnerable to revocation. The burden on the Defendant in this present situation is greater on account of the fact that there was no opposition, pre-grant or post-grant, to the Plaintiff's patent<sup>73</sup>. As far as the defendant is concerned, it has not produced any technical or plausible reasons as to why the acts of the defendant do not infringe the plaintiff's patents. The allegation made by the defendant is without any valid substance and without any basis. In the absence of even an iota of proof to the contrary, plaintiff's case of infringement is made out. The defendant has failed to provide any technical analysis or expert affidavit in support of its aforesaid contentions.

**B.** Therefore, if the case of infringement is made and there is no valid defence, normally in an action for infringement of patent, an injunction must not be refused<sup>74</sup>.

### **5.3 GUO INC HAVE NOT VIOLATED "FRAND" TERMS**

**A.** In the present case there is no violation of FRAND terms by Guo Inc. as it has been recognized that the confidentiality agreement is used to protect the commercial interests of both potential licensor and potential licensee during an Essential IPR licensing negotiation, and this general practice cannot be challenged<sup>75</sup>. Defendant to pay the royalty on the chipset value, price of the component in the instant case, cannot be accepted in view of plaintiff's practice of

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<sup>73</sup> BEECHAM, *Supra Note 13*.

<sup>74</sup> Strix Limited v. Maharaja Appliances Ltd., MANU/DE/2174/2009.

<sup>75</sup> TELEFONKTIEBOLAGET, *Supra Note 32*.

charging Royalty on the device price, end product in the present case, is Non-Discriminatory (FRAND)<sup>76</sup>. Potential licensee could only claim defence of abuse of dominant position only in limited circumstances where the defendants could establish that –(i) they had made an unconditional offer for obtaining a licensee which could not be refused by the patent holder without abusing its dominant position and (ii) such terms included the defendants waiving their right to challenge the patent. This view has been incorporated in a number of cases<sup>77</sup>.

**B.** In the present case, it is implicitly valid that Bailtri refused to sign the confidentiality agreement at the earlier stage and also wanted Guo to charge royalty rate on the price of the component<sup>78</sup> which is a conditional offer as it is fraudulent to the rest of the Guo(s) licensees. Power to grant an injunction against an implementer will only arise once at least two conditions are satisfied - there must be a FRAND licence available for the licensee to accept (or subject to case management some proper means of settling one) and there must be a SEP held by the commission granting it to the patent-holder, to be valid and essential. Only an implementer who refuses to take a FRAND licence will be at risk of an injunction<sup>79</sup>. Whereas an implementer who refuses to take a licence on terms found by the court to be FRAND has chosen to have no licence, and so if they have been found to infringe a valid patent an injunction can be granted against them<sup>80</sup>.

**C.** Rather accepting the offer on FRAND terms Basiltri infringed the patents of Guo by export to China. Defendant who had already found to infringe a valid patent cannot be compelled to accept an offer of a licence but a defendant with no licence, who had refused to accept terms on offer which had been found to be FRAND, would not be entitled to the protection from injunctions provided for by the patentee's FRAND undertaking. An injunction would follow and to grant it would be a proper exercise of the court's equitable jurisdiction<sup>81</sup>. An injunction has at least the potential to restrict competition. However, by making a commitment to grant a licence to the third parties on FRAND terms, the patent holder does not give up its right to seek an injunction,

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<sup>76</sup>BROADCOM, *Supra Note*, 28.

<sup>77</sup>Bundesgerichtshof [BGH] (federal court of justice) may 6, 2009- case No.KZR 39/06 (Ger.)

<sup>78</sup>Moot Proposition, Page 3.

<sup>79</sup> Huawei v. ZTE, [2015] Bus LR 1261.

<sup>80</sup>Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd.&Anr., MANU/NULL/0003/2017.

<sup>81</sup>Vringo v. ZTE (both [2013] EWHC 1591 (Pat) and [2015]).

and seeking of an injunction cannot by itself constitute an abuse of a dominant position.<sup>82</sup> The right of a party to go to court and ask for an injunction is a universally recognised right and enshrined in Article 47 of the Charter of Fundamental Rights, i.e. right to an effective remedy and to a fair trial.<sup>83</sup>

**D.** The final contentions are that Guo, In this patent infringement action may seek an injunction against an alleged infringer preventing the latter from continuing to use the inventions claimed in the patent, until and unless the substantive case on infringement (and in some cases also validity) has been determined. Also till the date there has been no order revoking the patent, thus, it should be treated as valid and therefore interim injunction shall not be refused.

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<sup>82</sup>Chemtura Corporation v. Union of India, MANU/DE/1880/2009.

<sup>83</sup>Huawei Technologies Co. Ltd. v. ZTE Corp., [2015] Bus LR 1261.

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**PRAYERS**

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Wherefore in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to adjudge and declare that:

1. Guo Inc. in suit for infringement is entitled to relief of account of profits.
2. Guo Inc. has not violated section 4 of the competition Act with respect to the Abuse of Dominant Position.
3. Guo Inc. is entitled to grant of interim Injunction.
4. To quash revocation proceedings filed by Basiltri in Intellectual Property Appellate Board.

*Any other order that this court may deem fit to grant on the grounds of justice, equity and good conscience.*

All of which is most respectfully submitted.

Date: 30 November, 2017

Sd/-

Place: Mudhiras

The Counsel for Guo Inc.