

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 PAKISTAN SERVICES
LIMITED AGAINST M/S OMNI COMM (PVT) LIMITED AND M/S LUCKY
GOLD (PVT) LIMITED FOR
DECEPTIVE MARKETING PRACTICES**

BY

**FAIZ-UR-REHMAN, RIAZ HUSSAIN & FATIMA SHAH
DATED: MAY 03, 2018**

BACKGROUND

- 1.1 M/s Pakistan Services Limited (hereinafter refer to as the ‘**Complainant**’), through M/s Hassan & Hassan (Advocates) International Legal Services, filed a complaint before the Competition Commission of Pakistan (the ‘**Commission**’) u/s 37(2) of the Competition Act, 2010 (the ‘**Act**’) against the following four entities;
 - (a). M/s Pearl Continental Hotel, Abbottabad (‘**Respondent No.1**’)
 - (b). M/s Omni Comm (Pvt) Limited (‘**Respondent No.2**’)
 - (c). M/s Pearl Continental Hotel, Faisalabad (‘**Respondent No.3**’)
 - (d). M/s Lucky Gold (Pvt) Limited (‘**Respondent No.4**’)
(hereinafter collectively refer to as the ‘**Respondents**’)
- 1.2 It was alleged in the complaint that the Respondents were fraudulently using the Complainant’s registered trademark/trade name “*Pearl Continental*” and logo “*PC*” for branding of their hotels with the same style and design, without any authorization from the Complainant. It was further alleged that such conduct of the Respondents is capable of harming the business interest and goodwill of the Complainant, which amounts to, *prima facie*, violation of Section 10 of the Act, i.e. Deceptive Marketing Practices.
- 1.3 Keeping in view of the above, the Commission initiated an enquiry in accordance with sub-section (2) of section 37 of the Act by appointing Mr. Faiz-ur-Rehman, Assistant Director (OFT), Mr. Riaz Hussain, Assistant Director (OFT) and Ms. Fatima Shah, Management Executive (OFT) as the enquiry officers (the ‘**Enquiry Committee**’). The Enquiry Committee was directed to conduct the enquiry on the issues raised in the complaint and to submit the enquiry report by giving their findings and recommendations, *inter alia*, on the following;

Whether the allegations leveled in the complaint constitute, prima facie, violation of Section 10 of the Act?

COMPLAINT

- 2.1. The Complainant in its complaint to the Commission made the following submissions:

I. STATEMENT OF FACTS

- 2.2. The Complainant is public limited company, listed with Pakistan Stock Exchange (PSX), having its registered office at 1st floor NESPAK House, Sector G-5/2, Islamabad. It was incorporated in 1958 and was principally engaged in the hotel business. The Complainant owns and operates chain of luxury hotels in Pakistan under the name and style of “*PC Pearl Continental*”.
- 2.3. The Complainant is one of the leading hotel operators/owners in Pakistan. At the time, the Complainant owns six luxury hotels in Pakistan and all its hotels enjoyed unique standing

in the market and employed more than three thousand three hundred employees across Pakistan.

- 2.4. The Complainant has been providing the highest quality of services in the field of hotel and hospitality management since 1958 under its registered trademark and logo. It was submitted that they are providing all the services related to its hotel and its management, including but not limited to food & beverage services, restaurants, banquets, boarding, lodging, sales & marketing, publicity, corporate, event management, and other related business and operations in accordance with the applicable law.
- 2.5. The Complainant enjoyed an excellent reputation in the industry and has successfully maintained and augmented its standards and quality of its services since its incorporation. In order to distinguish its property, products & services, the Complainant coined and adopted the expressed “*Pearl Continental*” and letters “*PC*” as its distinct trade name, trade identity and trademark.
- 2.6. The Complainant had registered the trademark “*Pearl Continental*” and logo “*PC*” with the trademark registry, Intellectual Property Organization, Government of Pakistan. **(Copy of trademark registration certificates is attached as Annexure-A)** Details of the Complainant’s trademark registration is, as under:

Tradename	Trademark No.	Class	Status
Pearl Continental/PC	193689	43	Registered
Pearl Continental/PC	125297	30	Registered
Pearl Continental/PC	198195	35	Registered
Pearl Continental/PC	198192	41	Registered

The trademark and logo of the Complainant is depicted below:



- 2.7. The Complainant had also registered its trademark and logo in 33 countries across the globe keeping in mind the substantial goodwill associated with the tradename and logo of PC Hotel.

- 2.8. The Complainant’s trademark/trade name is recognized by the public at large and stands as a symbol of luxury, excellence, dependability, reliability and of high quality hospitality in Pakistan.
- 2.9. The Complainant has been spending considerable expenses on advertising and promotion of its trademark and logo through various forms of media, both print and electronic, which has widely accepted circulation and viewership throughout Pakistan. The Complainant, therefore, alleged that due to extensive use and substantial promotional activities, the trademark “PC” has become a well-known mark in Pakistan and is especially distinctive.
- 2.10. The Complainant has also generated substantial revenues through its chain of PC Hotels by providing the quality services under the tradename “*Pearl Continental*” and logo “PC”. The Complainant had also spent considerable amount on the sales, marketing and promotion of its trademark/trade name. Details of revenues generated and the amount spent on promotion of the Complainant since 2014 are given below¹:

Year	Revenue (PKR)	Expenditure on Advertisement and Sales Promotions (PKR)
2014	7,609,885,000	85,239,000
2015	7,922,016,000	81,098,000
2016	9,151,060,000	83,192,000

- 2.11. It was, therefore, submitted that the use of the mark “PC” and trade name “*Pearl Continental*”, or any other deceptively similar mark, by any entity on any product, service or good would lead consumers to believe that such product, service and/or good is associated with the Complainant.

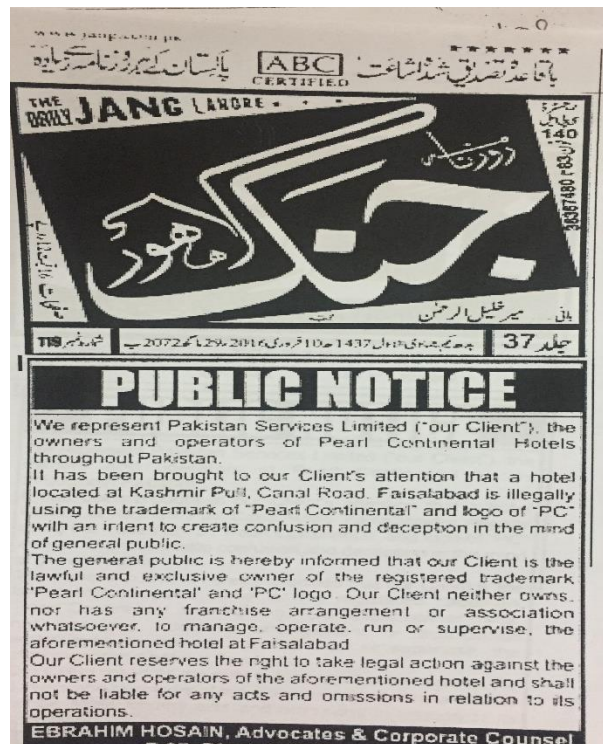
II. SUMMARY OF CONTRAVENTIONS

- 2.12. It is pertinent to note that the Complainant had not granted any right, permission of authorization to the Respondents to use the Complainant’s trademark, trade name or logo in connection with or in relation to the Respondents business, services or goods whatsoever.
- 2.13. The Complainant had granted a franchise to the Respondents *vide* the erstwhile “*Franchise and Hotel Management Agreement*” (the ‘**Agreement**’) for operation a four-star hotel in Abbottabad and Faisalabad under the trademark/trade name of “*Pearl Continental*” and logo “PC”.
- 2.14. That the Respondent’s failed to honor the contractual obligation despite extensions, the Respondents could not perform their obligations within stipulated timelines under the said Agreement, resulting in termination of the same *vide* the Complainant’s termination notice to the Respondent No.1 and Respondent No.2, dated 09-09-2003 and to Respondent No.3

¹ <http://www.psl.com.pk/financials.php>

and Respondent No.4, dated November 12, 2013, wherein the Complainant, *inter alia*, withdrew the authority to use the Complainant's trademark, trade name and logo with immediate effect.

- 2.15. That it was matter of record that to the date of complaint, the Respondents had not contested the termination of the Agreement before any judicial or quasi-judicial or arbitrary forum. At the same time, it was alleged, that the Respondents had continued to unlawfully and illegally use the Complainant's identical trademark, trade name and logo at their hotels.
- 2.16. That the unauthorized, illegal and continued use of the Complainant's trademark/trade name and logo could be seen on the Respondents hotel's rooftop board, menu cards, letterheads, invoices, billing receipts, banquet contracts, banquet interior/decoration, order books etc. with an intention to deceive the consumers by fraudulent use of Complainant's trademark, trade name and logo.
- 2.17. That in response to the illegal and continued use of its trademark, trade name and logo by Respondents No. 3/4, the Complainant issued public notice in the daily newspapers to warn the consumers and general public in respect of the illegal and unauthorized use of the same by the Respondents No. 3/4.



- 2.18. The Respondents are an “*undertaking*” within the meaning of the Act and are carrying out their business and offering services intentionally and illegally using the Complainant's trademark, trade name and logo. That such use is unauthorized, illegal, fraudulent and *mala fide* and constituted acts of “*deceptive marketing practices*” within the meaning of Section 10 of the Act.

- 2.19. That the aforesaid acts constituted deceptive marketing practices under Section 10(2) (a), (b) and (d) of the Act. It was further alleged that these actions are clearly harming the business interest of the Complainant and, at the same time, simultaneously grossly and intentionally misleading the consumers and general public.
- 2.20. That without prejudice to the instant complaint under Section 37(2) of the Act, read, *inter alia*, with Section 10 of the Act thereof, which provides a special remedy under a special law, i.e., the Competition Act, 2010, the Complainant was pursuing legal remedies against the Respondents No. 3/4 vide a civil suit before the Senior Civil Judge, Faisalabad.
- 2.21. That the Complainant was also pursuing legal remedies against the Respondents No. 3/4 in Civil Suit before the Intellectual Property Organization Tribunal (the '**IPO Tribunal**') in Lahore, Punjab. It was then stated that the IPO Tribunal passed an order in favor of the Complainant against the Respondent 3/4, restraining them from using the Complainant's registered trademark, trade name and logo.
- 2.22. The Complainant was pursuing legal remedies against Respondents No. 1/2 in Civil Suit filed in 2007 subsequent to which a decree was passed in favor of the Complainant, dated 29.07.2009, wherein the Respondents No. 1/2 were directed to restrain from using the name, logo, style, trademark, stationary and other paraphernalia of the Complainant permanently.
- 2.23. That the Respondents No. 1/2 filed an appeal before the Peshawar High Court, Abbottabad Bench, challenging the decree dated 29.07.2009. Therefore, in order to ascertain whether the aforesaid decree was being complied with, the court, vide order dated 03.04.2015, appointed the Additional Registrar as a Commission to inspect the hotel premises. The Additional Registrar *vide* his report dated 04.04.2015 submitted that a similar logo was being used, however, an undertaking by the General Manager of Respondent No.1 was submitted stating that the similar logos shall be forthwith removed.
- 2.24. That upon failure of the assurance and guarantee, similar logo was being used by the Respondents No. 1/2, resulting in initiation of contempt proceedings by the Complainant against the Respondents No. 1/2 in 2016 before the Peshawar High Court, Abbottabad Bench.

III. GROUNDS IN SUPPORT OF THE CONTRAVENTIONS OF THE RESPONDENTS

- 2.25. The Respondents have been carrying on a commercial venture using the Complainant's trademark, trade name, logo and corporate identity to market and sell their own business, goods and services. By using the proprietary mark/logo of the Complainant and by their willful anti-competitive behavior, the Respondents were gaining commercial advantages in contraventions of the Act.

2.26. That the Respondents are carrying out identical business and services as that of the Complainant and are unlawfully benefitting from the clientele of the Complainant by falsely implying and advertising its products, business and services to be the same or in connection with/or authorized by the Complainant. This, in turn, harming the business interest of the Complainant and likewise, the interest of the Complainant's clientele, consumers and general public.

2.27. In support of its claims, the Complainant relied upon, *inter alia*, the following past decisions of this Honorable Commission:

- i. Decision in the matter of M/s Ace Group of Industries;
- ii. Decision in the matter of M/s DHL Pakistan (Private) Limited and judgement dated May, 23, 2017 of the Competition Appellate Tribunal in Appeal No.1 & 2 of 2013 (DHL Matter); and
- iii. Decision in the matter of M/s Tara Crop Sciences (Private Limited).

IV. RELIEF SOUGHT

2.28. That in view of the above stated facts and circumstances, the Complainant prayed that the Honorable Commission may take the following actions against the Respondents:

- i. To conduct an enquiry against the Respondent under Regulation 16 of the Competition General Enforcement Regulation, 2007 (the 'GER 2007');
- ii. To procure the evidence, conduct a search and inspection of the premises of the Respondents and impound the relevant documents;
- iii. Initiation of proceedings under Section 30 of the Act;
- iv. Pass an appropriate Order under Section 31(c) of the Act;
- v. Impose an appropriate amount of penalty on the Respondents; and
- vi. Any other relief which the Honorable Commission may deemed fit to grant.

CORRESPONDENCE WITH THE RESPONDENTS

3.1. The complaint along - with its annexures was forwarded to the Respondents No.1, Respondent No.2, Respondent No.3 and Respondent No.4 for comments vide letter dated October 13, 2017 for submissions of comments. However, during the course of correspondence it was revealed that Respondent No. 2, Omni Comm. (Pvt.) Limited, was the owner and operator of Respondent No.1, Pearl Continental Hotel Abbottabad. Whereas Respondent No.4, Lucky Gold (Pvt.) Limited, was the owner and operator of Respondent No.3, Pearl Continental Hotel Faisalabad.

I. Respondent No. 2 – M/s Omni Comm. (Pvt.) Limited for M/s Pearl Continental Hotel Abbottabad

3.2. Respondent No.2 filed its comments to the complaint vide letter dated October 23, 2017. The contents of the reply are as under:

- i. The Complainant had earlier instituted proceedings under the trade mark law against it in the court of learned District Judge Abbottabad.
- ii. The matter was finally called in proceedings before the Honorable Peshawar High Court, Abbottabad Bench.
- iii. The Honorable Court appointed its additional Registrar as a local Commission to visit the hotel and to observe and confirm whether the facility was being run under the name and style of "*PC Pearl Continental Hotel*", and whether the stationary, cutlery and other provisions bear the name and logo "*PC Pearl Continental*" / "*Pearl Continental*" and "*PC*", or otherwise.
- iv. The learned Additional Registrar of the Court visited the hotel and submitted his report after the inspection and reported that neither the logo nor the name was being used by the hotel management. However, it was observed that a small board near the parking had letters "*PC*" written in a synonymous style of the logo used by the Complainant and therefore, the objection was removed forth-with. The specimens of the stationary used in all the departments of the hotel along with items of crockery and cutlery were also taken in the possession for the purpose of Court observation.
- v. Subsequently, the Honorable Court was pleased to dispose of the matter in the wake of report submitted by the learned Additional Registrar of the Court.
- vi. It was pointed out by the Respondent that the entire process was conducted with the consent and consensus of the Complainant, including the proceedings conducted by the learned Additional Registrar of the Court.
- vii. It was further highlighted that the Complainant did not assail order of the Honorable High Court any further as it was based on mutual consent of the parties.
- viii. That the above proceedings showed that the Complainant had brought a dead and finally decided matter before the Commission by attaching the entire judicial record with its complaint which was ostensibly an intentional and deliberate contempt of the lawful authority of the Honorable High Court.
- ix. It was alleged by the Respondent No. 2 that the Complainant had also filed contempt proceedings against it in the Peshawar High Court Abbottabad Bench, which was still pending adjudication.

3.3. The comments of the Respondent No. 2 were forwarded to the Complainant on October 30, 2017, for its comments/rejoinder, if any. The Complainant through an email, requested an extension in time to file the comments till November 17, 2017. Accordingly, the

Complainant was granted the requested extension. Consequently, the Complainant filed its rejoinder on November 17, 2017.

3.4. The Complainant drew the attention of the Commission to the admission of the Respondent No. 2 by stating:

- i. At the outset, each and every allegation and averment of the Respondent No.2 was denied unless specifically admitted therein.
- ii. It was pertinent to note that the instant complaint had been submitted under Section 10 of the Act, read with regulations 30 and 37 of the GER 2007.
- iii. That section 10 established a separate offence for “*Deceptive Marketing Practices*” under a special law which was quite distinct from violations by the Respondent No. 2 under the Trademark Ordinance, 2001, for which separate legal recourse and remedies were provided.
- iv. The Complainant had the right under all applicable laws of Pakistan to bring grievances against the Respondent No. 2. Moreover, it has a further right to avail all remedies provided by the said laws of Pakistan, including the Competition law, by way of this complaint.
- v. It was admitted by the Respondent No. 2 that it had set up board(s) with letters “PC” in order to gain unlawful advantage through deceptive marketing practices and Respondent No. 2 ought to be taken to task and show caused in respect thereof.
- vi. Furthermore, the fact that the Respondent No. 2 was made answerable to contempt proceedings was precisely because it continued to blatantly violate the relevant laws and took unlawful advantage of the name and logo “PC” and, to that day, continued to engage in deceptive marketing practices in violation of Section 10 of the Act.

II. Respondent No. 4 – M/s Lucky Gold (Pvt.) Limited for M/s Pearl Continental Hotel Faisalabad.

3.5. The complaint was forwarded to the Respondent No.4 vide letter dated October 13, 2017 for its comments, however no response was received from the Respondent No.4. Afterwards, a reminder was sent vide letter dated October 30, 2017. Consequently, a reply was received vide letter dated November 09, 2017, wherein the Respondent No.4 requested for extension in time period for submission of comments to the complaint. Accordingly, an extension in time was granted vide letter dated November 14, 2017, but neither the communication was acknowledged nor any comments were furnished by the Respondent No.4.

MARKET SURVEY

- 4.1. In order to confirm the allegations levelled by the Complainant, an independent market survey was conducted by the Enquiry Committee. The relevant market survey report is annexed herewith as Annexure – B.

ANALYSIS

- 5.1. As mentioned in Para 1.3. *ibid*, the mandate of this enquiry is to determine whether the allegations leveled in the complaint constitute, *prima facie*, violation of Section 10(1) of the Act in general;
- a. And Section 10(2)(a) in particular, wherein its conduct is “*capable of harming the business interest of another undertaking*” such as the Complainant;
 - b. And Section 10(2)(b) in particular, through “*distribution of false [and] misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the properties, characteristics, and place of production of services.*”;
 - c. And Section 10(2)(d) in particular, through “*fraudulent use of another’s trademark*”
- 5.2. Prior to establishing the above, in addition to the submissions of the Complainant and the Respondents along with the market survey, it is necessary to understand certain notions discussed subsequently.
- 5.3. A trade or service mark refers to a word, phrase, symbol, and/or design which is used to identify and differentiate goods and services, primarily on the basis of their producer/provider. Section 2(xxiv) of the Trade Marks Ordinance, 2001 (the ‘**Ordinance**’) defines the term “*mark*” in the following words:

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

Whereas Section 2(xlvii) of the Ordinance has defined the term “*trade mark*” as:

(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;

- 5.4. Therefore, for the purpose of quick identification of their brands of goods and services, firms often create trade/service marks in which they invest immensely to form their unique identity. Such intellectual property then also becomes an important source of marketing for undertakings in the market. Therefore, any such creative works used to distinguish a good or service are an important form of advertisement which mainly associates a good or

service with its producer/provider, simultaneously separating it from that of its competitors, and is also a prime representative of the nature as well as quality of that good or service. Hence, it is absolutely necessary to ensure protection of such property rights.

- 5.5. Consequently, owing to its properties and significance, intellectual property such as trade/service marks are protected by law via the medium of intellectual property rights. By registering intellectual property such as trade/service mark with relevant authorities, intellectual property rights extend exclusive rights for the use of the registered trade/service mark to its owners, infringement of which becomes a clear violation of law.
- 5.6. Violation of relevant laws, such as the said Ordinance as well as the Competition Act, 2010, thereby utilizes its resources to protect these rights for the welfare of the consumers who may avoid injury caused due to trademark infringement by buying a product which they may otherwise have not purchased. Similarly, these laws are also in place to protect the rights of the trade/service marks' owners who invest significantly into their brand image, one of the major representatives of which is the trade/service mark.
- 5.7. The Commission in its past orders has established the fact that protection of trademarks are in fact necessary to secure brand equity and are an important marketing factor which can affect the perception and consequently, sales of a good or service. Therefore, it also holds significance in light of the Act in general, and Section 10 in particular.
- 5.8. Subsequently, for the matter under consideration in this enquiry report, it is important to note that sufficient evidence has been submitted by the Complainant pertinent to the fact that it has registered its following trade mark with IPO in various classes, i.e., 30, 35, 41, and 43, which includes this trade mark registered in the business of, *inter alia*, "Services for providing food and drink; temporary accommodation". Moreover, as per submissions of the Complainant, it has registered its trademark around the world in thirty-three (33) countries to safeguard its rights and protect its goodwill. The registered trademark of the Complainant includes the letters "PC" and the complete title, "Pearl-Continental" in the following style and design;



I. Respondent No. 2 – M/s Omni Comm. (Pvt.) Limited for M/s Pearl Continental Hotel Abbottabad

5.9. In order to analyze conduct of the Respondent No. 2 in light of Section 10 of the Act, submissions of the Complainant, the Respondent No. 2 and findings of the market survey conducted by the Enquiry Committee will be taken into consideration. Following facts have been established in the aforementioned material:

- i. The Complainant's trademark has been registered.
- ii. There was a franchise agreement between the Complainant and the Respondent No. 1/2 which was terminated due to non-compliance of terms of agreements, thereby withdrawing their authorization to use the registered trade mark of the Complainant.
- iii. The Respondent No. 2 is currently involved in the same line of business, i.e., hoteling services.
- iv. Proceedings had been initiated against the Respondent No. 2 for trademark infringement in the District Court, Abbottabad by the Complainant, wherein it was proven that the Respondent No. 2 was in fact involved in trademark infringement as they continued the unauthorized use of the Complainant's registered trademark after termination of the franchise agreement.
- v. There are contempt proceedings taking place in Peshawar High Court against Respondent No. 2 as they were directed to halt the unauthorized use of the Complainant's trade mark while carrying out their business and upon investigation, they were still using the Complainant's trade mark.
- vi. Upon the investigation conducted by the Enquiry Committee, following evidence was collected confirming continuation of unauthorized use of the Complainant's trade mark by the Respondent No. 2:



PC Board at the Entrance Gate on the Main Road



Room Key

CH-IN 10-10-11
 CH-OUT 11-10-11
 MR. Rizy Hussain

PC HOTEL ABBOTTABAD

REMARKS	DATE	DETAILS	ROOM NO	CHARGES	CREDITS	BALANCE	INITIALS
	10/10/17	Rm 205		3500		3500-00	

I agree that my liability for my bill is not waived and agree to be held personally liable in the event that the indicated party fails to pay any part or full amount of the charges incurred.

Guest Signature _____

ROOM NO 205
 BASIC RATE 3500
 C.E.D. 2
 HOTEL TAX
 TOTAL 3500/-

CHARGE TO:

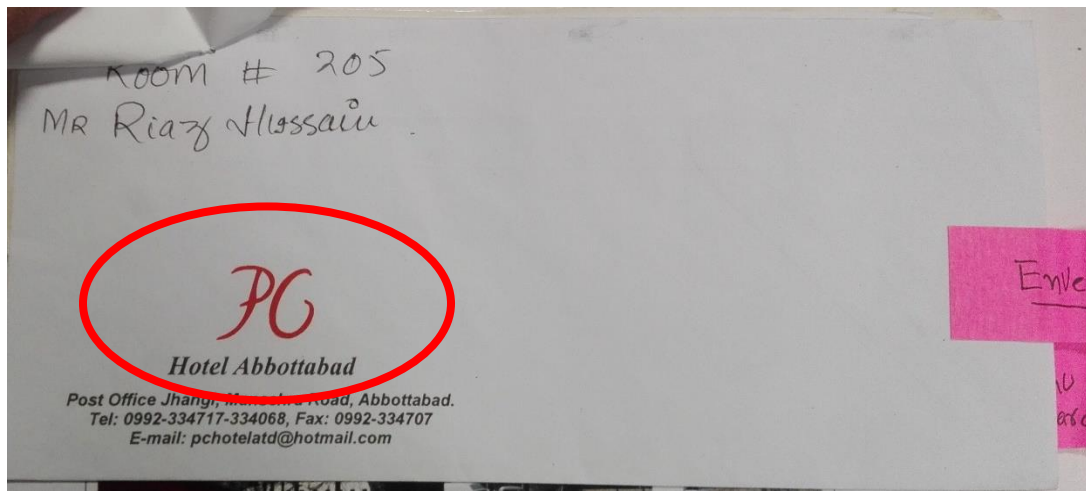
PC HOTEL ABBOTTABAD
 MANSEHRA ROAD ABBOTTABAD

OMNI COMM (PVT) Ltd
 OWNERS AND OPERATORS OF PC HOTEL ABBOTTABAD
 NTN # 1019881-4, G.S.T # 05-07-9801-002-64

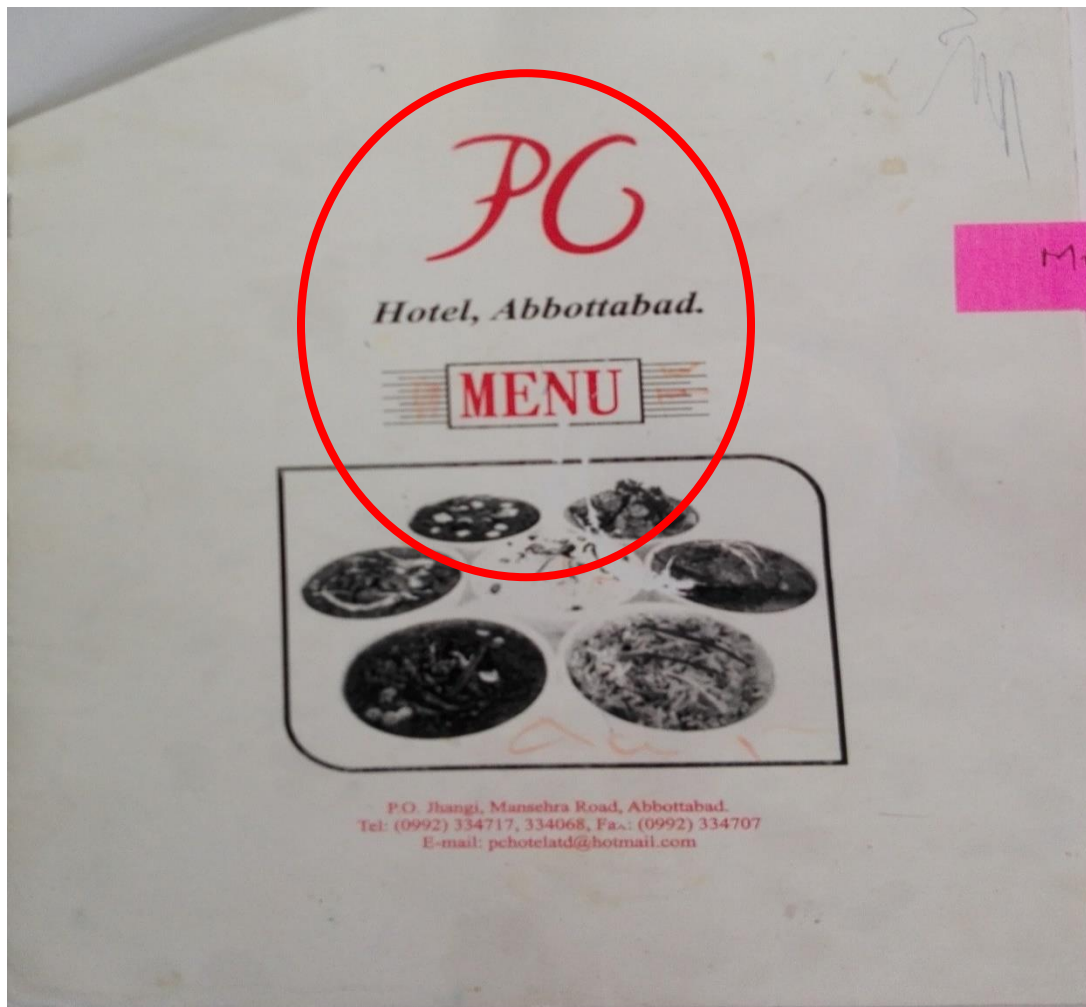
PAY ONLY LAST AMOUNT IN THIS COLUMN

Rs 3500/-

Cash Invoice



Official Envelope



Hotel Menu Card

- 5.10. The images above from the market survey conducted by the Enquiry Committee on October 10, 2017, prove that the Respondent No. 2 is involved in continuous use of the Complainant's trade mark in *prima facie* violation of Section 10(2)(d) of the Act which prohibits "*fraudulent use of another's trademark*".
- 5.11. Similarly, taking into consideration the design and style in which the letter and title, "PC" and "*Pearl-Continental*", used by the Respondent No. 2, is still very much similar to that of the Complainant's. Additionally, the fact that the Respondent No. 2 had a franchise agreement with the Complainant which was terminated due to breach of terms of agreement by the Respondent No. 2 confirms further that being involved in unauthorized use of extremely similar trade name and style of logo as that of the Complainant's registered trade mark, the Respondent No. 2, indeed wanted to capitalize on the reputation and goodwill of the Complainant by fraudulently attracting customers through passing off its hotel as that of the Complainant's and did so intentionally.
- 5.12. Consequently, the above discussion proves further that the Respondent No. 2 is, *prima facie*, in violation of Section 10(2)(d) of the Act which prohibits "*fraudulent use of another's trademark*".
- 5.13. This conduct of the Respondent No. 2 also, therefore, clearly constitutes to be deliberate "*distribution of false [and] misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, place of production, properties, and quality of services*" as by fraudulent use of the Complainant's trademark which is a well reputed brand name in the business of hotel services, the Respondent No. 2 is implying;
- i. that they provide the same quality of services as that of the Complainant's;
 - ii. that the services provided by them will comprise upon the similar properties and characteristics in terms of facilities provided by them; and
 - iii. that they belong to same place of production, i.e., chain of service providers which the remaining authentic "*PC: Pearl-Continental*" hotels belong to. This further represent and reinforce the expectations associated with this brand name for the purpose of factors mentioned in clauses "i" and "ii".
- 5.14. Moreover, by providing low quality services and lesser facilities compared with that provided by the Complainant's authorized franchises, the conduct of the Respondent No. 2 is bound to have a negative impact on the reputation and goodwill of the Complainant. Furthermore, by pretending to be authorized franchise of the Complainant, the Respondent No. 2 is also deceptively attracting consumers into opting for their services rather than those of other competitors in the market who are capable of providing the same quality of services as those of the Respondent No. 2. Consequently, it can be concluded that this conduct of the Respondent No. 2 is "*capable of harming the business interest of another undertaking*", which not only includes the business interest of the Complainant, but also of other competing undertakings in the same line of business. Therefore, the Respondent No. 2 has also been found in, *prima facie*, violation of Section 10(2) (a) and (b) of the Act.

II. Respondent No. 4 – M/s Lucky Gold (Pvt.) Limited for M/s Pearl Continental Hotel, Faisalabad

5.15. For the purpose of evaluating the conduct of Respondent No. 4 in light of Section 10 of the Act, once again submissions of the Complainant, the Respondent No. 4 and findings of the market survey conducted by the Enquiry Committee will be taken into consideration. Following facts have been established in the aforementioned material:

- i. The Complainant's trademark has been registered.
- ii. There was a franchise agreement between the Complainant and the Respondent No. 4. However, due to non-compliance of terms of agreements of the franchise agreement, it was terminated. This also resulted in withdrawal of authorization granted to Respondent No. 4 to use the registered trade mark of the Complainant.
- iii. The Respondent No. 4, in spite of termination of contract, continued construction of the project named as "*PC Pearl Continental Faisalabad*" for operating in the same line of business, i.e., hoteling services.
- iv. Even though the premises of the Respondent No. 4 is still not fully operational, certain units of it such as the banquet hall, as submitted by the Complainant and confirmed by the Enquiry Committee, have been functioning for quite some time.
- v. The matter was taken up by the Complainant against the Respondent No. 4 in Civil Suit before the IPO Tribunal at Lahore wherein the Respondent No. 4 was ordered to discontinue illegal use of the Complainant's trade mark and logo.
- vi. A Civil Suit has also been filed by the Complainant before the Senior Civil Judge, Faisalabad, which is currently pending litigation.
- vii. After perusal of the documents submitted by the Complainant, it was confirmed by the Enquiry Committee that the trade mark under consideration in fact belongs to the Complainant and authorization to use the "*PC Pearl Continental*" trade mark and logo by the Respondents No. 4 was suspended after termination of contract.
- viii. The investigation conducted by the Enquiry Committee resulted in collection of following evidence:



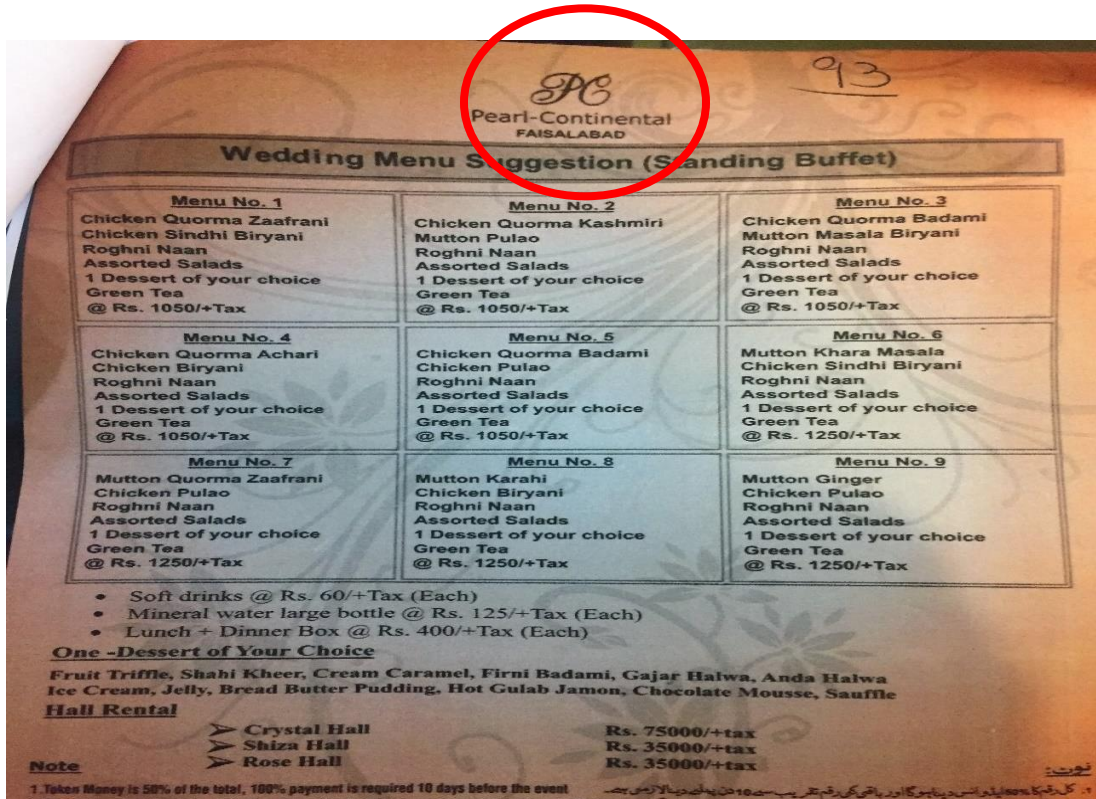
5.16. During the time of investigation, as per information provided by the security guard at the premises, the hotel had been closed down for maintenance and was expected to open in November, 2017. Nonetheless, the main sign board on the building in large size depicts clearly that the Respondent No. 4 has been using the registered trade mark and logo of the Complainant in a highly conspicuous manner.

5.17. Certain other evidence submitted by the Complainant which could not be validated by the Enquiry Committee due to closure of the hotel is reproduced below:



Hotel Building



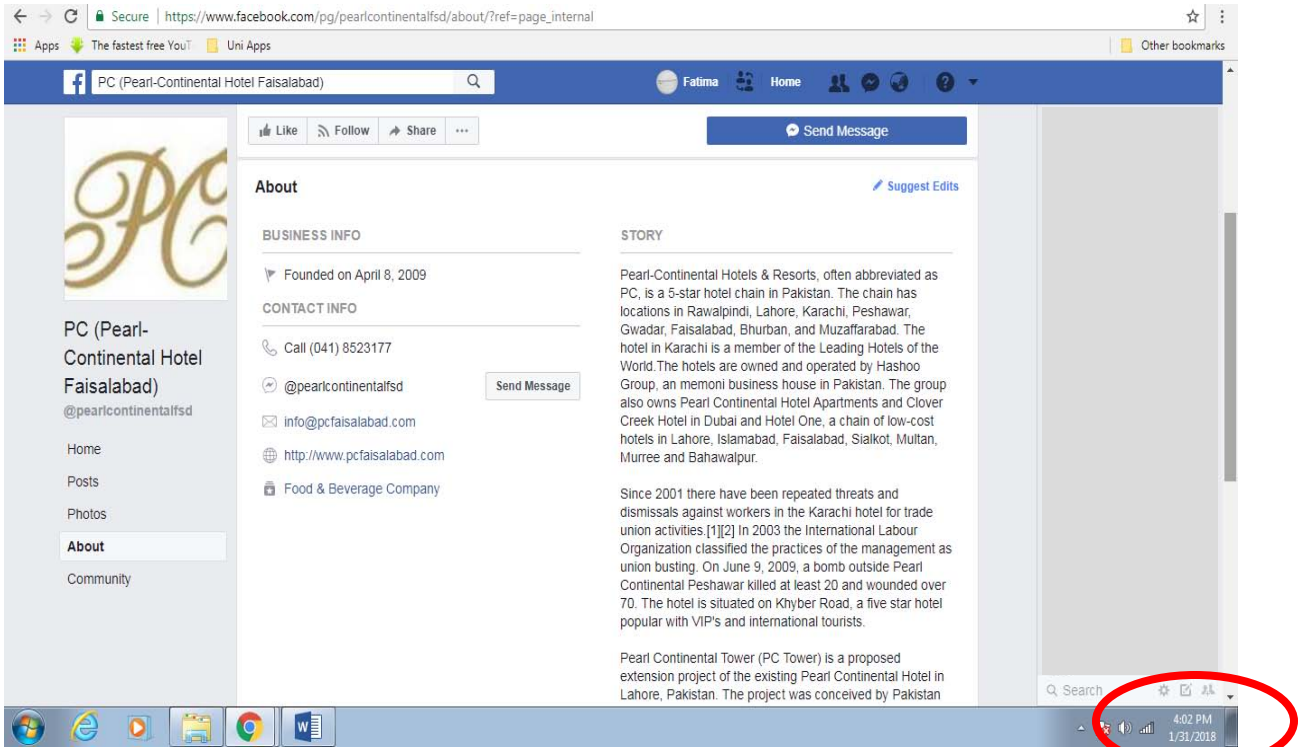


Wedding Menu Suggestion Card



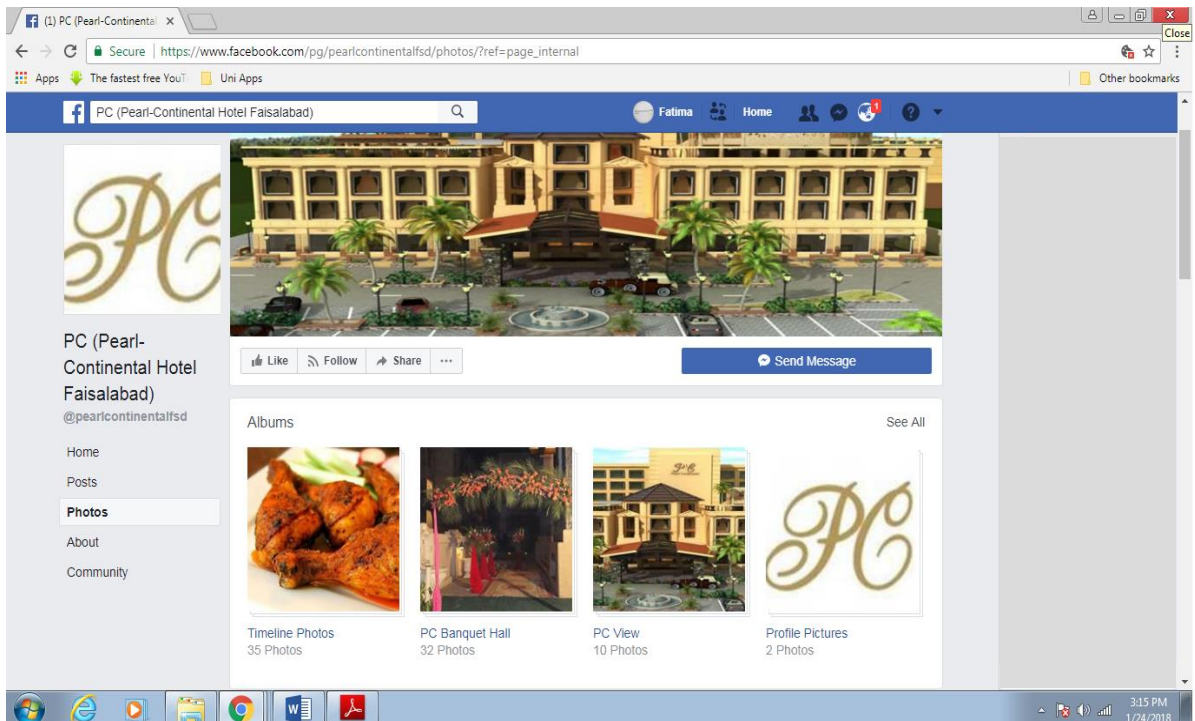
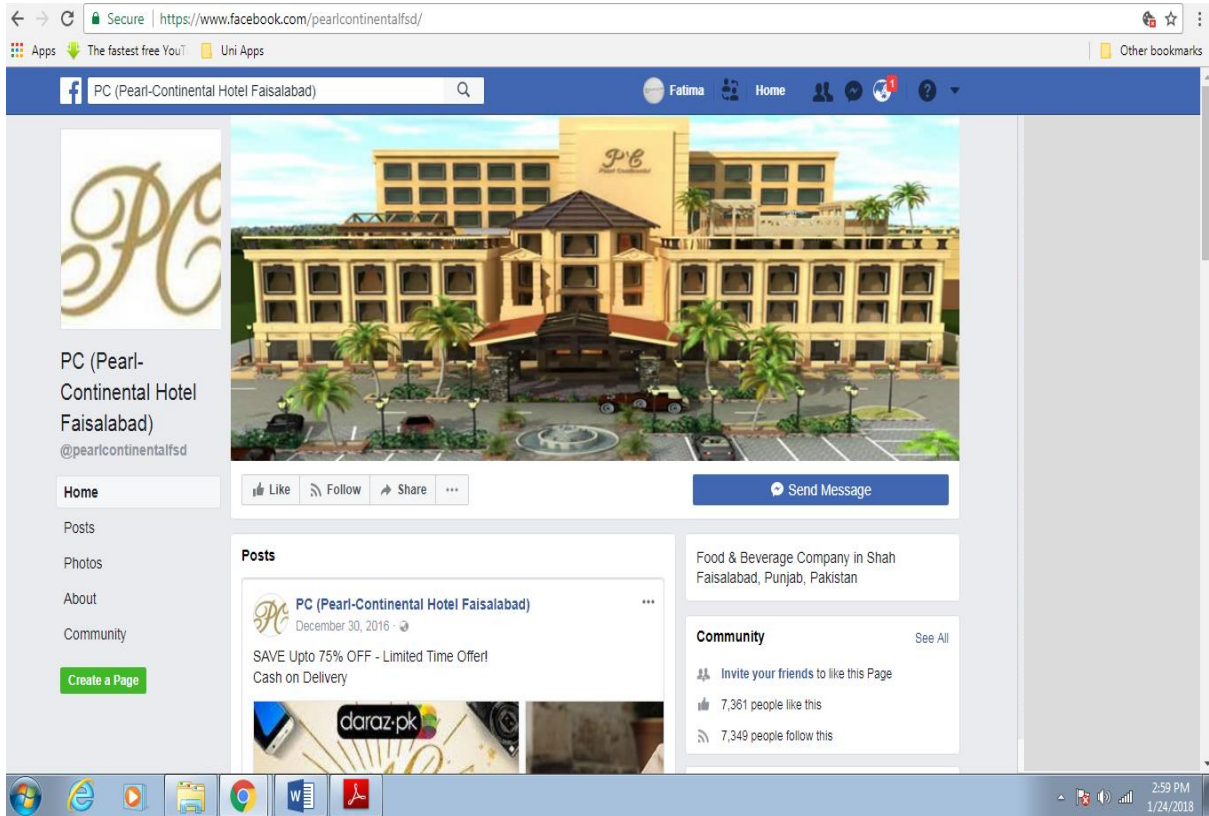
Beauty Parlor

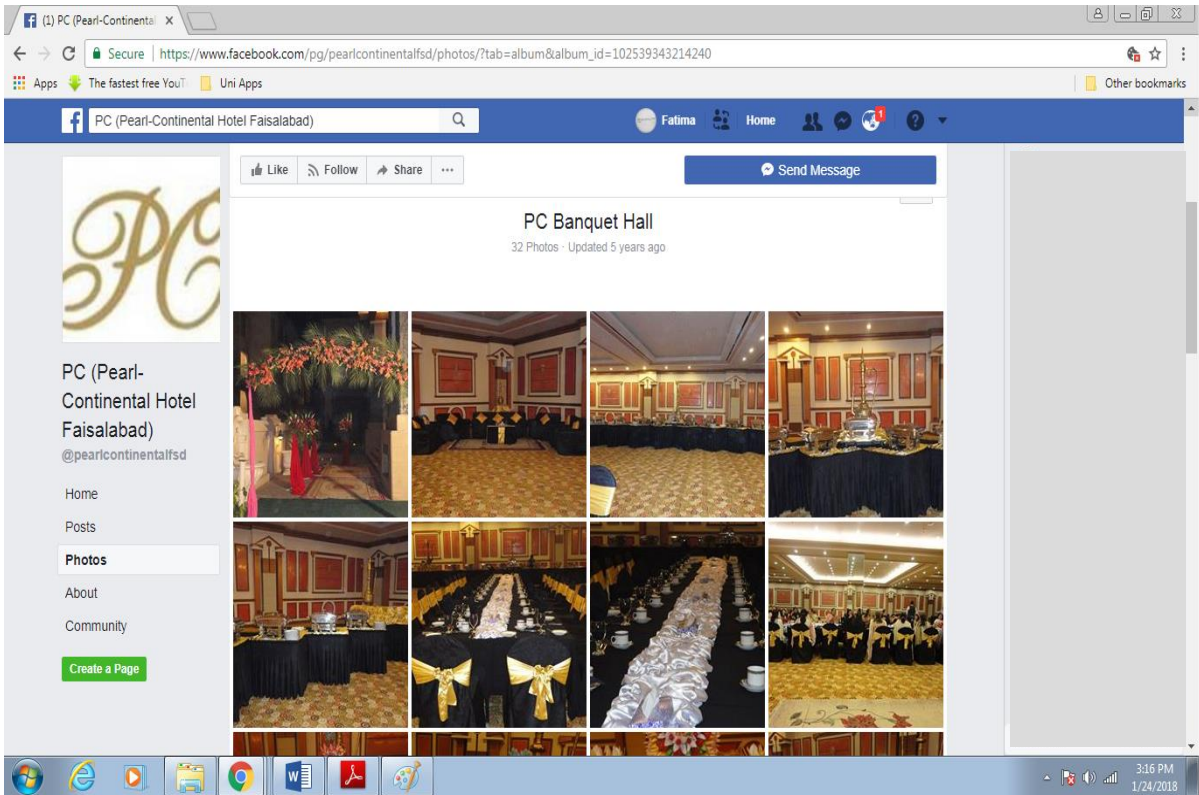
- 5.18. The encircled areas in the above photographs submitted by the Complainant show clearly that the Respondent No. 4 has been involved in usage of the Complainant's registered trade mark and logo. The logo is displayed at roof top of the building, which is the very main display of the hotel in the exact name and style as that of the Complainant's registered trade mark and logo. Therefore, the evidence above confirms that the conduct of the Respondent No. 4, *prima facie*, amounts to violation of Section 10(2)(d) of the Act which prohibits "*fraudulent use of another's trademark*".
- 5.19. Furthermore, as in the case of Respondent No. 2, the Complainant also had a franchise agreement with the Respondent No. 4 which was terminated due to non-compliance with the terms of agreement by the Respondent No. 4. This also proves that the Respondent No. 4 is in fact involved in unauthorized use of Complainant's registered trade mark and logo, and that this was done to exploit on the notable reputation and positive goodwill of the Complainant by means of attracting their clientele through deceptive means.
- 5.20. Additionally, the Respondent No. 4 is also running official Facebook page through which it has been involved in distribution of false and misleading information to consumers pertinent to various aspects of the nature of the hotel, "*PC Pearl-Continental Faisalabad*". Below are a few clips of the Facebook page run by Respondent No. 4.



5.21. The PC Pearl-Continental Facebook page was created in 2009. The franchise contract was terminated in 2013, however, the Facebook page is currently operational, as can be seen by the date on which this screenshot was taken. The fact that this page is still functional and contains all the information of the Complainant in the “About” and other introductory sections, it can

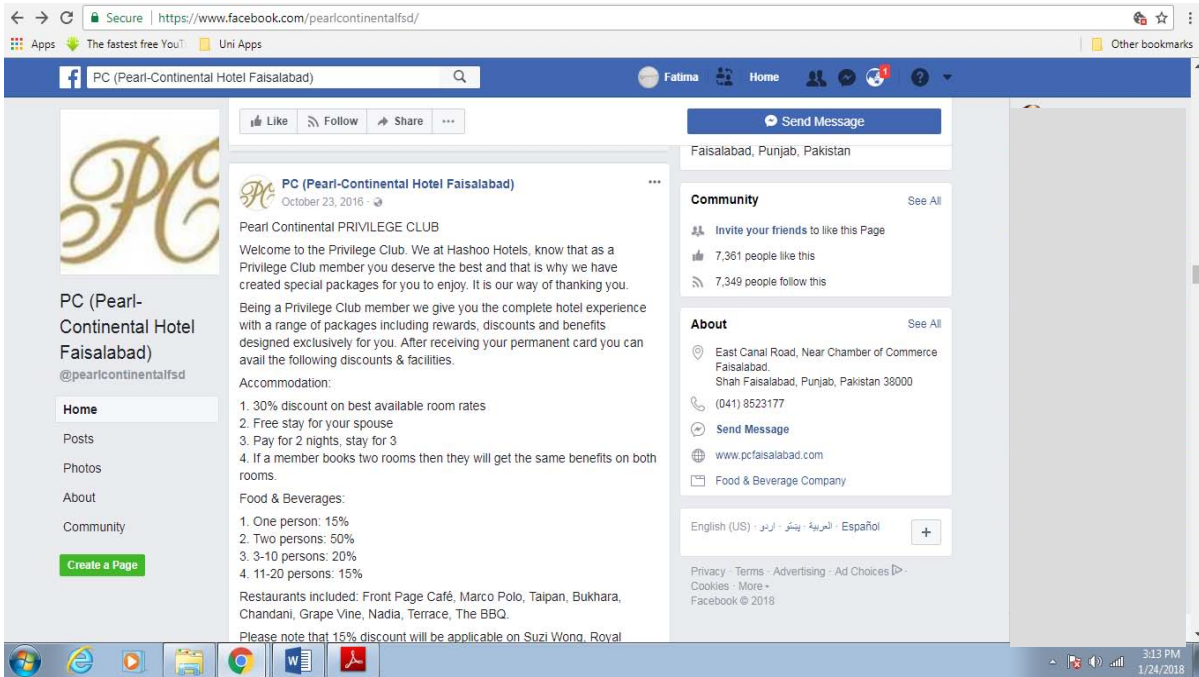
be concluded that the Respondent No. 4 is trying to pass off as the Complainant's actual franchise.





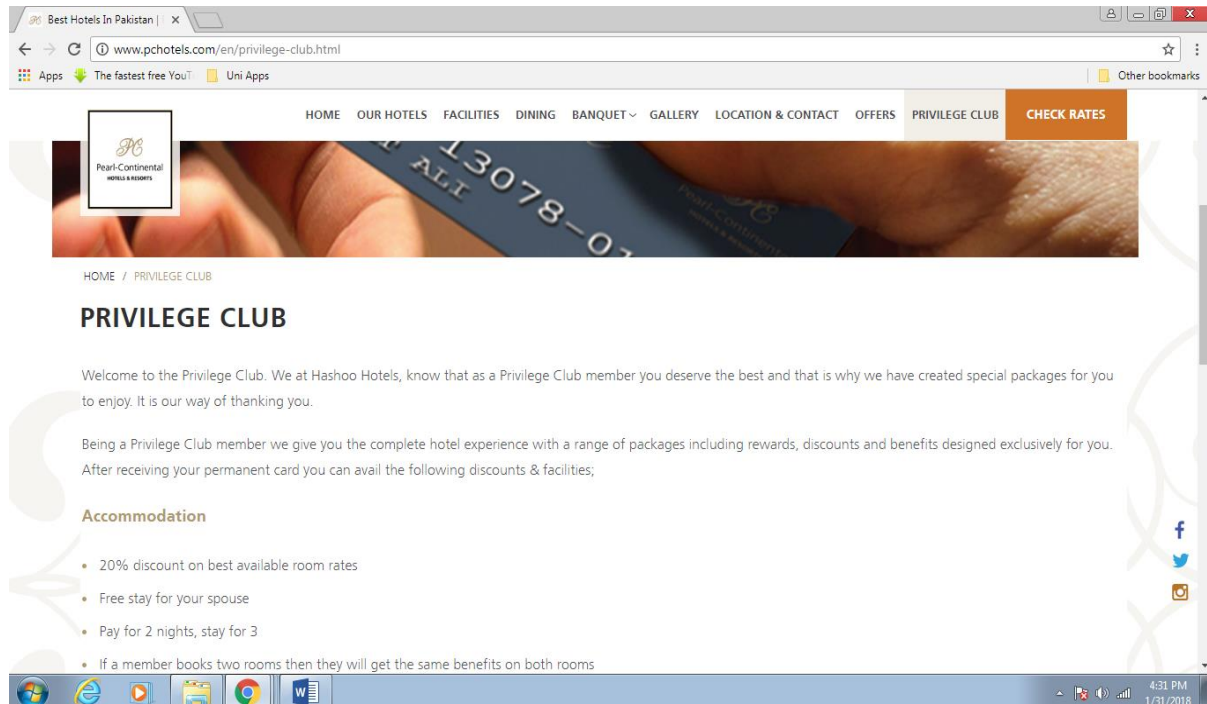
The Operational Banquet Hall of the Respondent No. 4 on Various Occasions

5.22. The album titled “PC Banquet Hall” exhibit that the banquet hall was in fact operational and has been passed off as that of the Complainant’s services.



Promotional Post of Privilege Club by Respondent No. 4

5.23. The image above displays the post related to promotional material shared on the Facebook page of Respondent No. 4 pertinent to a package especially created by the Complainant primarily for its regular customers known as the “*Privilege Club*” dated October 23, 2016. Whereas the image below shows the details of the actual product/package created by the Complainant on its website. This further proves that the Respondent No. 4 is in fact trying to give the impression that they are an authentic franchise of the Complainant’s.



5.24. Therefore, considering the fact that the Respondent No. 4 is fraudulently using the Complainant’s registered trade mark and logo of a 5 – Star luxury hotel, that too in the same line of business, i.e., hotel services, and are implying by means of various promotional material that they are the authorized franchise of the Complainant, it can be concluded that the Respondent No. 4 is also engaged in “*distribution of false [and] misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, place of production, properties, and quality of services*” by inferring;

- i. that they provide the same quality of services as that of a five star hotel like the Complainant’s;
- ii. that the services provided by them will comprise upon the similar properties and characteristics in terms of facilities provided by them; and
- iii. that they belong to same place of production, i.e., chain of service providers which the remaining authentic “*PC Pearl-Continental*” hotels belong to. This further represent and reinforce the expectations associated with this brand name for the purpose of factors mentioned in clauses “i” and “ii”.

5.25. Consequently, the quality services provided by the Respondent No. 4 will also have an adverse impact on the reputation and goodwill of the Complainant. Furthermore, as mentioned in case of the Respondents No. 2, presence of a franchise of the Complainant which has such high

repute is also capable of misleadingly enticing potential clientele into selecting the Respondents No. 4 for their services (such as the Banquet Hall of the Respondents No. 4), rather than those of other competitors in the market who may otherwise have the ability to provide the same quality of services as those of the Respondents No. 4. Therefore, it can be concluded that this conduct of the Respondents No. 4 is also “*capable of harming the business interest of another undertaking*”, such as the Complainant’s as well as other competing undertakings in the same line of business. Therefore, the behavior of the Respondents No. 4 also constitute, *prima facie*, violation of Section 10(2) (a) and (b) of the Act.

CONCLUSION AND RECOMMENDATION

- 6.1. In light of the above, it can be concluded that the Complainant has a strong standing in the market and has invested significantly in its goodwill and reputation. For this reason, it is also recognized as a brand of quality amongst the relevant market for providing quality services. Furthermore, it has also fulfilled legal requirements for protection of its intellectual property by registering its trade/service mark.
- 6.2. The Respondents by using similar and identical trademarks as that of the Complainant’s are clearly trying to free-ride on the goodwill and the reputation of the Complainant as due to such stark similarities, the consumers are bound to develop an association between the Complainant’s and the Respondents’ services. Therefore, the conduct of the Respondent No. 2 and Respondent No. 4, *prima facie*, amounts to violation of section 10 (1) read with sub-section 2(d) of the Act which prohibits “*fraudulent use of another’s trademark*”.
- 6.3. By fraudulently using the Complainant’s trademark, Respondent No. 2 and Respondent No. 4 are implying that they provide the same quality of services as that of the Complainant’s, the services provided by them comprise upon the similar properties and characteristics in terms of facilities provided by them and they belong to same place of production, i.e., chain of service providers which the remaining authentic “*PC: Pearl-Continental*” hotels belong to. This conduct of Respondent No. 2 and Respondent No. 4 falls under, *prima facie*, violation of Section 10(1), read with sub-section 2(b) of the Act which forbids “*distribution of false [and] misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, place of production, properties, and quality of services.*”
- 6.4. Furthermore, it is only natural that the consumers, due to such acts of deception on behalf of the Respondents, will opt for the Respondents’ services in case they are looking for the same quality of services as those provided by the Complainant at its original franchises. As a result, such fraudulent conduct of the Respondents is not only capable of harming the business interests of other undertakings in the same line of business but also capable of harming the business interests of the Complainant. Reason being that a negative experience at the Respondents’ hotels may negatively impact the reputation of the Complainant, and hence, may result in loss of business in the future, at its existing franchises. Therefore, it can be clearly concluded that even if there is no proof of actual harm incurred upon the business interests of

the Complainant, the unauthorized capitalization on the Complainant's registered trade mark and the potential to harm to the Complainant's goodwill amounts to, *prima facie*, violation of Section 10(1) of the Act, read with sub-section 2(a) of the Act.

- 6.5. The deceptive marketing practices, as discussed above, 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 when the undertakings resort to marketing their products in an unfair and misleading manner, their conduct is curtailed and instead are encouraged to indulge in marketing practices which are transparent and give consumers/customers true and correct perception regarding their goods and services. Therefore, in light of the above mentioned findings, it is recommended that the Commission may initiate proceedings against M/s Omni Comm (Pvt.) Limited – owners and operators of M/s Pearl Continental Hotel, Abbottabad, and M/s Lucky Gold (Pvt.) Limited – owners and operators of M/s Pearl Continental Hotel, Faisalabad, under Section 30 of the Act.

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