

# **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 DAIRY  
ASSOCIATION AGAINST M/S AT-TAHUR (PVT.) LIMITED FOR  
DECEPTIVE MARKETING PRACTICES**

**BY**

**Marryum Pervaiz, Riaz Hussain & Fatima Shah**

**Dated: November 15, 2018**



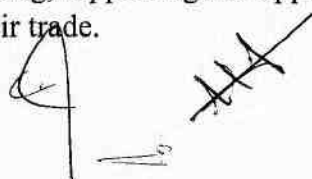
## 1. BACKGROUND

- 1.1 M/s Pakistan Dairy Association (the '**Complainant**') through its authorized representative i.e. AJURIS Advocates & Corporates Counsel filed a complaint on October 17, 2018, before the Competition Commission of Pakistan (the '**Commission**') u/s 37(2) of the Competition Act, 2010 (the '**Act**') against M/s At – Tahir (Pvt.) Limited (the '**Respondent**').
- 1.2 It was alleged in the complaint that the Respondent through its Facebook page by the name, 'Prema Milk', has been consistently disseminating false and misleading information to the consumers related to its product, Prema Milk (the '**Product**'). It was alleged in the complaint that the Respondent, by misrepresenting one of the Supreme Court's orders and various ensuing news articles pertinent to, *inter alia*, fitness of packaged milk and milk based products in the market, was concealing relevant information which could lead the ordinary consumer into believing that (i) the Product is the only milk brand safe for the consumption for humans in Pakistan (ii) tea whiteners are harmful for the health and (iii) powder milk is unsafe for children and can cause malnutrition in children. It was, therefore, submitted that such conduct of the Respondent was capable of harming the business interest 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 Ms. Marryum Pervaiz, Deputy 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 its findings and recommendations, *inter alia*, on the following;

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

## 2. COMPLAINT

- 2.1 The Complainant in its complaint made the following submissions:
- 2.2 That it is a conscientious corporate entity registered under Section 42 of the Companies Ordinance, 1984. It was established with the aim and objective to promote and undertake dairy and livestock sector related development activities and to consider and take legitimate steps necessary for starting, promoting, supporting and opposing and measure affecting the business of its members and their trade.



- 2.3 The members of the Complainant include, *inter alia*, Nestlé Pakistan Limited ('Nestlé'), Engro Foods Limited ('Engro'), DairyLand (Pvt.) Limited ('DairyLand') and Malmo Foods (Pvt.) Limited ('Malmo').
- 2.4 The Respondent is also a private limited company engaged in the production, supply and marketing of pasteurized milk and competing in the milk products market through its brand name 'Prema Milk'.

#### A. STATEMENT OF FACTS

- 2.5 The matter of Watan Party versus Government of Punjab etc. (Civil Petition No. 2374 – L/2016) was pending adjudication before the August Supreme Court of Pakistan (the 'Court') which pertained to *inter alia* the safety and standards of various brands of packaged milk products being sold in Pakistan. During the course of proceedings the Court directed various standard and quality assurance agencies of Pakistan to conduct tests on samples of both Ultra-High Temperature (UHT) and pasteurized milk of various brands.
- 2.6 It was clarified that the brands of Nestlé (including Nestlé 'MilkPak' and Nestlé 'NESVITA Calcium Plus'), Engro (including 'Olpers' and 'Olpers lite') and DairyLand (including 'Dayfresh UHT milk' and 'Dayfresh flavored milk') were UHT products as opposed to 'Prema Milk', which was pasteurized milk product.
- 2.7 It was also clarified that although Malmo produced and supplied pasteurized milk, Malmo was not a respondent before the Court in the aforementioned proceedings as it entered in the market subsequently. It was further stated that Nestlé, Engro and Malmo are engaged in the production of milk substitute products including, *inter alia*, 'Nestlé EVERYDAY' (tea whitener), 'Nestlé NIDO', 'Nestlé BUNYAD' (Dairy based formula), 'Tarang' (tea whiteners) and 'Dairy Omung' & 'Dayfresh' (dairy drink).
- 2.8 The Honorable Court through its order dated 08.12.2016 in the aforementioned matter have made certain observations regarding the reports submitted before it by various agencies. The reports are reproduced hereunder for ease of reference:

#### **"Reports submitted by Pakistan Council of Scientific and Industrial Research (PCSIR)"**

*Pursuant to the order dated 15.09.2016 and 16.09.2016, PCSIR has filed two sets of sealed reports about the analysis, which have been opened in the Court. However, the standards/guidelines have also been provided by the PCSIR on the basis of which analysis have been made. One report pertains to the UHT standardized milk which are six in numbers. Except Haleeb Milk, all samples of UHT milk tested by the said*



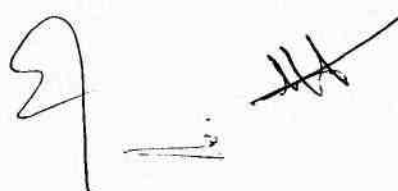
*laboratory were found fit for human consumption. Let a notice be issued to Haleeb Foods Limited to respond to the report submitted by the PCSIR.*

*Ten reports have also been submitted with regards to the pasteurized milk. Except 'Prema Milk' all other samples are found to be unfit for human consumption....*

**Report submitted by University of Agriculture Faisalabad (UAF)**

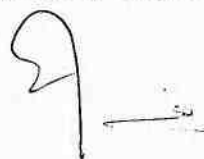
*UAF has also submitted its report before the Court. Out of seven UHT samples, all were found fit for human consumption."*

- 2.9 Through the aforesaid order dated 08.12.2016, the Court had directed for the matter to be relisted on 27.12.2016. At the time of passing the aforesaid order, the proceedings were ongoing and no conclusive findings had been given regarding the safety of the milk products under scrutiny by the Court.
- 2.10 During the ongoing proceedings the Court ordered further testing and through its order dated 09.03.2017, disposed of the case to the extent of certain milk brands, including milk brands of Engro, after receiving satisfactory reports in relation to them from the Punjab Food Authority (the 'PFA').
- 2.11 The Honorable Court stated in the order dated 09.03.2017 that "*As far as Prema Dairies Pvt Limited and Engro Foods Limited are concerned, as per the report PFA, the premises were inspected by its representative. Certain deficiencies were pointed out which have been removed. The test reports about the quality indicated that products of both companies are fit for human consumption*".
- 2.12 The matter is still pending final adjudication to the extent of other milk brands including Nestlé and DairyLand. In relation to the Nestlé the Court passed following order: "*As per the report submitted by PFA, the product of Nestlé is fit for human consumption. Yet we find expedient for our satisfaction to have this product analyzed by SGS Laboratories. Let sample be collected by PFA and sent for analysis as per the law and procedure.*
- 2.13 To the extent of DairyLand the Court had already observed through its order dated 27.12.2016 as follows: "*....learned counsel appearing on behalf of DairyLand Pvt. Limited states that the manufacturing unit of the DairyLand Pvt. Limited is situated in Sindh and as per report of all three analyzing agencies nothing impermissible violating the international protocols/standards has been found and this fact is supported by the Assistant Advocate General, Punjab and also Mr. Haider Rasul Mirza, Advocate Local Commission. We have been surprised that the physical inspection of the manufacturing unit has not yet been undertaken, however, learned counsel volunteers that has no*



*objection if some local commission preferably from Sindh is appointed so as to verify whether the unit is compatible to the international protocols/standards or not. Re-list"*

- 2.14 It was submitted that all the Nestlé products and milk substitute products were fully compliant with all the relevant laws and pass through stringent testing before supplied to the market. Strict internal quality control procedures were followed. It was further submitted that Nestlé conducted 27 tests on fresh milk which is received by it at its factories for processing. Each batch of finished products undergoes around 16 additional tests before being supplied to the market.
- 2.15 Furthermore, 29 additional tests are conducted by Nestlé Quality Assurance Center in Singapore randomly throughout the year. Nestlé has a very sophisticated milk quality testing equipment across the country and Nestlé Laboratories set up for such purpose have been accredited by the Pakistan National Accreditation Council as being compliant with ISO/IEC 17025:2005 standard.
- 2.16 Recently, external tests performed by renowned international and national laboratories established that Nestlé milk products were fit for human consumption. Tests regarding the quality of Nestlé's milk products includes the following:
- i). TUV SUD PSB Pte. Limited of Singapore tests report dated 23.12.2016.
  - ii). SGS Pakistan (Pvt.) Limited tests report dated 23.12.2016.
  - iii). Eurofins Global Control GmbH tests reports dated 23.12.2016.
  - iv). PCSIR Laboratories, Lahore tests reports dated 14.12.2016; and
  - v). Intertek test reports dated 06.03.2017
- 2.17 Nestlé is duly licensed for the production of UHT Milk, Juices, Cereals, NIDO and EVERYDAY pursuant to Section 11 of the Pure Food Ordinance, 1960 by the District Government Health Department. Nestlé's 'MilkPak' and Nestlé's 'NIDO Fortigrow' are licensed by Pakistan Standards and Quality Control Authority (the 'PSQCA') while Nestlé's 'Nesvita' and Nestlé's 'MilkPak' are also licensed by PFA.
- 2.18 Nestlé milk products are also certified by the Islamic Food and Nutrition Council of America. The safety and fitness of Nestlé production and storage of milk products, dairy tea whitener, UHT milk, infant formula and follow up formula amongst other products are also compliant with ISO 9001: 2015, ISO 14001: 2005, OHSAS 18001: 2007, ISO 22000: 2005, ISO TS 22002-1: 2009, FSSC 22000 standard as certified by Bureau Veritas Certification Holdings SAS-UK.
- 2.19 The Complainant further submitted that Engro, DairyLand and Malmo are also licensed by the PSQCA for the use of the Pakistan Standard Mark. Products of the Engro which are licensed include, 'Olpers Lite', 'Dairy Omung', 'Tarang' and 'Tarang Elaichi'. Products of DairyLand which are licensed include, 'Day Fresh', 'Day Fresh (low fat)'





and 'Day Fresh (flavored milk)'. The products of Malmo licensed by PSQCA include 'Malmo milk' (Pasteurized), 'Every Time' and other flavored milks. The licensed granted by PSQCA certify the compliance of the aforesaid products with the Pakistan Standard for the relevant products.

- 2.20 The PFA on 25.04.2017 published a 'public notice' on its website (<http://www.pfa.gop.pk/important-public-message/>) stating that ISO-17025 certified laboratories PCSIR, SGS and Intertek had undertaken tests on milk samples obtained from specified milk brands considering chemical, biological and physical parameters. It was stated that the samples procured from the listed brands were declared as fit for human consumption by the aforesaid laboratories. The listed brands contained Olpers Tetra Pack, Nestlé MilkPak, Nestlé NESVITA, Day Fresh Pasteurized milk and Malmo Pasteurized milk at serial number 1,4,5,9 and 12 respectively.

## B. SUMMARY OF CONTRAVENTION

- 2.21 The Complainant alleged that soon after the pronouncement of order dated 08.12.2016, the Respondent through its Facebook page by the name of 'Prema Milk' (<https://www.facebook.com/PremaMilk/>) started to disseminate false and misleading information with the ulterior motive of making inroad into the market share of other milk brands. The purpose was to create a false perception in the consumer market that apart from Prema Milk all other brands of milk had been declared unfit for human consumption by the Honorable Court. Some of the contents published and promoted by the Facebook page of 'Prema Milk' in pursuance of such unlawful agenda are detailed below:

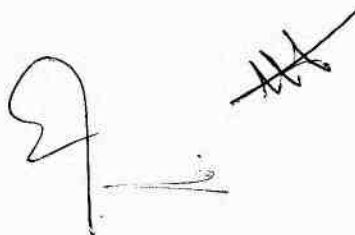
- i. The post of 15.12.2016 states;

*"AlhumdulilAllah "Except PREMA Milk, all other samples are found to be unfit for human consumption": source supreme court".*

- ii. Another post was shared on 28.12.2016 which stated;

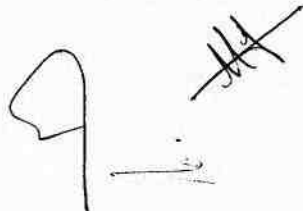
*"The report on pasteurized milk said all samples, except Prema Milk, was found to be unfit for human consumption.": Source: Dawn.com" this quote was followed by hash tags such as "#BringPurityBack #SayNotoUHT#ChoosePasteurizedMilk...."*

- iii. On 16.01.2017 a 32 second video was posted wherein Hamid Mir (an anchorperson) stated that PCSIR conducted chemical tests on many samples of milk on the order of the Court and that no other samples apart from Prema Milk was able to pass such testing.



- iv. A further post was shared on 31.01.2017 which contained an image wherein an article of Dawn News was reproduced in a small and obscure font. On one side of the reproduced article a quotation from the article was selectively reproduced in a much larger font size and in bold letters stating that **"only Prema milk was found safe for consumption"**.
- v. The post shared on 11.07.2017 states, **"Tea whiteners are not safe for consumption"** and is accompanied by an image with dark backdrop and an image of an article from Dawn News superimposed on it along with a quote from the same article having been separately reproduced above the article. The quotation reproduced stated *"Samples of the pasteurized milk brands were tested by the council of which only Prema Milk was found fit for human consumption."* With regard to the image of the reproduced article the headline is the most visible content of the entire post and states *"Tea whiteners are not safe for human consumption"*. The remaining article is illegible. The aforesaid reproduced quotation, reproduced along with the illegible portion of the article, is in black letters on white backdrop. But the legible misleading headline is for more conspicuous than the separately quoted and reproduced portion.
- vi. On 19.08.2017 a video was posted along with a caption stated *"Don't compromise your child's health, follow nature's way of health, hygiene and purity only buy fresh pure milk for your family. At Prema we care for your family's well-being and are committed to provide you quality fresh pasteurized milk which is why **we were the only milk observed to be fit for human consumption** by the Honorable Court #powderedmilk #milk #health #premamilk"*.
- vii. The accompanying video contained a 42 second long newsbreak by Tehlka News where the anchor quoted UNICEF Pakistan report according to which 44% of Pakistani children were not getting sufficient nutrition due to powdered milk. The anchor goes on to make the false and misleading claim that as per the report 44% children in Pakistan were not getting sufficient nutrition for their mental and physical well-being due to powdered milk.
- 2.24 The Complainant alleged that in the continuation of the posts shared as mentioned in paragraph 2.23(i) to paragraph 2.23(vii) above, the Facebook page of 'Prema Milk' continued to conduct deliberate and unlawful campaign of deception by portraying the order dated 08.12.2016 of the Court out of context while interacting with the general public through its comments underneath the above referred post, dated 15.12.2016. A general member of the public by the name of Muhammad Faizaan Warraich responded to the post and clarified the correct factual position of the facts by stating that;

*"Prema Milk you should read the report carefully there is difference in reports submitted by each lab, And all UHT milk were fit for drinking except haleeb"*.



In response to this comment, the page of 'Prema Milk' stated;

*"Dear Haleeb employee, you need to read the reports again specially the UVAS one...."*

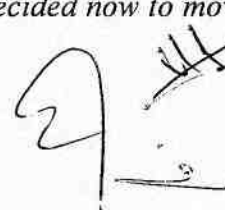
- 2.25 Furthermore, the Respondent also issued an undated trade letter which stated the following;

*"Except PREMA milk, all other samples are found to be unfit for human consumption- As per report presented to apex law authority by Pakistan Council of Scientific and Industrial Research (PCSIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF)."*

- 2.26 The Complainant submitted that on the basis of the above mentioned contraventions, the Respondent is engaged in anti-competitive behavior which is a violation of Section 10 of the Act.
- 2.27 The Complainant further submitted that it has been held in the case of M/s China Mobile Pak Limited vs. M/s Pakistan Telecom Limited that *"the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer'"*, who has been distinguished from the reasonable consumer. It has also been held in the case of International Harvester Co., 104 F.T.C. 949 at pg. 1058, that *"it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression..."*.
- 2.28 The Complainant alleged that the Respondent through its Facebook page Prema Milk has been consistently engaged in disseminating false and misleading information to consumer which eventually leads the ordinary consumer to believe that:
- (i) Prema Milk is the only milk brand safe for consumption by humans in Pakistan;
  - (ii) Tea whiteners are harmful to the health; and
  - (iii) Powder milk is unsafe for children and cause malnutrition in children.

The omission in disclosure and the implied impression conveyed through the aforesaid representation are of such nature that they are likely to be deceptive even for a sophisticated consumer, leave alone the 'ordinary consumer'.

- 2.29 The Complainant emphasized that the nature of the behavior was such that it had influenced customers in favor of the Product as was evident from comments received under such false representation on its Facebook page. Mr. Awais Umer in response to Prema Milk's post of 16.12.2016, commented, *"I decided now to move from Olpers to*



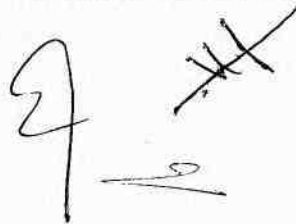


*Prema*” and Muhammad Naeem’s comment under the same post stated, “*Ager sirf yahe approved ha to baqi companies ko band karna chaye aur saza dine chaye*”. Such sentiments received on the false and deceptive representation of Prema Milk reveals that the aforesaid false and misleading representations are capable of harming the business interests of other undertakings and are also capable of affecting the decision of a consumer to enter into a transaction.

- 2.30 The Complainant alleged that there is grave risk of serious and irreparable damage not only to the goodwill and market share of the members of the Complainant, but also to other undertakings competing in the milk and milk substitutes market. Therefore, it would be in public interest to prevent the Respondent from continuing to deceive the general public during the pendency of any proceedings that may be initiated by the Honorable Commission.
- 2.31 In view of the above stated facts and circumstances, the Complainant respectfully prayed the Honorable Commission for the following reliefs:
- i. Proceedings may please be initiated against the Respondent for contravention of Section 10 of the Act;
  - ii. Proceedings may please be initiated without further inquiry envisaged by Regulation 22(2) of the Competition General Enforcement Regulations, 2007;
  - iii. Initiation of proceedings under Section 32 of the Act;
  - iv. The Respondent may further be directed to remove all such content as referred above on any platform under the direct or indirect control of the Respondent.

### **3 COMMENTS OF THE RESPONDENT**

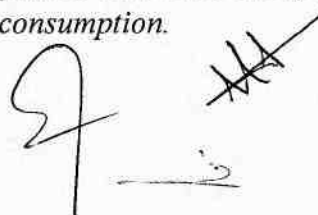
- 3.28 The complaint along with its annexures was forwarded to the Respondent for comments vide letter dated November 10, 2017. The Respondent through its legal counsel, Ali & Ali Barristers and Corporate Consulate, vide his letter, requested for an extension in time of four (4) weeks to file the comments. The Respondent was given an extension till December 07, 2017.
- 3.29 The Respondent filed its reply which is summarized as under:
- 3.30 The Respondent in its reply submitted that it was established in 2007. The Respondent is owner/proprietor of the brand name/trademark ‘Prema Milk’ which was launched in 2008. The Respondent has imported heifers from Australia and Netherland to produce milk at the state of the art dairy facilities where the Product is pasteurized and packed using a fully integrated and an internationally compliant “cow to consumer process”.



- 3.4 The product is processed and packed under strict hygienic conditions and are also ISO and Halal Certified. It has all the requisite approvals and licenses, including PFA and PSQCA.
- 3.5 The complete distribution network of the Product is controlled by the Respondent from cow feeding till distribution to the ultimate consumers. The distribution network of the Respondent comprises of the Central region and North region up to AJK. The Respondent is all set to expand its network to various satellite towns and cities all over the territory of Pakistan.
- 3.6 The Respondent further submitted that the consumer of the Product is a discerning and informed individual who is aware that the Product is a pasteurized milk brand. The consumers knows that the process required for pasteurization and the fact that the milk needs to be consumed within a number of days of purchase of the product. Pasteurization is the process of heating milk up to between 70 and 80 degree Celsius for a few seconds and then quickly cooling it down to eliminate certain bacteria.
- 3.7 In contrast UHT is a process whereby milk is heated to 280 degree Fahrenheit. This processing results in a shelf life that can extend up to nine months. Milk treated with pasteurization is labeled as 'Pasteurized', whereas milk treated with UHT is labeled as 'Ultra Pasteurized'. Therefore, the processes are fundamentally different with respect to pasteurized and UHT milk.
- 3.8 It was further submitted that the consumers who purchase pasteurized milk are aware of the difference in taste, shelf life and thickness of milk, amongst other factors. Whereas, purchasers of UHT milk are aware of the fact that the UHT milk has longer shelf life than pasteurized milk, and may be consumed slowly, as compare to pasteurized milk. Therefore, the customers of both milk brand have fundamentally different tastes and interests with respect to their products.
- 3.9 It was submitted that the Respondent's Product is a pasteurized milk product, whereas the members of the Complainant, including Nestlé, Engro and DairyLand are UHT milk brands. The Court through its various orders directed, *inter alia*, PCSIR to analyze the content/samples of both pasteurized and UHT milk and prepare reports. Accordingly, one report was prepared by PCSIR with respect to UHT milk and ten reports with respect to pasteurized milk. The reports, which have been summarized in the Supreme Court Order dated 18-12-2016, *inter alia*, states as follow:

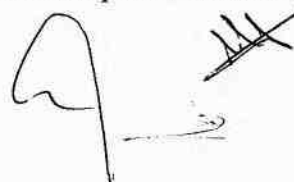
*"One report pertains to the UHT standardized milk samples which are six in numbers. Except Haleeb milk, all samples of UHT milk tested by the said laboratory were found fit for human consumption....*

*Ten reports have been submitted with regard to pasteurized milk. Except PREMA mail all other samples are found unfit for human consumption.*



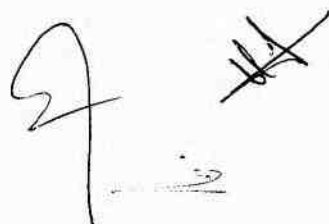
In addition, a report was also submitted to by UVAS to the Court, pursuant to the order dated 15.09.2016 and 16.09.2016. According to them, heavy metal components were found in UHT standardized milk samples of DairyLand's "Dayfresh", Haleeb's "Haleeb Milk" and Nestlé's "MilkPak" which was indicative of facts that further findings were required to ascertain purity of these milk brands.

- 3.10 Accordingly, notices were issued to the undertakings who were the manufacturers of pasteurized milk and whose products were found unfit for human consumption. Notices were also issued to UHT milk brands which were found acutely unfit for human consumption. Thus, the Court order dated 18.12.2016 was quite unequivocal and clear in the category of Pasteurized milk which concluded that Prema Milk was the only brand fit for human consumption. Furthermore, an ordinary person on a bare reading of the Court order can clearly make the distinction between the reports submitted and notice taken on Pasteurized and UHT milk brands products.
- 3.11 It was thus, reiterated by the Respondent that the Court declared that except Haleeb Milk, all samples of UHT brands were fit for human consumption. However, with respect to Nestlé, the Court for its satisfaction directed to analyze tests of the product from SGS laboratory. The hearings before the Court are still ongoing and no conclusive findings have been made except this that Prema Milk was the only brand declared fit for human consumption in pasteurized category.
- 3.12 It was, therefore, submitted that the complaint against the Respondent was against the law as well as facts of the case at hand and thus, should be set aside on the following basis that:
- i. It was filed in bad faith and on irrelevant grounds;
  - ii. It was in contradiction to the Constitution of Islamic Republic of Pakistan and the fundamental rights protected therein; and
  - iii. It was in contradiction to the provisions of the Act.
- 3.13 The Respondent further submitted that the matter was currently pending adjudication before the Supreme Court pertinent to the quality and suitability of use of all milk brands, thus rendering this complaint as premature.
- 3.14 It was alleged that the Complainant had no *locus standi* to file a complaint with the Commission as it had been established as a Section 42 Company under the (now repealed) Companies Ordinance, 1984, which was comprised upon, *inter alia*, Nestlé, Engro, Dairyland and Malmo. Consequently, it was submitted that the Complainant was neither the aggrieved nor the appropriate party to launch a complaint, considering it had a distinctive identity compared to that of its individual members. It was, hence, asserted that the various members should have filed a complaint in their individual capacities



who were dominant market players with considerable funds at their disposal, rather than taking cover of an entity which was operating as a not for profit organization.

- 3.15 Moreover, the Complainant's Memorandum of Association did not appear to grant it the power to initiate such an action before the Commission and therefore, the complaint was frivolous, vexatious and liable to be stricken off.
- 3.16 It was further submitted in this reference that the Chairman of one of the members, Nestlé, was in fact also serving as the Chairman of the Complainant, naturally resulting in conflict of interest. The Complainant was biased towards the business interests of its members, where the latter, being dominant market players, disguised themselves behind the cover of a non-profit organization. As a result, it was alleged that the only ulterior motive of the Complainant behind the said complaint was to damage the goodwill of the Respondent which was further elevated as the leader of the pasteurized milk brands due to the Order held by the Supreme Court.
- 3.17 Taking reference of Section 3 of the Act, the Complainant alleged that the Complainant held a dominant position in the market which it was abusing by excluding the Respondent from joining the Complainant as well as by filing the said complaint against the Respondent in order to restrict competition.
- 3.18 Furthermore, it was submitted that even otherwise the Respondent is part of the dairy sector which the Complainant is liable to safeguard and hence, the Complainant is in fact acting against business interests of an entity it has been established to protect. This conduct, therefore, reflected the *mala fide* intent of the Complainant which was merely safeguarding business interests of a self-serving cartel holding a dominant market position. Consequently, it was submitted that the complaint was malicious and hence, should be dismissed.
- 3.19 Moreover, it was stated that as per Regulation 19 of the Competition Commission (General Enforcement) Regulations, 2007, in order to file a complaint, an undertaking is bound to pay a fee of Rs. 50, 000, which the members of the Complainant had evaded by using the platform of the Complainant, thereby deeming the complaint to be rejected.
- 3.20 The Respondent vehemently denied all allegations submitted by the Complainant stating that it was ludicrous for the Complainant to suggest that the former's Facebook marketing campaign was deceptive and misrepresented the Order of the Supreme Court, a matter which is in fact currently *sub-judice*. The Respondent had only made factual claims that only its brand was deemed as fit for human consumption in the category of pasteurized milk, as declared by the Supreme Court, without distorting its actual statements. Finally, that any other inference was only a reflection of ill-justified distrust and suspicion on behalf of the Complainant.





3.21 A reference was given of Section 10 of the Act and the explanation of the terms "*false and misleading*" provided in the orders pertinent to the matter of M/s China Mobile Pak Limited and M/s Pakistan Telecom Limited was provided. The assertions made in the complaint alleging the Respondent of indulging in deceptive marketing practices were vehemently denied. It was stated that the Facebook page marketing campaign of the Respondent was clearly referencing the judgement of the Supreme Court stating that only the Respondent's brand, Prema Milk, was fit for human consumption. That the said campaign at no point has disseminated that the judgement deemed other milk samples as unfit for human consumption. Few extracts of the posts are presented below:

- i. The latest post on the Respondent's Facebook page, dated 14.11.2017, states;

*"Prema Milk is the only pasteurized milk of Pakistan which is manufactured according to international health standards and was found by the Supreme Court to be the only healthy and hygienic pasteurized milk for human consumption"*

The above excerpt proved that there was no ambiguity in the Facebook campaign with regard to the actual meaning of the Supreme Court's judgement.

- ii. The Facebook post, dated 15.12.2016, states "*Except PREMA Milk, all other samples are found to be unfit for human consumption: source Supreme Court*", which is the exact verbatim used by the Honorable Court in the relevant case proceedings and is also currently a *sub-judice* matter. Furthermore, it was alleged that a hyperlink to the complete court order was also provided right next to the claim which can be access by the consumers at any time, giving them a clear picture of the said statement.

- iii. Moreover, it was submitted that apart from that, whoever accessed the Respondent's Facebook page would view the latest post, dated 14.11.2017, which provided clarification pertinent to the category of the milk the said Order was referring to. It is ridiculous to assume that the impression of Prema Milk being the only safe milk brand amongst all other milk brands in the market was given in the Facebook posts as the source was clearly mentioned and the said order was also present on the Respondent's website. Consequently, the meaning of the Respondent's Facebook posts is clear and is also absolutely true.

- iv. In reference to the Facebook post stating, "*The report on pasteurized milk said all samples, except Prema Milk, were found unfit for human consumption – source: Dawn.com*", it was alleged that the Complainant's





plaint pertinent to the clear reference made to pasteurized milk as an insufficient disclosure was highly unreasonable as no reason was given in this regard either. It is further unreasonable to assume that the ordinary consumer could not differentiate between UHT and pasteurized milk. The Complainant's assertion that an ordinary consumer would not be able to apply prudence in such decision making is also not true.

- v. It was further submitted that with respect to the hashtag, "#SayNotoUHT" used on the said post, it had been incorrectly assumed that it was giving the impression that the report had deemed the whole UHT category milk as unfit for human consumption. The Respondent was merely making that claim in light of the various scholarly articles which associate various health issues with UHT milk when compared to pasteurized milk. Various scholarly articles were shared in this regard demonstrating health issues associated with use of UHT milk compared to ordinary milk.
- vi. In addition, in reference to the Respondent's Facebook post, dated 11.07.2017, which had highlighted observations made in a Dawn News article stating, "*Tea whiteners are not safe for human consumption*", the Complainant had alleged that use of the said statement was deceptive. In this regard the Respondent submitted that firstly, the statement was a quote of the Director of PSQCA who is a reliable authority on the matter. The quote was taken from a reputable and independent news source, i.e., Dawn News and if the Complainant had grievances in regard to this statement, the issue should be taken up with the relevant parties, without putting unfair onus on the Respondent.
- vii. Furthermore, it was submitted that it was a well-established scientific fact that various health issues had been identified with tetra pack milk and tea whiteners. This assertion was also referenced with a scientific study on the matter. Additionally, it was submitted that the World Health Organization (WHO) has also declared that "*solid or semi-solid food intended for infants cannot be considered as a substitute for breast milk and hence, should not be marketed*".
- viii. It was, therefore, submitted that the assertion that tea whiteners compared to pasteurized milk may be harmful for health was backed by reasonable scientific basis and hence, it is a true fact that was conveyed to the consumers to help them in making an informed decision.

3.22 The Respondent also averred that in addition to the aforementioned arguments, its posts still were not deceptive as they were in fact true. The content of the post declaring Prema

as the only brand fit for human consumption was the exact excerpt of the Supreme Court's Order and that the Complainant itself had construed it in a narrow manner.

- 3.23 It was alleged that the US Courts demand proof of actual deception in case a true, but possibly misleading statement was made. In this reference, various US court orders were referred. Whereas it was submitted that the Complainant had not provided any proof whatsoever in this regard. Moreover, the Respondent stated that even as per Article 117 of the Qanun-e-Shahadat Order, 1984, the burden of proof was on the Complainant which it had failed to provide. Therefore, it was submitted that the complaint should be dismissed for being frivolous.
- 3.24 The Respondent stated that it was admitted in the complaint itself that one member of the general public by commenting on the Facebook post had made a clarification regarding the difference between UHT and pasteurized milk under the various referenced Facebook posts. This was in contradiction to the Complainant's assumption that the ordinary consumer is unaware of this difference and does not understand the actual meaning of the excerpt of the SC Order, consequently deeming it capable of deception.
- 3.25 In response to the Complainant's claim that the said Facebook posts would be deceptive even for well-informed consumers let alone ordinary consumers, the claim was criticized on the following grounds:
- i. Whether the consumer in this case was gullible or sophisticated could be determined on the basis of the unique context of the case.
  - ii. The Commission through its precedence makes this distinction based on the fact that an ordinary consumer does not have the time and resources required to make a well-informed and rational decision and hence, the undertaking has the responsibility to ensure that no false or misleading information is distributed.
  - iii. Whereas, it was submitted, that in this case, a reasonable basis was present in the form of the Supreme Court Order.
  - iv. The Respondent's customer was a reasonably sophisticated consumer who could interpret the extracts of the Order in the right manner, i.e., the claim was only in reference to pasteurized milk.
  - v. An order held by the Court of Justice of the European Union considers "*average consumer*" as someone "*who is reasonably well informed and reasonably observant and circumspect*".
  - vi. The above view is necessary to consider as the viewers of all the referred Facebook posts were required to "like" the Respondent's Facebook page before they could access it and thus, indicate that they were knowledgeable consumers who understood the difference between pasteurized and UHT milk as well as the context of the posts quoting the Supreme Court's orders.

Therefore, rendering Complainant's assertion of the Facebook campaign being deceptive for an ordinary consumer is unreasonable and presumptuous.

- vii. Another research on "*Effects of Deceptive Advertising on Consumer Loyalty in Telecommunication Industry of Pakistan*" was referred which concluded that consumers were able to distinguish between the services offered and services received from cellular companies. Thus proving that the Pakistani consumer was not as naive as claimed by the Complainant and in fact, understood the nature of Prema milk and true meaning of the Facebook posts.

- 3.26 It was finally submitted that according to the Supreme Court of Pakistan, probability of deception was to be judged considering that the consumer was of average intelligence who had reasonable apprehension and proper eyesight and it at least "*observes prima facie facts, floating on the surface and not those who do not take care even to look at them.*" Therefore, certain due diligence was also expected from the ordinary consumer who would accurately comprehend the actual meaning and context of the Facebook posts quoting the Supreme Court's order without getting deceived by an otherwise true statement that Prema milk was indeed declared as the only brand of pasteurized milk as fit for human consumption.
- 3.27 Reserving the right to provide additional grounds in its favour pertinent to this case, the Respondent prayed that:
- i. The complaint be rejected on the basis of it being frivolous and vexatious
  - ii. Any other relief that the Commission may deem fit to be extended to the Respondent
- 3.28 The Respondent's reply was forwarded to the Complainant for its rejoinder vide letter dated December 12, 2017.

#### **4. REJOINDER BY THE COMPLAINANT**

- 4.1 The Complainant's rejoinder to the Respondent's reply was received through letter dated December 26, 2017. The rejoinder contained para-wise comments to the reply as summarized below:
- 4.2 The initial information pertinent to the details of the Respondent's company was neither denied nor admitted for want of knowledge. Whereas with respect to the PSQCA certification of the Respondent's company, it was highlighted that as per the documents submitted by it, the license appeared to be expired.
- 4.3 The Complainant submitted that it was presumptuous of the Complainant to assume the high level of understanding and caution of the consumer of Prema milk which was not

backed by any cogent evidence. It was further highlighted that even then, the intelligence of consumer of Prema milk alone was not the basic matter at hand, rather all consumers of milk were under consideration in this case.

- 4.4 Reference was made to the definition of 'pasteurization' developed by the International Dairy Foods Association according to which it is defined as *"the process of heating every particle of milk or milk product, in properly designed and operated equipment, to one of the temperatures given in the following chart and held continuously at or above that temperature for at least the corresponding specified time:"*<sup>1</sup>

Temperature	Time	Pasteurization Type
63°C (145°F)*	30 minutes	Vat Pasteurization
72°C (161°F)*	15 seconds	High temperature short time Pasteurization (HTST)
89°C (191°F)	1.0 second	Higher-Heat Shorter Time (HHST)
90°C (194°F)	0.5 seconds	Higher-Heat Shorter Time (HHST)
94°C (201°F)	0.1 seconds	Higher-Heat Shorter Time (HHST)
96°C (204°F)	0.05seconds	Higher-Heat Shorter Time (HHST)
100°C (212°F)	0.01seconds	Higher-Heat Shorter Time (HHST)
138°C (280°F)	2.0 seconds	Ultra Pasteurization (UP)

In light of the above, it was, therefore, stated that UHT milk also fell in the category of 'pasteurized milk' and hence, even an aware consumer could consider UHT being one of the forms of pasteurized milk.

- 4.5 The comments of the Respondent were out rightly rejected by the Complainant stating that 'pasteurized' and 'ultra-pasteurized/UHT' milks were both essentially packaged milk products. It was claimed that where the consumers of packaged and unpackaged milk might be differentiated, however, it was an unreasonable assumption that even the consumers within the packaged milk market were fundamentally different. In this regard, it was alleged that the participants of all packaged milk products were primarily concerned with fitness of the milk, whereas the difference in the preferences was

<sup>1</sup> <http://www.idfa.org/news-views/media-kits/milk/pasteurization>

primarily based on the taste, texture, shelf life, etc., and the suggestion that these factors create a significant difference was untenable.

- 4.6 Furthermore, the Complainant rejected the Respondent's claim that based on the difference in the expiry date of the two types of packaged milk made consumers aware of all the technicalities of the two product categories. Without conceding to this point, it was submitted that even then, the relevant consumer in this case was the general consumer of milk rather than restricted to that of the Respondent's.
- 4.7 The Complainant further submitted that in contrast to the Respondent's statements, the Complainant's members included Malmo Foods (Pvt.) Ltd. as well as DairyLand which produced pasteurized milk as well. It was added that the latter's pasteurized milk brand, Dayfresh was also declared fit by PFA through its public notice. Moreover, certain contents of the complaint, reproduced herein in paras 2.8 to 2.15 *ibid*, were reiterated.
- 4.8 In refutation of the Respondent's assertion, the Complainant presented that upon reading the Supreme Court's order dated 08.12.2016, that too in isolation of its later orders dated 27.12.2016 and 09.03.2017, the actual facts and context of the matter could not have been discerned. The Complainant, once again, reiterated to certain contents of the complaint, reproduced herein in paras 2.8 to 2.15 *ibid*.
- 4.9 The contents of the reply reproduced in para 3.11 *ibid* were denied by the Complainant and contents of paras 2.8 to 2.15 *ibid* were reiterated.

#### **COMMENTS ON THE GROUNDS OF REJECTION OF THE COMPLAINT BY THE RESPONDENT**

- 4.10 The Respondent's reply reproduced in para 3.12 *ibid* was vehemently denied on the following basis:
- i. The Respondent's allegations were declared vague and baseless and hence denied.
  - ii. It was submitted that it was an established law that the burden of proof is on the accusing party. The Respondent was being accused of violating a law and could not escape the allegations by using irrelevant consideration like eligibility of the Complainant in filing the complaint. Even otherwise the Commission has the power to take a *suo motto* action against such violations.
  - iii. The contents of the response were denied on the basis that no provision of the law were identified by the Respondent that were purportedly being contravened. That the complaint was well-reasoned and violation of Section 10 of the Act by the Respondent were thoroughly justified in the complaint.
- 4.11 The Complainant denied the contents of para 3.13 *ibid* on the basis that while the matter was still pending adjudication generally, however, the final rulings pertinent to Engro



Foods (Pvt.) Ltd. had already been issued in the order dated 09.03.2017, as evidenced in the complaint. The Respondent's allegations were legally flawed and that the Respondent had either failed to understand the basic notion of the complaint or was intentionally attempting to misguide the Commission. The matter before the Commission was not pertinent to Supreme Court's view on the currently unsettled matter on quality of milk itself, rather it was pertinent to the fact that the said undecided judgement (as admitted by the Respondent) was portrayed as the Supreme Court declaring all milk brands as unfit for human consumption except for the Respondent's brand in its deceptive marketing campaign.

- 4.12 The contents of the relevant paragraph were denied on the grounds that the GER permits the Commission to initiate *suo motto* actions in addition to pursuing complaints. That as per the Act or GER, the complaint does not have to be from an aggrieved party. That it was held in one of Commission's orders that "*the Commission is concerned with valid representations only, and not with technicalities of form.*"
- 4.13 In addition, all the allegations pertinent to the Complainant being a cartel were declared baseless and hence, denied. The Complainant's conduct of rightfully filing a complaint against an evident violation of the law by the Respondent could not be labelled malicious. The Complainant had only prayed to end the deceptive conduct of the Respondent which was in no way going to harm its genuine and fair business interests.
- 4.14 The claims of the Respondent were denied stating that in addition to the arguments presented above, that any "*undertaking*" could launch a complaint under the Act who did not have to be an aggrieved party. The Complainant as per the Act as well the Memorandum of Articles of Association had the legal right to launch a complaint. The deceptive marketing practices did not only harm the Complainant's members, but rather a whole class of milk, i.e., UHT milk.
- 4.15 The Complainant further denied the contentions of the Respondent on the basis that the complaint was filed pursuant to a board resolution. The Act prohibits "abuse" of dominant position and not merely holding a dominant position. The conduct constituting abuse of dominant position has been clearly elaborated by the Act. And to suggest that launching a rightful complaint was equivalent abusing this position was baseless and absurd.
- 4.16 It was further submitted that all the members of the Complainant competed actively against each other on regular basis and that no proof was submitted in support of its absurd allegations pertinent to intentional exclusion of the Respondent from obtaining membership of the Complainant.



- 4.17 Moreover, it was stated that the Complainant was not liable to protect illegal conduct of the relevant market players and hence, the Respondent's assertions in this regard were misconceived.
- 4.18 It was submitted that neither the Act nor the GER stated that each aggrieved party was obliged to file a complaint, rather each complaint had to be accompanied by the required fee. That the Respondent was merely attempting to distort the interpretation of the requirements and that the requisite fee had actually been paid by the Complainant.
- 4.19 With reference to the evidence provided in the complaint, the assertions of the Respondent were vehemently denied according to which *"the Company has simply made the factual assertion that out of Pasteurized milk brands, only Prema Milk was declared fit for human consumption as articulated by the SC Order"*. That the deceptive campaign gave the impression of Prema Milk being the "only" milk brands amongst all milk brands as fit for human consumption.
- 4.20 It was further submitted that the Act does not only prohibit false, but also misleading statements. The omission of material information from true statements are also capable of misleading consumers. By using random excerpts of the Supreme Court's "inconclusive" order dated 08.12.2016 "without providing the complete context" was highly misleading, where various milk brands were in fact declared fit for consumption by the Supreme Court in the subsequent orders.
- 4.21 The contents of the grounds submitted by the Respondent were denied on the arguments discussed in the subsequent paragraphs.
- 4.22 The Respondent stated that it had simply repeated the Supreme Court's verbatim, whereas even the latest post on the Respondent's Facebook page, dated 14.11.2017, which was posted after filing of this complaint, did not reproduce the actual verbatim of the supreme Court's order. Therefore, the Respondent's conduct was intentional and malicious and aimed at deceiving the consumers that all milk brands except Prema Milk had been declared as unfit by the Supreme Court.
- 4.23 The action of posting the new post by the Respondent was in fact contradictory to its own assertions, proven by the conspicuous use of the term "pasteurized" in the latest post, which was missing in the earlier posts. The presence of in conspicuous disclaimers in form of hyperlinks to the Court's order was insufficient to correct the general impression disseminated by the overall advertisement as has been clearly established by the competition law. Finally, it was absurd to assume that the viewers who had seen the previous posts had also viewed the latest, comparatively less deceptive post.
- 4.24 The contents of the sub-para were vehemently denied as the term "pasteurized" was a general term including "UHT Milk" category and therefore, the use of the term

“pasteurized” was insufficient to give the true impression to the ordinary consumer. Contents of the complaint were reiterated which stated that using the term pasteurized in its statement along with the hashtag “#SayNotoUHT” used on the said post, was giving the impression that the report had deemed the whole UHT category milk as unfit for human consumption. Therefore, even this post was capable of giving the false impression that the Supreme Court was declaring all milk brands unfit for human consumption except Prema Milk.

- 4.25 It was further submitted that the definition of the term “ordinary consumer” was not set by the Complainant rather the Commission in its order pertinent to the matter of M/s China Mobile Pak Limited and M/s Pakistan Telecom Limited in the following words:

*“Here it may be relevant to point out that the ‘ordinary consumer’ is not the same as the ‘ordinary prudent man’ concept evolved under contract law. Unlike the ‘ordinary prudent man’ the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer. Therefore, in order to implement the law in its true letter and spirit, the scope of the term ‘consumer’ must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words ‘average’, ‘reasonable’ or ‘prudent’ will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term ‘consumer’ under Section 10 of the Ordinance is to be construed as an ‘ordinary consumer’ but need not necessarily be restricted to the end consumer of the goods or services.”*

- 4.26 It was reiterated that it was absurd to assume that using the hashtag “#SayNotoUHT” with the said statement could be delinked from the Supreme Court order and instead be claimed to be based on other comparative health benefits of pasteurized and UHT milk as asserted by the Respondent in its reply reproduced in para 3.21(iii) and (iv) *ibid*.

- 4.27 Further commenting on the contents of the Respondent’s reply reproduced in paras 3.21 (iii) and (iv) *ibid*, it was submitted that:

- i. Without commenting on the merits and credibility of the quoted study, the presumed conclusion applied to goat’s milk. The relevance of the referred study was further criticized as it explains “...a significant number of consumers in Australia have a strong preference for goat’s milk and purchase it directly from farms, after which the milk is generally consumed within 48h.” It was submitted

that the study in fact concluded that “*refrigerating prolongs survival of the strain of C. Jejuni inoculated into caprine milk at least up to 48 h...*” Whereas it was highlighted that the Respondent itself claimed that the UHT milk was kept on outdoor shelves, while pasteurized milk was kept in refrigerators due to its short life.

- ii. Without commenting on the merits and credibility of the other study quoted by the Respondent, it was submitted that it merely suggested that UHT milk had lower iodine concentration as compared to ‘conventional milk’ and did not at all suggest that UHT milk was unfit for human consumption.
- iii. As per its general practice, the Respondent only produced selected excerpts of the said study, whereas the study had commented on various methods of UHT processing and it had discussed its results stating, “*there was little or no change during processing and during storage for up to 90 days in the content of vitamin A, carotene, vitamin E, thiamine, riboflavin, .... Processing caused no loss of vitamin B6 but there was considerable loss during storage ..... it seems unlikely that the UHT processing was a contributory factor in these storage losses since similar losses during storage were found in raw milk held at -30 °C.*”

4.28 The Respondent’s comments pertinent to DAWN Article were vehemently denied stating that it was unfortunate that the Respondent was misquoting authorities to justify its false campaign. The Respondent’s comments were quoted which have been reproduced in para 3.21(vi) *ibid*. In this regard it was submitted that the evidence submitted by the Respondent in this reference displayed no such comments by the Director PSQCA. The said article implied that Director PSQCA had stated certain undertakings were manufacturing tea whiteners, whereas they were marketing them as milk; that various standards had been finalized pertinent to marketing of tea whiteners which would be enforced after their due approval.

4.29 Furthermore, it was submitted that had tea whiteners been actually declared as unfit for consumptions, no such standards would have been developed and production and sale of tea whiteners would have been entirely curtailed. The Respondent had used deceptive portions of the article clearly and conspicuously, whereas the article clarifying the context of the article was provided in illegible manner in the said Facebook post.

4.30 Moreover, it was clarified that the article used by the Respondent was misconceived and misplaced as the said report was based on “*samples of homogenized and UHT Milk samples and tea whitener samples*”, where the findings of the said report were applicable on all such products including that of the Respondent’s. Whereas the WHO guidelines were only directed towards infant products which were not allowed to be marketed as breast milk substitutes and hence, were absolutely irrelevant in this regard.

4.31 The subsequent contents of the reply were denied and arguments presented above were reiterated. It was further submitted that reference of international judgements was





misdirected as the Commission's standards pertinent to interpretation and enforcement of Section 10 of the Act had continuously been distinct in this regard. Reference to Commission's order in the matter of M/s China Mobile Pak Limited was made according to which proving deception did not require proof of 'actual deception', where likelihood of occurrence of deception would suffice. Moreover, without conceding to the argument, the Complainant had also submitted proof of consumer deception in this case.

- 4.32 Contents of Respondent's reply reproduced herein in para 3.24 *ibid* were denied on the grounds that ability of one member of the public to distinguish between the two categories of milk under consideration could not account for level of understanding of the entire public. Furthermore, the response of the Respondent to the said Facebook comment was highlighted in this regard which stated, "*Dear haleeb employee, you need to read the reports again specially the UVAS one ...*". To this it was submitted that even if the supposed "haleeb employee" in contrast to the ordinary consumer was in fact able to distinguish between the two categories of milk and was able to understand the true context and message (as claimed by the Respondent itself) of the Respondent's Facebook campaign, then why did the Respondent feel the need to rebuke, ridicule and contradict the commenter?
- 4.33 Contents of Respondent's reply reproduced herein in para 3.25 *ibid* were denied on the premise that the Respondent's assumption that an ordinary consumer who as per usual circumstances would be believed to not indulge in detailed scrutiny of an advertisement or marketing campaign would be fully aware of details of all the court orders that were passed at different times was illogical. That by continuously limiting the viewer of this marketing campaign as only consumer of Prema Milk as opposed to it being the ordinary consumer of milk was aimed at complicating the matter. That even if the viewer is believed to be only the average customer of Prema Milk, the Respondent was artificially attributing high level of knowledge to them in this regard. Furthermore, it was incorrect of the Respondent to rely on foreign judgements when it has been widely established that the Commission's view on the matter of ordinary consumer as well as interpretation of competition law is differentiated.
- 4.34 Moreover, the assumption that viewership of the Respondent's campaign was limited only to those who had liked the page was absolutely wrong as it was highly likely that the page and posts were viewed by many others as well who had not liked the page. It was submitted that the post, dated 15.12.2016, had received 939 shares, 690 comments, 48,000 likes with an estimated reach of 13.3 million plus views. It was, therefore, submitted that the Respondent's assertion, "*the target market is appreciably smaller and becomes smaller still, when considered in the perspective of the Facebook post, which is accessible by only a small percentage of the population*", was either aimed at deliberately misrepresenting the facts or genuine lack of understanding of internet saturation in the country.





- 4.35 It was finally submitted that pertinent to the study on telecom consumers referred to in para 3.25(vii) *ibid*, the study was related to long term users of the telecom services who understood the difference between actual services and those marketed by the service provided. Whereas the audience and the message in the marketing campaign in this case was not limited only to the product, Prema Milk, and its consumers, rather it was targeting products of its competitors and all consumers of milk in general. Therefore, it was untenable to suggest that the audience was not gullible and hence, understood the actual facts of the matter discussed in the Supreme Court's orders. That if the case were as suggested by the Respondent then there would be no need for such a law which protected consumers as they would already be capable of making fully informed and rational decisions.
- 4.36 Contents of para 3.26 *ibid* were rejected for being entirely irrelevant to the matter at hand as Section 10(2)(d) was neither relevant to this matter, nor was it part of the complaint in the first place.
- 4.37 Prayers of the Respondent were also requested to be rejected based on being unreasonable.

## 5. ANALYSIS

- 5.1. Prior to carrying out the analysis, it is important to recall the issues at hand. The undersigned enquiry officers were given the mandate to conduct an enquiry about the issues raised in the complaint and to submit the enquiry report by giving their findings and recommendations, *inter alia*, on the following issues:
- (i) Whether conduct of the Respondent is capable of harming the business interests of other undertakings in, *prima facie*, violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act.
  - (ii) Whether the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use and quality that are subject matter of this enquiry report in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2)(b) of the Act.
  - (iii) Whether the Respondent is involved in false or misleading comparison of goods in the process of advertising in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2)(c) of the Act.

### I. Maintainability of the Complaint:

- 5.2. One of the objections raised by the Respondent pertinent to the complaint was its maintainability under provisions of the Act. The complaint was submitted by M/s

Pakistan Dairy Association which is an association of various market players in the dairy sector. It was submitted by the Respondent that the Complainant had no *locus standi* to file a complaint with the Commission as it had been established under Section 42 of the Companies Ordinance 1984.

- 5.3. It was further submitted that it was comprised of various market players including, *inter alia*, Nestlé, Engro, Dairyland and Malmo. It was, hence, asserted that the various members should have filed a complaint in their individual capacities, rather than taking cover of an entity which was operating as a nonprofit organization. Various other issues were raised with respect to some technical requirements associated with the format of a complaint which were alleged to be unfulfilled by the Respondent.
- 5.4. It is presented in this regard that as per Section 37(2) of the Act, read with Regulation 16 of the Competition Commission (General Enforcement) Regulations, 2007 (the 'GER'), the Commission may initiate an inquiry "*on receipt of a complaint from an undertaking or a registered association of consumers under regulation 17*". Where the term "*undertaking*" has been defined by Section 2(q) of the Act in the following words:

*"any natural person or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust, or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association or undertakings."*

- 5.5. Therefore, it can safely be established that as per the aforementioned provisions of the Act, the Complainant falls in the category of an "*undertaking*" and hence, can file a complaint with the Commission against an undertaking. Furthermore, the Complaint also fulfilled all the requirements laid down under Regulations 18 and 19 of the GER. Consequently, it is hereby concluded that the complaint was legally justified and could be pursued for the purpose of initiation of the inquiry.
- 5.6. In the subsequent sections, we will deliberate on the merits of the complaint.

## **II. Various Categories of Milk and Milk Based Products:**

- 5.7. For the purpose of analysis, we will first try to define various categories of dairy products relevant to this enquiry and establish how each differentiate from the other.
- 5.8. According to PSQCA, 'Packaged Full Cream Milk' can be defined in the following manner<sup>2</sup>;

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<sup>2</sup> PS: 5344-2016, PSQCA. PAKISTAN STANDARD SPECIFICATION FOR PACKAGED LIQUID MILK.

*“Packaged full cream milk is the milk, obtained from one or more healthy halal milk animals such as cow, buffalo, camel, goat, sheep etc. It should be free from colostrum, must be pasteurized or UHT. Packaged full cream milk shall contain not less than 8.50% of milk solids non-fat (MSNF) and not less than 3.5% milk fat. Packaged full cream milk may have been adjusted by adding dairy cream, concentrated milk, dry whole milk, skim milk, concentrated skim milk or nonfat dry milk to comply with the above composition. Packaged full cream milk may be homogenized and contains the permitted food additives & nutritive supplements.”*

- 5.9. The Punjab Pure Food Rules, 2011, has defined various categories of milk and milk products, some of which are reproduced below:

### **12.1 MILK AND MILK PRODUCTS**

**12.1.1 “Milk”**, means the normal, clean and pure secretion obtained from the memory glands of a healthy cow, buffalo, goat, camel or sheep (halal milk animals), whether boiled, homogenized, pasteurized, sterilized or UHT and includes standardized, reconstituted milk. Milk shall contain not less than 34 percent of milk protein in milk solids other than milk fat and Lactose not less than 4.6 percent in milk solids other than milk fat. It shall be free from colostrum. Milk shall not contain any added water, permitted food additive, other added substances, traces of antibiotic substance and hormonal residue.

**12.1.2 “Milk Product”** means and includes cream, concentrated milk, condensed milk, skimmed milk, separated milk, flavoured milk, milk for making tea/tea whitener, milk shake, milk drink, dahi, yoghurt, khoa, barfi, pera, kalakand, cheese, dried milk, dried milk for making tea/tea whitener, ice cream and any other product made by the addition of any substance to milk or to any of the milk products and used for similar purposes.

Milk Products shall not contain any substance not found in milk unless specified in the standards.

**12.1.4 “Pasteurisation”, “pasteurised”** and their grammatical variations when used to describe a dairy product means that every particle of such product shall have been heated in properly operated equipment to one of the temperatures specified in the table of this paragraph and held continuously at or above that temperature for the specified time (or other time / temperature relationship which has been demonstrated to be equivalent thereto in microbial destruction):

Temperature	Time
1450F (630C)	30 minutes
1610F (720C)	15 Seconds
1910F (880C)	1 Second

**12.1.6 “Ultra High Temperature milk or UHT milk”** means the milk which has been subjected to heat treatment by being retained at a temperature of

not less than 135°C for at least 2 seconds to render it commercially sterile and immediately aseptically packed in a sterile container. There shall be written on the label of a package containing ultra-high temperature milk or U.H.T milk the words "Ultra High Temperature Milk" or U.H.T milk", as the case may be.

12.1.20.....

(II) "**Liquid milk for making tea**".....

.....  
g) It shall be sterilized /UHT. It may contain permitted food additives not exceeding permissible limit but shall not contain any non-dairy ingredients.

h) There shall be written on the principal panel of the label just below the common name of product that the product is not recommended for infant and children.

(III) "**Liquid Tea Whitener**" means with 6.5 percent fat (3.5% milk fat and 3.0% vegetable fat), Minimum 3.0 percent solid not fat (SNF) and other permissible food additives.

(IV) **Dried milk powder for making tea** means and shall conform to the following standards:-

.....  
h) It shall be sterilized /UHT. It may contain permitted food additives not exceeding permissible limit but shall not contain any non dairy ingredients except sugar. The percentage of sugar shall be given on the principle panel of label in lettering not less than 14 just below the common name of food.

i) There shall be written on the principal panel of the label just below the common name of product that the product is not suitable for baby.

(V) "**Powder tea Whitener**" shall contain minimum of 15 percent milk fat or vegetable fat minimum 30 percent milk solids not fat (SNF) and other permissible food additives."

### III. Important Facts of the Matter:

- 5.10. The matter of Watan Party versus Government of Punjab, etc. (Civil Petition No. 2374 – L/2016, based on which this marketing campaign was initiated, was pending adjudication before the Supreme Court of Pakistan at the time of initiation of this inquiry. The said matter, *inter alia*, was in reference to the safety and quality standards of various brands of packaged milk products being sold in Pakistan.
- 5.11. Various safety and quality standard assurance agencies of Pakistan were directed by the Court to conduct tests pertaining to the quality of samples of different categories of milk and milk based products of various brands, which included brands of the two categories of milk, i.e., Ultra-High Temperature (UHT) and pasteurized milk.

- 5.12. As per the Complainant's website, there are currently twenty-four (24) members of the Complainant.<sup>3</sup> The list of members of the Complainant, who were also part of the said petition, is provided below with some of their relevant product details.

	Undertaking	Milk Products	Tea Whiteners	Dairy Based Formulae
1	Nestlé Pakistan Limited	Nestlé MILKPAK and Nestlé NESVITA	Nestlé EVERYDAY	Nestlé NIDO and Nestlé BUNYAD
2	Fauji Foods Limited	Nurpur	-	-
3	Haleeb Foods Limited	Haleeb	-	-
4	Shakarganj Food Products Limited	Good Milk	-	-
5	Engro Foods Limited	Olpers, Olpers lite, Dairy Omung and Dayfresh	Tarang	
6	Gourmet Foods	Gourmet Milk	-	-
7	Dairy Land Pvt. Limited	Day Fresh UHT Milk	-	-
8	Sharif Milk Products Pvt. Limited	Anhaar and Daily Dairy	-	-
9	Achha Foods Pvt. Ltd.	Achha Milk	-	-
10	Adam Milk Foods (Pvt) Limited	Adam's Milk	-	-

- 5.1 In the order dated 08.12.2016, reports of three safety and quality assurance agencies were discussed.

**Reports Submitted by Pakistan Council of Scientific and Industrial Research (PCSIR)**

- 5.2 As per the PCSIR report, pursuant to the Supreme Court's orders dated 19.09.2016 and 16.09.2016, PCSIR had filed two sets of sealed reports regarding the analysis. One report was related to the UHT standardized milk which were six in numbers. ***"Except Haleeb Milk, all samples of UHT milk tested by the said laboratory were found fit for human consumption."*** The Court directed to issue a notice to M/s Haleeb Foods Limited to respond to the report submitted by PCSIR.
- 5.3 With respect to pasteurized milk, the Court order stated, ***"Ten reports have also been submitted with regards to the pasteurized milk. Except Prema Milk all other samples***

<sup>3</sup> [http://www.pda.com.pk/member\\_list.htm](http://www.pda.com.pk/member_list.htm)



*are found to be unfit for human consumption.*” The Court directed to issue a notice to Doce Foods Limited (Doce Milk), Gourmet Foods, Fauji Foods Limited, Achha Foods Private Limited, Sharif Dairies Private Limited, Adam’s Foods Private Limited, Cakes and Bakes (Nutrivo Milk) and Al-Fajar Dairy and Foods Private Limited (Al-Fajar Milk) to respond to the reports submitted by PCSIR.

- 5.4 Therefore, as per the report submitted by PCSIR, in the UHT category, only Haleeb milk of M/s Haleeb Foods Limited was found unfit for human consumption out of the other five brands. Haleeb Foods Limited is a member of the Complainant. Whereas in the pasteurized milk category, only Prema Milk was deemed as fit for human consumption. Five out of nine undertakings whose milk products were deemed unfit for human consumption, are members of the Complainant. Therefore, in the overall packed milk category which includes both UHT and pasteurized milk, milk brands of the six out of the ten above listed members were found unfit for human consumption.

**Report Submitted by University of Veterinary & Animal Sciences (UVAS)**

- 5.5 Pursuant to the orders dated 15.09.2016 and 16.09.2016, a report by UVAS was also submitted to the Court. According to this report, traces of sugarcane were present in Haleeb Milk (UHT) as well as Achha Milk, Anhaar Milk and Adam’s Milk, whereas the latter three brands belong to the category of pasteurized milk.
- 5.6 Furthermore, heavy metal components were found in UHT standardized milk samples of Day Fresh, Good Milk, Haleeb Milk, MilkPak and Nurpur. Sample of pasteurized milk; Daily Dairy, Doce, Gourmet and Nurpur were found to contain heavy metal components.
- 5.7 As a result, ten (10) undertakings were called to respond to the UVAS report, out of which, nine (09) are members of the Complainant. UVAS, in its report, cleared the Respondent.

**Report Submitted by University of Agriculture Faisalabad (UAF)**

- 5.13. In its report before the Court, UAF submitted that out of seven UHT samples, all were found fit for human consumption. Whereas two samples of pasteurized milk brands, i.e., Adam’s Milk and Achha Milk, were found unfit for human consumption. Hence, two members of the Complainant were notified to submit their response.
- 5.14. In view of the reports submitted by the three safety and quality standard assurance agencies, as per the order of the Supreme Court dated 08.12.16, twelve (12) undertakings were found below safety and quality standards and hence, were called to clarify their position. Out of the twelve (12) undertakings, nine (09) are members of the Complainant. The Respondent was cleared as per all reports.

- 5.15. The matter was again heard on 27.12.2016. On the pretext of deficiencies found in certain brands and requirement of inspection of their respective premises by PFA, the abovementioned twelve (12) undertakings were re-listed for further hearing.
- 5.16. Subsequent to further proceedings, according to another order dated 09.03.2017, reports submitted by PFA cleared Gourmet Milk, Nurpur Milk, Achha Milk, Anhaar and Daily Dairy, Nestlé MilkPak, Adam's Milk, Haleeb Milk, and Good Milk. However, based on various other concerns/deficiencies noted pertinent to the milk samples, PFA was further directed to test the said product samples by other testing laboratories/agencies, including SGS, UVAS, etc. The twelve (12) brands that were re-listed for further testing, including those otherwise cleared by PFA, were Doce Milk, Nurpur Milk, Achha Milk, Anhaar, Daily Dairy, Nestlé MilkPak, Adam's Milk, Al-Fajar Milk, Nutrivo Milk, Haleeb Milk, Good Milk, and Day Fresh.
- 5.17. The brands against which legal proceedings were suspended include Gourmet Foods, Engro Food Pvt. Ltd. and Prema Dairies Pvt. Ltd. (At-Tahur Private Limited).
- 5.18. Additionally, PFA conducted further tests on samples of various UHT and pasteurized brands of milk. A grace period of three months was granted by PFA to the undertakings, who had failed to meet the required standards, for compliance. The grace period ended on 15.03.2017 after which all the aforementioned brands, excluding Al-Fajar Milk, were deemed as fit for human consumption.
- 5.19. After the abovementioned exercise, the matter pertinent to safety and quality of packaged milk was disposed of by the Supreme Court after vide order dated 03.03.2018 with the direction to PFA to continue with the testing of such products for maintenance of quality and safety standards at all times.
- 5.20. In view of the above mentioned information, we will evaluate the marketing campaign of the Respondent in light of Section 10 of the Act which prohibits deceptive marketing practices.

#### **IV. Overall Net Impression of the Respondent's Marketing Campaign:**

- 5.21. In order to determine instance of deception in any marketing material, the main focus of the Enquiry Committee, as per the general practice, is to evaluate its "net general impression". The Canadian Competition Commission, according to its Competition Act, states: "*To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meaning.*"<sup>4</sup>
- 5.22. In pursuit of the above, we will examine the varied portions of marketing material of the Respondent on its Facebook page, submitted by the Complainant. The marketing campaign of the Respondent, under scrutiny of this enquiry, initiated on December 15, 2016, till August 19, 2017.

<sup>4</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>



- 5.23. The image above displays the initiation of the campaign by the Respondent. This post of 15.12.2016 states, "AlhumdulilAllah "Except PREMA Milk, all other samples are found to be unfit for human consumption": source supreme court". As per facts of the matter, the statement, "Except PREMA Milk, all other samples are found to be unfit for human consumption", is in fact the exact verbatim of a portion of the Supreme Court's order dated 08.12.2016, consequently, the statement cannot be termed as a false statement.
- 5.24. However, it is necessary to note that the Respondent has omitted certain material information in the said post regarding the complete context of the Supreme Court's statement. As Section 10 of the Act defines deceptive practices as "false and misleading" statements, the Commission has defined the term misleading in the following manner<sup>5</sup>:

"Whereas '**misleading information**' may essentially include oral or written statements or representations that are: (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat

<sup>5</sup> <http://cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

*open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent. "*

- 5.25. The above reference suggests that any information distributed via marketing campaign can mislead consumers if it is vague in any way or has omitted certain information, even if such a conduct is not deliberate. Consequently, distribution of misleading information is capable of giving a wrong impression with respect to a good or service which could induce a consumer into distorted decision making, hence, causing consumer injury. Therefore, if the Respondent's conduct is proven misleading, it would amount to deceptive marketing practices in terms of Section 10 of the Act.
- 5.26. The Court passed various rulings with respect to various categories of milk products as well as different brands of such products. As mentioned earlier, keeping in view the reports of various agencies, five out of six UHT milk brands were deemed as unfit for human consumption and were re-listed for further action in the order dated 08.12.2016. Whereas in case of pasteurized milk, except for Prema, all (nine) were declared unfit for human consumption. The UHT brand which was not deemed as unfit by the Court was Olpers by Engro Foods Limited.
- 5.27. Even though other than Prema, only one other UHT brand was declared as fit within the samples of sixteen UHT and pasteurized milk combined, it should be noted that the statement reproduced from the Order and used in the Facebook post specifically belonged to the report submitted by PCSIR and the view in the said statement was held only in reference to pasteurized milk. As rightly pointed out by the Complainant, where the PCSIR report only cleared Prema in the category of pasteurized milk, it also cleared five out of six samples of UHT milk brands. However, the post of the Respondent dated 15.12.2016, by omitting the context of the said report, gives the impression that amongst all milk brands, only Prema was declared as fit for human consumption by the Supreme Court. Consequently, by omitting such material information, the post was in fact misleading for the general public.
- 5.28. The Respondent submitted in its reply that it also provided a hyperlink for the actual Supreme Court order which could be viewed by the reader. However, it is important to note that any disclosure of information, if it significantly changes the meaning of the main claim, does not absolve the marketers of deception. The purpose of a disclaimer is only to provide additional information and clarity regarding a claim, rather than completely altering the meaning of its overall message. That is, the meaning of the message conveyed in the main claim and the overall advertisement should not be significantly altered when read with information given in the disclaimers.



- 5.29. The Federal Trade Commission (FTC), on this matter, has elaborated this concept in its 'FTC Policy Statement on Deception', dated October 14, 1983, stating<sup>6</sup>,

*"Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation. Other practices of the company may direct consumers' attention away from the qualifying disclosures. Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices."*

- 5.30. The FTC has also developed a comprehensive set of guidelines for undertakings to adhere to, while marketing online in its document titled, "Cyber Monday success: Five tips for online retailers", wherein it has been stated:

*".....It's unwise to bury material information behind vaguely-labeled hyperlinks or on dense "Terms and Conditions" pages that are more snooze-inducing....."*<sup>7</sup>

Applying the above guidelines to this case, the assumption that viewers of this post will go through the detailed order of the Supreme Court is unreasonable as consumers tend to mainly focus on the main headline or the overall impression given in an advertisement.

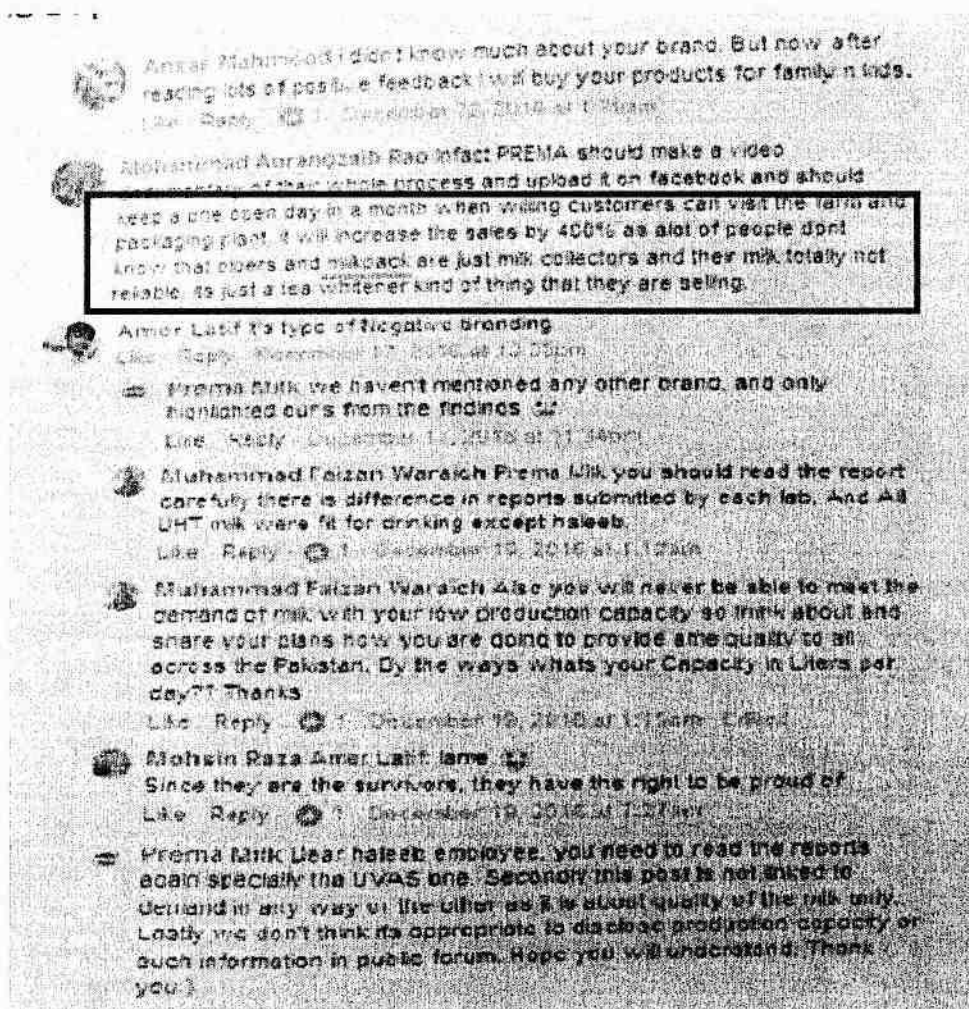
- 5.31. In view of the above, it can be safely concluded that using the exact verbatim of the Supreme Court's order with reference to the PCSIR report, however, while omitting material information pertaining to its overall context, clearly falls within the definition of "misleading". Provision of a hyperlink to the complete Order was insufficient to correct the overall impression disseminated by the post through its main headline. To depict its superior quality with contrast to its competitor's products, the Respondent should not have termed the source as "Supreme Court", rather it should have been labelled as PCSIR. Moreover, in order to avoid deception, the context of that statement, i.e., the said statement was made in reference to pasteurized milk, should also have been provided clearly and conspicuously. Furthermore, if the Respondent wanted to convey

<sup>6</sup> FTC Policy Statement on Deception, pg. 4

<sup>7</sup> <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/cyber-monday-success-five-tips-online-retailers>



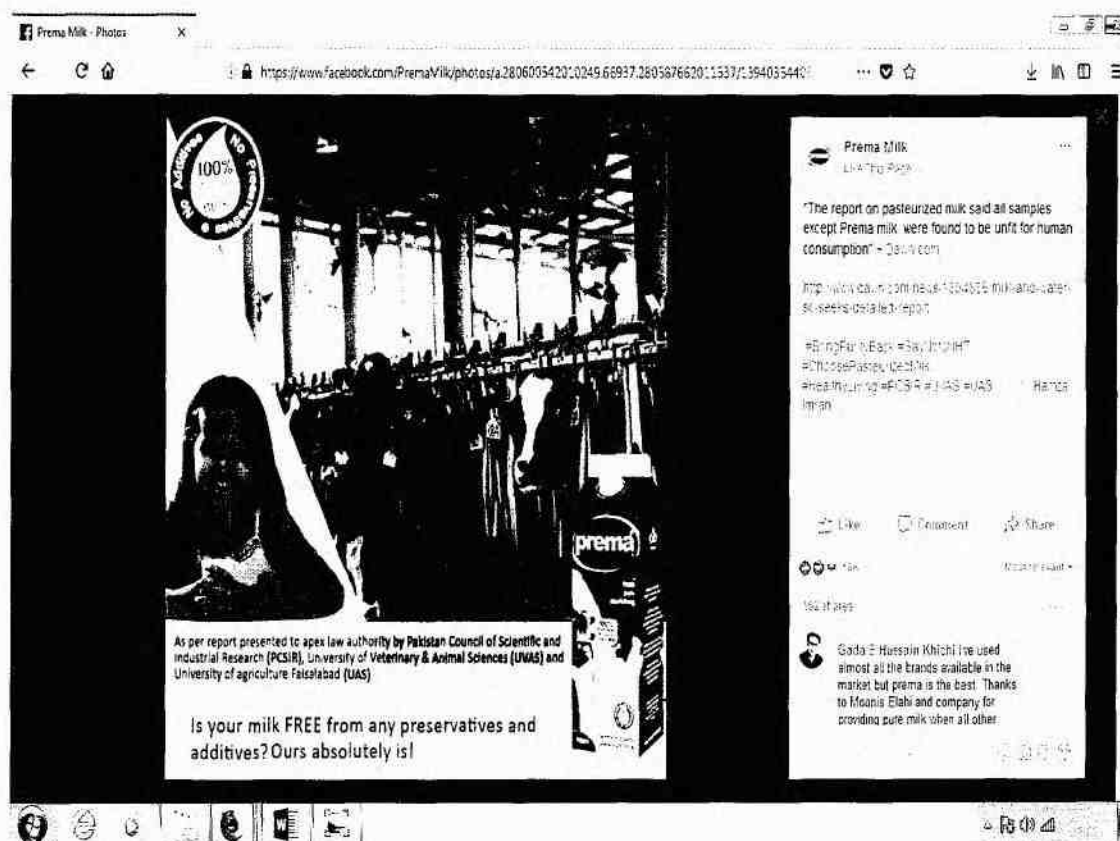
the overall message of the order, it should not have presented it as the exact verbatim of the order and instead, should have reproduced the text in its own words.



#### Comments Underneath Facebook Post Dated 15.12.2016

- 5.32. The second image shows the comments made by the general public underneath the above referred post, dated 15.12.2016. The highlighted portion in the above image is a comment by Mr. Mohammad Aurangzaib Rao, wherein he has stated, “.....a lot of people don't know that olpers and milkpack are only milk collectors and their milk totally not reliable, its just a tea whitener kind of thing that they are selling”. This comment suggests that a member of the general public has not been able to understand and conceive the specific context of the PCSIR report, as claimed by the Respondent who asserted that the general public was fully aware and understood i) the difference between UHT and pasteurized categories of milk, ii) that Premia belonged to the category of pasteurized milk which was significantly different than other UHT brands, and iii) the overall context of the excerpt taken from the Supreme Court's order and reproduced in its post. The commenter also mentions the brand 'Olpers' which was in fact cleared by all the agencies which further proves the facts that the general public was deceived.

- 5.33. As mentioned earlier, in order to avoid deception, the context of the quoted statement should have been provided clearly and conspicuously that as per the “**PCSIR**” report, amongst the category of “**pasteurized**” milk, only Prema was found fit for human consumption. Therefore, it can be established that this statement is in fact highly misleading and hence, capable of causing deception.
- 5.34. Furthermore, within the comments, Mr. Muhammad Faizaan Warraich clarified the correct factual position of the matter stating that “*all UHT milk were fit for drinking except haleeb*”. In response to this, the Respondent rebuked the commenter by saying, “*Dear Haleeb employee, you need to read the reports again specially the UVAS one ....*” Such a reaction to the correct understanding of the context of the post further reflects the *mala fide* intent of the Respondent.
- 5.35. Another post was shared on 28.12.2016, which stated, “*The report on pasteurized milk said all samples, except Prema Milk, was found to be unfit for human consumption.*”: *Source: Dawn.com*. The relevant image is provided below:



- 5.36. The statements made in the post referred above are clearer compared to the initial post as it states clearly that the said findings were pertinent to pasteurized milk samples only. This post is even sourced correctly as it mentions all the testing agencies. However, the

act of deception has occurred due to the hashtags followed by the cited quote as well as another statement made therein which misleads the viewers into thinking otherwise. The mentioned quote was followed by various hashtags, such as “*#BringPurityBack #SayNotoUHT #ChoosePasteurizedMilk....*”, and another statement, “*Is your milk FREE from any preservatives and additives? Ours absolutely is!*”. Both these additions to the initial quote clearly reflect the true nature of the impression purposefully being disseminated by the Respondent, i.e., pasteurized milk is a better and purer option compared to UHT milk. It can, therefore, be concluded that this post was also aimed at misleading the general public and thus, deceptive, as there was mala fide intent involved on part of the Respondent.

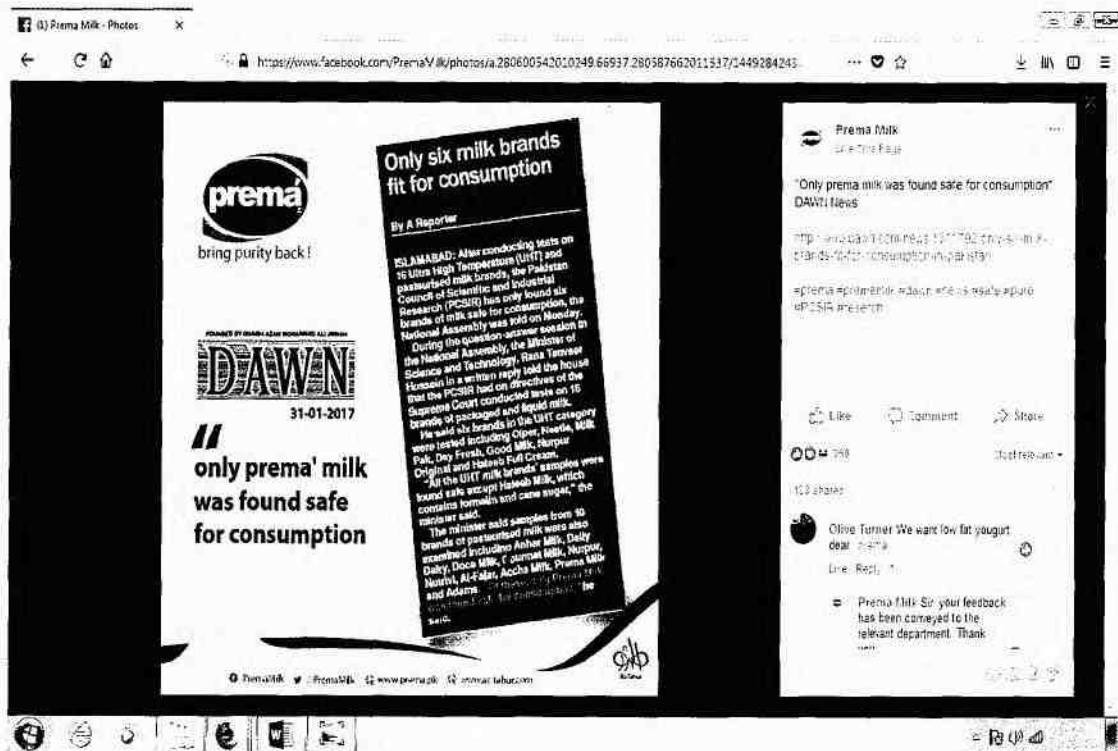
- 5.37. Furthermore, the Respondent in this regard submitted that use of the hashtag, *#SayNotoUHT* had no connection with the Supreme Court’s Order or the Dawn article. That the said assertion was made based on various scholarly articles. In this regard, the rejoinder of the Complainant, reproduced herein in paras 4.26 *ibid* is upheld. It is highly unreasonable of the Respondent to infer that the audience of this post, while viewing the post would be able to determine that the hashtag, “*#SayNotoUHT*”, was not made in reference to the main statement of the post, i.e., the excerpt from Dawn article referring to the Supreme Court’s order. Assuming that the Respondent’s claims were true that the basis of these hashtags were the scholarly articles on the topic, relevant clear and conspicuous references should have been given by the Respondent to avoid this confusion. Additionally, it is important to note that the Respondent had already given the other impression in its previous posts and taking the two posts into consideration collectively, the viewer is most likely to get the impression that Prema was the only milk brand declared as safe by the Supreme Court and that UHT milk is injurious for health.
- 5.38. The Respondent also submitted various scholarly articles in support of its contentions that pasteurized milk is better than UHT milk. However, determining superiority of various categories of milk is outside the scope of this enquiry report. Therefore, no comments would be made on the reliability and conclusions of the submitted reports. It is, although, reiterated that the manner in which the said hashtag was placed in the post along with the excerpt of the Dawn article, it in no way implies that the assertion, “*#SayNotoUHT*”, was made based on findings of various scientific scholarly articles and not in reference to the Dawn article.
- 5.39. In addition to the above posts, on 16.01.2017, a 32 second video was posted in which Hamid Mir (a senior journalist) states that chemical tests were conducted by PCSIR on different samples of milk pursuant to the order of the Supreme Court and that except Prema, none of the samples managed to qualify through the tests. Once again, a false statement was made within this video. As per the overall Supreme Court’s order, two milk brands – one UHT and one pasteurized milk brand – were cleared. While as per the PCSIR report, one pasteurized milk brand sample (Prema) and five out of six

samples of UHT milk brands were cleared by PCSIR. Whereas to infer otherwise, clearly falls in the category of false marketing.



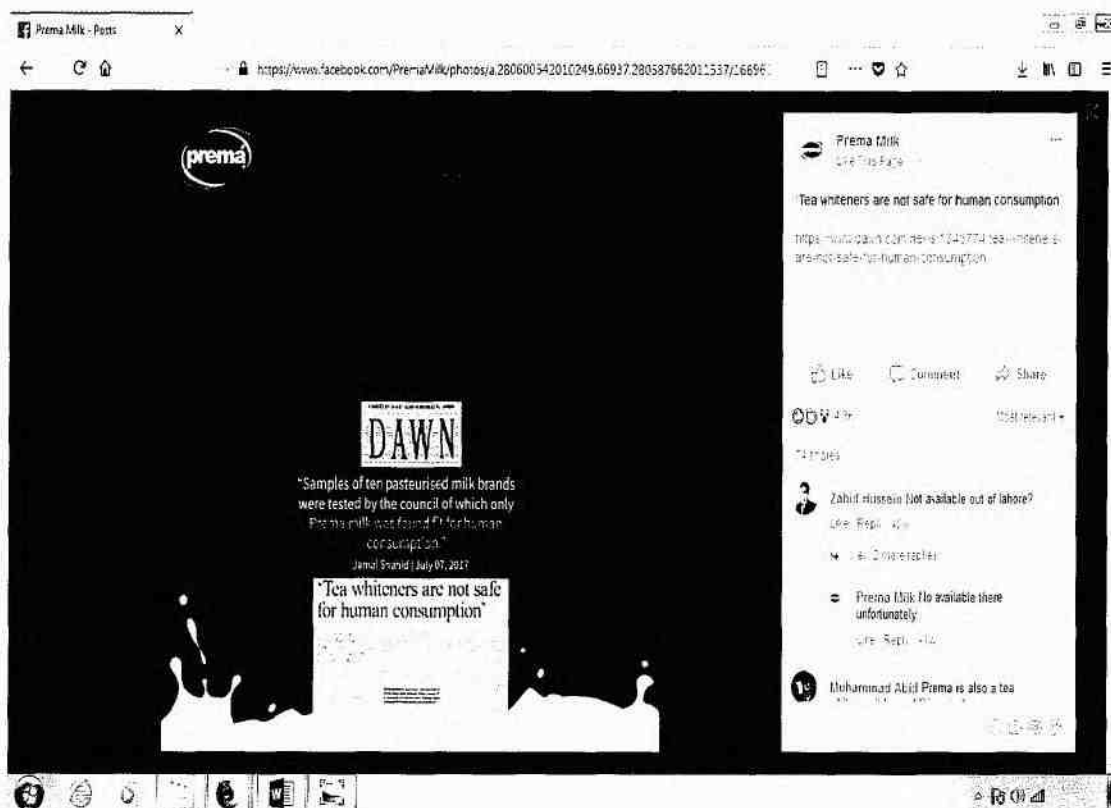
- 5.40. Above is an image of the said video. This video suggests that amongst all milk samples, only Prema milk managed to qualify the test, which is a false message. Once again, this post should also be taken in connection with the previous posts of the Respondent as there is a high probability that the previous posts would have already misled the viewers and created a wrong impression in their minds regarding the true nature of the report results.
- 5.41. The marketing campaign of the Respondent continued with another post shared on 31.01.2017. The post contained an image with an article of Dawn News reproduced therein. The relevant image is reproduced below for ease of reference.





- 5.42. In this post, the Respondent provided a significant portion of the article in legible font size. The title of the article states, *"Only six milk brands fit for consumption"*. The Respondent also used a selective statement from the article in a much larger font size and in bold letters stating that *"only Prema' milk was found safe for consumption"*. The same words were the main content of the posts as well. This statement of the article has also been highlighted by the Respondent from which the link can be made by the viewers. In addition, the hashtags in this post are more truthful as they provide the true source of this conclusion, i.e., #PCSIR. As the extract of the article provided is also legible and the highlighted part can also be viewed by the audience, it can be concluded that there is little or no probability of deception in this post.
- 5.43. The post shared on 11.07.2017 states, *"Tea whiteners are not safe for consumption"*, which contains an image of an article from Dawn News, while the remaining article is illegible. Another extract from the same article has been reproduced above the article. The extract states, *"Samples of the pasteurized milk brands were tested by the council of which only Prema Milk was found fit for human consumption."* The statement, *"Tea whiteners are not safe for human consumption"*, has been made the headline of the overall post as well. The said post is given below:





5.44. A link to the said article has been provided below.<sup>8</sup> The article suggests that DG PSQCA – Mohammad Khalid Siddique presented that tea whiteners were being marketed as milk and hence, unsafe for human consumption. Where the headline of the article has been reproduced correctly, it is necessary to note that the headline of the article itself is quite misleading. Upon reading the article, it can be understood clearly that tea whiteners on their own have not been declared unfit, rather them being marketed as milk could be injurious for health. Therefore, the onus of the misstatement not only falls on the news agency, but also on the Respondent who should have read, understood and spread the correct message of the article.

5.45. The statement with respect to fitness of Prema milk compared to other milk brands was provided with sufficient context. However, the overall net impression is still deceptive.

5.46. On 19.08.2017, a video was posted along with a caption stating, ***"Powdered milk causes stunted growth in children – Don't compromise your child's health, follow nature's way of health, hygiene and purity only buy fresh pure milk for your family. At Prema we care for your family's well-being and are committed to provide you quality fresh pasteurized milk which is why we were the only milk observed to be fit for human consumption by the Honorable Supreme court of Pakistan #powderedmilk #milk #health #premamilk"***.

<sup>8</sup> <https://www.dawn.com/news/1343774/tea-whiteners-are-not-safe-for-human-consumption>

7



- 5.47. The video was based on a 42 second segment by Tehlka News, wherein the anchor highlights findings of UNICEF report on Pakistan. According to this report, owing to consumption of powdered milk, 44% of Pakistani children were not getting adequate nutrition, especially for their mental and physical well-being. The video further mentions the 'International Code of Marketing of Breast-milk Substitutes' which does not permit the marketing of infant formula.
- 5.48. In the video post reproduced above, the Respondent, once again, has quoted the verdict of the Supreme Court in a misleading manner as Prema was **NOT** the only milk brand observed to be fit for human consumption by the Supreme Court. Moreover, by this time, the Supreme Court had also withdrawn proceedings against Gourmet Milk by M/s Gourmet Foods, which also belongs to the category of pasteurized milk, in its order dated 09.03.2017. Therefore, deception at a higher level, occurred due to fraudulent conduct of the Respondent. Additionally, by 15.03.2017, PFA had also declared a total of nineteen (19) brands of various UHT and pasteurized milk brands as fit for human consumption thus adding to the level of mala fide intent on part of the Respondent.
- 5.49. If the Respondent wanted to exhibit superiority of its milk products compared to powdered milk, reliable sources should have been cited by it in this regard. The international marketing code mentioned in this news clip is only directed towards infant formula which is completely irrelevant to the category of the Respondent's product.

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Furthermore, as mentioned earlier, the Respondent misused the Supreme Court's order in this post again which amounts to deceptive conduct on its behalf.

- 5.50. An undated trade letter was also issued by the Respondent which claimed: "*Except PREMA milk, all other samples are found to be unfit for human consumption- As per report presented to apex law authority by Pakistan Council of Scientific and Industrial Research (PCSIIR), University of Veterinary & Animal Sciences (UVAS) and University of Agriculture Faisalabad (UAF).*" This claim, as discussed earlier, is also misleading. It is misleading on the pretext of omitting material information pertinent to the context of the quoted statement, i.e., it was in regard to the category of pasteurized milk. However, taking into consideration the findings of all reports, only Prema (pasteurized) and Olpers (UHT) were cleared. The remaining fourteen brands were indeed declared unfit.
- 5.51. Finally, an assertion was made by the Respondent regarding its post, dated 14.11.2017, which contained the claim, "*Prema Milk is the only pasteurized milk of Pakistan which is manufactured according to international health standards and was found by the Supreme Court to be the only healthy and hygienic pasteurized milk for human consumption*". In this reference it is presented that where this post does not contain deceptive material, it came almost a year after the initiation of the *prima facie* deceptive marketing campaign of the Respondent on 15.12.2017. By this time, the Respondent had been involved in a *prima facie* deceptive marketing campaign for almost a year.
- 5.52. Furthermore, this post came after initiation of this inquiry, which also suggests that the Respondent modified its statements to give an accurate impression of the Supreme Court's order after it had been informed about the proceedings initiated against it pertinent to deceptive marketing practices. This further reflects the realization on behalf of the Respondent of the fact that the earlier posts in fact contained deceptive material.
- 5.53. Moreover, it was submitted by the Respondent that whoever accessed its Facebook page would definitely view the latest post, dated 14.11.2017, which provided clarification pertinent to the category of the milk the said Order was referring to. However, it is necessary to understand that this is the latest post of the Respondent, whereas *prima facie* deception had been occurring for almost a year by the time this post came. It is also ridiculous to assume that a post that came in at a later date would i) be viewed by everyone who had seen the earlier posts and ii) be able to completely rectify the harm caused by the earlier campaign.
- 5.54. In addition to the above discussion, it was further discovered by the Enquiry Committee that a similar campaign was also launched by the Respondent on its Official Twitter account. A few images are reproduced below;



PREMA Milk

As you can see from Supreme Courts orders PREMA is the only milk fit for human consumption.

Punjabi Baba

Is Milk you're drinking safe?

Report in SC reveals hazardous ingredients in milk like formalin (Chemical for preserving dead bodies), fungus



PREMA Milk (@Premamilk) · X



Twitter Inc. (US) <https://twitter.com/premamilk?lang=en>



Home About

Guest User

Help · Log in



PREMA Milk

Supreme Courts orders proving PREMA milk is the only milk fit for human consumption.

SC orders the concerned parties to submit evidence to support their position

regarding the deficiencies highlighted in the said report and copy

whereof along with the photographs be sent to them. The Director

General, FPA shall also file a concise statement in this regard within

one week.

Reports submitted by Pakistan Council of Scientific and Industrial  
Research (PCSIIR):

Pursuant to the orders dated 15.9.2016 and 16.9.2016

PCSIIR has filed two sets of sealed reports about the analysis, which

have been opened in the Court. However, the standards/guidelines

have also been provided by the PCSIR on the basis of which analysis

have been made. One report pertains to UHT standardized milk

samples which are six in numbers. Except Haleeb Milk, all samples of

UHT milk tested by the said laboratory were found fit for human

consumption. Let a notice be issued to Haleeb Foods Limited to

respond to the report submitted by the PCSIR.

Ten reports have also been submitted with regard to pasteurized

milk. Except PREMA milk, all other samples are found to be unfit for

human consumption. Let a notice be issued to M/s Doce Food

Limited (Doce Milk), Gourmet Foods Limited (Gourmet Milk), Fauji Foods



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Where the posts have similar implications as those on the published on its Official Facebook page discussed above.

#### V. Other Issues:

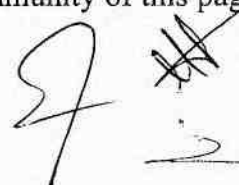
- 5.55. The issue of the matter pending adjudication was raised by both parties. In this reference it is submitted that the process of testing various samples of milk for fitness resulted in findings of the initial reports submitted to the Supreme Court by the three agencies, namely PCSIR, UVAS and UAF. Based on the initial samples, clear and final results were submitted pertinent to the fitness of the samples by each agency. Where different agencies contained different conclusions related to the matter, taking all the tests into consideration, only one UHT milk brand – Olpers and one pasteurized milk brand – Prema was cleared in the initial stages.
- 5.56. The advertisement campaign of the Respondent started based on the initial findings of the reports and hence, appears to be justified to the extent that they could have been used to promote the superior quality of its brand compared to those of the other players in the market. However, due to omission of certain material information, misleading information was distributed specifically in regard to one of the other cleared UHT brands, i.e., Olpers, also resulting in fraudulent damage to its business interests, which is actionable under the Act.
- 5.57. In addition, the matter had been pending adjudication, however, as mentioned in the preceding paras, the results pertinent to the initial batch of samples were indeed

*[Handwritten signature]*



conclusive. The remaining brands were cleared subsequently by PFA and, to an extent, by the Supreme Court by the end of March 2017. However, this was achieved at a later stage, after deficiencies were removed and improvements were made to the products by all the undertakings. It should also be noted in this reference that after this development, the Respondent continued to use the earlier decisions of the various agencies, which further constitutes as being *prima facie* engaged in deceptive marketing practices as by that stage, Prema was no longer the only brand fit for human consumption, not even in the category of pasteurized milk. Whereas after the subsequent decisions of the Supreme Court and PFA, the misleading marketing campaign continued through its various Facebook posts. As mentioned earlier, this matter has been concluded and disposed of by the Supreme Court through its order dated 03.03.2018, clearing all brands under scrutiny with directions for PFA to ensure compliance of rules by the undertakings in the future.

- 5.58. The Respondent also alleged that the Complainant was a cartel and had adopted a biased posture towards the Respondent. That it had also excluded the Respondent from becoming a member of the Complainant. However, the Respondent did not submit any proof in this regard. Therefore, no violation of the Act can be attributed to the Complainant in this regard.
- 5.59. The Respondent claimed that the viewer of this marketing campaign was very well aware of the nature of its product – Prema milk and hence, meaning of the misleading excerpts taken from the Supreme Court’s order. That in order to view this marketing campaign, one would have to “like” and become a member of its page before they could access it and thus, it indicated that they were knowledgeable and sophisticated consumers who understood the difference between pasteurized and UHT milk as well as the context of the posts quoting the Supreme Court’s orders. Furthermore, references of other jurisdictions, laws and other studies were given to assert that due diligence would be expected from consumers. Various observations are presented in this regard.
- 5.60. The Facebook page of the Respondent being a “Public” page can be accessed by anyone at any time, without having to “like” it, as was done by the Enquiry Committee. Hence, viewer of the marketing campaign was not limited to the Respondent’s customers, rather all consumers of milk in general. Moreover, it is a known fact that the purpose of marketing is, *inter alias*, increase sales and the relevant market share which requires targeting new customers. Then to claim that the marketing campaign of the Respondent was only directed towards its existing clientele was a bogus inference. Therefore, it is safe to conclude that the marketing campaign was designed to target the overall market of milk consumers, including consumers of UHT and powdered milk, as various posts contained material which discouraged use of these products.
- 5.61. The post, dated 15.12.2016, has received around 938 shares which demonstrates further that this post has reached many people outside the community of this page. Even if an



individual is aware of the difference between the two categories of milk, i.e., UHT and pasteurized, and that Prema belongs to the category of pasteurized milk, no one would be able to understand the true meaning of the Order's extract due to the misleading/deceptive manner in which it was presented. Even the most sophisticated consumer can easily be deceived by the statement, "*Except PREMA Milk, all other samples are found to be unfit for human consumption*": source supreme court.", especially taking into consideration the general discussions conducted within the public revolving around fitness and adequacy of various categories of milk and milk based products and ensuing health concerns.

- 5.62. Notwithstanding the standards set by any other law or forum with respect to the aptitude of a consumer, the scope of this inquiry is to determine whether there has been a *prima facie* violation of the Competition Act, 2010, by the Respondent. Where the precedent set in this regard is clear that while determining deception, we have to take into consideration the "ordinary consumer", who has been defined by the Commission, as rightly highlighted by the Complainant, in the following manner:

*"Here it may be relevant to point out that the 'ordinary consumer' is not the same as the 'ordinary prudent man' concept evolved under contract law. Unlike the 'ordinary prudent man' the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer. Therefore, in order to implement the law in its true letter and spirit, the scope of the term 'consumer' must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services."*

- 5.63. In view of the above, it is clear that while evaluating the instance of deception, we must view a marketing campaign from the perspective of an ordinary consumer. Furthermore, the Act does not require us to gather proof of actual deception, rather it requires us to determine whether there is a "probability/intent" of deception involved in a marketing campaign. Whereby the above discussion clearly establishes that the marketing

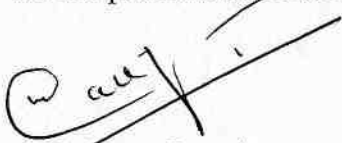


campaign of the Respondent appears to be *prima facie* deceptive in terms of Section 10(1) of the Act in general, read with sub-Section 10(2)(b) of the Act which prohibits distribution of false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, quality and suitability for use of a product.


- 5.64. The Respondent, by misrepresenting the facts of the matter, fraudulently tried to mislead the public into believing that its product was not only better than its direct competitors' products, i.e., pasteurized milk brands, but also than the remaining milk products, such as UHT, powdered milk, tea whiteners, etc. It can, therefore, be concluded that by engaging in such conduct, the Respondent was also involved in false and misleading comparison of goods in the process of advertising in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2)(c) of the Act
- 5.65. Moreover, various comments made underneath different posts of the Respondent also demonstrate that the public was actually deceived into perceiving that the Respondent's product was better than all the available milk products in the market. Therefore, the Respondent's misleading campaign is also capable of harming the business interests of other undertakings in, *prima facie*, violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act.

## 6. CONCLUSION AND RECOMMENDATIONS

- 6.1. The information supplied by the Complainant and the claims made by the Respondent while marketing its product were thoroughly examined and we are of the opinion that the Respondent is involved in distribution of false and misleading information that lacks a reasonable basis along with making false comparisons related to the character, properties, suitability for use and quality of its product which is also capable of harming the business interests of other undertakings. Such deceptive conduct of the Respondent amounts to a *prima facie* violation of Section 10(1), in terms of Section 10(2)(a), (b) and (c) of the Act.
- 6.2. Provided that this is a matter which has a direct impact on the public at large, the Respondent should also be restrained from advertising its product in an unfair and deceptive manner. Furthermore, *prima facie* violations under the Act, as highlighted in the findings of the enquiry report, warrant initiation of immediate proceedings against the Respondent under Section 30 of the Act.

  
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