

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 POLYCON PAKISTAN
(PRIVATE) LIMITED AGAINST M/S IRSHAD TRADING CORPORATION
FOR
DECEPTIVE MARKETING PRACTICES**

BY

**FAIZ-UR-REHMAN AND FATIMA SHAH
DATED: JULY 10, 2019**

BACKGROUND

- 1.1. A complaint was filed by M/s Polycon Pakistan (Pvt.) Limited (the ‘**Complainant**’), through its legal counsel M/s. AXIS Law Chambers, with the Competition Commission of Pakistan (the ‘**Commission**’) against M/s Irshad Trading Corporation (the ‘**Respondent**’) for alleged violation of Section 10 of the Competition Act, 2010 (the ‘**Act**’), i.e., Deceptive Marketing Practices.
- 1.2. It was alleged in the complaint that the Respondent was involved in unauthorized use of a modified version of the Complainant’s registered trademark/trade name and logo “*Super Tuff*” for branding of its products, water tanks, with similar style and design. It was further alleged that such conduct of the Respondent was capable of harming the business interest and goodwill of the Complainant, which amounts to, *prima facie*, violation of Section 10 of the Act, which prohibits 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, Deputy Director (OFT) and Ms. Fatima Shah, Assistant Director (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 its 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 has made the following submissions.
- 2.2. The Complainant has alleged that there is tangible evidence that the Respondent is in the process of engaging in anti-competitive practices warranting the Commission’s immediate intervention. These practices include i) the Respondent passing itself off as a joint venture partner of the Complainant; and ii) passing itself off as the Complainant itself by adopting and using modified versions of the Complainant’s name and well-established trademark “*Super Tuff*” to sell its goods. That these actions constitute a violation of Section 10 of the Competition Act, specifically, Sections 10(1) read with sub-Sections 10(2)(a), 10(2)(b), and 10(2)(d) of the Act.
- 2.3. It has been submitted in the complaint that the Complainant was incorporated in 1986 and is a pioneer and market leader in the manufacture of polyethylene water tanks in Pakistan through rotation molding; is the first company to manufacture food grade water tanks in Pakistan; and is recognized by its ISO-9001-2000 certified Super Tuff branded product line, which is a household name in Pakistan due to its high standard and superior quality. That it

is also involved in the manufacture of, *inter alia*, chemical containers, textile containers, garbage cans, lights & poles, coolers, insulated containers, traffic cones, road barriers, diesel fuel tanks, bio gas tanks, tractor canopies and other plastic products.

- 2.4. That the Complainant was also a former member of the prestigious Association of Rotational Moulders (“**ARM**”) which is a worldwide trade association currently representing member companies in over 58 countries. In its September 2008 publication of the European Business Express, ARM described the Complainant as a one of the “leading companies” in moulding in South Asia.
- 2.5. It has been further submitted that the Complainant is a leading product developer and many of its designs and innovations have been registered and protected under the Patents & Designs Act, 1911. These include its “Lamp (Mashal)” design bearing design No. 9671-D in Class 03, its “Pole” design, bearing design no. 9672-D in Class 03, “Lamp (Fanoos)” design, bearing design no. 9673-D in Class 03, “Lamp” design bearing design no. 9676-D in Class 03, its “Water Tank” design bearing design no. 9674-D in Class 03, and its “Water Tank” design bearing design number 9675-D in Class 03.
- 2.6. That in 1986, the Complainant began the manufacture and sale of Pakistan’s first Food-Grade water tanks under the brand name and title of “*Super Tuff*”. It has been asserted that the Complainant’s Super Tuff water tanks (the “**Water Tanks**”) are manufactured from United States Food and Drug Authority (USFDA) certified imported raw material procured from the leading resin suppliers. That the Water Tanks are of superior quality with the same having received EN ISO 9001:2008, along with the Pakistan Standards & Quality Control Authority (PSQCA) Compliance certification. It has been emphasized that as the Complainant is also a product developer, the black vertical water tank is the Complainant’s original design, having a novel shape and design. The design of the black vertical water tanks has also been a protected and registered design under the *Patents and Design Act, 1911* bearing Design No. 9675-D, under Class 03.



Super Tuff Water Tank Logo

- 2.7. It has been stated that since its inception in 1986 to date, the Complainant has spent considerable time, effort, and financial investment in designing, developing, and promoting the Water Tanks along with its “Super Tuff” branding, which, as a result of the same, has attained a status of distinctiveness in the market. Moreover, the time, effort and financial investment made in the manufacture and design of the Water Tank has helped in establishment of this distinctiveness. That the Super Tuff Water Tanks, along with all Super Tuff products, now enjoy a reputation synonymous with quality and goodwill throughout Pakistan due to the Super Tuff product lines’ superior manufacturing which is compliant with international standards.
- 2.8. Furthermore, the Complainant submitted that the Water Tanks are actively marketed and sold, and bear a unique shape and original design, both in terms of its logo and the Water Tank Design, colour scheme, design and make up. That the Complainant has one of the largest supply and distribution networks in Pakistan, which is well-organized, equipped, efficient and reliable.
- 2.9. The Complainant highlighted that its clients include the Pakistan Army’s General Headquarters’ (GHQ), Strategic Plans Division (“SPD”), and the Atomic Energy Commission of Pakistan (“AEC”), due to the impregnability of the Super Tuff Water Tanks. Moreover, that both the SPD and the AEC are also in use of the Water Tanks for multiple purposes which includes, but is not limited to, containing, transporting, and disposing of hazardous chemicals, a fact which proves a rigorous quality control check process.
- 2.10. In addition, back in 1991, to ensure the protection and exclusivity of its brand identity and to preserve its intellectual property, the Complainant applied for the registration of its Super Tuff trademark and was successfully able to obtain the same. (Copy Attached as **Annex-A**).

- 2.11. It has been stated in the complaint that prior to May 2018, the Complainant had a nationwide network of authorized distributors for the purposes of the sale and distribution of the Water Tanks and other products which included the Respondent as one of its distributors. However, in May 2018, the Complainant decided to close down its network of authorized dealers and decided to sell directly in the market itself. In light of the existing commercial relationship between the Complainant and the Respondent and on the Respondent's request to continue its commercial relationship with the Complainant, the Complainant agreed to continue doing business with the Respondent for a short trial period. The Respondent's scope of services under this commercial relationship was limited to distribution of the Complainant's goods.
- 2.12. Moreover, for the purposes of facilitating the Respondent during the trial period, the Complainant allowed the Respondent access to its factory, network of distributors and suppliers and prices of its Super Tuff product line. All such information was intimated to the Respondent via emails dated 14 May 2018, addressed to Muhammad Hussnain (m.husnain94@hotmail.com), an officer/employee of the Respondent. However, upon failing its commitments and various incidents, the Complainant came to the conclusion that the Respondent had no interest in improving the sales and/or distribution of the Complainant's products, instead, it had entered into the trial commercial relationship with the Complainant to gain access to its confidential information and trade secrets.
- 2.13. The Complainant submitted that the first such instance was in August 2018 when the Complainant came to learn that the Respondent's sole proprietor, Mr. Mian Muhammad Irshad, had approached one of the Complainant's suppliers by presenting himself as a representative of the Complainant. That the second instance was when in September 2018, the Respondent approached the Complainant with a proposal that they establish a joint venture between the two. However, despite the Complainant's reprimand of the Respondent's actions and clear-cut rejection of its proposal, the Respondent approached the Complainant with a brochure and business cards belonging to a supposed joint venture by and between the Complainant and the Respondent. That remarkably, the business cards published by the Respondent also represented Mr. Irshad as the supposed joint venture's "Marketing Director". The Complainant's staff and management on seeing the materials immediately ordered Mr. Irshad to cease and desist from acting as if he represented the Complainant and to destroy immediately, both the brochures and the business cards. Although Mr. Irshad stated that he would destroy the material, it later came to the Complainant's knowledge that the Respondent had already distributed the false and misleading brochures and business cards in the market which include, but is not limited to, Faisalabad, Multan, and various areas of Southern Punjab and Khyber Pakhtunkhwa (KP).

سپر ٹف واٹر ٹینک

نقلوں سے ہوشیار

آپ کی اور آپ کی فیملی کی صحت کا ضامن

125 گالون سے 1000 گالون تک

حفظان صحت کے اصولوں کے عین مطابق

فوڈ گریڈ میٹریل سے تیار کردہ

LONG LIFE دیرپا
REASONABLE PRICE مناسب قیمت
CAPACITY EMBOSSED مکمل گنجائش

TUV AUSTRIA ISO 9001:2008 CERTIFIED

ITC SUPER TUFF POLYCON

سپر ٹف واٹر ٹینک

The Only Food Grade WATER TANK IN PAKISTAN

- Special food grade polymer
- UV Stabilized against Sun & Weather
- Seamless Construction & completely leakproof
- Easy to install. All brass fittings provided
- Corrosion-proof, rust proof, termite-proof
- Easy to clean, smooth surface
- Hygienic water storage. Germ free, odorous and algae free
- Strong but light weight. Capacity as embossed
- Comprehensive warranty. Competitive prices

SUPER TUFF BLUE & WHITE VERTICAL WATER TANKS		
125	Dia 32" Height 38"	11,335
150	Dia 32" Height 48"	12,660
200	Dia 36" Height 53"	16,670
300	Dia 47" Height 44"	23,335
400	Dia 48" Height 50"	27,840
500	Dia 48" Height 73"	36,260
1000	Dia 68" Height 73"	73,350

SUPER TUFF BLUE & WHITE HORIZONTAL WATER TANKS		
150	Length 55", Height 25", Width 26"	16,700
200	Length 61", Height 29", Width 30"	21,700
300	Length 64", Height 37", Width 32"	36,700

Just Partner of

ITC SUPER TUFF POLYCON PAKISTAN (PVT) LTD

LAHORE OFFICE: Plot No. 17-B, Phase-1, DHA, Lahore Cantt. Phone: (042) 35311111, 35311112, 35311113, 35311114, 35311115, 35311116, 35311117, 35311118, 35311119, 35311120, 35311121, 35311122, 35311123, 35311124, 35311125, 35311126, 35311127, 35311128, 35311129, 35311130, 35311131, 35311132, 35311133, 35311134, 35311135, 35311136, 35311137, 35311138, 35311139, 35311140, 35311141, 35311142, 35311143, 35311144, 35311145, 35311146, 35311147, 35311148, 35311149, 35311150, 35311151, 35311152, 35311153, 35311154, 35311155, 35311156, 35311157, 35311158, 35311159, 35311160, 35311161, 35311162, 35311163, 35311164, 35311165, 35311166, 35311167, 35311168, 35311169, 35311170, 35311171, 35311172, 35311173, 35311174, 35311175, 35311176, 35311177, 35311178, 35311179, 35311180, 35311181, 35311182, 35311183, 35311184, 35311185, 35311186, 35311187, 35311188, 35311189, 35311190, 35311191, 35311192, 35311193, 35311194, 35311195, 35311196, 35311197, 35311198, 35311199, 35311200

ISLAMABAD OFFICE: Plot No. 17-B, Phase-1, DHA, Lahore Cantt. Phone: (042) 35311111, 35311112, 35311113, 35311114, 35311115, 35311116, 35311117, 35311118, 35311119, 35311120, 35311121, 35311122, 35311123, 35311124, 35311125, 35311126, 35311127, 35311128, 35311129, 35311130, 35311131, 35311132, 35311133, 35311134, 35311135, 35311136, 35311137, 35311138, 35311139, 35311140, 35311141, 35311142, 35311143, 35311144, 35311145, 35311146, 35311147, 35311148, 35311149, 35311150, 35311151, 35311152, 35311153, 35311154, 35311155, 35311156, 35311157, 35311158, 35311159, 35311160, 35311161, 35311162, 35311163, 35311164, 35311165, 35311166, 35311167, 35311168, 35311169, 35311170, 35311171, 35311172, 35311173, 35311174, 35311175, 35311176, 35311177, 35311178, 35311179, 35311180, 35311181, 35311182, 35311183, 35311184, 35311185, 35311186, 35311187, 35311188, 35311189, 35311190, 35311191, 35311192, 35311193, 35311194, 35311195, 35311196, 35311197, 35311198, 35311199, 35311200

KARACHI OFFICE: Plot No. 17-B, Phase-1, DHA, Lahore Cantt. Phone: (042) 35311111, 35311112, 35311113, 35311114, 35311115, 35311116, 35311117, 35311118, 35311119, 35311120, 35311121, 35311122, 35311123, 35311124, 35311125, 35311126, 35311127, 35311128, 35311129, 35311130, 35311131, 35311132, 35311133, 35311134, 35311135, 35311136, 35311137, 35311138, 35311139, 35311140, 35311141, 35311142, 35311143, 35311144, 35311145, 35311146, 35311147, 35311148, 35311149, 35311150, 35311151, 35311152, 35311153, 35311154, 35311155, 35311156, 35311157, 35311158, 35311159, 35311160, 35311161, 35311162, 35311163, 35311164, 35311165, 35311166, 35311167, 35311168, 35311169, 35311170, 35311171, 35311172, 35311173, 35311174, 35311175, 35311176, 35311177, 35311178, 35311179, 35311180, 35311181, 35311182, 35311183, 35311184, 35311185, 35311186, 35311187, 35311188, 35311189, 35311190, 35311191, 35311192, 35311193, 35311194, 35311195, 35311196, 35311197, 35311198, 35311199, 35311200

سپر ٹف واٹر ٹینک

آپ کی اور آپ کی فیملی کی صحت کا سامن

خريد تے وقت SUPER TUFF کا کنڈرہ شدہ ٹریڈ مارک ضرور دیکھ لیں

نقالوں سے ہوشیار

Since 1986

- Special food grade polymer. U.V. Stabilized against Sun & Weather
- Seamless Construction & completely leakproof
- Easy to Install. All-brass fittings provided
- Corrosion-proof, rust proof, termite-proof. Easy to clean, smooth surface
- Hygienic water storage. Germ free, odorless and algae free
- Strong but light weight. Capacity as embossed
- Comprehensive warranty, Competitive prices

50 گیلن سے 5000 ہزار گیلن تک

سپر ٹف واٹر ٹینک

The Only Food Grade WATER TANK IN PAKISTAN

RATE LIST

سپر ٹف ہورائزینٹل ٹینک

SUPER TUFF HORIZONTAL TANKS

Capacity in US Gallons	Dimension in Inches	Retail Price
75	Length 48" Height 27", Width 23"	11,000
100	Length 56" Height 35", Width 29"	20,000
200	Length 80" Height 39", Width 37"	26,070
250	Length 82" Height 45", Width 37"	35,200
300	Length 88" Height 45", Width 20"	41,870

سپر ٹف ورتیکل ٹینک

SUPER TUFF VERTICAL TANKS

Capacity in US Gallons	Dimension in Inches	Retail Price
50	Diameter 21" Height 35"	6,670
125	Diameter 30" Height 32"	13,830
190	Diameter 36" Height 33"	16,330
200	Diameter 36" Height 33"	21,670
250	Diameter 51" Height 39"	27,870
300	Diameter 48" Height 44"	30,500
350	Diameter 51" Height 47"	36,870
400	Diameter 51" Height 57"	39,340
500	Diameter 51" Height 70"	41,670
1000	Diameter 70" Height 82"	83,350
1200	Diameter 68" Height 81"	81,680
1000	Diameter 75" Height 67"	109,260
2000	Diameter 82" Height 109"	140,690
2000	Diameter 82" Height 150"	180,360
5000	Diameter 100" Height 177"	450,000

سپر ٹف واٹر ٹریٹمنٹ ٹینک

SUPER TUFF WATER TREATMENT TANK

500	White	40,000
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سپر ٹف لوٹ ٹینک

SUPER TUFF LOFT TANKS

100	Length 36", Height 18", Width 36"	18,200
150	Length 48", Height 18", Width 36"	22,600

Joint Venture of

POLYCON PAKISTAN (PVT) LTD.

LAHORE OFFICE:
107, SIKANDAR ROAD, P.O. BOX 107, NEW MARKET, LAHORE
LAHORE BRANCH: 2413-PAKISTAN, Fax: 3725-8010000
Phone: 3742-3400-3400000, Fax: (3742) 3400000
E-mail: info@polycon.com.pk Website: www.polycon.com.pk

HYDRABAD OFFICE:
171-A, Gulistan E-Ilahi,
Millet Chowk, Hyderabad
Tel: +91 41 2662173, 6502-982715

MARATHI OFFICE:
M.C. 2nd Floor, Commercial Area 'B'
Dattatraya Housing, Andhwa, Mumbai
Phone: 022 24297502-24297503 Fax: 022 24297504

Respondent's Brochures



Respondent's Business Card

- 2.14. It has been, therefore, alleged there is no doubt that the public at large has been deceived and led to believe that the Respondent and the Complainant have entered into a “joint venture” and that the goods sold by this fictitious joint venture are those of the Complainant, whereas in reality, the goods are being sourced by Mr. Irshad from other vendors, and possibly manufactured by the Respondent. There have also been further other incidents depicting continuation of such deceptive behavior, by either posing itself a partner of the Complainant or by using similar trade dress and tradenames on its marketing material along with making other deceptive claims.
- 2.15. Subsequently, it has been submitted that on November 07, 2018, the Complainant received a WhatsApp image of a brochure distributed by a “*Polygon Pakistan Plastic Industry*”. Upon reviewing the brochure, the Complainant noted the address and discovered it to be that of the Respondent. It has been asserted that such conduct proves that the Respondent is passing itself off as the Complainant by slightly altering its name to sound phonetically the same as the Complainant’s name, i.e., ***Polygon Pakistan Plastic Industry***, and by making use of a modified version of the Complainant’s “Super Tuff” logo, which is a red version of the Super Tuff logo with the addition of the word “power”, i.e. ***Super Power Tuff*** (the “**Offending Trademark**”), and has used an edited image of the Water Tank which has been superimposed with the modified version of the Offending Trademark.
- 2.16. Images of the offending brochure along with the Complainant’s brochure for comparison purposes is pasted below with the relevant portions encircled in red.

THE ONLY FOOD GRADE WATER TANK IN PAKISTAN **سپر ٹف واٹر ٹینک**

- UV Stabilized against sun & frost
- Seamless Construction & completely balanced
- Easy to install, All brass fittings provided
- Corrosion proof, rust proof, termite proof
- Easy to clean, smooth surface
- Hygienic water storage, Germ free, odorless and algae free
- Strong but light weight, Capacity as embossed
- Comprehensive warranty, Competitive prices

Capacity	Length	Diame	Height
Gallons	Inches	Inches	Inches
75	40	23	27
100	45	26	30
200	60	32	37
250	65	37	40
300	68	40	43

Capacity	Diame	Height
Gallons	Inches	Inches
10	21	30
125	19	32
150	21	37
200	26	43
250	30	47
300	31	51
400	31	57
500	31	63
1000	35	82
1500	38	91
2000	40	97
2500	42	103
3000	42	110

Capacity	Length	Diame	Height
Gallons	Inches	Inches	Inches
120	32	28	33
150	32	30	35
200	36	33	39
300	47	44	51
400	49	48	55
500	49	51	59
1000	55	73	87

Capacity	Length	Height
Gallons	Inches	Inches
700	38	36
100	40	38

POLYCON PAKISTAN (PVT) LTD
 32/33A (PHASED) COLONY V/1 STREET, LAHORE (PVT) 54043 (PASTRAL)
 PHONES: 042-35004533, 3500055, 3500054, 3542, 3500053
 E-MAIL: info@polycon.com.pk, Website: www.polycon.com.pk
 KARACHI OFFICE
 16-C, 1st FLOOR, COMMERCE AREA, K. DORR ROAD, HAZRAT ALI, ALTAHAFI HAPAZI
 PHONE: (021) 35000533, 35000534, 35000535

TUV AUSTRIA
 ISO 9001:2000
 ISO 9001:2000
 ISO 9001:2000

THE ONLY FOOD GRADE WATER TANK IN PAKISTAN **سپر ٹف واٹر ٹینک**

خریدتے وقت SUPER TUFF کا
 کندہ شدہ خرید مارک ضرور دیکھ لیں

تقاروں سے
 ہوشیار

LONG LIFE
 REASONABLE PRICE
 CAPACITY AS EMBOSSED

یہا
 مناسب قیمت
 کل گنجائش

ISO 9001-2000 Certified

POLYCON

Complainant's Brochure (Left – Back/Right – Front)

SUPER TUFF WATER TANK **سپر پاور ٹف واٹر ٹینک**

The Only Food Grade WATER TANK IN PAKISTAN

- Special food grade polymer
- UV stabilized against sun & frost
- Seamless Construction & completely balanced
- Easy to install, All brass fittings provided
- Corrosion proof, rust proof, termite proof
- Easy to clean, smooth surface
- Hygienic water storage, Germ free, odorless and algae free
- Strong but light weight, Capacity as embossed
- Comprehensive warranty, Competitive prices

Capacity	Price
500 Ltr.	7,885
700 Ltr.	8,480
1000 Ltr.	11,020
1200 Ltr.	13,195
1600 Ltr.	15,370
2000 Ltr.	19,865
2500 Ltr.	25,885

Capacity	Price
30 Gallon	4200
100 Gallon	7000
150 Gallon	10100
200 Gallon	12000
300 Gallon	17900
400 Gallon	22700
500 Gallon	26000
1200 Gallon	61000
2500 Gallon	135000

POLYCON PAKISTAN PLASTIC INDUSTRY
 30-Km. Lahore Road, Faisalabad

SUPER POWER TUFF WATER TANK **سپر پاور ٹف واٹر ٹینک**

آپ اور آپ کی فیملی کی صحت کے لیے

تقاروں سے
 ہوشیار

تے وقت
 ضرور دیکھ لیں

فٹنگز اور فٹنگز کے لیے
 حفاظت کے
 اصولوں کے مطابق

LONG LIFE
 REASONABLE PRICE
 CAPACITY AS EMBOSSED

یہا
 مناسب قیمت
 کل گنجائش

ITC
 EGO PIPE & FITTINGS
 SUPER TUFF WATER TANK

Respondent's Brochures

2.17. Moreover, it has been further asserted that the colour scheme of the brochure, the Urdu text and the Urdu version of the Super Tuff logo (in yellow and white), the font type used (Times New Roman) and the price list are all identical to the brochure distributed by the Complainant and thus, constitutes irrefutable proof of the fact that this has been done so as to deliberately mislead and deceive consumers into believing that the goods available at the Respondent's retail outlets or otherwise are those of the Complainant. Furthermore, the Respondent is also presenting its products as being "*the only Food Grade Water Tank in Pakistan*", as copied from the Complainant's brochure, which makes it an entirely false representation.

2.18. That subsequently, on November 12, 2018, one of Complainant's employees received another WhatsApp message with an image of another brochure being distributed by the Respondent as is evident from the Respondent's logo being present on the same - the ITC Logo. That in the Second Brochure, the Respondent has been found making various representations which are blatantly false and clearly made to cause confusion and deception among consumers such as;

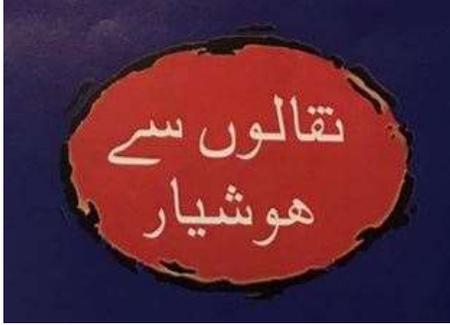
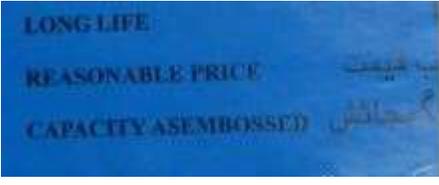
- (i) the Offending Trademark ("*Super Power Tuff*"), which is a modified version of the Complainant's Super Tuff trademark;
- (ii) the colour scheme of the brochure, the Urdu text and the Urdu version of the Super Tuff logo (in yellow and white), the font type used (Times New Roman);
- (iii) even the Urdu logo, warning consumers to beware of copycats, is exactly the same one as the one used on the Complainant's actual brochure;
- (iv) the Second Brochure includes an image of the Water Tank on which the Offending Trademark has been superimposed;
- (v) the Second Brochure is also making representations about the quality of the water tanks i.e. "*long life, reasonable price, capacity as embossed*", which has been quite clearly copied and directly pasted from the Complainant's brochure;
- (vi) the Respondent is also representing its water tanks as being manufactured from "*food grade*" raw material which is raw material certified to be used for the purposes of manufacturing products. This material can safely contain food items and liquids without any plastic contamination.

(It has been brought to the notice of the Commission that the Complainant's Water Tanks have received the requisite ISO and PSQCA certifications to verify that the Complainant's Water Tanks are safe for the purposes of containing food and liquids. In contrast, the Respondent does not have these certifications, and by making use of the Complainant's trademarks, logo, etc., the Respondent is deceiving innocent consumers and contaminating the entire supply chain, thereby causing serious harm and injury to public health); and

- (vii) the Respondent is also representing itself as being in the business of manufacturing water tanks "*Since 1986*", the same year the Complainant was incorporated.

- 2.19. The Complainant has alleged that it has also come to its knowledge that on November 01, 2018, the Respondent filed an application before the Intellectual Property Organization's Trademark Registry for the registration of the Offending Trademark, bearing Application no. 512409 in Class 20 under the *International Nice Classification for Good and Services*, and further presented itself as having been in use of the offending logo since 2009 so as to present itself as having some *bona fide* claim over the modified logo.
- 2.20. For ease of reference, the original marks and the offending marks along with the representations have been provided by the Complainant and are reproduced before.

<u>THE COMPLAINANT</u>	<u>THE RESPONDENT</u>
	
	
	
	

	
	
<p>(The Complainat Company was incorporated in 1986)</p>	

2.21. It has, therefore, been alleged by the Complainant that there is no doubt that the Respondent has engaged in anti-competitive behavior in clear violation of the provisions of Section 10 of the Act. That this behavior was borne out by the documentary evidence appended to this Complaint and verified by individuals who are mutual contacts of both the Complainant and the Respondent. It has been further alleged that the Respondent is now also actively manufacturing, marketing and selling water tanks by falsely and fraudulently using the goodwill, reputation, and trademarks of the Complainant, along with making false claims and representations as to the quality and standard of the water tanks as well thereby causing great harm to the Complainant's business not to mention the adverse public health implications of the Respondent's illegal conduct.

2.22. That to summarize the above, the Respondent has engaged in multiple actions which constitute a violation of Section 10 of the Act by virtue of which the Respondent has created a blatantly false impression for the purposes of deceiving the public at large and the Complainant to its great detriment for its own gain and benefit. These multiple offending actions have been highlighted below:

I. Respondent Passing off as Complainant Company's Joint Venture Partner

2.23. The Respondent's action of passing itself off as the Complainant's *joint venture partner* constitutes a violation of Section 10(2)(a) – *the distribution of false or misleading*

information that is capable of harming the business interest of another undertaking ; and 10(2)(b) of the Act – the distribution of false or misleading information to consumers; as the Respondent is selling goods, which includes Water Tanks and other items advertised on its fake brochures, of a sub-standard and inferior quality giving the impression that the goods are the Complainant’s goods. That the Complainant has spent decades cultivating its goodwill and brand which is being damaged by the Respondent’s fraudulent behavior of selling poor quality goods while passing off as the Complainant

- 2.24. Furthermore, the Respondent, by using the Super Tuff logo and brand name on its brochures without the Complainant’s permission constitutes infringement and fraudulent use of the Complainant’s brand which constitutes a violation of Section 10(2)(d) of the Act – *fraudulent use of another’s trademark, firm name or product labeling.*

II. Respondent Passing off as Complainant Company and use of Super Tuff brand

- 2.25. The Complainant averred that the Respondent’s action of presenting itself off as the Complainant by using a slightly altered, yet phonetically similar name is a clear violation of Section 10(1) and 10(2)(d) of the Act. Moreover, the use of the Complainant’s Super Tuff tradename, with the addition of the word “*power*” in all its brochures is another act constituting deception, also termed as “*parasitic copying*” or “*copycat packaging*” by the Commission. That resultantly, the consumer may be misled by copycat packaging in terms of three aspects: the consumer might take the copycat product for the original; the consumer could be misled as to the quality; or the consumer could be misled as to the origin of the product.
- 2.26. That the overall look of the brochure, the use of the Super Tuff logo in English and its Urdu variant, the use of a slightly edited image of the Water Tank, along with the name “*Polygon*” prove that the Respondent is seeking to misrepresent, deceive, and mislead consumers into believing that its products are those of the Complainant, and hence this conduct constitutes a violation of Section 10(2)(a), 10(2)(b), and 10(2)(d) of the Act.

III. False Representations about the quality of the Water Tanks and business

- 2.27. It has been further averred that the Respondent in its fake brochures is claiming that the Water Tanks are manufactured from food-grade raw material. Moreover the claims about the Respondent’s water tanks and products having “*Long life, Reasonable Priced*” “*Capacity as Embossed*” has been directly copied from the Complainant’s brochure. Furthermore, the Respondent does not have any of the certifications it claims to have, and by making use of the Complainant’s trademarks, logo and brand name, etc., to deceive consumers into believing that it does, could jeopardize the health of potential consumers who purchase the water tanks, etc. Finally, the claim that the Respondent has been in business “*Since 1986*” is an entirely false representation.

- 2.28. Consequently, it has been alleged that the Respondent's conduct amount to clear violations of Sections 10(1), read with sub-Sections 10(2)(a), 10(2)(b), and 10(2)(d) of the Act. It has been submitted that from the facts narrated above, it is clear that the sole purpose of the Respondent's maneuver to enter into a new commercial relationship with the Complainant was to gain access to the Complainant's factory, its manufacturing processes and know-how, its network of suppliers and distributors – all in order to set-up and launch a parallel business passing off as the Complainant and therefore, the Commission's intervention has been sought immediately to put an end to the Respondent's deception.
- 2.29. In view of the foregoing, it has been prayed for that:
- i. Proceedings may be initiated against the Respondent for contravention of Section 10 of the Act;
 - ii. An injunction under Section 32 of the Act may be granted restraining the Respondent from continuing the deceptive marketing practices.
 - iii. Any other direction deemed appropriate by the Commission
- 2.30. The Complainant was called upon to submit the colored copy of the trademark registration certificate and the graphical representation of the registered trademark vide letter dated January 14, 2019, which were submitted by the Complainant on January 22, 2019.

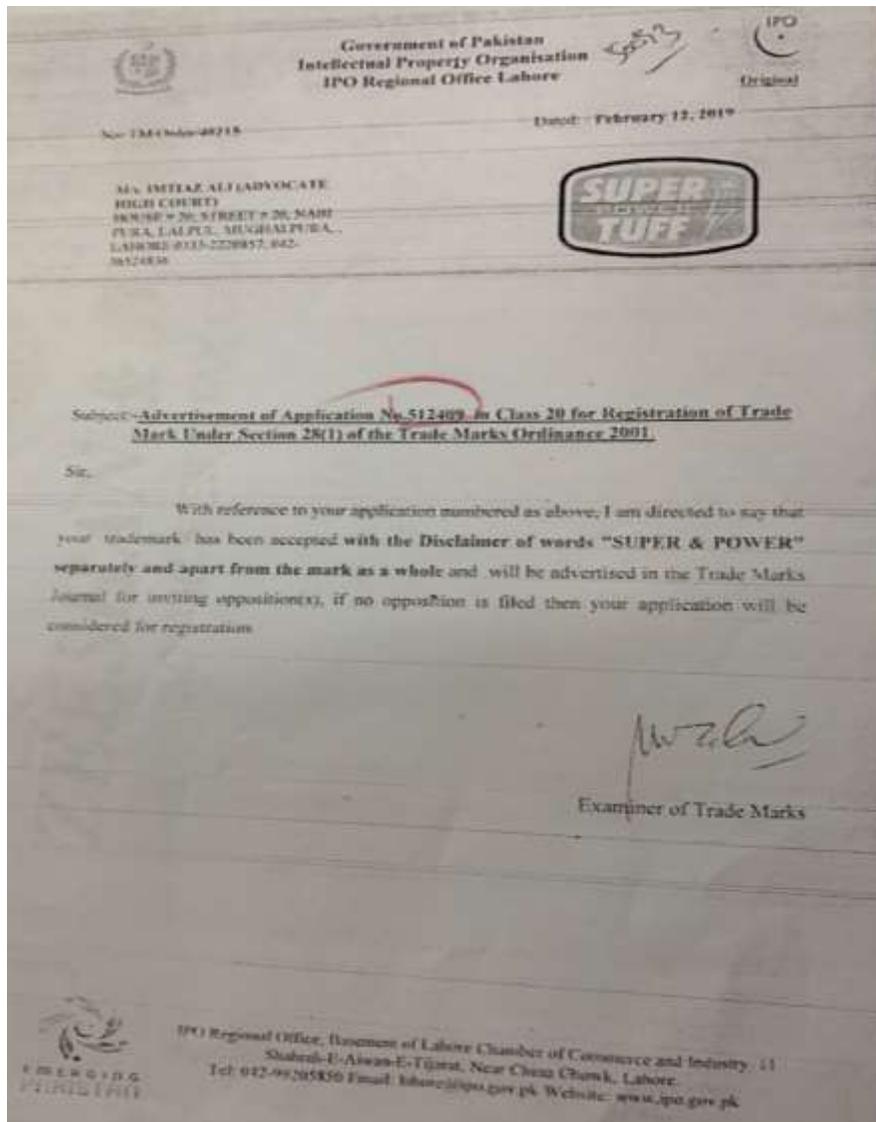
MARKET SURVEY

- 3.1. In order to verify the allegations made by the Complainant, a market survey was conducted by the Enquiry Committee in Faisalabad on February 20, 2019, the findings of which have been reproduced in the Market Survey Report, attached herewith as **Annexure – B**.

SUBMISSIONS OF THE RESPONDENT

- 4.1. The Respondent, through letter dated February 28, 2019, was called upon to submit comments/clarifications to the said complaint. However, the Respondent requested for an extension vide letter dated March 14, 2019, which was granted to it by the Enquiry Committee through letter dated March 18, 2019. The Respondent requested for a further extension in time on March 27, 2019, which it was given vide letter dated March 28, 2019.
- 4.2. The Respondent finally submitted its comments through letter dated April 06, 2019, the contents of which are reproduced below.
- 4.3. It has been submitted in the reply that the complaint is fictitious and based on false assumptions. That as per submissions of the Complainant, the nationwide list of the Complainant's distributors included the Respondent, hence it had the authority to sell the Complainant's products in the market. Moreover, that it has been investing great efforts in building the Complainant's network and selling its products in the market.

- 4.4. It has been alleged by the Respondent that the reason behind the Complainant's complaint is that the Complainant has been feeling threatened by the Respondent's strong network with the customers and its status as a strong dealer and hence, wants to end the agreement between the two.
- 4.5. It has been asserted by the Respondent that the Complainant and the Respondent came to a conclusion that the two should form a joint venture (JV) to maximize sales and benefit both the entities. That the Complainant had agreed to the fact the Respondent could purchase raw materials from its suppliers to maintain the high quality of production. Therefore, the Respondent purchased raw materials from the Complainant's suppliers on behalf of the Complainant, which is not against the law.
- 4.6. It has been alleged by the Respondent that the Complainant actually agreed to form a JV, the documentation of which was to be completed in the near future. That it would be ludicrous on behalf of the Respondent to come to the Complainant with the contact cards and brochures in spite its rejection of the proposal and therefore, the allegations made by the Complainant are false.
- 4.7. It has been asserted by the Respondent that if in view of the Complainant, the Respondent is actually involved in deceptive marketing practices, then why did it not issue it any legal notice or file a civil suit against it? Therefore, it has been further asserted that the same was done as everything was done with consent of both the parties.
- 4.8. It has been submitted by the Respondent that every citizen of Pakistan has the right to do business. Moreover, the accusations made by the Complainant that Polygon Pakistan Plastic Industry and Polycon Pakistan (Pvt.) Limited are phonetically and apparently similar are baseless. That it would have been deceptive on the Respondent's part if it had used the term "*(Pvt.) Limited*" without getting itself registered with the SECP, which it has not done so.
- 4.9. It has been further submitted that under the law, a logo can be registered under different classifications. That the Respondent has applied for its trademark "*Super Power Tuff*" in respect of 'Tanks', in Class 20 of the Trademark Ordinance, 2001. Furthermore, it has been stated that the IPO Examiner also accepted the Respondent's application after which the trademark was advertised in the Publication Journal of Trade Mark on February 12, 2019. Copy of the said letter is reproduced below.



- 4.10. Whereas, it has been submitted that the Complainant's "Super Tuff" trademark has been registered under Class 21 of the Trademark Ordinance, 2001 in respect of 'Containers'. Therefore, the assertion that the Respondent is infringing upon the rights of the Complainant is bogus as the two belong to two entirely different classifications.
- 4.11. It has, therefore, been finally submitted that the said complaint is thereby frivolous as the Respondent has not been engaged in violation of Section 10 of the Act and hence, the Commission may grant relief to the Respondent based on above facts.

REJOINDER

- 5.1. The Respondent's reply was forwarded to the Complainant for a rejoinder, if any, vide letter dated April 09, 2019. The said rejoinder was received on letter dated April 22, 2019, the contents of which are summarized below;

- 5.2. That without prejudice to the above, it is important to note that the Respondent has made several startling admissions of fact in its reply, especially in paras, reproduced here in paras. 4.8. to 4.10 *ibid*. That a bare perusal of the Complaint and the Respondent’s reply clearly proves undeniable admissions of fact by the Respondent in respect of its anti-competitive conduct in violation of Section 10 of the Competition Act (specifically, Sections 10(1), 10(2)(a), 10(2)(b), and 10(2)(d)) and therefore, there is no doubt whatsoever that the Complainant is entitled to judgment upon such admissions as prayed for in the Complaint and this Rejoinder.
- 5.3. That the Respondent’s anti-competitive behavior, *mala fides* and repeated efforts to damage and erode the Complainant’s goodwill stand proven from the fact that the Respondent has applied for registration of a copied trade mark / word mark. The Reply and the Trade Mark Journal (No. 817 of February 1, 2019) published on Intellectual Property Organization’s Website shows that the Respondent has illegally applied for registration of not one, but rather two separate variations of the Complainant’s “Super Tuff” logo / word mark which establishes without a doubt that the Respondent has engaged in deceptive and anti-competitive behavior. This constitutes yet more proof of the Respondent’s blatantly illegal conduct and it is time that the Commission acted decisively to put this to an end.

<u>Logo</u>	<u>Application no.</u>	<u>Class</u>
	512409	20
	512408	17

- 5.4. That the Reply does answer or rebut any of the facts and evidence and specifically, in relation to the false representations about the quality of Water Tanks and its ISO and PSQCA certifications, which constitute grave and serious violations of Section 10 (2) (b) of the 2010 Act as to the distribution of false or misleading information to consumers.
- 5.5. That the assertion that the “Respondent was putting their great efforts in the building the network of the complainant company and providing maximum sales revenue” is absurd and denied and that the Respondent is put to strict proof thereof.
- 5.6. That the contents of the paragraph no. 4.5. *ibid* are denied for being blatantly false and untrue and a reflection of the Respondent’s delusional behavior. That the Respondent, by fraudulently misrepresenting and holding itself out as a “joint venture partner” of the

Complainant, has seriously damaged the business interests of the Complainant. It has been alleged that it is clear that the sole purpose of the Respondent to enter into a new commercial relationship with the Complainant was to gain access to the Complainant's factory, its manufacturing processes and know-how, its network of suppliers, and its network of distributors – all in order to deceptively set-up and launch a parallel business passing off as the Complainant.

- 5.7. That the contents of the paragraph no. 4.6. *ibid* are false, frivolous and baseless, and are categorically denied. That it has already been stated and proven multiple times that the Respondent was merely a distributor of the Complainant. As explained in the Complaint, the Complainant never agreed to any joint venture between the parties, and therefore, the Respondent is put to strict proof of its assertion to the contrary.
- 5.8. That the contents of the paragraph no. 4.7. *ibid* are vehemently denied. The Act does not require the Complainant to send a legal notice to the Respondent prior to filing a complaint before the Commission. Moreover, the Complainant has approached all the relevant forum/authorities for redressal of its grievances, including this Commission and the Police.
- 5.9. That the contents of the paragraph no. 4.8. *ibid* are vehemently denied as false and baseless. That under the Constitution of Pakistan 1973, the right to business is subject to qualifications imposed by law, according to which the Respondent cannot engage in business in a manner that infringes the Complainant's goodwill and intellectual property. That the Respondent cannot claim a spurious joint venture with the Complainant and deal with the suppliers and consumers of the Complainant without its permission. It has been alleged that the Respondent has deceptively held itself out as an affiliate of the Complainant and has deceived customers of the Complainant in violation of Section 10(1)(a) of the Act.
- 5.10. It has been further alleged that the Respondent's use of the name "*Polygon Pakistan Plastic Company*" is phonetically very similar to the Complainant's name, i.e., "*Polycon Pakistan (Pvt.) Limited*", which is a clear violation of the Section 10(1) and 10(2)(d) of the Act.
- 5.11. That the contents of paragraph no. 4.9. *ibid* are denied and are clearly based on an erroneous reading of the Trade Marks Ordinance, 2001. It has been asserted by the Complainant that the Respondent evidently has no understanding of the trademark registration process. That the Respondent's trademarks have merely been advertised in the trade mark journal in order to invite objections to their registration and are not currently registered trademarks. On the contrary, the Complainant already possesses registered trademarks that are nearly identical to the marks the Respondent is seeking to register. That the Complainant is currently in the process of filing objections against both trademarks and shall submit evidence of the same to the Commission for its consideration.
- 5.12. That the contents of the paragraphs no. 4.10. and 4.11. *ibid* are vehemently denied. The goods under both classes (class 20 & 21) are of a similar nature.

ANALYSIS

- 6.1. As mentioned in para 1.3 above, the mandate of this enquiry is to determine whether, *prima facie*;
- a. the conduct of the Respondent *is capable of harming the business interest of another undertaking* such as the Complainant in violation of Section 10(1) of the Act in general and sub-Section 10(2)(a) in particular;
 - b. the Respondent is *disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis related to character, method of production, properties and suitability for use and quality of products* in violation of Section 10(1) of the Act in general and sub-Section 10(2)(b) in particular; and
 - c. the Respondent has engaged in *fraudulent use of another's trademark, firm name, or product labelling or packaging* in violation of Section 10(1) of the Act in general and sub-Section 10(2)(d) in particular.

FACTS OF THE MATTER

- 6.2. Prior to conducting the analysis of the findings of the enquiry, a brief summary of the factual background will be presented in this section.
- i. The Complainant was incorporated in 1986 and is involved in the production and sales of, *inter alia*, food grade vertical water tanks, shown below.



- ii. The Complainant sells its product line by using its “Super Tuff” logo, displayed below, which was registered with the IPO in 1991.



- iii. The Respondent was one of the dealers belonging to the distribution network of the Complainant.
 - iv. After May 2018, the Complainant decided to undertake the responsibility of distribution independently.
 - v. The Complainant has alleged and submitted evidence exhibiting the Respondent passing itself off as the Complainant itself or a “Joint Venture” between the two entities.
 - vi. In the reply, the Respondent did not deny publishing and distribution of the marketing material demonstrating the two entities as JV partners.
 - vii. The Respondent asserted that the two entities has agreed to form a JV, whereas no proof was submitted in this regard.
 - viii. Allegedly, in the process of passing off as the Complainant, the Respondent has distributed information to the consumers through various mediums, such as product packaging (copying trademark and artistic work of the Complainant), brochures, business cards, company profile and so on. Images of the relevant material has been reproduced in the preceding sections.
 - ix. Contents of the Market Survey Report (Please refer to **Annexure – B**)
- 6.3. In the subsequent discussion, analysis will be carried out as per the mandate of this enquiry.
- A. Whether, *prima facie*, the Respondent has engaged in fraudulent use of the Complainant’s trademark, firm name, product labelling and packaging**
- 6.4. Determining the above necessitates, *inter alia*, understanding a few concepts and laws pertinent to Intellectual Property (IP). Any form of ‘creative/artistic works’ created by an entity refers to IP, whereas the protection provided to the owners of such IP, are therefore, referred to as intellectual property rights (IPRs) which allows monopolistic use of that IP by such owners. Various forms of IPRs include copyrights, patents, industrial design rights, trademarks, and trade dress allotted to the creators and owners of IP.
- 6.5. Furthermore, as per Trademark Act, 1940, trademark has been defined as, “(l) “*trade mark*” means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person”.¹, where a mark is defined as, “(f) “*mark*” includes a device, brand, heading, label, any combination thereof;”². Therefore, a trademark is a distinguishable logo, design or expression, often

¹ http://www.acif.org.pk/Files/TradeMarkAct_1940.pdf

² http://www.acif.org.pk/Files/TradeMarkAct_1940.pdf

termed as a “brand” or “brand name”, which helps in differentiation of particular goods and services from their competing goods and services/competing brands.

6.6. Moreover, trade dress has been defined in the following words;

“Trade dress is the overall commercial image (look and feel) of a product that indicates or identifies the 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’.”³

6.7. In view of the above and Section 10(2)(d) of the Act, which prohibits fraudulent use of another’s trademark, firm name, product labelling and packaging/trade dress, the Respondent’s conduct pertinent to the matter at hand will be analyzed.

I. Passing Off as the Complainant’s Joint Venture (JV) Partner

6.8. As submitted above, the Complainant has been in business since the last thirty-three (33) years and has invested significant efforts into establishing its brand name while using the trademark logo of “Super Tuff”. Additionally, IPRs have also been procured for the same by the Complainant. Whereas the evidence submitted by the Complainant suggests that the Respondent indulged in passing itself off as a JV partner of the Complainant without its consent. The relevant marketing material of both the undertakings is reproduced below for ease of reference:



Respondent’s Business Card for the Supposed JV

³ <http://www.inta.org/TrademarkBasics/FactSheets/Pages/Trade-Dress.aspx>

THE ONLY FOOD GRADE WATER TANK IN PAKISTAN

سپرٹف واٹرٹینک

خریدتے وقت **SUPER TUFF** کا کنڈر شدہ فریڈ مارک ضرور دیکھ لیں

تقالوں سے ہوشیار رہنا مناسب قیمت کیل گنجائش

POLYCON ISO 9001-2000 Certified

VERTICAL TANK

HORIZONTAL TANK

LOFT TANK

DOUBLE PLY WATER TANK

THE ONLY FOOD GRADE WATER TANK IN PAKISTAN

سپرٹف واٹرٹینک

Special Features:
 UV Stabilized against Sun & Weather
 Seamless Construction & completely leakproof
 Easy to install. All brass fittings provided
 Corrosion-proof, rust proof, termite-proof
 Easy to clean, smooth surface
 Hygienic water storage. Germ free, odorless and algae free
 Strong but light weight. Capacity as embossed
 Comprehensive warranty. Competitive prices

Super Tuff Horizontal Tanks

Capacity in US Gallons	Length in inches	Width in inches	Height in inches
75	44	22	27
100	44	25	33
150	60	27	30
200	60	27	45
300	80	41	45

Super Tuff Vertical Tanks

Capacity in US Gallons	Diameter in inches	Height in inches
50	24	36
75	24	48
100	30	37
150	30	51
200	36	41
300	44	44
400	51	47
500	51	71
750	72	61
1000	80	81
1500	92	110
2000	100	110

Super Tuff Ribbed Double Ply Tanks

Capacity in US Gallons	Length in inches	Width in inches	Height in inches
75	44	22	33
100	44	25	40
150	60	27	37
200	60	27	44
300	80	41	44
400	80	41	56
500	80	41	72
1000	100	53	73

Super Tuff Loft Tanks

Capacity in US Gallons	Length in inches	Width in inches	Height in inches
100	36	36	30
150	48	36	30
200	48	36	30

POLYCON PAKISTAN (PVT) LTD.
 42/1, G-10/1, F-7/2, Sector 10, DHA Phase II, Karachi-75200, Pakistan
 Phone: (9241) 3504242-3504243, Fax: (9241) 3504242
 Email: info@polycon.com.pk, Website: www.polycon.com.pk
KARACHI OFFICE:
 40/2, 2nd Floor, Commercial Area, G-7, Opposite Moulana Azhari Public School, Phase-1, DHA, Karachi-75200, Pakistan
 Phone: (9241) 3504242-3504243, Fax: (9241) 3504242

TUV AUSTRIA
 ISO 9001 CERTIFIED
 ISO 14001 CERTIFIED
 ISO 22000 CERTIFIED

Complainant's Brochure (Left – Front/Right – Back)

سپرٹف واٹرٹینک

آپ کی اور آپ کی فیملی کی صحت کا ضامن

Since 1986

خریدتے وقت **SUPER TUFF** کا کنڈر شدہ فریڈ مارک ضرور دیکھ لیں

تقالوں سے ہوشیار رہنا مناسب قیمت کیل گنجائش

Special food grade polymer. UV Stabilized against Sun & Weather
 Seamless Construction & completely leakproof
 Easy to install. All brass fittings provided
 Corrosion-proof, rust proof, termite-proof
 Easy to clean, smooth surface
 Hygienic water storage. Germ free, odorless and algae free
 Strong but light weight. Capacity as embossed
 Comprehensive warranty. Competitive prices

POLYCON ISO 9001-2000 Certified

50 لیٹرن تک 5000 ڈالر تک

ITC SUPER TUFF POLYCON

TUV AUSTRIA
 ISO 9001 CERTIFIED
 ISO 14001 CERTIFIED
 ISO 22000 CERTIFIED

The Only Food Grade WATER TANK IN PAKISTAN

سپرٹف واٹرٹینک

RATE LIST

SUPER TUFF HORIZONTAL TANKS

Capacity in US Gallons	Dimension in inches	Retail Price
75	Length 44" Height 27", Width 22"	11,000
100	Length 44" Height 33", Width 25"	20,000
150	Length 60" Height 30", Width 27"	26,000
200	Length 60" Height 45", Width 27"	35,000
300	Length 80" Height 45", Width 41"	41,000

SUPER TUFF VERTICAL TANKS

Capacity in US Gallons	Dimension in inches	Retail Price
50	Diameter 24" Height 36"	6,975
75	Diameter 24" Height 48"	13,650
100	Diameter 30" Height 37"	10,500
150	Diameter 30" Height 51"	21,675
200	Diameter 36" Height 37"	27,675
300	Diameter 44" Height 44"	35,000
400	Diameter 51" Height 47"	36,070
500	Diameter 51" Height 77"	38,340
750	Diameter 72" Height 70"	61,670
1000	Diameter 80" Height 81"	80,350
1500	Diameter 92" Height 81"	107,850
2000	Diameter 100" Height 100"	140,650
2500	Diameter 102" Height 110"	190,500
3000	Diameter 150" Height 117"	480,000

SUPER TUFF WATER TREATMENT TANK

Capacity	Color	Price
500	White	40,000

SUPER TUFF LOFT TANKS

Capacity	Length	Width	Height	Price
100	36"	36"	30"	10,300
150	48"	36"	30"	22,800

ITC Joint Venture of **POLYCON PAKISTAN (PVT) LTD.**

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 407, DHA Phase II, Karachi-75200, Pakistan
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 Phone: (9241) 3504242-3504243, Fax: (9241) 3504242

Respondent's Brochure No. 1 (Left – Front/Right – Back)



Respondent's Brochure No. 2 (Left – Front/Right – Back)

6.9. As the Respondent did not deny the presence of these documents and no proof was submitted in support of its assertions that the two entities were in fact planning on forming an agreement, it appears that the Respondent did create the above material wherein it has repeatedly claimed to be a "Joint Venture of ITC and Super Tuff", where ITC can be termed as a logo of Irshad Trading Corporation – the Respondent and Super Tuff refers to the Complainant. While doing so, it can be clearly seen from the above images that the Respondent fraudulently used the trademark of the Complainant and a similar trade dress, including the text on the brochures, on the marketing material distributed by it. This was apparently done with the aim of gaining authenticity of its (fake) agreement and connection with the Complainant. In doing so, the Respondent is found to be involved in fraudulent use of the Complainant's trademark, trade dress and labelling in *prima facie* violation of Section 10(2)(d) of the Act.

II. Passing Off as the Complainant/its Authorized Retailer through Fraudulent Use of its Trademark

6.10. Furthermore, following observations were made during the market survey conducted by the Enquiry Committee.

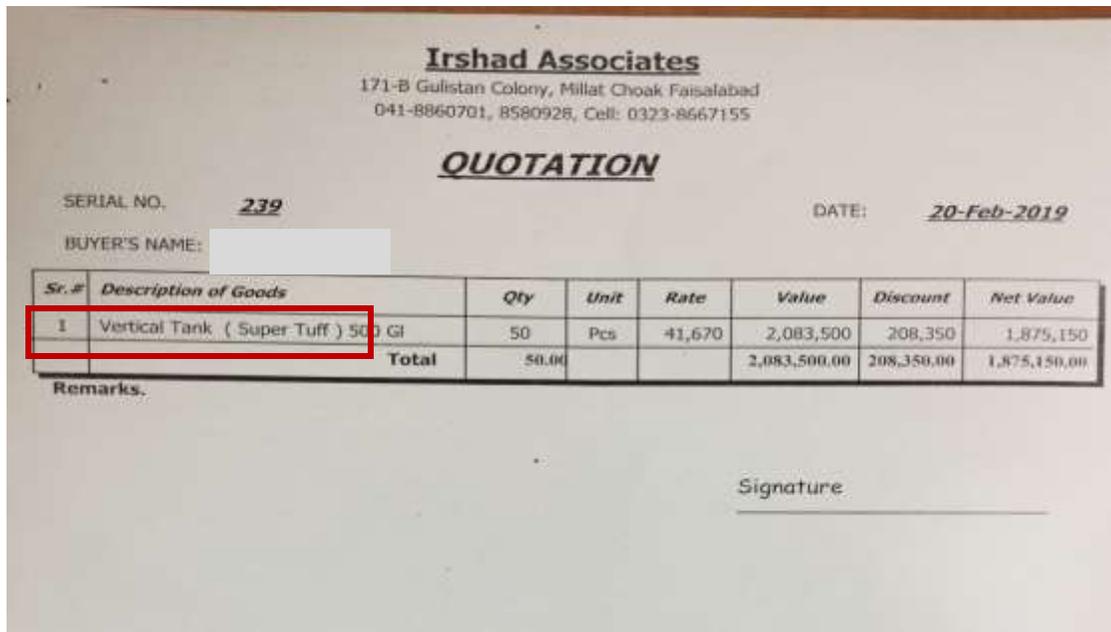


The above image is that of the Respondent's signboard outside its store which displays continued use of the Complainant's logo. Moreover, in order to gain further information from the Respondent, the following documents were procured from the Respondent.



Respondent's New Business Card (Left – Front/Right – Back)

- 6.11. The above images also show the continued use of the Super Tuff logo on the Respondent's new business card. The Respondent was further inquired whether it also supplies the Complainant's product, Super Tuff water tanks, to which it responded in affirmative. It was requested to draft a quotation for the same and the following was given to the Enquiry Committee.



- 6.12. It may be noted that even though the Complainant has claimed that it no longer supplies its products to the Respondent, the Respondent still claims to be one of the retailers of the Complainant among other brands, which further verifies its *mala fide* intentions and deceptive behavior. This infers that since the Complainant does not supply its Water Tanks to the Respondent, the Respondent now sells counterfeit products to consumers as well.
- 6.13. Finally, the Respondent provided the documents displayed above in the following envelope, which also contains the Super Tuff logo of the Complainant in its original form.



6.14. In view of the foregoing, it can be concluded that continuous use of the Complainant’s Super Tuff Logo on its marketing material without its due authorization, *prima facie*, amounts to fraudulent use of another’s trademark by the Respondent in violation of Section 10(2)(d) of the Act.

III. (a) Passing Off as the Complainant through Copycat Packaging/Fraudulent Use of Modified Version Trademark and Firm Name

6.15. Moreover, taking into consideration the latest marketing material of the Respondent, as submitted by the Complainant and verified by the Enquiry Committee through the market survey, it appears that the Respondent is now selling its products by using a slightly modified version of the Complainant’s logo, i.e., Super **Power** Tuff. Relevant images are reproduced below. It is important to note that the modified logo created by the Respondent is almost identical to that of the Complainant’s. The only alterations made by the Respondent addition of the term “Power” which has been placed in a smaller font size, where the overall look and feel of the brochures as well as water tanks is also similar to those of the Complainant’s.

6.16. It is also important to note that Super Tuff is a unique brand name for the product range of the Complainant and is not associated specifically with such products, i.e., water tanks in any manner, and hence, it cannot be claimed by the Respondent that it has been adopted by it due to its generic nature. This further reinforces the fact that the Super Tuff trademark, the term and the logo design, is the Complainant’s unique registered trademark which has been developed artistically and innovatively for its product line. Therefore, by making small variations to the logo, the Respondent is still involved if trademark infringement.



Complainant’s Brochure (Left – Front/Right – Back)



Respondent's Brochure (Left – Front/Right – Back)

- 6.17. Additionally, the Respondent has also printed name of the “supposed” firm name, i.e., **Polygon Pakistan Plastic Industry**, which is phonetically very similar to the Complainant’s firm name, i.e., **Polycon Pakistan (Pvt.) Limited**. Not only do Polygon Pakistan and Polycon Pakistan sound similar, but more interestingly, it does not make any sense for the Respondent to place this name on its brochure as the Respondent refers to its undertaking either with the firm name Irshad Trading Corporation (ITC) or Irshad Associates, whereas no association can be found between the Respondent and the supposed Polygon Pakistan Plastic Industry.
- 6.18. Likewise, it has been further observed that the Respondent has also used the similar logo on the Water Tanks as well, where the term “Power” is again negligible compared to the remaining Super Tuff logo. Therefore, it can be safely concluded that the Respondent is still, even while using a slightly modified version of the Complainant’s logo and other marketing material, trying to pass off as the Complainant. The same can also be observed on the Respondent’s products – Water Tanks.



Respondent's Water Tanks



Complainant's Water Tanks

6.19. Consequently, the Respondent appears to be involved in fraudulent use of another's trademark and firm name in, *prima facie*, violation of Section 10(2)(d) of the Act.

III. (b) Passing Off as the Complainant through Fraudulent Use of its Product Labelling and Packaging



Water Tanks at the Respondent's Store



Water Tanks Images on the Respondent's Company Profile

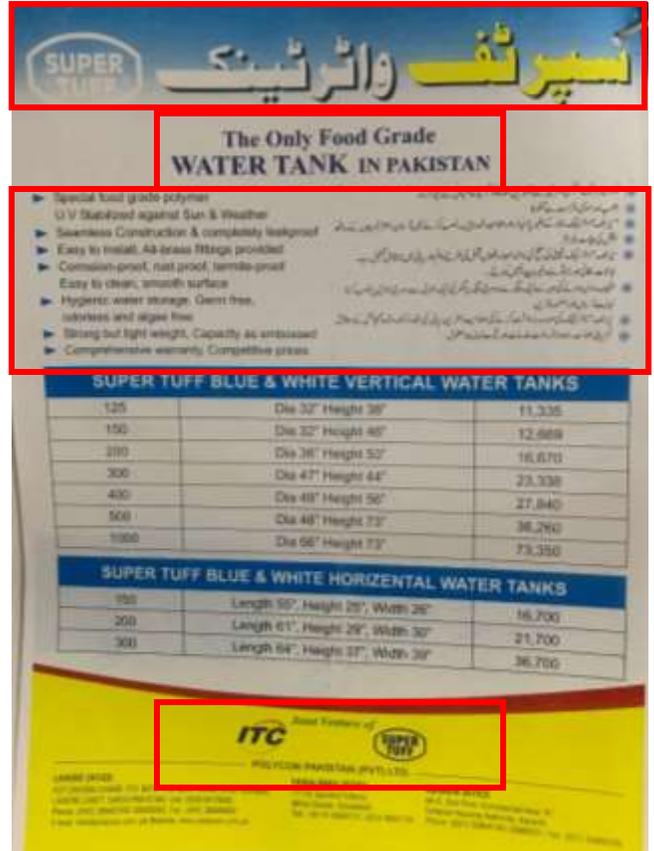


Complainant's Vertical Water Tanks

- 6.20. The above images include a photograph taken at the Respondent's store, its company profile procured during the inquiry and, to facilitate a comparison, the images of the Complainant's vertical Water Tanks. It can be seen that the Respondent is not only using a modified version of the Complainant's logo on its products and marketing material, but is also copying its trade dress on the same. The color combination, the font type and font colors, the image of triple tanks and their positioning, all display copying of the Complainant's trade dress by the Respondent. The same can be observed on the brochures. Consequently, the overall look and feel given by the Respondent's Water Tanks and other marketing material is similar to that of the Complainant's. It is also important to note that the Respondent has inserted the term "Power" into the logo in a much smaller and thinner font size compared with the remaining "Super Tuff" term. Consequently, it appears that the Respondent is doing so to maintain the consumer's focus on the term "Super Tuff" and ignore the term "Power" in between, in order to deceive them into believing that there is an association between the two undertakings, i.e., the Complainant and the Respondent.
- 6.21. Moreover, the text on the brochures highlighted below as well as other claims and marks such as the various quality related stamps/marks along with the text related to its quality has been clearly replicated on to the Respondent's brochures from the Complainant's brochures with Super Power Tuff logos. Similarly, it should be noted the font type, their placement, size and color combination of the text on the pamphlet give the look and the feel of the Complainant's pamphlets.
- 6.22. The relevant marketing material is reproduced below for ease of reference:



Complainant's Brochure (Left – Front/Right – Back)



Respondent's JV Brochure (Left – Front/Right – Back)



Respondent's New Brochure (Left – Front/Right – Back)

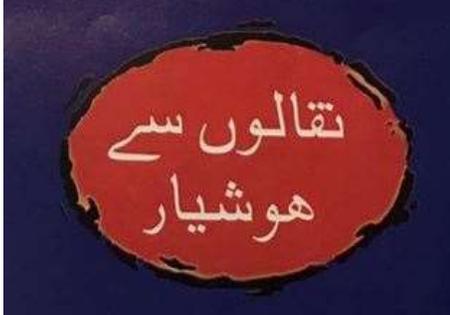
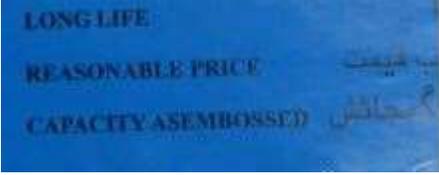
Whereas various claims, reproduced below, have all been copied directly from the Complainant's brochure.

- i. *The Only Food Grade Tank in Pakistan;*
- ii. *LONG LIFE*
- iii. *REASONABLE PRICE*
- iv. *CAPACITY EMBOSSED*
(In English and Urdu)
- v. *Khareeday waqt Super Tuff (Super Power Tuff by the Respondent)ka kuninda shuda trademark zarur daikhain*

6.23. The tag, "Since 1986" has been printed on the Respondent's brochure, however, 1986 is the year in which the Complainant was established. The pamphlet also shows firm name of the Respondent, ITC, which proves that the pamphlet belongs to the Respondent. It is further highlighted that the Respondent has also warned the consumers against the counterfeiters by printing the same warning in Urdu as the Complainant, i.e., "naqalon say hoshiaar – be careful of the counterfeiters", that too in the exact same color scheme and font, which makes its actions further deceptive.

6.24. The table below created by the Complainant displays a clear comparison of the Respondent's violations;

<u>THE COMPLAINANT</u>	<u>THE RESPONDENT</u>
	
	
	

	
	
	
<p>(The Complainat Company was incorporated in 1986)</p>	

6.25. The above table shows that the Respondent has copied the exact labelling of the Complainant and by placing the “since 1986” stamp, the Respondent is clearly trying to pass off as the Complainant.

6.26. It is hereby emphasized that with minute alterations made to the trademark, logo, trade dress, etc., the overall look of the products and their marketing material still remains the same and hence, the Respondent’s conduct is capable of misleading the consumers into buying the Respondent’s products while being in search of the Complainant’s products. Such behavior, where slight variations are made to the marketing material is referred to as “Parasitic Copying” or “Copycat Packaging”, and if proven, amounts to violation of Section 10(2)(d) of the Act.

6.27. In view of the above, it is stated that by creating negligible variances in the brand name, packaging/trade dress, brochures, etc., and by copying the exact text of the Complainant's brochures, the Respondent has engaged in, *inter alia*, Parasitic Copying/Copycat Packaging as well as fraudulent use of the Complainant's trademark, firm name, product labelling and packaging and thus, it appears to be involved in *prima facie* violation of Section 10(2)(d) of the Act.

B. Whether, *prima facie*, the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis related to character, method/origin of production, properties and suitability for use and quality of products

6.28. The Respondent, on its marketing material, has engaged in complete replication of the claims made on the Complainant's marketing material, however, without any reasonable basis. No evidence of use of high quality raw material or certification as per the brochures was submitted to the Enquiry Committee.

6.29. ***Joint Venture of ITC and Super Tuff*** – the Respondent had placed the statement, “joint venture of ITC and Super Tuff” without a reasonable basis. The Complainant out rightly denied existence of such a venture, whereas the Respondent had no proof in support of its claims. Therefore, by making such a statement is capable of deceiving the consumers as they would buy products from the Respondent thinking it to have some kind of a relationship with the Complainant. Resultantly, it can be concluded that by making such statements on its marketing material, the Respondent has entered into deceptive marketing practices for distributing false and misleading information to consumers in *prima facie* violation of Section 10(2)(b) of the Act.

6.30. ***The Only Food Grade Tank in Pakistan*** – the Respondent has copied this statement from the Complainant's brochure. The Complainant is obviously also making its water tanks with food graded material. Hence, the Respondent's claim that it is the “*only*” undertaking in the market manufacturing tanks out of this material appears to be false and thus, in violation of Section 10(2)(b) of the Act. Moreover, no cogent evidence has been submitted by the Respondent that it in fact uses Food Grade Material to produce the said water tanks and as a result, the Respondent's conduct constitutes to be distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks, in *prima facie* violation of Section 10(2)(b) of the Act.

6.31. **Quality Stamps/Marks** – the Respondent has also placed quality marks of various standard setting entities on its marketing material, including, *inter alia*, PSQCA, UKAS MANAGEMENT SYSTEMS – 063, CERTIFICATION INTERNATIONAL of ISO 9001: 2008, CI/15577, etc., without providing any proof in this regard. Therefore, it appears that the Respondent does not have any cogent evidence to support its conduct and therefore, it appears to be involved in distribution of information lacking a reasonable basis related to

character, method of production, properties, quality and suitability for use of its Water Tanks in *prima facie* violation of Section 10(2)(b) of the Act.

- 6.32. **Since 1986** – the Respondent has printed the date of the Complainant’s incorporation, whereas no evidence has been submitted proving that the former has also been involved in this business since 1986. Moreover, by placing the “*since 1986*” stamp along with indulging in Copycat Packaging, the Respondent is clearly trying to pass off as the Complainant. Therefore, the Respondent’s actions amount to distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks in *prima facie* violation of Section 10(2)(b) of the Act.

C. Whether, *prima facie*, the conduct of the Respondent is capable of harming the business interest of the Complainant

- 6.33. Finally, the overall conduct of the Respondent, i.e., distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks in *prima facie* violation of Section 10(2)(b) of the Act and fraudulent use of another’s trademark, firm name, or product labelling or packaging in *prima facie* violation of Section 10(2)(b) of the Act, is capable of harming the business interest of the Complainant by stealing its rightful customers, negatively affecting its sales and profits, and damaging its good will. Resultantly, as the Respondent’s conduct is capable of harming the business interest of the Complainant, the Respondent appears to be in *prima facie* violation of Section 10(2)(a) of the Act.

RECOMMENDATIONS

- 7.1. This enquiry report was aimed at examining the allegations of the Complainant. In view of the position stated in the preceding paras, it appears that the Respondent is fraudulently using the registered trademark of the Complainant, a similar firm name, labelling, trade dress and packaging. As a result, the Respondent has, *prima facie*, entered into deceptive marketing practices in terms of the provisions of Section 10(2)(d) of the Act Furthermore, by indulging in copycat packaging and copying of other text of the Complainant’s brochure, the Respondent has made various high sounding claims without a reasonable basis thereby, *prima facie*, violating Section 10(2)(b) of the Act. Finally, such conduct of the Respondent is also capable of harming business interest of the Complainant and hence, the Respondent has *prima facie* entered into deceptive marketing practices in terms of the provisions of Section 10(2)(a) of the Act.
- 7.2. As distribution of false and misleading information and IP infringement attracts the consumers into purchasing goods they might otherwise have not opted for gives the fraudulent undertakings an unfair advantage over the fair competitors and also harms their business. Thus, in the interest of general public at large, and ordinary consumer in specific, the undertakings which are involved in misleading and unfair trade practices must be

discouraged from selling their inferior products in a deceptive manner and they should also be directed to adopt such practices which are transparent and provide the consumers/customers true and correct information about their products.

- 7.3. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against Mr. Mian Muhammad Irshad, sole proprietor of M/s Irshad Trading Corporation, also operating as M/s Irshad Associates, under Section 30 of the Act.

(Faiz-ur-Rehman)
Deputy Director
Enquiry Officer

(Fatima Shah)
Assistant Director
Enquiry Officer