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Certificate No.	: IN-DL23393494732812U
Certificate Issued Date	: 25-Apr-2022 03:06 PM
Account Reference	: IMPACC (IV)/ dl871503/ DELHI/ DL-DLH
Unique Doc. Reference	: SUBIN-DL87150333661582834973U
Purchased by	: ALOK KUMAR JAIN
Description of Document	: Article 12 Award
Property Description	: Not Applicable
Consideration Price (Rs.)	: 0 (Zero)
First Party	: ALOK KUMAR JAIN
Second Party	: Not Applicable
Stamp Duty Paid By	: ALOK KUMAR JAIN
Stamp Duty Amount(Rs.)	: 100 (One Hundred only)



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Disputed Domain Name: WWW.OPTIMUMNUTRITION.IN
ARBITRATION AWARD

Respondent

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BEFORE ALOK KUMAR JAIN, SOLE ARBITRATOR

.IN REGISTRY

NATIONAL INTERNET EXCHANGE OF INDIA(NIXI)

INDRP ARBITRATION

INDRP Case No. 1521

Disputed Domain Name: WWW.OPTIMUMNUTRITION.IN

ARBITRATION AWARD

Dated 26.04.2022

IN THE MATTER OF:

**GLANBIA PERFORMANCE NUTRITION LIMITED
GLANBIA HOUSE,
KILKENNY
IRELAND**

COMPLAINANT

Versus

**SAMIT GUPTA
A-11.Shriram Ind. Estate,
Near Wadala Tel Exchange,
Wadala ,Mumbai-400031
Maharashtra,India**

RESPONDENT

1. The Parties

- 1.1 The Complainant in this arbitration proceeding is **Glanbia Performance Nutrition Limited** , with its office at Glanbia House,Kilkenny,IRELANDThe Complainant is represented by Shri

Akhilesh Kumar Rai, AZB & Partners, Plot no.A8, Sector 4, Noida-201301, India, Ph:+911204179999, Email: akhileshkumar.raai@azbpartners.com

- 1.2 The Respondent is Samit Gupta with its office at A-11, Shriram Ind. Estate, Near Wadala Tel Exchange, Wadala, Mumbai-400031 Maharashtra, India, Ph:(+91)2240732121, Email:samitg@yahoo.com

2 **Domain Name and Registrar:-**

- 2.1 The Disputed Domain name is <www.optiimmunutrition.in> bearing Registry Domain ID: D5D77179AB1014884B1A9E079094F215E-IN which was registered on 4th April 2020
- 2.2 The accredited Registrar with whom the Disputed Domain Name is registered is Technologies Pvt.Ltd., 103, Triputi Udyog Premises Ltd., IB Patel Road, Goregaon, Mumbai, Maharashtra, Ph:022-40811155, email: abuse@netlynx.com

3 **Procedure History:**

- 3.1. This arbitration proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy (the "Policy") adopted by the National Internet Exchange of India ("NIXI") and the INDRP Rules of Procedure (the "Rules") which were approved in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the Disputed Domain

Name with a NIXI accredited Registrar, the Respondent agreed to the resolution of disputes pursuant to the said Policy and the Rules.

As per the information received from NIXI, the history of the proceedings is as follows:

- 3.2. The Complaint was filed by the Complainant with NIXI against the Respondent . On 23.3.2022 I was appointed as Sole Arbitrator to decide the disputes between the parties. I submitted statement of Acceptance and Declaration of Impartiality and Independence same day as required by rules to ensure compliance with Paragraph 6 of the Rules.

NIXI notified the Parties of my appointment as Arbitrator via email dated 23.3.2022 and also served by email an electronic Copy of the Complainant with Annexures on the Respondent at the email address of the Respondent.

- 3.3. I issued notice to the parties vide email dated 23.3.2022 directing the Complainant to serve complete set of Complaint

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on the Respondent in soft copies as well as in physical via courier /Post. The Complainant served the copies of the Complaint in electronic form vide email dated 25.3.2022 at the email address of the Respondent on 25.3.2022 and also sent copy of the Compliant to the Respondent by Courier which was delivered to the Respondent on 26.3.2022 as per service report furnished by the Complainant vide its Email dated 29.3.2022. The Respondent was directed to file its response with in 10 days from the date of notice. No response was received from the Respondent. Therefore, on 2.4.2022. I granted further time to Respondent directing the Respondent to file response within 7 days failing which the matter shall be decided on merit. No reply from the Respondent was received till 10.4.2022. On 11.4.2022 I informed the parties that no reply has been received from the Respondent and now the complaint shall be decided on merit. No personal hearing was requested.

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3.4 A Complete set of Complaint was sent by NIXI in electronic form by email to the Respondent on 23.3.2022 while informing the parties about my appointment as Arbitrator. There after a complete set of complaint was again sent to the Respondent in electronic form by email dated 23.5.3.2022 by the Complainant as per directions of the tribunal. The Complainant also served copy of the Complaint on the Respondent by Courier as per service report submitted by the Complainant vide email dated 29.3.2022. 10 days time was given to the Respondent to file reply. on 2.4.2022 the tribunal granted further 7 days time to the Respondent to file its response. All communications were sent to Complainant, Respondent and NIXI by email. Therefore I hold that there is sufficient service on the Respondent through email as per INDRP rules. The Respondent has not filed any response to the Complaint despite two opportunities and there has been no communication from the Respondent till date.

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3.5. Clause 8(b) of the INDRP Rules requires that the Arbitrator shall at all times treat the Parties with equality and provide each one of them with a fair opportunity to present their case.

3.6. Clause 12 of INDRP Rules provides that in event any party breaches the provisions of INDRP rules and/or directions of the Arbitrator, the matter can be decided ex-parte by the Arbitrator and such arbitral award shall be binding in accordance to law.

3.7 As stated above, Initially I gave 10 days time to the Respondent to file a Response and additional 7 days time to file response, but the Respondent failed to file any Response to the Complaint despite opportunities and chose not to answer the Complainant's assertions or controvert the Complaint and the contentions raised. As a result, I find that the Respondent has been given a fair opportunity to present his case but has chosen not to come forward and defend itself.

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3.8 Further Clause 13(a) of the Rules provides that an Arbitrator shall decide a Complaint on the basis of the pleadings submitted and in accordance with the Arbitration & Conciliation Act, 1996 amended as per the Arbitration and Conciliation (Amendment) Act, 2015 read with the Arbitration & Conciliation Rules, Dispute Resolution Policy, the Rules of Procedure and any by-laws, and guidelines and any law that the Arbitrator deems to be applicable, as amended from time to time.

In these circumstances the Tribunal proceeds to decide the complaint on merit in accordance with said Act, Policy and Rules in absence of the Respondent on Respondent's failure to submit a response despite having been given sufficient opportunity and time to do so.

4. Grounds for Arbitration Proceedings.

INDRP Policy para 4.Class of Disputes provides as under:

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Any Person who considers that a registered domain name conflicts with his/her legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

- (a) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights; and
- (b) the Registrant has no rights or legitimate interests in respect of the domain name; and
- (c) the Registrant's domain name has been registered or is being used in bad faith.

5. The Case of the Complainant :-

The Complainant has requested for transfer of the disputed domain in its favour. In support of its case the Complainant has stated in the complaint as under:

- 5.1. The Complainant has averred that The Complainant is the world's leading producer and marketer of quality consumer performance nutrition products supporting an active lifestyle. Further, the Complainant owns a number of premium sports nutrition brands

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including, but not limited to, Optimum Nutrition ("ON"), Bio-Engineered Supplements & Nutrition, Inc. ("BSN"). And that the ON, OPTIMUM NUTRITION and its formative marks have been registered/ applied for registration by the Complainant in various countries of the world as shown in para no.6 of the Complaint. The details of registration of Complainant mark in India are given in Annexure -3 to the Complaint.

5.2 The products bearing the Complainant's Mark have been sold continuously and extensively in India at least since the year 2000. It is likely, based upon the brand's worldwide distribution, that the Complainant's products were available in India several years prior to the year 2000 owing to travellers bring the products under Complainant's Mark to Indian shores or individuals importing the said product into India. Attached herewith as Annexure "4" are Copies of invoices evidencing sales of "OPTIMUM NUTRITION" branded products in India since the year 2000 is Annexure -4 to the Complaint.

5.3 The products of the Complainant are widely available in India through various e-retailer websites, including but not limited to

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Amazon.in, Flipkart.com, HealthKart.com, Nutrabay.com, bodybuildingindia.com as per Annexure '5' to Complaint.

Complainant has been using the Complainant's Mark for more than 30 years and has built an enviable reputation in respect of the said mark(s). The relevant section of the public associates the Complainant's Mark with the Complainant alone and none else. It is that the Complainant, its licensee and its authorized distributors alone have limited rights to use the Complainant's Mark in India. No one other than those permitted by-the Complainant can use 'OPTIMUM NUTRITION' as a trademark or part of corporate name or in any manner whatsoever.

Thus the Complainant. has a long and extensive use of the Complainant's Mark and by virtue of such use, the said marks can be termed as a well recognized mark.

5.4 The Offending Domain is currently parked free, as the Respondent hasn't developed a site on it yet and temporarily uses the Domain Registrar's (i.e. Netlynx) name servers. Registrars usually promote their services on parked domains or

only display advertisements. The screen-print of the webpage hosted on the Offending Domain is Annexure "7" to the Complaint. Further the current webpage on the Offending Domain gives options of selecting between: Optimum Nutrition Gold, Optimum, Whey Protein, Creatine, Bcaa and Protein Powder, which are all the products offered by the Complainant.. Further, when the user clicks on one of these options the webpage on the Offending Domain provides links to various other webpages where the said products can be found. Currently, the webpage on the Offending Domain is acting like a search engine for Complainant's product available on third party websites. Attached herewith as Annexure "8" are screen prints of the Offending Domain evidencing the aforesaid submissions.

5.5 It is evident that the Respondent has no legitimate use of the Offending Domain. Additionally, the Respondent has no valid reasons for adopting the mark OPTIMUM NUTRITION as part of the Offending Domain. It is to be noted that 'OPTIMUM NUTRITION' connotes and denotes the goods and services of

the Complainant alone. Even the search for the mark OPTIMUM NUTRITION on Google search engine only displays results pertaining to the Complainant. Annexure "9" are documents evidencing the Google search. In view of the same, it is evident that the adoption of the said mark by the Respondent in the Offending Domain only reeks of dishonesty in the first instance. The Respondent has no right whatsoever to use or adopt the Complainant's Mark.

5.6 The manner in which the Offending Domain has been worded, i.e. www.optimumnutrition.in, gives a false impression that the Offending Domain is the India specific website of the Complainant, whereas such is not the case. The Respondent will create confusion amongst the consuming public by using the mark OPTIMUM NUTRITION in the Offending Domain.

5.7 Further, the Respondent is not a bonafide user of the Offending Domain, as the Respondent created the Offending Domain in the year 2020 and is yet to operate a website on the same. Further, the Offending Domain displays an option

for the purchase of the Offending Domain. [t appears that the Respondent is only interested in sale of the Offending Domain to the highest bidder, thereby profiting from established reputation and goodwill generated by the Complainant over years.

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Discussions and findings:

The Complainant has invoked Clause 4 of the Policy to initiate the Arbitration Proceeding.

Clause 4 of the INDRP Policy provides as under:

4.Class of disputes:

Any Person who considers that a registered domain name conflicts with his/her legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

(a) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights; and

(b) the Registrant has no rights or legitimate interests in respect of the domain name; and

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(c) the Registrant's domain name has been registered or is being used in bad faith.

Therefore in order to succeed in the Complaint, the Complainant has to satisfy inter alia all the three conditions provided in clauses 4(a), 4(b) and 4(c) quoted above.

6.1 Condition 4(a):) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights;

I have gone through the complaint and perused all the documents annexed with the Complaint.

The Complainant has stated that the Complainant offers, specialty nutritional products which include a wide range of healthcare products. Copies of screen prints from the website of the Complainant evidencing the products offered by it under the Complainant's Mark is Annexure 10 to the Complaint. Further the Complainant is the lawful and legitimate proprietor of the Complainant's Mark, as can be

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evidenced from the registration certificates enclosed as Annexure 3 to the Complaint.

The Respondent has not filed any response to the complaint as such all the averments of the complainant has remained un rebutted.

It is evident from above submissions ,averments made in the complaint and documents annexed with the complaint that the complainant has sufficiently established its rights in and to the ownership of the OPTIMUMNUTRITION Trademarks.

The Complainant further stated that the Registrant has unlawfully and substantially subsequently adopted the Disputed Domain Name 'optimumnutrition.in' in 2020. The Disputed Domain Name is substantially identical and confusingly and deceptively similar to and wholly incorporates the prior registered and reputed trademark OPTIMUMNUTRITION and is in direct conflict with the corresponding trading name and domain name of the Complainant.

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The use of the Complainant's trading name in its entirety in the Disputed Domain Name will inevitably lead consumers to believe that the Disputed Domain Name is affiliated in some way to the Complainant.

In this regard, the following cases may be referred:

- i. *Lego Juris AIS v. Robert Martin (INDRI/125)* wherein the Learned Arbitrator observed that it is well recognized that incorporating a trademark in its entirety, particularly if the mark is an internationally well-known mark, is sufficient to establish that the domain name is identical or confusingly similar to the Complainant's registered mark.
- ii. *Incase Designs Corp v. Stavros Fernandes (INDRP/ 1209)* wherein the Learned Arbitrator observed that it is well established that the mere addition of the Country Code Top Level Domain '.in' does not add any distinctive or distinguishing element. In view of the same the Learned Arbitrator adjudged that the domain name *www.incase.in* of the respondent was identical to the trade mark *INCASE* of the Complainant.

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iii. *The Gillette Company v. Mr Gaurav Kana (INDRJI/049)* wherein the disputed domain name was *www.gillete.in* and the complainant was the proprietor of the trademark and trading name *GILLETTE*. The Learned Arbitrator in the matter observed that:

"The Complainant has been using the trade name GILLETTE in many countries including the United States. As such, consumers looking for GILLETTE may instead reach the Respondent's website. Therefore I hold that the domain name www.gillette.in is confusingly similar to the Complainant's trademark."

A mere perusal of the disputed domain name 'optimumnutrition.in' of the Registrant/Respondent shows that the Respondent has used the Complainant's trading mark 'OPTIMUMNUTRITION' in its entirety. it is well established that the mere addition of the Country Code Top Level Domain '.in' does not add any distinctive or distinguishing element.

In view of the above facts and submissions of the complainant, and on perusal of the documents annexed with

the Complaint, I hold that the Disputed Domain Name www.optimumnutrition.in of the Registrant is identical to the trademark OPTIMUMNUTRITION of the Complainant.

6.2 **Condition no.4 (b) the Registrant has no rights or legitimate interests in respect of the domain name;**

The Complainant has stated that The Respondent has no right to use/ register the mark 'OPTIMUM NUTRITION' of the Complainant in any manner, as it is the sole property of the Complainant and the Complainant has statutory and common law rights on the Complainant's Mark. The adoption of the mark 'OPTIMUMNUTRITION' by the Respondent is not licensed/ permitted by the Complainant, thus adoption of the mark 'OPTIMUM NUTRITION' as part of Offending Domain or in any manner whatsoever, results in infringement and passing off the rights of the Complainant in and to the Complainant's Mark . Owing this reason alone, the Respondent cannot claim to have any legitimate rights in the trademark OPTIMUM NUTRITION.

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The Respondent's adoption of the well recognized trademark "OPTIMUM NUTRITION" of the Complainant, as part of the Offending Domain is a violation of the Complainant's rights in and to the Complainant's Mark.

The Respondent has not filed any response as such the facts stated in the complaint had remained unrebutted. Further the Respondent has failed to satisfy the conditions contained in clause 6(a),(b) and 6(c) of INDRP Policy.

On the contrary , perusal of above averments and other averments made in the complaint and on perusal of documents annexed with the Complaint ,it is evident that the Complainant has established that the Registrant has no rights or legitimate interest in respect of the Disputed Domain Name and has never been identified with the Disputed Domain Name or any variation thereof. The Registrant's use of the Disputed Domain Name is dishonest and with the sole intention to divert and mislead customers

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onto unrelated and sponsored links belonging to third parties including Competitors.

Therefore, in view of the submissions made in the complaint and on perusal of the accompanying documents, I am of the opinion that the Respondent has no rights or legitimate interests in respect of the domain name;

Accordingly I hold that the Registrant has no rights or legitimate interests in respect of the Disputed Domain Name.

6.3 Condition 4(C): the Registrant's domain name has been registered or is being used in bad faith

Clause 7 of INDRP Policy provides as under:

Clause 7. Evidence of Registration and use of Domain Name in Bad Faith

For the purposes of Clause 4(c), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

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(a) circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out-of-pocket costs directly related to the domain name; or

(b) the Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Registrant has engaged in a pattern of such conduct; or

(c) by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

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It is shown by the complainant that the Complainant is a well known reputed and global entity with extensive operations around the world since last more than 30 years . The Registrant was most certainly aware of the repute and goodwill of the Complainant. Therefore adoption of the substantially identical Disputed Domain Name by the Registrant in 2020 is with the sole intention to trade upon and derive unlawful benefits from the goodwill accruing to the Complainant. The Registrant has in fact knowingly adopted the Disputed Domain Name which wholly -contains the Complainant's prior trademark OPTIMUMNUTRITION to attract customers to the Disputed Domain Name by creating confusion with the Complainant's reputed trademark OPTIMUMNUTRITION and corresponding domain name.

The bad faith is evident from the adoption of 'OPTIMUM NUTRITION' in the Offending Domain, which is the property of the Complainant and is associated with the Complainant only. The Offending Domain is worded in such a manner that it appears to be India specific website of the Complainant. The

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mark OPTIMUM NUTRITION is a well recognized mark and is not a commonly used combination of word. The said mark is only associated with the Complainant and none else. Therefore, adoption of the said mark by the Respondent is dishonest and in bad faith. The dishonesty and bad faith is also evident from the fact that the Offending Domain has been parked by the Respondent and is made available for sale. The adoption of the trademark, OPTIMUM NUTRITION, of the Complainant without a license or other authority, is evidence of bad faith in itself. The Respondent has no reason to adopt the trademark of the Complainant. The adoption of the Offending Domain by the Respondent is not for non-commercial purposes and would not fall under the ambit of 'fair use'. The only reason for adoption of the mark 'OPTIMUM NUTRITION' is to make illegal profit. The adoption of the Offending Domain is contrary to the honest commercial practices of trade. The bad faith of the Registrant is further evident from the fact that Using the Disputed Domain Name for displaying links for commercial gain is clearly in bad

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faith. Bad faith is also evident from the that the disputed domain name is also open for sale. .

In view of above facts, submissions of the Complainant and on perusal of the documents annexed with the Complaint , I find that the Complaint has proved the circumstances referred in Clause 7(a)(b) and (c) of INDRP policy and has established that the registration of disputed domain name is in bad faith.

Accordingly I hold that the Registrant's Domain Name has been registered in bad faith.

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Decision:

- 7.1. In view of the foregoing, I hold that the Disputed Domain Name is identical and or confusingly similar to the Complainant's well-known 'OPTIMUMNUTRITION' Trademarks and that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name and that the Disputed Domain Name was registered in bad faith.

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In accordance with the INDRP Policy and Rules, I direct that the Disputed Domain Name registration be transferred to the Complainant.

Alok Kumar Jain

Delhi
Dated 26.04.2022

Alok Kumar Jain
Sole Arbitrator