

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 NATIONAL FOODS
LIMITED AGAINST M/S SHAINAL AL-SYED FOODS COMPANY FOR
DECEPTIVE MARKETING PRACTICES**

BY

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Dated: June 20, 2016

1. BACKGROUND

- 1.1 National Foods Limited (the ‘**Complainant**’) through Irfan & Irfan, Advocate(s) Supreme Court of Pakistan, filed a complaint against M/s Shainal Al-Syed Food Company (the ‘**Respondent**’) 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 alleged in the complaint that the Complainant is in the business of production, marketing and sale of large variety of food products at affordable prices & the Respondent has copied the packaging of Complainant’s Products, and by doing so has distorted healthy competition in the market.
- 1.3 Based on the preliminary fact finding, the Competent Authority initiated an enquiry in accordance with sub section (2) of Section 31 of the Act by appointing Ms. Marryum Pervaiz, Deputy Director (OFT) and Ms. Urooj Azeem Awan, Management Executive (OFT) as enquiry officers (collectively the ‘**Enquiry Officers**’) to conclude the enquiry.
- 1.4 The aim of the enquiry was to determine whether, *prima facie*, by using similar packaging to National Foods Limited’s packaging:
 - a) The Respondent is 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
 - b) The Respondent’s 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
 - c) The Respondent’s conduct 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?

2. THE COMPLAINT:

- 2.1 This section summarizes the contentions raised in the complaint:
- 2.2 The Complainant is a Company incorporated under the Companies Ordinance, 1984, established on February 19, 1970, and is a leader and trend setter in Pakistan in the business of production, marketing and sale of large variety of food products at affordable prices which are more than one hundred (100) in number (hereinafter collectively referred to as the ‘**Complainant’s Products**’), including but not limited to, dessert preparation mixtures, custards, jams, jellies, marmalades, pickles, ketchups, vinegars, sauces, recipe masalas, salts, snacks, spices and ingredients.
- 2.3 The Complainant has clearly established and has been using a trademark (word) ‘National’ as a trademark, house mark and company name since 1970. Additionally it has been using this trademark in a logo form which appears on all the related items of the company like stationary, office building or structures etc. An image of the Complainant’s trademark is depicted below:



- 2.4 Subsequently, the Complainant further modernized its trademark in 2008 which is registered under registration number 21926-Copr dated August 16, 2010 (attached as annex-A), and since appears on all the related items of the company like stationary, office building or structures etc. An image of the Complainant's modernized trademark (hereinafter referred to as '**Distinctive National Logo**') is depicted below:



- 2.5 It has been further alleged in the complaint that the Complainant enjoys a copyright in the representation of the above Distinctive National logo, writing and description etc. That for the purposes of present complaint, since year 1970, Complainant's superior quality food products have been prepared, marketed and sold throughout Pakistan and National is a household name in Pakistan for the product category which is being marketed by the Complainant in Pakistan.
- 2.6 Complainant has been using various distinctive packages for a large variety of its products however, trademark and house mark 'National' as well as Complainant's Distinctive National Logo appears on all of its product packaging. The Complainant is selling, amongst others, the following products using trademark and house mark 'National' as well as Complainant's Distinctive National Logo and distinctive packaging:
- a. National Salan Masala
 - b. National Qourma Masala Mix
 - c. National Fish Masala Mix
 - d. National Achar Gosht Masala Mix
 - e. National Biryani Masala Mix
 - f. National Haleem Masala Mix
 - g. National Kasuri Methi
 - h. National Strawberry Custard Powder

- 2.7 Specimen of the Complainant's above products, bearing trademark and house mark as well as distinctive package color scheme, design and get up (hereinafter collectively referred to as '**Complainant's genuine color scheme, design and get up**') are depicted hereunder:

National Salan Masala



National Quorma Masala Mix



National Fish Masala Mix



National Achar Gosht Masala Mix



National Biryani Masala Mix



National Haleem Masala Mix



National Kasuri Methi



National Strawberry Custard Powder



- 2.8 It was further submitted that the Complainant is actively marketing and selling all of its products bearing the Complainant's genuine color scheme, design and get up, and has one of the largest supply and distribution network in Pakistan. The well organized, equipped and efficient distribution network and supply chain ensures that the Complainant's products are supplied to retailers throughout the country in a manner that a reasonable stock of Complainant's products are available for purchase by the end consumer at all times.
- 2.9 That the value of revenues of the Complainant, amongst others, through use of Complainant's genuine packaging color scheme, design and get up for the past few years have been as follows¹:

Year	Rupees (In Millions)
2004	1,267.716
2005	1,671.393
2006	2,071.804
2007	2,721.553
2008	3,415.890
2009	4,519.232
2010	5,395.503
2011	6,751.167
2012	8,821.249
2013	10,564.743
2014	12,095.708

- 2.10 The Complainant further submitted that by the virtue of the advertisement through permitted means and media and superior quality of food products, it has acquired substantial reputation and goodwill throughout Pakistan and has become very popular amongst the trade and general public, which holds the same in high esteem. Furthermore, the Complainant has promoted its products through various permitted customary means of promotion and substantial amounts have been spent on these promotions.
- 2.11 Thus, the products sold under Complainant's genuine packaging color scheme, design and get up have acquired a high reputation and goodwill in Pakistan, which belongs to the Complainant and the use of a similar trademark and/or color scheme, design and get up by another entity would result in misrepresentation made in the course of trade to potential customers, which amounts to infringement of rights of Complainant and which may injure the business or goodwill of the Complainant.
- 2.12 The Complainant has been the first entity to design, introduce, develop and popularize its products in Pakistan with the said color scheme, design and get up and no third party or entity has or is using the same or similar legitimately within Pakistan, especially in relation to food products such as that of Complainant's products. Any use of such, without prior permission, license or consent of the Complainant, is dishonest and only motivated to deceive or confuse the general public into believing that such entity is or is related to the Complainant's in some or other manner.
- 2.13 The Complainant has, in order to protect its interests and rights in Complainant's genuine packaging color scheme, design and get up for its products, registered the Distinctive

¹ Cross-checked and verified as on 29th of April, 2016 from <http://nfoods.com/investor-relations/financial-report/>

National Logo trademark with Registration No. 75158 under the Class 30 of Trade Marks Act, 1940, which was then repealed by the Trade Marks Ordinance, 2001.

- 2.14 The Complainant has also secured various copyrights, in the Complainant's genuine packaging color scheme, design and get up, in the representation of the features of the label, writing and description etc., appearing on various products' packaging, which being artistic works were created and first published (used) for and on behalf of Complainant under the provisions of the Copyright Ordinance, 1962, and therefore, unauthorized use of such features, writing and description by third parties would constitute infringement of Complainant's such rights. Details of Complainant's registered copyrights submitted in relation to Complainant's products are reproduced hereunder:

Ser.	Title of Copyright	Registration No.	Registration Date
1.	National Logo	21926-Copr	16-08-2010
2.	National Foods Karahi Gosht Masala Mix	21930-Copr	16-08-2010
3.	National Foods Biryani Masala Mix	21929-Copr	16-08-2010
4.	National Foods Qourma Masala Mix	21934-Copr	16-08-2010
5.	National Foods Strawberry Custard	21952-Copr	16-08-2010
6.	National Foods Haleem Masala Mix	21933-Copr	16-08-2010
7.	National Foods Ginger Powder	21921-Copr	16-08-2010
8.	National Foods Black Pepper Powder	21925-Copr	16-08-2010
9.	National Foods Garlic Powder	21923-Copr	16-08-2010
10.	National Foods Turmeric Powder	21947-Copr	16-08-2010

- 2.15 The Complainant has recently become aware that the Respondent has started preparing, packing, marketing, supplying and selling various food products (hereinafter referred to as '**Respondent's Products**') using imitated trademark 'Shainal' logo. The Respondent is selling its following products using imitated trademark Shainal logo:

- a. Shainal Salan Masala
- b. Shainal Qourma Masala Mix
- c. Shainal Fish Masala Mix
- d. Shainal Achar Gosht Masala Mix
- e. Shainal Biryani Masala Mix
- f. Shainal Haleem Masala Mix
- g. Shainal Kasuri Methi
- h. Shainal Strawberry Custard Powder

2.16 The Respondent's above infringing products are also packed in packaging having color scheme, design and get up which is confusingly similar to the Complainant's genuine color scheme, design and get up. Specimen of Respondent's abovementioned products, bearing the imitated trademark 'Shainal' logo as well as imitated package color scheme, design and get up are depicted hereunder:





2.17 The deception being caused is gauged by the following images which draw an easy comparison of the Complainant's and Respondents' products:



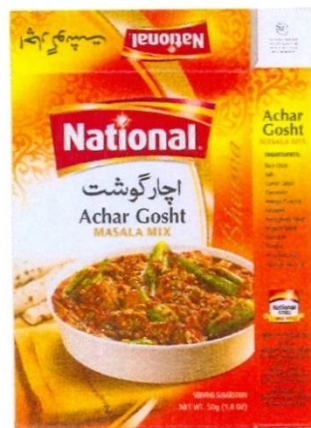
National Fish Masala Mix



Shainal Fish Masala Mix



National Achar Gosht Masala Mix



Shainal Achar Gosht Masala Mix



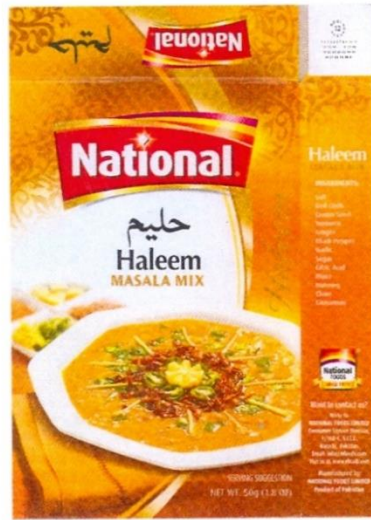
National Biryani Masala Mix



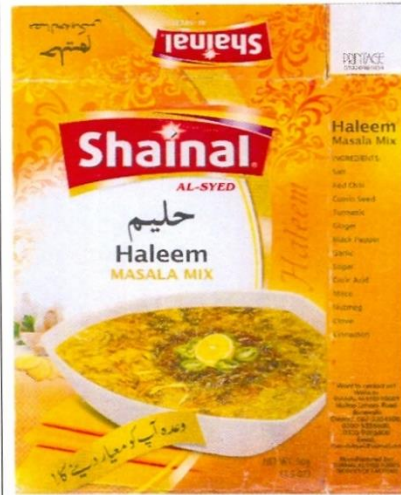
Shainal Biryani Masala Mix



National Haleem Masala Mix



Shainal Haleem Masala Mix



National Kasuri Methi



Shainal Kasuri Methi



National Strawberry Custard Powder



Shainal Strawberry Custard Powder



- 2.18 It has also been submitted by the Complainant that at an earlier stage, upon an application by the Complainant, a raid was conducted at the Respondent's premises by the Food Inspector, Burewala and Respondent's lower quality food products were taken into custody by the Food Inspector.
- 2.19 Hence, the Respondent has, *prima facie*, started preparing, packing, marketing, supplying and selling various food products using imitated trademark 'Shainal' logo identical to/deceptively similar to Complainant's genuine color scheme, design and get up for Complainant's products. The use of such packaging is, *prima facie*, in violation of Section 10 of the Act i.e. Deceptive Marketing Practices.
- 2.20 The Complainant further submitted that the Respondent's aforesaid acts constitute Deceptive Marketing Practices in terms of Section 10 (2) (a), by the unauthorized use of 'Shainal' logo and identical to or similar packaging color scheme, design and get up for Complainant's products, and by distributing false and misleading information as if the Respondent is authorized by the Complainant to use such or that the Respondent's business is genuine and originating from the Complainant, which is capable of harming the business interests of the Complainant.
- 2.21 It is further submitted that the Respondent is packing and selling its products to consumers under false pretense, who would associate such products and use of such products to that of Complainant, violating Section 10 (2) (b) of the Act.
- 2.22 It was further submitted by the Complainant that the Respondent filed an application bearing No. 336588 before the Registrar of Trademarks, seeking to register its imitated trademark 'Shainal' logo, which was advertised in the Trademark Journal No. 762 on July 01, 2014, before registration. The Complainant, for securing its vested rights in relation to its genuine packaging color scheme, design and get up has opposed the abovementioned application by filing an Opposition before the Registrar of Trademarks.
- 2.23 Therefore, the Respondent has been, *prima facie*, carrying on a commercial venture using imitated trademark, logo and packaging color scheme, design and get up for Nationals' products. In doing so, the Respondent is gaining commercial benefit which is being achieved through anti-competitive behavior. As the Respondent is carrying on identical to/similar business, and the Respondent is commercially benefitting from the Complainant's clientele by falsely implying and advertising their products to be the same or in connection with/ or authorized by the Complainant, which is harming the business of the Complainant.
- 2.24 The Complainant, for securing its rights relating to the trademark and house mark National, National logo, as well as distinctive package color scheme, design and get up filed a suit titled 'National Foods Limited VS. Shainal Al-Syed Foods' before Hon'ble District Court, Lahore, presently pending adjudication before Mr. Hasnain Qadir, learned Additional District Judge, Lahore on April 15, 2015 (hereinafter referred to as 'Lahore Suit') and after hearing ex-parte arguments Honorable Court was pleased to pass an Order dated April 15, 2015, restraining the Respondent from using and advertising imitated trademark "Shainal" and imitated package, color scheme, design and get up.

3. SUBMISSIONS OF THE RESPONDENT:

- 3.1 The legal counsel for the Respondent submitted a reply on their behalf to the complaint filed by the Complainant on 11th of December, 2015.
- 3.2 The reply stated that the Respondent started business in the name and style of M/s Shainal Al-Syed Food Company, having its registered office at Street No. 07, Main Road, Mujahid Colony, Burewala Distt. Vehari using the logo of ‘Shainal Al-Syed’ for its products.
- 3.3 The Respondent applied for a Trademark registration on 20th of March, 2013 for the mark ‘Shainal Al-Syed’ (Logo) under Class 30. Intellectual Property Organization Pakistan (IPO) initially published the application for registration in the Trademark Journal of 20th of April, 2013, bearing Application No. 336588. The application was also re-published in the Trademark Journal of July, 2014. The Respondent has also applied for the registration of Copyright of its logo ‘Shainal Al-Syed’.
- 3.4 The Respondent denied all allegations made in the complaint, stating that the company is manufacturing the products, referred to in the complaint, with best quality using its own logo with its own color scheme, packaging and design.
- 3.5 The Respondent further wrote that the name ‘*National*’ and ‘*Shainal Al-Syed*’ logo, packaging, color scheme, design and get up bears no resemblance with each other and the Complainant’s name’s spelling, meaning and pronunciation is also different from that of the Respondent, therefore, no malafide intention appears on the Respondent’s part.
- 3.6 The reply further stated that the Complainant’s logo with its color scheme was registered under class 30 with application no. 339151 in the Trademark Journal No. 764 on 30th of April, 2013, whereas the Respondent’s Logo with its color scheme got registered under class 30 with application no. 336588 in Trademark Journal 762 on 2nd of April, 2013, from which it is evident that the Respondent obtained it first.
- 3.7 That the Complainant’s opposition, to the Respondent’s application to register its trademark, has already been replied to by the Respondent to IPO Pakistan.
- 3.8 Apart from the reply, the legal counsel, on behalf of the Respondent, also submitted new packaging by the Respondent that had been edited in design to appear different from that of the Complainant. The legal counsel also submitted that the new packaging had come into effect in the market.

4. REJOINDER BY THE COMPLAINANT:

- 4.1 The reply of the Respondent was sent to the Complainant for rejoinder on December 15, 2015.
- 4.2 On 1st of Feb, 2016, the Complainant submitted its rejoinder/comments via its legal counsel on the reply of Respondent to the complaint.
- 4.3 The reply stated that the Respondent had failed to show or plead any defense to the complaint and instead of submitting Parawise reply to all the allegations contained in the complaint, the Respondent has relied on feeble arguments without any legal rational or logical basis and/or any substantive evidence to corroborate that it is not in contravention of the Act.

- 4.4 It was submitted that the Respondent has failed to state the rationale behind using/adopting this particular logo for their brand. Furthermore, the Respondent had failed to identify/mention an exact year or date when it had first started using the imitated 'Shainal' logo.
- 4.5 The Complainant also submitted that it has filed an opposition to the application bearing No. 336588, for registry of imitated trademark by the Respondent, before the Registrar of Trade Marks to protect its vested rights in relation to its genuine packaging, color scheme, design and get up for National Products and National Logo. Similarly, the Respondent's application for registration of Copyrights of its imitated Shainal Logo will be opposed by the Complainant in case it is published in the Copyrights Journal before approval.
- 4.6 The Complainant also denied that the Respondent is supplying its product using its own Logo, with its own color scheme, packaging and design and that instead the Respondent was making use of the Complainant's goodwill and reputation.
- 4.7 It was submitted that Respondent is attempting to mislead by claiming names of the products i.e. Biryani Masala, Qourma Masala etc. are common to language and cannot be used otherwise, wherein the names of the food items are not the subject of the complaint filed by the Complainant and it is in fact the use of the imitated Shainal Logo, color scheme, design and get up which is contested as the source of deception.
- 4.8 Furthermore, the Respondent has failed to produce or state any figures which it has spent on the marketing and distribution of its products. Therefore, it is clear that Respondent is only benefitting from the goodwill and reputation of the Complainant, which is at the same time detrimental to the business interest of the Complainant.
- 4.9 The Respondent's statement that the Complainant registered with No. 339151 class 30 dated 30-4-13 with TMJ No.764 whereas the Respondent got their registered with No. 336588 class 30 dated 2-4-2013 with TMJ No. 762 was denied being misleading and vexatious. Also, it was pointed that the Respondent falsely claimed that its logo and label is registered under No. 336588, which is not the case.
- 4.10 It was denied that there is no resemblance in name spelling, meaning and pronunciation, submitting that Shainal Logo is visually and phonetically similar to National Logo along with the identical/confusingly similar use of color scheme, packaging, design and get up.
- 4.11 It has been submitted that the learned Additional District Judge, finding *prima facie* similarity, issued a restraining order against the Respondent. (Copy of the order is attached annexed B)

5. ANALYSIS:

- 5.1 In the following paragraphs the facts and evidence submitted by the Complainant and Respondent are analyzed and discussed in order to reach a conclusion regarding the issues at hand, i.e., whether the Respondent has copied the Complainant's packaging, in doing which, has potentially harmed the Complainant and mislead consumers, *prima facie*, in violation of Section 10 of the Act.

5.2 Section 10 of the Act pertaining to deceptive marketing practices is reproduced below for the ease of reference:

10. Deceptive marketing practices.— (1) *No undertaking shall enter into deceptive marketing practices*

(2) *The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to,*

(a) *the distribution of false or misleading information that is capable of harming the business interests of another undertaking;*

(b) *the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;*

(c) *false or misleading comparison of goods in the process of advertising; or*

(d) *fraudulent use of another’s trademark, firm name, or product labeling or packaging.*

5.3 Before discussing the submissions of the Complainant and Respondent, 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”².

5.4 According to the Consumer Protection from Unfair Trading Regulations 2008, UK, a list of prohibited commercial practices, as transposed from the Unfair Commercial Practices Directive 2005 (UCPD), include at item no. 13 *“Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by the same manufacturer when it is not.”³*

5.5 It is evident from the information provided from both undertakings that the Complainant had an existence prior to the establishment of the Respondent in the Masala Mix product category. The Complainant has been using the trademark (word) ‘National’ as a trademark, house mark and company name since 1970. Subsequently, the Complainant further modernized its trademark in 2008, which was registered under registration number 21926-Copr dated August 16, 2010. On the other hand the Respondent has failed to provide, in their reply, a date of publishing/use of their imitated logo and

² Giuseppe Abbamonte, “Copycat Packaging, Misleading Advertising and Unfair Competition”

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> , No 13 of Annex I

design as well as a date of incorporation of their undertaking. However, from the 'Statement of Particulars' within the 'Application for Registration of Copyrights' provided in the annexures of the reply by the Respondent, it has been extracted that the imitated logo has been in continuous use since 2014 by the Respondent.

- 5.6 In order to establish whether parasitic copying may have occurred, it is important to compare elements of the Complainant's and Respondent's packaging to assess similarities.
- 5.6.1 As per the packaging submitted by the Complainant (reference is made to para no. 2.17 in the enquiry report), it is very clearly identifiable that the Respondent identically copied the Complainant's logo, product labeling, creative design element including placement of various details and language used by the Complainant.
- 5.6.2 The distinctive 'National' logo has deliberately been placed by the Respondent in the same place, with same color scheme and within the same design element on the packaging as that of the Complainant's, except for using the word 'Shainal' in the artistic design instead of National, but with the same diamond design 'dot' with a starburst in the background over letter 'i' as that of Complainant's. However, the Respondent has placed the words 'Al-Syed' in a smaller font beneath the infringed logo for distinction.
- 5.6.3 The overall 'curved' design element running throughout the right hand side of the Complainant's packaging has been identically copied by the Respondent along with the floral pattern used as a design element on the top half of the packaging, fading and reappearing in a similar fashion as that of the Complainant's.
- 5.6.4 The name of the Masala Mix (product) has been displayed by the Respondent at the center of the packaging in a similar style and font as that of the Complainant in identical color scheme, with the name of the dish in black and word 'Masala Mix' under it in a shade of yellow. Moreover, the same name of product appears running vertically on the right side of the packaging in an identical color and style on both the Complainant's and Respondent's packaging.
- 5.6.5 The net weights are displayed by the Respondent on the bottom right corner of the packaging where the Complainant displays its serving suggestion by net weight, thereby only different in meaning but appearing similar.
- 5.6.6 The ingredients displayed in English by the Respondent on the right panel of the packaging are identical to/similar to the Complainant's packaging with minor differences which can easily be overlooked. Furthermore, the contact details on the bottom of the same panel have been copied in a similar fashion beginning with words 'Want to contact us? Write to.....'. The only difference observed in the right panel of the two packaging is the presence of Complainant's House Mark appearing above the contact details on their packaging, the space of which is vacant on the Respondent's packaging.
- 5.6.7 The left panel of the Complainant's packaging displays the ingredients in Urdu which have been copied by the Respondent in an identical fashion. Furthermore,

the Complainant has displayed a circular ISO 9001 Certification Mark under the ingredients in a shade of chrome. The Respondent on the other hand has copied the same design of circular mark in the same color scheme with words '*100% Satisfaction Guaranteed*' appearing within it. A bar code is visible on the bottom of the left panel of both the packaging of Complainant and the Respondent with different serial numbers.

- 5.6.8 On the top of back panel of the packaging of the Complainant appears the National Logo and the products name with a small paragraph underneath in praise of the Complainant's product. The back panel of the Respondent's packaging also follows the same sequence with Shainal Logo (similar to National's Logo) on the top left and product name on top right in the same style and colors with a paragraph in praise of the Respondent's product, similar in construction to the Complainant's paragraph with slight variation.
- 5.6.9 The rest of the back panel of the Complainant's packaging displays instructions to cook in Urdu which has been reproduced in verbatim by the Respondent on their packaging with similar /identical design elements and color combinations. On the left is also displayed an assortment of spices by the Complainant which have not been identically copied by the Respondent but are similarly displayed on their packaging.
- 5.6.10 The folding flaps on top of the packaging are also identical with respective similar logos displayed on right and product name on left in similar style, font and color scheme.
- 5.6.11 All the samples of dishes displayed have been placed in the exact same bottom right corner of the packaging by the Respondent as that of the Complainant with a similar or identical image of napkin underneath and an assortment of condiments or vegetables on the left side. The utensils in which the dishes are displayed on Respondent's packaging are white in color as that of the Complainant, however, the shape of the utensils are only similar on three products and the rest of the five are different.
- 5.6.12 In reference to Para No. 2.17 above, the general color scheme of the packaging of Respondent is similar/identical to that of the Complainant, which along with imitated design is causing clear confusion.
- 5.7 In furtherance of the comparison of elements, it is pertinent to shed light upon packaging of various prominent market players in the Masala Mix product category. Three of the prominent competitors in the category are Shan, Phool and Mehran. For the sake of brevity and fair comparison, product '*Biryani Masala Mix*' is being used as an example from all three competitors alongside the Complainant's and Respondent's packaging as under:



5.8 It is visible in the images above that shades of Red and Orange color are not dominant and specific to the product 'Biryani Masala' as all three competitors other than the Respondent are majorly using different shades of Green and Yellow to market their product. Similarly, all three competitors have completely distinctive trademarks, logos, design, color scheme and trade dress for the same product. Therefore, it is safe to say that every brand in the given example, other than the Respondent, has tried to capture the market with their distinct logo, packaging design and color scheme. However, the packaging of the Respondent is uncannily similar to/ identical to that of the Complainant with very slight and easily overlooked differences.

5.9 It is important here to consider that colors used by the Complainant are not the intellectual property of the Complainant, nor does it have the sole right to use those colors in the relevant product category. However, it has been held by the U.S. Court of Appeals in the matter of *Beneficial Corp v. FTC*, 542 F. 2d 611 (3rd Circuit, 1976) that:
*"The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context."*⁴

Therefore, in view of the comparison drawn under para no. 5.6, the similarities found in the elements of the packaging of Complainant and Respondent are enhanced because of the use of similar colors by the Respondent, thereby passing off its product as that of the Complainant. All other three competitors referred to under para no. 5.7 are using shades of green and yellow, yet due to stark differences in their design elements, the packaging do not appear similar or identical to each other and each has its own distinct appearance.

5.10 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 Act⁵.

⁴ <http://openjurist.org/542/f2d/611/beneficial-corporation-v-federal-trade-commission#fn6>

⁵ In the Matter of show cause notice issued to M/S A.Rahim Foods (Private) limited for deceptive marketing practices. Para no 17, sub –para 'e'

- 5.11 It has also been observed that the Respondent's trademark "Shainal" is a derivative of the trademarks of two market leaders "National" and "Shan". The name 'Shainal' is a homophone to the trademark 'National' in general and a combination of the words 'Shan' and 'National' in specific. It can be safely assumed that the name Shainal has not come into existence out of creativity but rather has risen out of malafide intent to ride upon the goodwill of two market leaders in the industry.
- 5.12 Moreover, it is pertinent to mention here that the Complainant has been in use of this modernized National logo design since year 2008, copyright for which had been obtained in year 2010 under Registration No. 21926-Copr. However, the Respondent, with intention to register its trademark in the imitated 'Shainal Al-Syed' logo, filed an application with the Intellectual Property Organization in 2014. The application included an affidavit, signed by Mr. Ghulam Dastgir Shah – partner of the Respondent, bearing oath that the artistic work/ logo/label design was an original creation and neither copy nor imitation of any design, trademark or service mark (attached as Annex-C).
- 5.13 In view of facts, it is safe to infer that the Respondent has imitated the Complainant's packaging and the conduct of the Respondent falls under the ambit of Parasitic Copying, 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 mark infringement. Still they often generate deception or confusion among consumers⁶”*
- 5.14 In light of the analysis above, the Respondent appears to be in violation of Section 10 (1) of the Act in terms of Section 10 (2) (d) 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.
- 5.15 It is also important to shed light upon the new packaging submitted by the Respondent during the course of enquiry which, as per the Respondent, has been edited in design to differentiate from the packaging of the Complainant. However, no written acknowledgement of the change in design of the packaging has been submitted by the Respondent even when required by the enquiry officers. Edited packs of six (06) products were submitted by the Respondent along with the reply, out of which only three (03) packs are in relation to the products against which the complaint has been made. The relevant new packaging by the Respondent is presented hereunder, alongside old packaging of the Respondent and the Complainant's packaging, to draw a comparison for a brief review:

⁶ Jorge Novais Goncalves, EC, DG Internal Market and Services “Similar Packaging: an IP, competition or a consumer protection matter?”

Complainant's National Products	Respondent's Shainal Products	Respondent's Shainal Products New
<p data-bbox="304 331 624 360">National Quorma Masala Mix</p> 	<p data-bbox="676 331 979 360">Shainal Quorma Masala Mix</p> 	<p data-bbox="1035 331 1339 360">Shainal Quorma Masala Mix</p> 
<p data-bbox="304 779 624 837">National Achar Gosht Masala Mix</p> 	<p data-bbox="676 779 979 837">Shainal Achar Gosht Masala Mix</p> 	<p data-bbox="1035 779 1339 837">Shainal Achar Gosht Masala Mix - New</p> 
<p data-bbox="304 1272 624 1301">National Biryani Masala Mix</p> 	<p data-bbox="676 1272 979 1301">Shainal Biryani Masala Mix</p> 	<p data-bbox="1035 1272 1339 1330">Shainal Biryani Masala Mix New</p> 

5.16 In reference to the point of view of the Commission in similar cases (referring to Para 5.10 above), the new edited packaging submitted by the Respondent is still strikingly similar to that of the Complainant as a whole for the 3 products against which a comparison has been drawn in para 5.15 above. The creative design and presentation of the trade mark 'Shainal Al-Syed' logo has been changed in a way that it is not confusingly similar to that of the Complainant's trade mark if observed in isolation.

However, there are still visually confusing resemblances in elements of color scheme, layout style, design, labels and font usage, which when viewed as a whole appear confusingly similar, thereby can still become the cause of confusion among customers.

- 5.17 It is pertinent to mention here that the Respondent has changed the design of the logo on the newly designed/modified packaging whereas the application for registration of trademark had been filed by the Respondent for the original design which was strikingly similar/identical to that of the Complainant. This, *prima facie*, implies that the Respondent will have to bear no loss from the change in design since it did not have to invest in building a reputation and goodwill out of the previous original design in the first place.
- 5.18 The Complainant has been in the practice of selling its products nationwide in distinctive color scheme, design and packaging since 1970, which was modernized in 2008. The copyright for artistic design of modernized logo had been obtained by the Complainant in year 2010. The Complainant also managed to obtain copyrights for the modernized design of packaging of a few of its products in the product line in 2010 (copyrights are attached Annex-D). This is suggestive of the fact that the Complainant has enormously invested in building its reputation and goodwill in the relevant market over a period of 46 years. During the course of this time, the Complainant also incurred high costs in advertising its products on various media such as television, print and radio. However, the Respondent applied for the registration of trademark with an identical design in 2014, to which the Complainant filed an opposition. The Complainant then moved ahead to apply for the registration of trademark in the design for which it had already obtained a copyright in 2010. This establishes that, even when the registration of trademark for both parties is still pending, the Complainant has been using the design since 2010, prior to its use by the Respondent, thereby its rights resting automatically with the Complainant.
- 5.19 The Respondent, on the other hand, has failed to provide a specific date/year since when it started distributing its product in mimicked packaging. Furthermore, the Respondent also failed to provide the details of geographical distribution of their products. Therefore, the enquiry officers have been at a loss to deduce the reach of the Respondent's product within Pakistan. However, it can be established from the information provided in the Complaint and submissions of the Respondent that the product is distributed in the geographical location of its production site i.e. Burewala and adjacent localities.
- 5.20 In view of para no. 5.18 & 5.19 above, it can be established that the Complainant has a nationwide distribution channel with products available all around the country whereas the Respondent being a fairly new entrant, has a limited reach with its products available in fewer cities.
- 5.21 Furthermore, it is pertinent to consider that the Respondent has not indulged in advertising its products through any of the media used by the Complainant and the only form of marketing it has invested in is through packaging and distribution. The fact is suggestive that the Respondent, through imitated packaging, did not have to invest in marketing strategies to create a unique brand identity or goodwill.

- 5.22 The Commission had held in the matter of *M/s K&N's Foods (Pvt.) Ltd vs. M/s Rahim Foods Limited* that “...the copycat incurs minimal cost and in fact none of the cost of investment and innovation in design that the market leader has spent to build goodwill and reputation of its brand assets in the relevant market. Hence, where product differentiation is insufficient, such a practice on part of the copycat has fatal consequences for the business of the market leader.”
And
“.... The Commission shall, therefore, be satisfied that the evidence adduced before it is conclusive, if the strikingly similar packaging and labeling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant.”⁷
- 5.23 The Commission, as quoted in para 5.22 above, explains that the Commission shall consider it enough that parasitic copying has occurred and damage has been inflicted upon the Complainant if an average consumer is found confused by strikingly similar packaging. This explains that there exists a direct relation between distribution of false or misleading information to a consumer and harm to business interest of an undertaking, referring to violation of Section 10 (1) of the Act in terms of Section 10 (2) (a) & (b) of the Act.
- 5.24 It is pertinent to consider that through copycat packaging differentiation among two products from different manufacturers is greatly reduced, thereby making it harder for an average consumer to choose. Statistics have shown that an average consumer does most of his shopping on an auto pilot. Shoppers have a limited ability to focus, absorbing only between 5 and 7 pieces of information in a given time frame. This means that the brain generally tries to keep things simple by relying on shape and color as simple search mechanisms⁸. Consumers base their purchasing decisions on first impressions of the product exterior and do not engage in a considered examination of the product⁹. This suggests, that even a reasonable/discerning consumer would not be able to differentiate between the Complainant and Respondent’s packaging at a cursory glance let alone an ordinary consumer. Tests have shown that where products are packed in a similar way, consumers get confused and sales of the imitated product are reduced in a way that is not the case when the packaging is clearly different from the brand¹⁰.
- 5.25 Since parasitic copying is adopted by copycats with the purpose of boosting sales by passing off its goods as that of the original creator, the underlying motive not only causes confusion in the mind of an ordinary consumer but also causes loss of sales to the original creator.
- 5.26 In this case, it is apparent that the Respondent has used imitated packaging as a ploy to reap benefit out of the investments made by the Complainant in its goodwill over a period of 46 years. Not only has it intended to inflict damage in the form of loss of sales

⁷ [In the Matter of show cause notice issued to M/S A.Rahim Foods \(Private\) limited for deceptive marketing practices](#). Para no 17, sub –para ‘c’ & ‘d’

⁸ Tony Durham, Report on 2012 Symposium on Retail Competition “Shopper Behavior: how choices are made”

⁹ Jacobs vs. Fruitfield Group Ltd 2007 published in “Misleading Packaging Practices; Briefing Paper” Directorate General for Internal Policies.

¹⁰ Tony Durham, Report on 2012 Symposium on Retail Competition “Shopper Behavior: how choices are made”

to the Complainant but also as a loss of brand identity and uniqueness of the Complainant's products. In view of the facts above, it appears that the Respondent's conduct is capable of harming the business interest of the Complainant and capable of distribution of false and misleading information to consumers related to the origin/manufacturer of the products, character, properties and quality of goods, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) & (b) of the Act.

- 5.27 A similar case was filed by the United Biscuits UK (Ltd) against ASDA Stores Ltd (*United Biscuits UK (Ltd) v ASDA Stores Ltd [1997]*)¹¹, in which the claimant, who manufactured 'Penguin' biscuits, sought to prevent the defendant from marketing its 'Puffin' biscuit, who had introduced 'Puffin' as a brand beater in the market. In the case, Puffin biscuit was introduced in the market by the chain of retail stores called ASDA as their own brand, a rival to claimant's 'Penguin'. However, in the attempt, the defendant designed a very similar packaging to that of the claimant's product along with a trade name in relevance of the ornithology of Penguin bird. The packaging of both the claimant and the defendant's biscuit is presented hereunder for reference:



- 5.28 In the matter the Honorable Judge held that judicial first impression is of some importance especially where the goods in question are familiar and inexpensive. The Judge held that:

“My first impression of the Puffin packaging (in all four colors or varieties) is that it would cause a substantial number of members of public to suppose that there was a connection between the Puffin biscuit and the Penguin biscuit. Despite evidence of isolated mistakes, I do not consider that a substantial number would believe that the Asda Puffin is the McVities Penguin. But many would believe that the two must be made by the same manufacturer.”

- 5.29 The Judge also considered the judicial notice of relevant ornithology with regards to the origin, nesting habitats and plumage of the sea birds used by both the undertakings. On the basis of these findings it was held by the Honorable Judge that although the

¹¹ [1997]R.P.C. 513, Robert Walker J.

trade marks in the name of ‘Penguin’ had not been infringed, it did amount to passing off for which United Biscuits as a manufacturer of McVities ‘Penguin’ biscuits was entitled to appropriate remedies.

6. RECOMMENDATIONS/CONCLUSION:

- 6.1 In light of the facts, it appears that the conduct of the Respondent, *prima facie*, does amount to passing off its products as that of the Complainant’s through fraudulent use of Complainant’s logo, packaging, color scheme, design and get up of products, in violation of Section 10(1) of the Act, in terms of Section 10 (2) (d) which prohibits *fraudulent use of another’s trademark, firm name, or product labeling or packaging*.
- 6.2 In view of the analysis, it also appears that the conduct of the Respondent, *prima facie*, has the potential to inflict harm upon the goodwill and business interest of the Complainant and cause confusion among customers through dissemination of false and misleading information related to character, properties and quality of goods via similar/identical packaging, in violation of Section 10(1) of the Act, in terms of Section 10 (2) (a) & (b).
- 6.3 The deceptive marketing practices have a direct impact on the public at large. It is in the interest of the general public and fair competition in the market that the undertakings should be stopped to market their products in an unfair and misleading manner and be encouraged to resort to the marketing practices which are transparent and give consumers/customers true and correct information. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against M/s Shainal Al-Syed Foods under Section 30 of the Act.

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