

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under the provisions of Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED BY M/S ISMAIL INDUSTRIES LIMITED
AGAINST M/S S.M. FOOD MAKERS LIMITED & M/S VOLKA FOOD
INTERNATIONAL LIMITED FOR DECEPTIVE MARKETING PRACTICES**

BY

Enquiry Officers:

- (i) M. Salman Zafar**
- (ii) Marryum Pervaiz**
- (iii) Riaz Hussain**

Dated: May 18, 2020

1. BACKGROUND

- 1.1 M/s Ismail Industries Limited (the ‘**Complainant**’) through M/s Ali & Associates, filed a complaint against M/s S.M. Food Makers Ltd (**Respondent No. 1**) and M/s Volka Food International Ltd. (**Respondent No. 2**) (hereinafter collectively referred to as the ‘**Respondents**’) with the Competition Commission of Pakistan (the ‘**Commission**’) for alleged violation of Section 10 of the Competition Act 2010 (the ‘**Act**’), pertaining to Deceptive Marketing Practices.
- 1.2 It was submitted in the complaint that the Respondents are engaged in business of production, marketing, sale and exports of wide range of confectionery items and the Respondents have copied/imitated the registered trademark and copyrighted packaging of the Complainant, and by doing so have distorted healthy competition in the market.
- 1.3 After attaining the preliminary facts, the Competent Authority has initiated an enquiry in accordance with sub-section (2) of Section 37 of the Act by appointing Mr. Noman Laiq, Senior Director (OFT), Ms. Marrayum Pervaiz, Joint Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT) as enquiry officers (collectively referred to as the ‘**Enquiry Committee**’) to conclude the enquiry. However, during the course of enquiry, the Enquiry Committee was reconstituted by the Competent Authority and the following officer were appointed as an enquiry officers; Mr. M. Salman Zafar, Director (IA& OFT), Ms. Marrayum Pervaiz, Joint Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT).
- 1.4 The aim of the enquiry was to determine whether, *prima facie*, by using similar packaging and trade mark:
 - I. *The Respondents are violating Section 10 (1) of the Act, in terms of Section 10 (2) (d) of the Act, which prohibits **fraudulent use of another’s trademark, firm name, or product labeling or packaging**; and/or*
 - II. *The conduct of the Respondents pertains to **the distribution of false or misleading information to consumers related to character, place of production, properties and quality of goods**, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (b) of the Act?*
 - III. *The Respondents conduct is **capable of harming the business interest** of the Complainant in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) of the Act; and/or*

2. THE COMPLAINT:

- 2.1 The Complainant is a well- known public limited company that was established in 1988, duly listed on Pakistan Stock Exchange, which is testament to the growth and prominence of the Complainant’s substantial goodwill and reputation.
- 2.2 Main activities of the Complainant’s Company are manufacturing, trading, and export of variety of products including confectionary items under the House Mark **CANDYLAND**, biscuits under the House Mark **BISCONN**, potato chips and snack foods under the House Mark **SNACK CITY**, cast polypropylene film marketed and sold under the House Mark **ASTROPACK**.

- 2.3 The Complainant possesses the most advance technology and machinery which allows for efficient production. Moreover, the complainant’s investment in technology has enhanced its quality control techniques and the complainant is among very few competitors to have achieved ISO-22000 certification. The use of the sophisticated production techniques and rigorous quality control system constitute a major part of the Complainant’s strength in the market.
- 2.4 The Complainant has been exporting its products to more than 40 countries in North America, Europe, Australia, Africa, the Far East and the Middle East for over two decades.
- 2.5 It has been submitted that the Complainant is the largest manufacturer and exporter of confectionary products in Pakistan under the House Mark “**CANDYLAND**”, the Complainant sells dozens of instantly identifiable products that are specifically demanded across the country for exceptional taste and quality. Some of these products include:
- In the Toffee category; **Jumbo Eclairs, Toffee Khopra, Milk Toffee,**
 - In the Chewy candy category; **Yums, Dewy Chewy,**
 - In the Chewing Gum category; **Campus, Star Gum, Bubble Your Name, Paan Dum, Fruzi,**
 - In the Jellies category; **Chili Mili, Crazy Pops, ABC, Bottles, Amrood, Frizzy-O, Jello Mello, Jelly Beans,**
 - In the Chocolate category; **Paradise, NOW, Sonnet, Cloud 9, Novella,**
 - And in Candies; **Fanty, Cola, Flip, Imli, Kacha Aaam, Amrood, Apple Fizz, Minty and Pico.**
- 2.6 The Complainant is extremely serious about the goodwill and brand value attached with its products and has therefore availed a number of legal protections for the intellectual property associated with these products, including trademark registrations and copyright registrations through the Intellectual Property Organization, Government of Pakistan (IPO).
- 2.7 The Complainant has protected its trademarks and developed over several decades, through sheer hard work, billions of rupees in investment, and exceptional devotion to ethical business practices, with the prioritization of producing the highest quality products. As such, it has taken every reasonable step to protect its intellectual property and brand value associated with number of its edible items.
- 2.8 It was submitted in the complaint that the Respondent No. 1 is an undertaking that sells confectionary and snack products under various House Marks including **Gibs, Donal, Kims,** and **Silver Lake**. The Respondent No.2 is a directly affiliated concern with the Respondent No. 1 that operates under the House Marks **Giggly, Volka,** and **Cookania**. Both Respondents operate in the same sector, led by Mr.Chaudhry Zulfiqar Ali Anjum and family.
- 2.9 The Complainant alleged that the Respondents are involved in the blatant and unabashed infringement of its intellectual property on several fronts, such that a substantial portion of their operations and revenue can be attributed to the unauthorized use of protected intellectual property upon products that are designed with a view to feeding off the well-established goodwill of the complainant.

- 2.10 The Complainant further alleged that the use of these illegal and unauthorized methods, by the Respondents, are systemic and persistent, thus falls under Deceptive Marketing Practices and Unfair Competition, thereby prohibited under Section 10 of the Act, such as the packaging, the color scheme, the devices in the form of the shape/configuration of the product, and layout of elements on the packaging items are deceptively similar to that of the complainants products. As such, these illegal and unauthorized adoptions are intension of dishonest, and only motivated to deceive and confuse the general public into believing that the Respondents and/ or their products are in some manner related to these of the Complainant's.
- 2.11 Furthermore, the Respondents resort to the use of numerous House Marks to further the goal of leveraging the goodwill and associated investment. As such, **KIMS, SILVER LAKE, COOKANIA, DONAL, SONEY Selection, GIBS** and **GIGLY** are operated by the Respondents, each of which carries products that have been designed to deceive and defraud the consumer into misattributing these products to the reputation and adherence to quality subscribed by the Complainant. One of the Complainant's most popular confectionary product among kids and adults across the country is **Chili Mili**. Particulars of these recognized trademarks registered in Pakistan are as follows:

Sr. No	TRADEMARK	APPLICATION NO	CLASS	STATUS
01	Chili Mili (Wrapper)	348575	30	REGISTERED
02	Chili Mili (Box)	348570	30	REGISTERED
03	Chili Mili (Device)	176688	30	REGISTERED

- 2.12 The Complainant's proprietary rights in respect of the distinctive Label Design, Getup, and Artistic Work associated with **Chili Mili** trademarks are well protected under the respective Copyright laws, as well as by the virtue of the Berne and Paris Convention to which Pakistan is a signatory, the particulars of which are follows:

Sr. No	Title	Reg. No.	Application Type	STATUS
01	Chili Mili (Wrapper)	31892	Label Design	REGISTERED
02	Chili Mili (Box)	14162	Label Design	REGISTERED
03	Chili Mili (Device)	16127	Label Design	REGISTERED
04	Chili Mili (Device)	23167	Label Design	REGISTERED

- 2.13 Furthermore, the Complainant alleged that the use of very similar/identical packaging of this well-known product is illegal and blatant, such that it copies the intricacies of the products of the Complainant, including the color scheme, the arrangement of elements on the packaging, the trademark, and even the shape and the size of the product of the Complainant.
- 2.14 Visual comparisons between Complainant's famous product with those of the many copied versions sold by the Respondents are shown below:



Complainant's Product Box



Respondent's Product Box



Complainant's Product Wrapper



Respondent's Product Wrapper





2.15 Another product of the Complainant in the confectionary jellies category is ABC jelly which is extremely popular among kids owing to its attractive packaging and letter shaped pieces. This product of the complainant too, has been copied by the Respondents to the extent that the ordinary consumer is likely to mistake the copied product for the original. The comparisons between both the Complainant and Respondents product packaging is depicted below:



Complainant's Product Box



Respondent's Product Box



Complainant's Product Wrapper



Respondent's Product Wrapper


2.16 The Complainant manufactures a number of hard candy products and biscuits/cookies in rightful flavors with bright packaging that are sold across the country and is very popular in each segment of population. The Complainant alleged that the Respondents are engaged in

the parasitic copying of a number of these products of the Complainant. The comparison between both the Complainant and Respondents product packaging is given below:



- 2.17 Various images of the Respondents' products making use of copied packaging, color schemes, trademarks and product configurations can be accessed on the Respondent's Facebook pages and website. <https://www.facebook.com/230660083966726/photos/a.230694803963254/310136492685751/?type=3&theater>er Gibs Chewz (Candyland Yums) <https://www.facebook.com/230660083966726/photos/a.230694803963254/373692576330142/?type=3&theater>,
- 2.18 Various Products under Respondent No. 1's KIMS House Mark that make use of parasitic copying can be accessed at: <https://browsermedia.me/clients/kims/products/>. Numerous Products under Respondent No. 2's Cookiania and Giggly House Marks that make use of parasitic copying can be accessed at: <https://www.volkafood.com/assets/catalog.pdf> <https://www.volkafood.com/cookiania#products/>
- 2.19 Visual comparison of some well-known brands and Respondents' products is depicted below:

TRADENAME OF ORIGINAL MANUFACTURER	ORIGINAL PRODUCT	RESPONDENTS' ILLEGAL/PARASITIC ADOPTION(S)
Peek Freans		
Hilal		
LU		

TRADENAME OF ORIGINAL MANUFACTURER	ORIGINAL PRODUCT	RESPONDENTS' ILLEGAL/PARASITIC ADOPTION(S)
Peek Freans		
Peek Freans		
Peek Freans		
Peek Freans		
LU		
LU		
Hilal		

TRADENAME OF ORIGINAL MANUFACTURER	ORIGINAL PRODUCT	RESPONDENTS' ILLEGAL/PARASITIC ADOPTION(S)
LU		
Peek Freans		
Hilal		
LU		

2.20 The Complainant has established substantial goodwill and brand value in the market and in the minds of general public by virtue of its heritage of applying ethical and moral business policies and applying the same to the manufacturing and packaging of the products. As such, consumers from all segments not only in Pakistan but also in foreign countries hold its products in high esteem, thus actively demanding the same for general consumption.

2.21 The cause for the instant complaint arose and continues to arise at each instance the Respondents blatantly engage in the practice of parasitic copying as enumerated by the decisions of the Commission pursuant to Section 10 of the Act by distributing, advertising, and retailing products that make use of the aforesaid copycat packaging, designed solely not just to harm the business interests of the complainant, but also damage its goodwill and brand value, and to avail deception to pass off their products as those the Complainant's high quality ones.

2.22 It was submitted that the Complainant has a very distinct and highly recognizable packaging for its products. For example, the packaging for **Chili Mili** is predominantly in purple color with little shade variations for the wrapper, box and pictorial illustrations thereon. These

constitute the House Mark **Candyland**, trademark **Chili Mili** in the center, with the creative devices in the shape of animated chilies with hats. The box, wrapper and the shape of the product themselves are protected material, since the color scheme and artistic work use thereupon help the consumer instantly identify the product and associate the same with high quality and well established goodwill.

- 2.23 The Respondents' conduct of copying the Complainant's trademark and copyrighted material constitutes deceptive marketing practices under Section 10 (2) (d) of the Act based on the use of deceptively similar logos, color schemes, label designs and overall layout. The likelihood of deception among consumers is more serious because the Respondents' goods are meant to pass off as those of the Complainant's high quality products, which directly impugns the interest of consumers, as well as competitors, therefore distorting healthy competition in the market.
- 2.24 Furthermore, the parasitic copying being perpetrated by the Respondents is at extensive level, such that it comprises dozens of products of various well-known undertakings that invested huge funds in building their reputation. These dishonest practices of the Respondents therefore present serious challenges to the competitive business environment, in addition to setting problems for consumers in making informed choices about their purchasing habits.
- 2.25 The Respondents' conduct also constitute a violation of Section 10(2)(a) of the Act since the parasitic copying of the Complainant's products reflects malevolent intent to use the complainant's goodwill and hard work as a spring board to illegally leverage its own products, thereby causing irreparable harm to the complainant's business interests. It is submitted that under applicable law and associated decisions of the Commission, mere potential harm to the business interests of the Complainant suffices to constitute a violation of the said provision (**2015 CLD 1638**).
- 2.26 The Complainant alleged that the Respondents' actions constitute a violation of Section 10(2) (b) of the Act, particularly in terms of the trade dress used upon its products and the impression created by the product labeling and packaging is bound to lead the ordinary consumer into mistaking the copied products as the originals, thus misleading the unwary consumers as to the quality and the origins of the products.
- 2.27 The Complainant further highlighted that it has also sustained damages as a direct result of Respondents' parasitic practices towards its products, and if the Respondents are allowed to carry on with their deceptive and unfair practices, the Complainant will suffer substantial business losses and irreparable harm to its goodwill.
- 2.28 The Complainant respectfully prayed for the following:
- i. Initiation of proceedings in accordance with the procedure of the Act as per Section 30 of the Act;
 - ii. An order restraining the Respondents permanently from engaging in Deceptive Marketing Practices, including the order to cease and desist from the manufacture, sale, distribution, export and advertisement of the Complainant's trademark or associated visual packaging, layout or fonts or close variation of any of these elements;.

- iii. An order directing confiscation, forfeiture, destruction and market withdrawal of all of the Respondent's products that carry the potential to cause deception and confusion among the public, including trademarks, copyrighted work, product of configuration, or any visual element used upon any form of packaging that violates Section 10 of the Act;
- iv. An order directing the Respondent to take down all promotional, advertisement or printed material carrying visual content depicting the products of the Respondent that carry the copycat packaging, including from billboards, electronic media, or any other form of disseminating information;
- v. For the order pursuant to the instant complaint to direct the Respondents to submit a compliance report within 60 days of the order, in particular with Section 10 of the Act;
- vi. An order directing the Respondents to compensate the Complainant for losses suffered as a result of its deceptive marketing practices, which the Complainant estimates to be in region of 500 Million Rupees;
- vii. Any other relief deemed by the Honorable Commission.

3. SUBMISSION OF THE RESPONDENTS:

- 3.1 The Complaint was forwarded to the Respondents for their comments on April 23, 2019. Since no response was received, a reminder was sent to the Respondents vide letter dated May 20, 2019 calling upon them to submit reply to the Enquiry Committee on or before May 30, 2019.
- 3.2 The Respondents requested for an extension in time through letter dated May 30, 2019 which was granted accordingly vide letter dated June 10, 2019. The Respondents were directed to submit their comments on or before June 24, 2019.
- 3.3 On June 22, 2019, the Respondents once again requested for further extension in time to submit reply/comments however, on June 27, 2019 the Respondents were directed to submit their reply/comments no later than July 03, 2019.
- 3.4 The Respondents have submitted a joint reply through their legal counsel Mr. Malik Wasim Khokar, Advocate High Court. The contents of the reply are summarized below:
- 3.5 It has been submitted that the Respondents have established their businesses in 1990, and are mainly engaged in manufacturing of variety of confectionary products falling in classes 29 and 30 of the International Classification of goods and services. Reportedly, S.M Food Makers is the third largest biscuits selling company in Pakistan. Similarly, Volka Foods International commands immense reputation in Pakistan and abroad by virtue of its quality goods.
- 3.6 The Respondents have a wide range of confectionary products being sold in domestic and international markets. These products are exported in various countries including USA, UK, Portugal, Saudi Arabia, Malaysia, Afghanistan, Tanzania, Yemen, Angola, Bangladesh and few other African countries. The Respondents claimed that they have latest German production lines and products produced in these lines are highly hygienic and safe.
- 3.7 The Respondents sell wide range of products including biscuits, toffees, bubble gums, jelly, cake, nimko, chocolate bar, deposited candies, hard boiled candies, etc. under different

House Marks namely: **Gibs, Gibs Collection, Soney, Donal, Giggly, Cookania** and **Kims**. The Respondent No. 2 has also earned the Exporter of the Year award which was delivered by the Prime Minister of Pakistan.

- 3.8 That the Respondents are creative innovator and recognize the importance and value of the intellectual property rights and being responsible entrepreneurship have taken all necessary measures to protect their rights. In this regard, the Respondents have obtained registration of various trademarks & copyrights however, some of the trademarks and copyrights application are pending for registration with the Trade Mark Registry.
- 3.9 It was submitted that the Respondents are responsible and law abiding corporate entities and have never been involved in violation of third parties intellectual property rights including the Complainant. The Respondents have been using the marks that have been adopted by them and they are the bona fide adopter and user thereof. The Respondent's certain works/trademarks are protected under the Trade Marks and Copyright laws and use hereof is fair under provisions of the relevant laws.
- 3.10 The following preliminary objections were raised by the Respondents in their reply:
- 3.11 That the Complaint had been filed by an unauthorized person as no board of resolution had been attached with the Complaint, hence the Complaint was not properly instituted and is liable to be dismissed.
- 3.12 The Complainant has not approached the Commission with clean hands, as it has deliberately concealed true facts from this Hon'ble Commission, hence the Complainant is not entitled to claim any relief from the Commission. The Complainant with *mala fide* intention has made up a concocted story to mislead the Commission.
- 3.13 The Complainant claims are false and frivolous. The Complaint has been filed with the intention and ulterior motives just to harass and blackmail the Respondents. The purpose behind filling the instant Complaint is to eliminate healthy competition from the market. Hence, it is liable to be rejected and the Respondents are entitled for an appropriate compensation from the Complainant.
- 3.14 The Complaint has no cause of action against the Respondents and the complaint is liable to be dismissed. That the Complainant has no *locus stand* to file the Complaint against the Respondents.
- 3.15 Any involvement of the Respondents in infringement activities was denied. It was submitted that most of the trademarks being used by the Respondents are protected under the Trademark and Copyrights law. It was submitted that the Respondents adopted the works, calligraphy, layout design and other labels prior in time and have been using the same since long time.
- 3.16 It was further stated, that the Complainant has been trying to abuse the Court's process and to disrupt the business of the Respondents so that the Complainant can enjoy the market without any healthy competition. Therefore, the action of the Complainant is mala fide and with ulterior motive to create impediment in the business of the Respondents.

- 3.17 It was submitted that the Respondents' trademarks are neither identical nor confusingly similar to that of the Complainant. On the contrary, they are distinguishable from the trademark and artwork of the Complainant and the Respondents reserve their rights to substantiate their claims of dissimilarity during the course of hearing. Further, it was stated that the law of trademark does not grant anyone the exclusive right to the use of descriptive and/or generic words. The Complainant has been trying to illegally capitalize on the use of such generic/descriptive words to restrain other undertakings.
- 3.18 Furthermore, since the Respondents have been using most of their trademarks prior to the adoption of the trademarks by the Complainant, it is entitled to the concurrent honest use and their uses cannot be prevented under the Law.
- 3.19 All allegations of the Complainant were vehemently denied as baseless and frivolous. It was denied that the Respondents adopted the trademarks in order to take advantage of the Complainant's reputation and to make illegal gains. It has been submitted that the adoption of the trademarks by the Respondents is honest and bona fide and the Respondents have no knowledge of the goodwill of the Complainant's trademarks.
- 3.20 In view of the above submissions, the Respondents respectfully prayed that the Complaint may kindly be dismissed with special costs since the Complainant has no cause of action against the Respondents and any further relief which the Commission deems appropriate may also be granted.

4. REJOINDER OF THE COMPLAINANT:

- 4.1 The comments/reply of the Respondents was forwarded to the Complainant for its rejoinder vide letter dated July 18, 2019.
- 4.2 The Complainant submitted its rejoinder vide letter dated August 20, 2019, the contents of which are reproduced below:
- 4.3 The Complainant claimed that the Respondents have attempted to conceal and mislead the Commission by providing the sheer volume of irrelevant annexed documents while the substantial response spans a small portion thereof.
- 4.4 It was submitted that Section 10 (2) (d) of the Act is exceptionally broad, spanning not only fraudulent use of another's trademark but also another firm's name, or product labelling, or packaging, thereby rendering the Respondents' conduct as illegal and a flagrant violation of the Act.
- 4.5 It was submitted that the Respondents are engaged in the parasitic copying of various products produced by the Complainant, and as such, this series of acts, including but not limited to the adoption of deceptively similar (and in many cases identical) trademark, trade dress, packaging labels, color schemes, and visual devices falls under the scope of not only the Act and thus punishable, but several legal instruments including the Trademark Ordinance 2001, the Copyright Ordinance 1962 and the Pakistan Penal Code.
- 4.6 It was submitted that a Trademark or Copyright registration does not in and of itself establish prior use on part of the holder, and it is indeed such scenarios that the mechanisms built into

the Trademark Ordinance seek to address, including the incorporation of Section 96 of the same.

- 4.7 It was stated that the Complainant has no interest whatsoever in prejudicing the legitimate business and commercial interests of any entity, however, the Complainant is extremely serious about safeguarding its rights under the law, especially its intellectual property rights, which the Respondents have been in continuous violation of over the years, having launched and carrying out the sale of dozens of products that adopt deceptively similar trademarks, trade dress, packaging labels, color schemes, and product configurations.
- 4.8 All the assertions on the part of the Respondents, as to blackmail/harassment/concoction/coercion/forgery/mala fide, has denied by the Complainant in the most unequivocal terms, and the Complainant reserves the right to initiate proceedings against any such false allegations. The Complainant has filed this complaint pursuant to the procedure enumerated under the Act, and fulfilled all the requirements for the same.
- 4.9 It was submitted that the pattern of abuse and parasitic copying emanating from the Respondents is clearly illegal, unlawful and tried to undermine the Complainant's business interests, to such extent that cannot be qualified. Furthermore, all claims such that the Respondents are bona fide adopters or prior users of the intellectual property used upon their copied products and the Respondents' products are wisely popular has denied as manifestly false.
- 4.10 Further, the instant Complaint has nothing to do with rivalry, since the Complainant has neither challenged, nor plans to challenge the legal and legitimate commercial activities of the Respondents, and the Complaint has been limited strictly to those acts and products of the Respondents that encroach upon the Complainant's goodwill/reputation/sales/intellectual property.
- 4.11 The Complainant has pointed out that the legal standard to ascertain deception and confusion in the context of intellectual property applied to goods is from the eyes of the ordinary consumers, who, pursuant to the decisions of the superior judiciary, cannot be expected to observe minute details in scripted upon goods that are near identical to the original. Furthermore, the Respondents' statement as to the Complainant's House Mark being the dominant feature is perverse and an attempt to detract from the truth, exactly because the dominant feature(s) upon numerous Complainant's products have been maliciously copied by the Respondents upon their own.
- 4.12 The Complainant submitted that the Complaint had been instituted by a duly authorized person and the board resolution of the Complainant's company had been attached in the annexures of the Complaint.
- 4.13 The Complainant highlighted that under clear principles enumerated by the High Courts and Supreme Court, prior use of a trademark is the supreme consideration as to the adjudication of proprietary rights, with the courts even going so far as revoking trademark registrations of copied/deceptively similar trademarks/artistic work/trade dress on the basis that another used mark first, even when that other did not have a registration for the same. It is clear therefore that under the law, the assertion that the Respondents have trademark/copyright registrations

for parasitic elements being used upon their products is liable to be rejected outright, especially since the Complainant has prior use for all trademarks/trade dress/artistic work that forms the subject matter of this Complaint.

- 4.14 It is to be noted, however, that regardless of the use of its own House Mark, the use of near identical packaging upon the same goods as those of the Complainant in and of itself warrants a violation of Section 10 of the Act, pursuant further to the Commission's past orders in matters concerning deceptive marketing practices.
- 4.15 The Complainant further stated that the Respondents have not denied that the products making use of parasitic copying, highlighted in the Complaint, do not belong to them. Secondly, the fact that the Respondents have chosen to focus on the trademarks and put off comparisons of labels to the hearing stage only exposes mala fide adoptions. It is clear that the Respondents' products, including but not limited to associated trademark, label design, color scheme, layout and even the size and shape of the products have been coined and put together with the clear and indomitable aim to pass off their products as the Complainant's original, specifically with a view to duping the public into purchasing the imitations, thinking the same to be originals.
- 4.16 It was submitted that creating an imitation/deceptively similar version that makes use of the same color scheme, identical trademark, identical label/layout, identical product configuration, identical Chilli shaped device with hats and same pricing per unit come together to establish clear malicious intent on the part of the Respondents and a violation of Section 10 of the Act.
- 4.17 The Complainant reiterated that it deserves to be compensated for the loss of revenue and business opportunity, in addition to immense damage to its goodwill as a result of the Respondents' illegal actions.

5. ANALYSIS:

- 5.1 The following paragraphs shall seek to provide a detailed discussion and analysis, in light of the aforementioned facts, to consider whether there has been a, *prima facie*, violation of provisions of Section 10 (1) of the Act in terms of Section 10 (2) (a), (b) and (d) of the Act.
- 5.2 In doing so, the Enquiry Committee wish to identify three distinct issues:
- I. *Whether the allegations levied against the Respondents under the Complaint constitute a, prima facie, violation of section 10 (1) of the Act in terms of Section 10 (2) (d) of the Act i.e. fraudulent use of another's trade mark, product labeling or packaging; and*
 - II. *Whether the allegations levied against the Respondents under the Complaint constitute a, prima facie, violation of section 10 (1) of the Act in terms of Section 10 (2) (b) of the Act i.e. distribution of false or misleading information to consumers, including the distribution of information lacking reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods.*
 - III. *If so, whether the allegations levied against the Respondents under the Complaint constitute a, prima facie, violation of section 10 (1) of the Act in terms of Section 10 (2)*

(a) of the Act i.e. distribution of false or misleading information that is capable of harming the business interest of another undertaking.

I. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENTS UNDER THE COMPLAINT CONSTITUTE A, PRIMA FACIE, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (D) OF THE ACT I.E FRAUDULENT USE OF ANOTHER'S TRADE MARK, FIRM NAME, OR PRODUCT LABELING OR PACKAGING.

5.3 Before discussing the submissions of the Complainant and Respondents, it is important to understand the stance of international competition legislation in the matters regarding “Parasitic Copying” or “Copycat Packaging”. There is no specific definition of Copycat packaging however an appropriate definition could be:

“Copycat packaging is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting, since normally it does not infringe intellectual property rights. The risk posed by copycat packaging is consumer confusion, and consequently distortion of their commercial behavior”¹.

5.4 In order to determine the above, various matters pertinent to significance of trademarks and their association with Section 10 of the Act would subsequently be discussed. It is important to understand the concept of trade/service mark.

5.5 A word, phrase, symbol, and/or design which is used to classify and distinguish goods and services in general and from those of its competitors is known as a trade or service mark.

5.6 The term, “mark” has been defined in Section 2(xxiv) of the Trade Marks Ordinance, 2001 (the ‘**Ordinance**’)² as:

(xxiv) "mark" includes, in particular, a device, brand, heading, label, ticket, name including person name, signature, word, letter, numeral, figurative elements, color, sound or and combination thereof ;

5.7 In addition, Section 2(xlvii) of the Ordinance defines the term “trade mark” as³:

(xlvii) "trade mark" means any mark capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings;

5.8 Additionally, the International Trademark Association defines trade dress as, “Trade dress is the overall commercial image (look and feel) of a product that indicates or identifies the

¹ Giuseppe Abbamonte, “Copycat Packaging, Misleading Advertising and Unfair Competition”

² http://www.ipo.gov.pk/uploads/CMS/Trade_Mark_Ordinance_2001.pdf

³ http://www.ipo.gov.pk/uploads/CMS/Trade_Mark_Ordinance_2001.pdf

source of the product and distinguishes it from those of others. It may include the design or shape/configuration of a product; product labeling and packaging; and even the décor or environment in which services are provided. Trade dress can consist of such elements as size, shape, color and texture, to the extent that such elements are not functional. In many countries, trade dress is referred to as 'get-up' or 'product design'.

- 5.9 The Complainant has submitted that, under the House Mark “**Candy Land**”, the Complainant’s trademarks for some of its products, including **Chili Mili**, **ABC**, **Yums** and **Butter Scotch**, has already been registered with the Trade Mark Registry, Government of Pakistan. The Complainant’s trademarks **Peanut Cookies** and **Chocolate Chip**, has also been registered under the House Mark “Bisconni” with the Trade Mark Registry.
- 5.10 The Complainant further submitted that one of its most popular confectionary product is “Chili Mili” which is tremendously popular across the country, and favorite among kids and adults alike. The Following trademarks of its well-known product “Chili Mili” are registered in Pakistan:

Sr. No	Trademark	Reg. No	CLASS	Status	Date Of Reg.
01	Chili Mili (Wrapper)	348575	30	REGISTERED	25-10-2013
02	Chili Mili (Box)	348570	30	REGISTERED	25-10-2013
03	Chili Mili (Device)	176688	30	REGISTERED	16-03-2002

- 5.11 The Complainant’s proprietary rights in respect of the distinctive label design, getup, and artistic work associated with “Chili Mili” trademarks are well protected under the respective Copyright laws, as well as by the virtue of the Berne and Paris Convention to which Pakistan is a signatory, the particulars of which are follows:

Sr. No	Title	Reg. No.	Application Type	Status	Date Of Reg.
01	Chili Mili (Wrapper)	31892-Copr.	Label Design	REGISTERED	19-10-2015
02	Chili Mili (Box)	31891-Copr.	Label Design	REGISTERED	19-10-2015
03	Chili Mili (Device)	16127-Copr.	Label Design	REGISTERED	30-04-2007

- 5.12 The Respondents were also asked to submit trademark and copyright certification along-with official representation of their trademarks and copyrighted label design & artistic work. The Respondent No. 1 submitted documents pertaining to its proprietary rights in respect of the distinctive label design, getup and artistic work associated with “**Chili Shili**” and “**Chili Villi**”, protected under the Copyright Law. The details of copyright certification of the Respondent No. 1 are given below:

Sr. No	Trademark	Application No.	Class	Status	Date Of Application.
01	Chili Shili (Wrapper)	447933	30	Pending	21-08-2017
02	Chili Villi (Wrapper)	500364	29	Pending	03-07-2018
03	Chili Villi (Wrapper)	500365	30	Pending	03-07-2018

Sr. No	Title	File No.	Application Type	Status	Date Of Application
01	Chili Shili (Wrapper)	F.21-1432/2017- Lhr	Artistic Work/Label Design	Pending	16-03-2017
02	Chili Villi (Wrapper)	-	Artistic Work/Label Design	Pending	07-08-2018

- 5.13 In view of the above, it is evident that the trademark “Chili Mili” of the Complainant was registered prior to the application of the Respondent No. 1’s trademark “Chili Shili & Chili Villi” which is still pending for registration with the Trade Mark Registry. The artistic work/label design of “Chili Mili”, of the Complainant, was also registered with the central Copyright Office prior to the application of the Respondent No. 1 for registration of artistic work/label design of “Chili Shili & Chili Villi”. Therefore, it can be safely concluded that the Complainant was the first and prior user of the trademark “Chili Mili” and artistic work/label design associated with this trademark under the Copyright Law.
- 5.14 It has been submitted by the Complainant through their complaint that the *‘Respondents have fraudulently adopted the Complainant’s packaging including exact color scheme, shape & design in order to deceive the consumer. The Respondents are also using deceptively similar trademark as of the Complainant.’*
- 5.15 Furthermore, the Complainant also alleged that the Respondents are using various House Marks at the top of the packaging, each of which carries products that have been designed to deceive and defraud the consumers into misattributing these products to the reputation and adherence to quality subscribed to by the Complainant.
- 5.16 It was felt pertinent by the Enquiry Committee to compare both the product packaging of ‘Chili Mili’ of the Complainant and ‘Chili Shili & Chilli Villi’ of the Respondent No. 1 and determine whether there was infact a, *prima facie*, violation of Section 10(1) of the Act in terms of Section 10(2)(d) of the Act.
- 5.17 The Complainant’s product ‘Chilli Mili’ has been marketed under the House Mark ‘Candy Land’. However, the Respondent No. 1’s products ‘Chilli Villi’ & ‘Chilli Shili’ have been marketed under the House Mark ‘Donal’ & ‘Sony’ respectively. The product packaging of both the Complainant and Respondent No. 1 are given below:



Complainant's Product Box



Respondent No. 1's Product Box



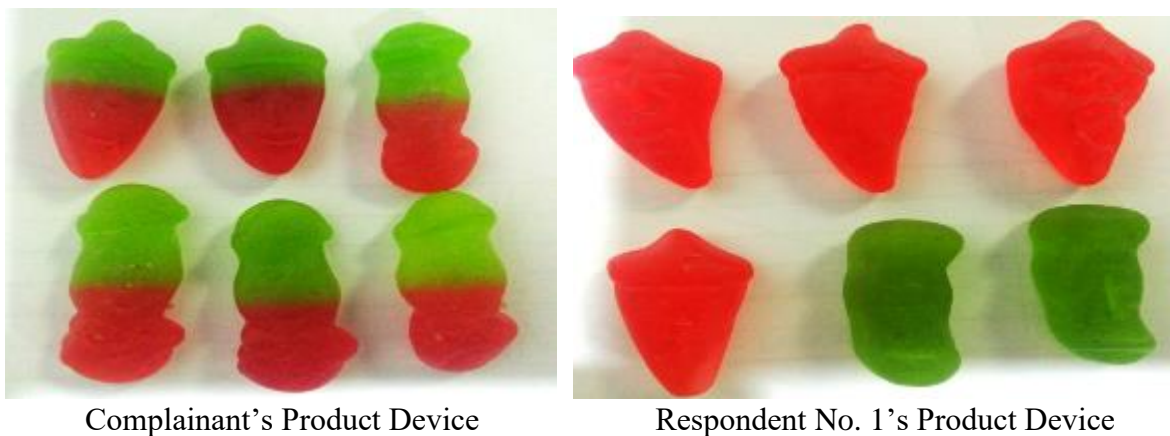
Complainant's Product Wrapper



Respondent No. 1's Product Wrapper



- 5.18 It may be noted from the above images that the Complainant uses a distinct, bright purple color to market its jelly product. The packaging of the product contains the word “Chili Mili” (in English) surrounded by a shape of para shoot hanging with a device of chili. The House Mark of the Complainant, Candy Land, is written with blue color on top of the brand name/trademark. The Complainant also used green and red colors for chilies which are used as device/jellies.
- 5.19 The Respondent No. 1 has adopted a trademark, Chili Shilli & Chilli Villi, which is phonetically similar to that of the Complainant’s well known trademark Chili Mili. The Respondent No. 1 also uses the same distinct, bright, purple color to market its jelly product and has, like the Complainant, chosen to use almost the same shade for writing the next on the packaging. However, instead of ‘Chili Mili’ the Respondent No. 1’s product is marketed as “Chili Shili & Chili Villi” under the House Mark Donal & Soney at the top of the brand name/trademark. The Respondent No. 1 has also used devices of chilies hanging with para shoot in the same manner as used by the Complainant on its product packaging. The device of the Complainant’s product “Chili Mili” is also registered under the Copyright Law.
- 5.20 The Complainant alleged that the Respondent No. 1 has also copied the expression/style/getup of the device used by it. Images of both the Complainant’s and the Respondent No. 1’s device are given below:



- 5.21 It can be viewed from the above images that the Complainant has used a shape of green chili as a device which is a registered work under the Copyright Law. The Respondent No. 1 has also used the same color scheme and similar shape of device for its product “Chili Shili”.
- 5.22 From the above paragraphs it may be ascertained that both product boxes, wrappers and product devices appears to be similar in shape, design and packaging color and are of the same material and feel. The Respondent No. 1 has adopted a deceptively similar trademark, as that of the Complainant, on its product packaging. For an ordinary consumers of jellies, most likely kids, the two packaging may appear similar and potentially deceptive.
- 5.23 The Complainant submitted that the product box (Chili Mili) is registered with the Trade Mark Registry bearing No. 348570, however it is clearly mentioned on trademark certificate that the Complainant has *no rights to the exclusive use of all descriptive word, device word*

and numeral appearing on the label (Copy of the trademark certificate is attached as Annex- A).

- 5.24 Furthermore, the Complainant has registered its device of the product under the registration no. 16127-Copr. and wrapper under trade mark no. 348575. The trade mark certificate no. 348575 was issued with a direction that the Complainant has “*no rights to exclusive use of all descriptive word features and other descriptive matter appearing on the label*”. **(Copy of the relevant certificates are attached as Annex- B).**
- 5.25 Moreover, the expression/style/getup of the product “Chili Mili” is also registered and protected under the Copyright Law as mentioned in para 5.12 *ibid* with respect to the box, wrapper and device of the Complainant’s product.
- 5.26 The Respondent No. 1 has also applied for trademark and Copyright registration for its products “Chili Shili & Chili Villi” which is still pending with the Trade Mark Registry, IPO Pakistan **(Copy of the trademark application of the Respondent No. 1 is attached as Annex-C).**
- 5.27 In light of para 5.10 to 5.26 above, it is concluded that the purpose of using the similar/identical trademark “Chili Shili & Chili Villi” and similar box, wrapper, color scheme and/or design/getup/expression of the product device by the Respondent No. 1 was to take benefit of the goodwill attached to the Complainant’s product and attract the consumers. Therefore, the act of using the phonetically similar trademark, color scheme, wrapper, box and device as that of the Complainant by the Respondent No. 1 is, *prima facie*, deceptive in nature. Therefore, the Respondent No. 1 appears to be in violation of Section 10(1) of the Act in terms of Section 10(2)(d) of the Act which prohibits *fraudulent use of another’s trademark, firm name, or product labelling or packaging*.
- 5.28 Similarly, the Complainant alleged that the Respondent No. 1 has also copied its various other brands in an identical manner that an ordinary consumer can wrongly perceive regarding the source of production, i.e., the Complainant. Therefore, it is important to shed light upon various other brands of the Complainant and the Respondent No. 1 to draw a conclusion with respect to use of trademark and copyright as well.
- 5.29 As mentioned in para 5.9 above, various other trademarks were also registered in favor of the Complainant with respect to its brands including but not limited to ABC Jelly, Yums Fruity Chews, Butter Scotch, Cookies Peanut and Chocolate Chip. The Complainant alleged that the Respondent No. 1 has also been involved in fraudulent use of its above mentioned trademarks and copyrighted packaging. It is, therefore, necessary to analyze the packaging of various other brands of the Complainant as well as the Respondents.
- 5.30 The product ABC has been marketed under the House Mark ‘**Candy Land**’ by the Complainant and product A to Z has been marketed under the House Mark ‘**Gibs**’ by the Respondent No. 1. Images of both the Complainant and the Respondent No. 1’s product packaging are given below:



Complainant's Product Box



Respondent No. 1's Product Box



Complainant's Product Wrapper



Respondent No. 1's Product Wrapper

5.31 The Complainant's proprietary rights in respect of the distinctive label design, getup, and artistic work associated with "ABC Jelly" trademarks are well protected under the respective laws, the particulars of which are follows:

Sr. No	Title	Reg. No.	Class	Status	Date Of Reg.
01	ABC Jelly	266062	30	REGISTERED	07-05-2009
02	ABC Jelly	266063	29	REGISTERED	07-05-2009
03	ABC Jelly (Label)	23192-Copr.	Label Design	REGISTERED	26-03-2011

(Copy of the trademark certificate and copyright certificate is attached as Annex- D & E).

5.32 If we generally look at the packaging of both the Complainant and Respondent No. 1, there is no difference in the colors scheme used by the Respondent No. 1. Even the tone/shade of major colors used by the Respondent No. 1 are deceptively similar to the Complainant. For deep analysis, we will draw comparison between both the packaging with respect to the placement of words, designs, color scheme and symbols.

- 5.33 If we compare the packaging of the Complainant’s product ABC and the Respondent No. 1’s product A to Z, it has been observed that in the center of the packaging letter ABC (brand name) is written in multiple colors with pictorial characters peeking from each letter. The House Mark ‘Candy Land’ is written on top of the letter “ABC” with blue color. The Complainant used two piece of clouds running on top of the packaging and one picture of sports car running under the letter ABC. It is pertinent to mention here that the trademark of the Complainant’s product is registered with the disclaimer that “registration of this trademark shall give no right to the exclusive use of the letters ‘ABC’ & word ‘Jelly’”. On the other hand the Respondent No. 1 has also used the same yellow and green color for its product packaging. The Respondent No. 1 used letter A to Z in two different colors. The Respondent No. 1 also used two piece of clouds running on top of the letter and cartoons devices peeking from the letter A & Z. The Respondent No. 1 used the House Mark ‘GIBS’ on top of the product packaging to distinguish its product from the Complainant.
- 5.34 Moreover, it is pertinent to mention again that the Complainant has been in use of trademark ABC Logo design since May 07, 2009, copyright for which had been obtained in the year 2011 under Registration No. 23192-Copr. However, the Respondent No. 1, with intention to register its trademark in the imitated ‘A to Z logo, filed an application with the IPO on November 05, 2018 which is still pending for registration with the IPO (**Copy of the Respondent No. 1’s trademark application is attached as Annex-F**).
- 5.35 In light of the above, it is concluded that the purpose of using similar labelling design by the Respondent No. 1, was to take benefit of the goodwill attached to it and attract the consumers. Therefore, the act of using phonetically similar word A to Z by the Respondent No. 1 on the packaging of its product is, *prima facie*, deceptive in nature. Therefore, the Respondent No. 1 appears to be in violation of Section 10 (2) (d) of the Act.
- 5.36 Another product of the Complainant namely Yums has been market under the House Mark ‘Candy Land’ and the Respondent No. 1’s product namely Chews has been marketed under the House Mark ‘Gibs’. Images of the both the Complainant’s and the Respondent No. 1’s product are given below:



Complainant’s Product



Respondent No. 1’s Product

- 5.37 In the matter of the Complainant’s product ‘Yums’ and the Respondent’s product ‘Chews’, it has been observed that the Complainant has used yellow color as base color of its packaging design and various other multiple shades including orange, green, red and magenta

colors are also used in overall color scheme of the product. The House Mark of the Complainant is displayed on left corner of the packaging in red color. The Respondent No. 1 has also used the same distinct, bright, yellow color to market its confectionery product and has, like the Complainant, chosen to use almost the same shade of red for writing the text on the packaging as well as on the box of the product. However, instead of ‘Yums’ the Respondent’s product is marketed as ‘Chewz’ with House Mark ‘GIBS’ displayed on left corner of the packaging.

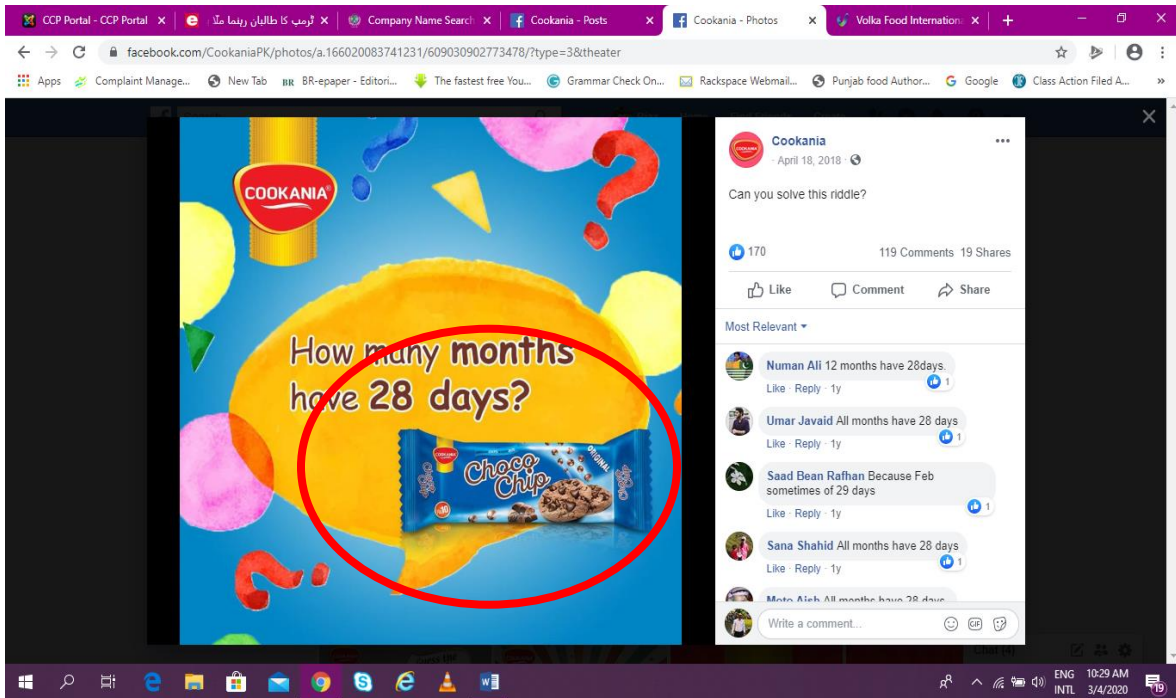
- 5.38 It is important to mention here that the Complainant’s trademark ‘Yums’ is registered in class 29&30 of the Trade Mark Registry, IPO, Pakistan with a disclaimer that “registration of this trademark shall give no right to the exclusive use of all descriptive features appearing on the label”. Moreover, the expression/style/getup of the Complainant’s product ‘Yums’ is protected under the registration no. 26635-Copr with the Central Copyright Office. However, the Respondent No. 1 has not submitted any document to prove that the trademark and labelling design of its product ‘Chewz’ is registered with the IPO, Pakistan (**Copy of the Complainant’s trademark certificate and copyright certificate is attached as Annex- G & H**).
- 5.39 In view of the above, it is concluded that the act of using similar packaging by the Respondent No. 1 was to take benefit of the goodwill attached to it and attract the consumers. Therefore, the Respondent No. 1 appears to be in violation of Section 10 (2) (d) of the Act.
- 5.40 The Complainant has also alleged that the packaging of one of its famous brand ‘Chocolate Chip’ has been copied by the Respondents. The alleged product, Choco Chip, of the Respondent No. 2 has been sold under the House Mark ‘Cookania’ and the product ‘Chocolate Chip’ of the Respondent No. 1 has been sold under the House Mark “Donal”. Images of both the Complainant’s and the Respondents’ product packaging are given below:



Complainant’s Product



Respondent No.1’s Product



Respondent No. 2's Facebook Page

- 5.41 The Complainant's trademark 'Chocolate Chip' and all other descriptive matter appearing on the label along with devices are registered in class 30, under the trademark no. 191282, with the Trade Mark Registry, IPO Pakistan. However, a disclaimer has been given on the trademark certificate that *"registration of this trademark shall give no right to the exclusive use of words 'Chocolate Chip' and all other descriptive matter and devices separately and apart from the mark as whole"*. The Respondents have not submitted the trademark and copyright registration certificate of the alleged products (**Copy of the trademark certificate of the Complainant is attached as Annex- I**).
- 5.42 If we generally look into both the packaging, it can be observed that the House Mark of Complainant is at left corner in red color (Bisconni) and the letters chocolate chip cookies written in brown, red and white color with blue color background. The House Mark, Donal, of the Respondent No. 1 is at left corner and chocolate chip cookies written in same color combination as used by the Complainant. However, the tag line "Cookies with real Chocolate Chips" is mentioned at the right side of the Respondent No. 1's product packaging. The Respondent No. 2 has also created a very similar packaging as that of the Complainant. The Respondent No. 2 has copied all distinctive features of the Complainant's product 'Chocolate Chip' including the color scheme and devices as well to confuse the ordinary consumer about the origin of the product, i.e., the Complainant.
- 5.43 It can, therefore, be concluded that the purpose of using similar packaging by the Respondent No. 1 and Respondent No. 2 was to take benefit of the goodwill attached with the Complainant's product and aimed to mislead the public and thus, deceptive in terms of Section 10(2) (d) of the Act.
- 5.44 Another product of the Complainant namely 'Butter Scotch' has been marketed under the House Mark "Candy Land" since last many years. The Respondent No. 1 has also introduced an energy candy under its own House Mark "GIBS" with the similar name as that of the

Complainant, i.e., 'Butter Scotch'. Images of both the Complainant's and the Respondent No. 1's product packaging are given below:



Complainant's product packaging



Respondent No. 1's product packaging

- 5.45 The Complainant has not submitted the trademark certificate of its product 'Butter Scotch' however, the Complainant has obtained copyright certificate of "Butter Scotch" in year 2011 under registration No.23181-Copr with the IPO, Pakistan. It is evident from the copyright registration certificate of the Complainant's product 'Butter Scotch' that the Complainant has not an exclusive right over the word 'Butter Scotch', however, the expression/style/getup of the "work" is registered/protected under copyright law. The Respondent No. 1 was also asked to submit trademark and copyright certificates pertains to its product 'Butter Scotch' however, the Respondent No. 1 has failed to produce trademark and copyright registration certificates (**Copy of the Complainant's copyright certificate is attached as Annex- J**).
- 5.46 If we compare both the product packaging, it has been observed that the artistic work of the Respondent No.1's product 'Butter Scotch' is slightly different from that of the Complainant's registered artistic work. Moreover, the Complainant has not submitted trademark certificate of its product 'Butter Scotch', therefore, it is hard to conclude that the Complainant has an exclusive right over the trade-name/trademark 'Butter Scotch'. Therefore, it can be concluded that the Respondent No. 1 has not copied the Complainant's product labelling or packaging.
- 5.47 Another product of the Complainant, namely Peanut Cookies, has been sold in the market since 2009 under House Mark "Bisconni". The Respondent No. 1 has also introduced cookies product under the House Mark 'Donal'. Images of both the Complainant's and the Respondent No. 1's product packaging are given below:



Complainant's product



Respondent No. 1's product

- 5.48 The trademark “Bisconni Peanut Cookies” of the Complainant is registered in class 29, under the trademark no. 2660670 with the IPO, Pakistan. However, a disclaimer has been given on a trademark certificate that “registration of the trademark shall give no right to the exclusive use of all descriptive words and features appearing on the label”. The Respondent has not submitted its trademark and copyright certificate pertain to its product ‘Donal Peanut Cookies’ (**Copy of the Complainant’s trademark certificate is attached as Annex- K**).
- 5.49 Upon a comparison, it can be observed that the Respondent No. 1 has copied all central features of the Complainant’s registered trademark including the major color of the packaging. The Complainant has used light green color as a base color, the same has been copied by the Respondent No. 1. The word cookies is written beneath the word peanut which is half underlined and a device of biscuit is also a central point of the Complainant’s trademark. The House Mark ‘Bisconni’ is written on left corner of the packaging in pink font color. The Respondent No. 1 has also designed its product ‘Donal Peanut Cookies’ in exact same style as that of the Complainant. The ordinary consumer can only differentiate two packaging by recognizing the House Marks of both the Complainant and the Respondent on their respective product packaging.
- 5.50 From the above analysis, it can be concluded that the similarities found in the elements of the packaging of Complainant and Respondent No.1 is enhanced because of the use of similar colors by the Respondent No.1, thereby passing off its product as that of the Complainant.
- 5.51 It is pertinent to mention here that packaging is one of the most effective marketing tools in the sale of many products, especially consumer goods. Marketing studies have shown that the design and bright colors of the packaging is the most effective marketing tools for sale. Children between the ages of 6 and 11 years are willing to buy attractive packaging products, including sweets, chocolate and cereals.⁴ Bright colors like yellow, red and blue, are most attractive packaging color for children, they prefer to buy products in bright color

⁴http://hrmars.com/hrmars_papers/The_dilemma_of_flavor,_shape_and_color_in_the_choice_of_packaging_by_children.pdf

packaging.⁵ And bright colors, to influence the selection process will be used for children in stores.⁶

- 5.52 The Commission, in the matter of M/s K&N's Foods (Pvt.) Ltd vs. M/s Rahim Foods Limited, in order to set a benchmark for the Commission's consideration and consequent adjudication of cases, held that the Commission considers it appropriate to examine the packaging and product labelling appearance of a finished product as a whole which may collectively include visually confusing resemblances in elements of color scheme, layout style, design, images, labels, font usage etc., instead of each individual similarity in isolation, to come to its determination as to a contravention under Section 10 (2)(d) of the Act⁷.
- 5.53 In view of the facts, it is safe to infer that the Respondent No. 1 & 2 have not only used deceptively similar trademark but they have also imitated the Complainant's packaging. Therefore, the conduct of the Respondents falls under the ambit of Parasitic Copying also, which means;

“Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, color combination and graphic arrangement) but usually there is just enough difference to avoid a clear cut trade mark⁸ infringement. Still they often generate deception or confusion among consumers⁹”

- 5.54 In light of the analysis above, the Respondent No. 1&2 appears to be in, *prima facie*, violation of Section 10(1) in terms of Section 10 (2)(d) of the Act which prohibits fraudulent use of another's **trademark, firm name, or product labeling or packaging**; where its conduct appears to be infringing upon the rights of the Complainant through fraudulent use of Complainant's logo, packaging, color scheme, design and get up of products, trying to pass off its product as that of the Complainant.

II. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENTS UNDER THE COMPLAINT CONSTITUTE A, PRIMA FACIE, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (B) OF THE ACT I.E. DISTRIBUTION OF FALSE AND MISLEADING INFORMATION TO CONSUMERS, INCLUDING THE DISTRIBUTION OF INFORMATION LACKING REASONABLE BASIS, RELATED TO THE PRICE, CHARACTER, METHOD OR PLACE OF PRODUCTION, PROPERTIES, SUITABILITY FOR USE, OR QUALITY OF GOODS.

⁵ The importance of packaging attributes: a conjoint analysis approach, European Journal of Marketing, Vol. 41 Iss: 11 pp. 1495 – 1517

⁶ Expectations and the Food Industry: the Impact of Color and Appearance, Kluwer Academic/Plenum Publishers, New York, NY

⁷ In the Matter of show because notice issued to M/S A.Rahim Foods (Private) limited for deceptive marketing practices. Para no 17, sub –para ‘e’

⁹ Jorge Novais Goncalves, EC, DG Internal Market and Services “Similar Packaging: an IP, competition or a consumer protection matter?”

- 5.55 The Honorable Commission has, in the case of Proctor and Gamble Pakistan (Pvt.) Limited (2010 CLD 1695¹⁰), noted that misleading information includes any information that is capable of giving a wrong impression or idea, or is likely to lead to an error of conduct, thought or judgment, or which tends to misinform or misguide the consumer. It is furthermore an established view that it is not necessary that the deceptive information cause actual deception, but it is in fact sufficient that the misleading information tends to cause deception amongst the ordinary consumers.
- 5.56 The Honorable Commission has further held in its order In the Matter of M/s China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited ¹¹(hereinafter referred to as the ‘Zong Order’) that the term consumer, as referred to in Section 10 of the Act, has to be construed in the widest sense so as to refer to the ‘ordinary consumer,’ which is distinct from the concept of the ‘ordinary prudent man,’ as evolved under Contract Law. The Zong Order further holds that ‘unlike the “ordinary prudent man” the thrust on ordinary diligence, caution/ duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors “when looking at a deceptive commercial practice.”’
- 5.57 This Enquiry Report shall once again make reference to the DHL Order¹², where in para 48, the Honorable Commission has made the following references:

‘We also would like to refer to the judgments of Hoffmann-La Roche [1978] E.C.R. 1139, para.7, and Philips Electronics NV v Remington Consumer Products Ltd [2002] ECR I-0000; wherein it was held that “the essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfill its essential role in the system of undistorted competition, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality”. It is also pertinent to highlight that in the judgments of Arsenal Football Club v. Matthew Reed [2003] RPC 9 and Loendersloot [1997] E.C.R. I-6227 it was observed that “for that guarantee of origin, which constitutes the essential function of a trade mark, to be ensured, the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.’

- 5.58 It is hence submitted that the consumers of confectionary products are usually children. The majority of these comprise innocent and/or unwary consumers, so much so, that the market is usually driven by the dominant features of the product including the color scheme. This is a fact that all major manufacturers have specific dominant features for their various products, making it easier for the consumers to identify the respective products. Hence, it is not beyond plausibility that an ordinary consumer upon seeing the Respondents’ specific colored box or wrapper of the product, may assume the Complainant as the product’s rightful manufacturer.

¹⁰ <http://www.cc.gov.pk/images/Downloads/Proctor-and-Gamble-Order-Finalized.pdf>

¹¹ <http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

¹² http://www.cc.gov.pk/images/Downloads/dhl_pakistan.pdf

- 5.59 Furthermore, parasitic practices of the Respondent is in term of the trade dress used upon its products and the impression created by the product labelling and packaging is bound to lead the ordinary consumer into mistaking the copied products as the originals, thus misleading the unwary purchaser as to the quality and the origin of the products.
- 5.60 In light of para 5.55 to 5.59 above, it is concluded that the packaging of the Respondents' products is capable of giving a wrong impression to the general public regarding the quality of the product and place of product in term of origin, in violation of Section 10 (1) of the Act in terms of Section 10 (2) (b) of the Act.

III. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENTS UNDER THE COMPLAINT CONSTITUTE A, PRIMA FACIE, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (A) OF THE ACT I.E. THE DISTRIBUTION OF FALSE OR MISLEADING INFORMATION THAT IS CAPABLE OF HARMING THE BUSINESS INTERESTS OF ANOTHER UNDERTAKING .

- 5.61 The Complainant has, vide its Complaint, also alleged that the actions of the Respondents are adversely harming its business interests under clause (a) of subsection (2) of Section 10 of the Act.
- 5.62 It is submitted that the parasitic copying of the Complainant's products reflects the malicious intent to use the Complainant's goodwill, reputation and hard work as a spring board to illegally leverage its own product, thereby causing irreparable harm to the Complainant's business interest.
- 5.63 It is pertinent to point out that part of a business's identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value. As a result, businesses spend tremendous amounts of resources to identify their goods, distinguish their services, and cultivate good will.
- 5.64 The undertakings develop a relationship with its customers/consumers by building up its reputation and spend a lot now a day in making the goods and/or services distinct from that of other competitors. Therefore, the goods so sold or services so provided would create goodwill in the mind of wary person and the goodwill owned by the trademark and/or copyright owner on account of the use of similar trademark and/or copyright by the other undertaking would cause a substantial damage to the trademark and/or copyright owner's business and goodwill. Commercial reputation is actually a very broad concept which refers to all reputation related to any marks of goods or services provided by business operators, usually including registered trademarks, (well-known) unregistered trademarks; unique company names, person names, product names, packages, decorations; origin of products, internet domains, and so on. Usually, using for a commodity without authorization any of these unique marks or names of another's famous commodity, or counterfeiting or using similar ones of another's famous commodity, thereby misleading the consumers would ultimately have a direct impact on the business of the undertaking whose mark is used without authorization and also on the consumers who may be deceived to purchase the inferior good.

- 5.65 The four principal devices undertakings used to distinguish themselves are trade names, trademarks, service marks, and trade dress. (i). Trade names are used to identify corporations, partnerships, sole proprietorships, and other business entities, (ii). Broadly speaking, a trademark is a sign that individualizes the goods/services of a given enterprise and distinguishes them from the goods/services of others. It can be in the form of words, designs, letters, numerals or packaging, slogans, devices, symbols, etc., (iii). Whereas service marks are attached to goods through tags and labels, service marks are generally displayed through advertising. As their name suggests, service marks identify services rather than goods, and (iv) Trade dress refers to a product's physical appearance, including its size, shape, texture, and design. Trade dress can also include the manner in which a product is packaged, wrapped, presented, or promoted¹³.
- 5.66 In this regard, we note that when an undertaking decides to start the business with a particular name, style or with a particular trademark or copyright, they are duty bound to ascertain and ensure that the same is not being used by any other undertaking. If such caution is not exercised before starting business activity and subsequent marketing campaigns are also launched, the entire responsibility as to the consequences shall rest on the undertaking, who uses the same or similar name and style, trademark or copyright deceptively that was already in the use of or was already owned by the other undertaking.
- 5.67 Keeping in view the above, it appears that the Respondents through their packaging has infringed upon the rights of the Complainant, who is a prior user of the alleged trademark and copyrighted packaging and who has invested considerable money and efforts in establishing the alleged trademark and packaging.
- 5.68 Therefore, we are of the view that the act of the Respondents is capable of harming the business interest of the Complainant constitutes a, *prima facie*, violation of Section 10(1) of the Act in terms of Section 10(2) (a) of the Act.

6. FINDINGS AND RECOMMENDATIONS:

- 6.1 The Respondents' product, under the imitated trademark, is in total disregard to the proprietary rights vested to the Complainant in respect to the trade mark and trade dress, wherein trade dress means and includes *a product's physical appearance, including its size, color, design, and texture. In addition to a product's physical appearance, trade dress may also refer to the manner in which a product is packaged, wrapped, labeled, presented, promoted, or advertised, including the use of distinctive graphics, configurations, and marketing strategies*¹⁴.
- 6.2 In the matter, the Respondents' packaging strongly possesses the ability to mislead the consumers and may induce them to make transactional/ financials decisions based upon the duplication of the Complainant's trade mark and trade dress.

¹³ <https://law.jrank.org/pages/10981/Unfair-Competition-Trade-Name-Trademark-Service-Mark-Trade-Dress-Infringement.html>

¹⁴ <http://legal-dictionary.thefreedictionary.com/Trade+Dress>

- 6.3 The Respondents' actions are likely to cause even more damage due to the fact that the products channels of trade and probable customers of the Complainant and those of the Respondents are the same, in the light of which, the customers are, *prima facie*, at the risk of being deceived constantly.
- 6.4 The Complainant's business interest is harmed as a result of the Respondents' infringement of the trade mark and trade dress. In the event, that the Respondent is allowed to carry on with its deceptive and unfair practices, the Complainant will suffer substantial business losses and suffer irremediable harm to its goodwill, reputation and exclusivity.
- 6.5 In view of the above it can easily be established that the Respondent No. 1&2, by using trademark and trade dress of the Complainant, have enjoyed the goodwill and reputation of the Complainant. Therefore, the Respondent No. 1&2 have, *prima facie*, entered into deceptive marketing practices, in violation of Section 10 (1) of the Act in terms of Section 10 (2) (a),(b) & (d) of the Act.
- 6.6 It is deducible that misleading information always attracts consumers to purchase the products of low quality which provides undertakings a competitive edge over the competitors. Thus, in order to protect public interest, the undertakings should be discouraged from selling their products in a deceptive manner and be directed to adopt such practices which are transparent and give consumers/customers true and correct information about their products. Under the circumstances, it is recommended that a show cause notice may be served upon the Respondents for violating the provisions of Section 10 (1) of the Act in terms of Section 10 (2) (a), (b) & (d) of the Act.
- 6.7 The deceptive marketing practices have a direct impact on the public at large. It is therefore, in the interest of the general public that the respective undertakings should be restrained from advertising their products/services in an unfair and misleading manner and instead be encouraged to resort to advertising practices which are transparent and give consumers/customers true and correct information.
- 6.8 *Prima Facie* violations under the Act, in terms of the findings of this Enquiry Report, warrant initiation of proceedings against the M/s S.M. Food Makers Limited and M/s Volka Food International Limited under Section 30 of the Act.

M. Salman Zafar
(Enquiry Officer)

Marryum Pervaiz
(Enquiry Officer)

Riaz Hussain
(Enquiry Officer)