

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 K&N FOODS (PVT) LTD
AGAINST M/S A. RAHIM FOODS (PVT) LTD FOR DECEPTIVE
MARKETING PRACTICES**

BY

Noman Laiq & Marryum Pervaiz

Dated: December 12, 2013

1. **Background:**

- 1.1 K&N's Foods (Pvt.) Ltd (the '**Complainant**') through Khurram Gul Ghory and Ali Kabir Shah, Advocate(s) High Court filed a complaint against M/s A. Rahim Foods (Pvt.) Ltd (the '**Respondent**') with the Competition Commission of Pakistan ("The Commission") for alleged violation of Section 10 of the Competition Act 2010 ("the Act") pertaining to deceptive marketing practices.
- 1.2 It was alleged in the complaint that, the Complainant is a leading Pakistani company and a pioneer in the poultry and frozen foods sector including nuggets, burger patties, kebabs, sausages, smoked meats etc. That K&N has established an extremely identifiable brand identity by using a cohesive trademark, the trade dress/colour of its packaging and logo- comprising of a rectangular red box with a picture of the finished product on the front. That the Respondent has entirely copied the Complainant's packaging and by doing so has distorted healthy competition in the market.
- 1.3 Based on the preliminary fact finding, the Director General (OFT/Legal) pursuant to powers delegated under S.R.O 176(I)/2010 appointed Mr. Noman Laiq, Joint Director (OFT) and Ms. Amun Sikandar, Assistant Director (OFT) as enquiry officers (collectively the '**Enquiry Officers**'). During the course of enquiry Ms. Amun Sikandar went on leave and thus the competent authority appointed Ms. Marryum Pervaiz, Assistant Director (OFT) as enquiry officer in her place to conclude the enquiry.
- 1.4 The aim of the enquiry was to determine whether, *prima facie*, by using similar packaging to K&N's packaging:
 - a) The Respondent is violating Section 10 of the Act, in particular Section 10 (2) (d) which prohibits *fraudulent use of another's trademark, firm name, or product labeling or packaging*; and/or
 - b) The Respondent's conduct *is capable of harming the business interest* of the Complainant in violation of Section 10 and in particular Section 10 (2) (a) of the Act?

2. **The Complaint:**

- 2.1 This section summarizes the contentions raised in the complaint:
- 2.2 That in 2003 the Complainant launched a wide range of frozen processed, ready to cook and fully cooked products. The products include nuggets, burger patties, kebabs, sausages, cold cuts, smoked meats, bite sized cooked chicken etc. The complainant was one of the first to target frozen products to the general Pakistani market and played a fundamental role in developing the appetite of Pakistani consumers towards these convenient, frozen products.
- 2.3 The Complainant has clearly established an extremely identifiable brand identity by using a cohesive trademark consisting of brand names, the company's trade

name **K&N's**, the trade dress/colour of its packaging and logo. The complainant adopted a distinctive rectangular red box with the picture of the finished product on the front, storage and cooking instructions on the back, ingredients on one side and a smaller image of the finished product on the other side of the pack. An image of K&N's packaging is depicted below:



- 2.4 It has been further alleged in the complaint that, the Complainant has developed instantly identifiable product labeling and packaging that serves the primary purpose of identifying the Complainant as the source of the products. K&N's packaging is also a symbol of quality and attracts consumers.
- 2.5 The Respondent has distorted healthy competition by entirely copying K&N's packaging and used the recognition and goodwill associated with K&N for unjust personal gains. The misuse of such packaging causes the consumer to be deceived and/or misled regarding the origin of the product. A discerning consumer may also be subconsciously attracted towards a product that appears to be a replica thus diluting the goodwill and exclusivity of the packaging or product labeling.
- 2.6 The Respondent entered the market in 2008 having had no previous experience in the poultry meat or frozen foods sector. The Respondent initially launched its line of frozen foods using packaging that was different and distinct from the K&N's packaging. The Respondent's old packaging is highlighted below:



- 2.7 The Respondent continued the use of this packaging but was unable to make an impact in the market and re-launched its product in 2012 with packaging/label designs that have been substantially copied from the Complainant's product labeling and packaging, in particular the use of the colour red, which is one of the clearest means to differentiate K&N's branded products. **(A comparison of the Complainant's packaging and the Respondent's new packaging and old packaging has been Annexed as Annex-1)**
- 2.8 The Respondent also identically copied the Complainant's product labeling, including placement of various details and language used by the Complainant. The text pertaining to the ingredients, storage and cooking instructions has been copied verbatim from the Complainant's K&N packaging. The text found on the Complainant's and Respondent's Kofta product is reproduced below:

Complainant's Packaging Cooking Instructions:

Procedure: Appliances and utensils vary; cooking times accordingly. Defrost product inside refrigerator until slightly thawed, prior to cooking. Avoid re-freezing thawed product.

Cooking Pot: To enjoy traditional Kofta curry, prepare curry with your choice of recipe. Add slightly thawed Kofta along with water. Cook until ready

OR

Karahi: To enjoy Kofta as a snack, preheat oil to frying temperature (170 C). Deep fry slightly thawed kofta for five minutes, or until brown.

Respondent's Packaging Cooking Instructions:

Appliances and utensils vary; cooking times accordingly. Defrost product inside refrigerator until slightly thawed, prior to cooking. Avoid re-freezing thawed product.

To enjoy Kofta as a snack, preheat oil to frying temperature (170 C). Deep fry slightly thawed kofta for five minutes, or until brown.

OR

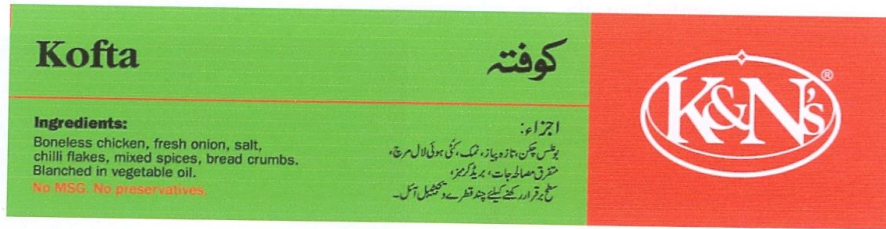
To enjoy traditional Kofta curry, prepare curry with your choice of recipe. Add slightly thawed Kofta along with water. Cook until ready.

An image of the back containing cooking information is depicted below, for the sake of comparison:



2.9 Moreover the list of ingredients appearing on the Respondent's packaging is also identical and appears in identical sequence. The Respondents' actions also raise serious questions regarding the authenticity of the language appearing on the

Respondent's packaging and the veracity of the claimed list of ingredients.



2.10 In addition, the Respondent has copied the Complainant's distinctive trademark COMBO WINGS used for its chicken wings. The term COMBO WINGS was first adopted by the Complainant and has been approved by the Registrar of Trademarks for registration. The unauthorized use of the trademark COMBO WINGS constitutes a further violation of Section 10(d) of the Act. An image of the packaging of the Respondent and Complainant's COMBO WINGS is as below:



2.11 In large supermarkets frozen products are kept in large freezers alongside each other and it becomes difficult to differentiate between them. In smaller stores, the Respondents' products are deliberately maneuvered to be kept alongside the Complainant's, and in several instances reported to the complainant, the

Respondent's deceptively packaged products have been kept in K&N's branded freezers supplied by the Complainant. The deception being caused is gauged by the following images:



3. Submissions of the Respondent:

- 3.1 That the Respondent, A. Rahim Foods Pvt. Limited is a part of Dawn Group of Companies and is engaged in the business of manufacturing, processing, marketing and sale of a large variety of food and frozen food products. That the Dawn Group, of which the Respondent is part, entered into the business of food products in October 1981, when its first plant was established in Karachi. That the Dawn Group launched its first product Dawn Bread and started using predominantly red colour for packaging of its products including but not limited to breads, cakes and rusks etc. The use of red colour by Dawn Group is depicted below:



- 3.2 That presently, Dawn Group is marketing its breads, buns, burger buns, fruit buns, cakes, rusks, frozen food products, semi cooked food products and ready to eat food under the house mark and trade name Dawn with predominantly red package colour scheme, design and get up.

- 3.3 That the Respondent entered into the business of frozen foods and ready to eat meals including but not limited to Allu Palak, Chapli Kebabs, Chana Daal Halwa, Samosas, Chana Daal Karayla, Gajar Halwa, Vegetable Biryani, Chikar Choley, Lahori Choley, Kari Pakora, Loki Halwa, Vegetable Achari, Vegetable Bhujya, Sarson Saag, Plain Parathas and Frozen Puris. That, companies within Dawn Group have permitted the Respondent to use trademark, house mark and trade name DAWN as well as red colour packaging for its frozen food products. All business and product details of Dawn Group are available on www.dawnbread.com
- 3.4 That both Dawn Group and the Respondent enjoy tremendous reputation and goodwill in their trademark, house mark and trade name Dawn which is a household name in Pakistan. Products of Dawn Group and/or the Respondent packed in red colour scheme, design and get up enjoy enviable consumer recognition, reputation and goodwill.
- 3.5 It was further submitted that, an overwhelming majority of food companies world wide (with negligible exceptions) use red colour in their trademarks, packaging, colour scheme, design and get up as well as in their publicity material and in case of fast food chains, the interior décor of restaurants etc., is also predominantly red in colour. Mc Donald's, KFC, Burger King, Hardee's, Pizza Hut, Wendy's, Arby's and Albaik as well as brands such as Coca Cola, Tesco.
- 3.6 That it is the Dawn Group (of which the Respondent is a part) which had started using red colour for its branding and packaging for its various food products, office stationary, publicity material and vehicles, first and prior to the Complainant for various food products. Dawn Group has been hosting and sponsoring various sports, social, educational, corporate and commercial events during almost the last three decades and has used red colour for various banners, publicity and other material. That, famous food chains like McDonald's sources its burger buns etc from Dawn Group.
- 3.7 That the Complainant has wrongly and falsely claimed rights to its red packaging as Dawn has been using the red colour since 1981 whereas the Complainant's company was incorporated in Pakistan on November 27, 1996 (15 years after first use of red colour by Dawn group). The Complainant company started its frozen food products only in year 2003 (after almost 22 years of use of red colour by Dawn Group). The Complainant does not have exclusive right to use the colour red, and never objected to the food packaging of red colour of any national or international brands.
- 3.8 With regard to the Complainant's brand name Combo Wings, it was submitted that Combo Wings is a generic term which is used in relation to a specific selection and combination of chicken wings and shoulder blade and the word Combo Wings bears a direct reference to the kind, character, nature and quality of the product.

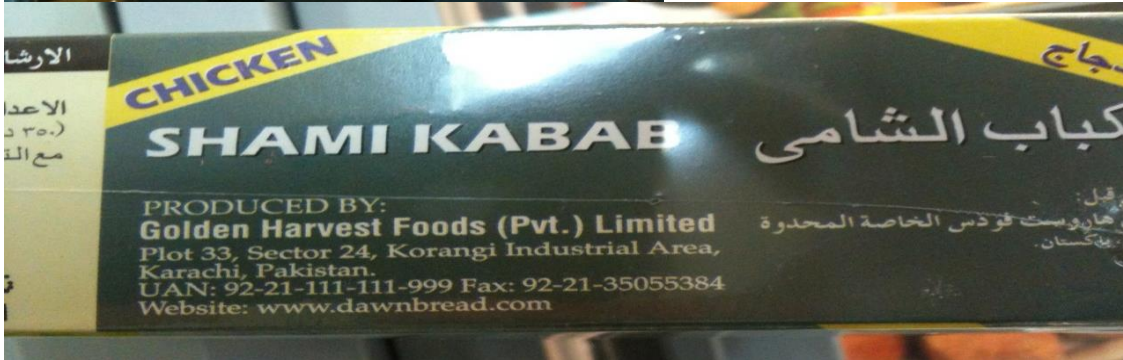
- 3.9 Therefore, the complainant cannot gain rights to its so called “unique brand names”, “Combo Wings”, “Haray Bharay Nuggeys”, “Fun Nuggets” and “Tender Pops” as the same lack the very characteristics of a trademark under Section 2 (xxiv) & (xlvii) read with Section 14 and 21 of the Trademark Ordinance 2001. Further the Complainant has no trademark registration for any of the labels for packaging and or otherwise for any packaging with red colour scheme, design and get up and all the trademark certificates pertain to the use of the letters K&N S with a disclaimer on exclusive use of letters K&N S separately and apart from the mark as words. In the circumstances the Complainant has no rights in the aforementioned labels and the red colour in packaging. That the Complainant has not mentioned the specific date that they introduced red packaging and they have only mentioned the year to be 2003.
- 3.10 With respect to the allegations regarding “product information”, “ingredient and storage and cooking instructions” under law, there is no right in any product description and information or otherwise description of any ingredient, storage and cooking instructions as wrongly and falsely stated by the Complainant. Clearly Kofta Products have to be heated or fried at the same temperatures therefore, the complainant cannot attribute false claims in this behalf.

3.11 Additional Submissions of the Respondent and Complainant

- 3.12 The Inquiry Officers as per letter dated February 25, 2013 directed the Respondent to send additional information to clarify certain facts including a) whether the brand Dawn Foods and Dawn Bread are owned by the same company, i.e A. Rahim Foods Pvt. Ltd, b) the nature of the relationship between A. Rahim Foods and the owner of Dawn Bread, c) boxes (empty) of the range of products in the frozen food market under the brand name of Dawn Foods and d) the old packaging of Dawn Foods.
- 3.13 In response to nature of the relationship between the Respondent and the owner of “Dawn Bread” the Respondent submitted that M/s Golden Harvest Foods Pvt. Ltd is the owner of all the intellectual property rights belonging to Dawn Group, including trademark registrations pertaining to the brands “Dawn Bread” and “Dawn Foods” while other group companies including the Respondent have been authorized to use these trademarks from time to time. Both the Respondent and M/s Golden Harvest Pvt Ltd have common directors/shareholders and majority shares of both these companies are owned by Mr. Ghulam Hussain, CEO of M/s Golden Harvest and Mr. Fida Hussain, CEO of the Respondent. With both CEOs holding equivalent shares in M/s Golden Harvest of 33.33 % and in M/s A. Rahim Foods of 25 %. Therefore they are associated undertakings in terms of Section 2(2) of the Companies Ordinance, 1984. The Respondent also submitted samples of packaging from their entire range of frozen foods and submitted that the old packaging was not available with the Respondent and instead of the original a scanned version was sent reproduced below:



- 3.14 The Inquiry Officers in their letter dated April 4, 2013 requested the Complainant for additional information including a) An estimation of damages in terms of loss suffered by the company b) Sales figures before and after the introduction of Dawn's new packaging c) Evidence that reputation and goodwill has been damaged d) Pictorial evidence of deliberate/inadvertent placement of Dawn's packaging alongside K&N's in freezers from various large/medium sized retailers in major cities.
- 3.15 In response, the complainant submitted that an exact estimation of damages was not possible as they were unable to quantify the number of consumers who may have mistakenly picked up Dawn frozen food items instead of K&N frozen food items. With respect to sales figures they submitted that they would not be an accurate estimate of damages and further since the financial year has not come to an end for 2013 it would be difficult to evaluate. With respect to evidence of goodwill being damaged the complainant submitted emails received from aggrieved consumers on the accounts consumer.relations@KandNs.com and Contact@KandNs.com and letters addressed to K&N office in Karachi both. These consumer accounts are varied but follow a similar theme whereby consumers have expressed purchasing Dawn's product by mistake owing to the packaging of K&N and Dawn being too similar.
- 3.16 In addition, the Complainant to support their contention that often Dawn and K&N products are place alongside each other in the same freezer in large retailers submitted images of the same taken from Hyperstar Fortress and Metro Model Town in Lahore and Hyperstar, Metro Saddar, Metro Safari Park and Metro Star Gate in Karachi. Images of Dawn products being kept in K&N branded freezers in smaller retail stores in Karachi including Hajjis Baddar Commercial, Ittehad Grocers, Ittehad Commercial, New Kamal, Baddar Commercial were also submitted. **(Annexed herewith as Annex-2 for ease of reference)**
- 3.17 On July 3, 2013 the Complainant submitted images of Dawn's frozen products being sold in Dubai under the brand name Mezban, to depict that their packaging is different for the market abroad. Two of these images showing a front view of the Shami Kebab product packaging and side view showing the manufacturer as M/s Golden Harvest the owner of Dawn Bread and associated undertaking of the Respondent have been reproduced below :



3.18 A meeting dated 12-07-2013 was conducted at the office of the Commission, the purpose of which was to give a chance both parties to submit any additional facts that would aid in the course of the inquiry. The Respondent was told to clarify certain facts submitted by the Complainant; that the Complainant launched its frozen food product in 2003, the Respondent entered in 2008 with the old packaging and no previous experience in frozen food sector. In 2012 the Respondent revised its packaging to a bright red color. The Respondent did not deny this and reiterated its previous submission that the Dawn Group launched with its red colour in 1981 and the Complainant cannot claim exclusivity of the use of red colour. The Complainant argued that Dawn uses a no. of different colors for its packaging of bread while the logo remains red in colour and referred to images sent in their previous submission. This image have been reproduced below:



3.19 The Respondent reiterated its previous argument that Mc Donalds, KFC, Burger King all use red colour in their trade dress and logos and are in the same product category. The Complainant argued that the market for fast food cannot be compared to the frozen food market as the method of sale of both products is different while frozen foods are stocked in retail stores, fast food is sold from exclusive outlets. The Respondent argues that under the Trademark Ordinance 2001, all food falls under the same category i.e Class 30 and therefore the argument does not hold. The Complainant sighted the example of KFC and K&N and submitted that they fall under different categories as per the Trademark Ordinance 2001 and KFC being a fast food retailer falls under Class 35. The Inquiry officers asked the Complainant whether they had attempted to register their packaging and the Complainant responded that an application for registration has been filed with the competent authority. In addition, under the Burn's Convention 1986 pertaining to copyrights literary work of over two sentences need not be registered and reiterated that Dawn had copied cooking instructions verbatim from the K&N packaging. The Inquiry officers asked the Complainant and Respondent whether there was a standardized quantity i.e no. of frozen items in one pack that the producers of frozen goods had to comply with. The Complainant submitted that there is no such standard and even then the Respondent has mirrored the quantities of the Complainant's product line for example if there are six burger patties offered by K&N there are exactly six offered by Dawn.

4. Analysis:

- 4.1 In the preceding paragraphs the facts and evidence submitted by the Complainant and Respondent are analyzed and discussed in order to reach a conclusion regarding the issues at hand, that is, whether the Respondent has copied the Complainant's packaging also known as parasitic copying and in doing so potentially mislead consumers and is in prima facie, violation of Section 10 of the Act.
- 4.2 Before discussing the submissions of the Complainant and Respondent, it is important to shed light on international competition legislation pertaining to "Parasitic Copying" also known as "Copycat Packaging".
- 4.3 There is no specific definition of Copycat packaging, one appropriate definition could be "Copycat packaging is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting, since normally it does not infringe intellectual property rights. The risk posed by copycat packaging is consumer confusion, and consequently distortion of their commercial behavior"¹.
- 4.4 The Unfair Commercial Practices Directive 2005 (UCPD) contains provisions designed to tackle copycat packaging design that misleads or confuses consumers. Article (1) b) of UCPD prohibits commercial practices misleading consumers in

¹ Giuseppe Abbamonte, "Copycat Packaging, Misleading Advertising and Unfair Competition"

relation to the main characteristics of the product, including its commercial origin. Article (2) a), prohibits any marketing of a product that creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. According to the Consumer Protection from Unfair Trading Regulations 2008, UK, a list of prohibited commercial practices as transposed from the UCPD include at item no. 13 *“Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by the same manufacturer when it is not.”*

- 4.5 There is no harmonized system for the prevention of parasitic copying in the European Union and methods of protection available differ between member states. According the Hogan Lovell’s Final Report for the European Commission on Parasitic Copying, the most popular means for preventing Parasitic Copying was competition law as majority of the member states are of the view that parasitic copying is an example of unfair commercial practices and national laws derived from the UCPD are used to prevent them². The elements necessary for successful commencement of legal proceedings differ between member states with some requiring proof of consumer confusion and some requiring the original product to have prior existence in the market and only a risk of consumer confusion/likelihood of confusion may be present.
- 4.6 Since this is a first case of its kind, i.e the Complainant alleging that the Respondent has copied their packaging, it demands that a careful consideration of the facts is necessary, in order to establish whether the conduct of the Respondent is a form of copycat/parasitic copying.
- 4.7 It is evident from the above, that the Complainant had prior existence in the market and was a market leader for frozen foods as it launched its frozen food product in 2003 with the same packaging, and the Respondent followed in 2008 and launched its frozen food products in the old packaging (Reference is made to para 2.6 of the enquiry report). The Respondent’s submission that they entered the market in 1981 and launched their first product Dawn Bread does not hold as there is a clear distinction between the market for baked goods and frozen foods. Further in 2012 the Respondent revised its packaging and changed the layout, image resolution, colour, font of text and label design of its packaging as is clear from a comparison of Complainant’s and Respondent’s packaging (Images of a comparison of the Complainant’s packaging and the Respondent’s new packaging and old packaging has been Annexed as Annex-1)
- 4.8 With respect to the Respondent’s submission that they had always been using the colour red and the Complainant cannot claim exclusive rights in the colour red. There is no doubt that the Respondent has been using the colour red for its logo since 1981, however the image submitted of the logo depicts two colours that is red and blue. (Reference is made to para 3.1 image of Original Dawn Logo). Further the Respondent failed to prove through pictorial evidence that the

² Member states with specific legal provisions for parasitic copying are Cyprus, Denmark, Greece, The republic of Ireland, Latvia, Lithuania, the Netherlands, Portugal, Slovak Republic, Slovenia, Spain and Sweden.

remainder of the packaging of its cakes, rusks, breads were predominantly red at the time. It is apparent from a perusal of the Respondent's website that the logo has been revised since then to include the colours yellow, green and blue, further the packaging of the Respondent's entire range of products is in a wide variety of colours. (Reference is made to image of Dawn Bread packaging under para 3.18) and it is pertinent to note that the frozen food items for export are of different colour as per the Respondent's website and a perusal of the image at para 3.17 indicates that the Respondent's product frozen shami kebab under the brand name Mezban for the Dubai market is dark green. It is also important to note, that the Complainant does not have an objection to the Respondent's logo being red and blue since 1981 or current logo being predominantly red, rather it is that the overall packaging of the Complainant has been imitated.

- 4.9 There are 285 shades of visibly different red to the naked eye for a person without any colour blindness and with 20/20 vision. Moreover, the United States district court for Ohio³ and Court of Appeals for the Second Circuit⁴ have held that secondary meaning may be attached to certain colors and their shades if the color is not a functional feature of the product, and such colors or their shades may be protected as intellectual property. Similarly the Austrian Supreme Court has ruled⁵ that the use on products of a color previously established to identify the goods of another party can breach intellectual property rights. For this breach to occur the color must be used in relation to specific products. In this case the Complainant used the color red on its packaging solely as a unique color for brand identity, since frozen foods have no relation with the color red. There is no logical reason for using that particular shade of red found on the Complainant's packaging or a similar color combination (i.e red and white the colour of K&N's logo) on frozen food packaging unless it is to exploit the identity of the Complainant's products by potentially creating confusion in the minds of consumers. It is pertinent to note that the shade of red used on the Respondent's products is not in any manner similar to the shade originally used on the Respondent's packaging which appears to be a darker shade, almost maroon (Reference is made to image under para 2.6 and 3.13 and Annex 1), while it is in fact quiet similar to the shade used on the Complainant's packaging.
- 4.10 In order to further establish whether parasitic copying may have occurred, it is important to compare elements of the Complainant's and Respondent's packaging to assess similarities. As per the Complainant's submission, the Respondent also identically copied the Complainant's product labeling, including placement of various details and language used by the Complainant. The text pertaining to storage and cooking instructions has been copied verbatim from the Complainant's K&N packaging. Moreover the list of ingredients appearing on the Respondent's packaging is also identical and appears in identical sequence. (Reference is made to image at para 2.9 of the enquiry report). In support of this allegation the Complainant cited the example of its Kofta product where it is evident from a perusal of the packaging as mentioned earlier, that the preparation

³ In *Dap Products, Inc. v. Color Tile Manufacturing, Inc.* (decided on April 19th, 1993)

⁴ In *Christian Louboutin S.A. v Yves Saint Laurent America Holding, Inc.* (decided more recently on September 5th, 2012)

⁵ In *Manz'sche Verlags v. Linde Verlag* (decided in 1997)

instructions have been copied verbatim and the list of ingredients appears in identical sequence. In addition, the ingredients for both the Respondent's and Complainant's packaging appear in the side panel of the box and Preparation instructions for both appear at the back of the box. Further, the quantity of product is the same that is there are nine pieces of the product in both boxes.

- 4.11 The Respondent argued that there is no right in any product description and information or otherwise description of any ingredient, storage and cooking instructions as wrongly and falsely stated by the Complainant. Clearly Kofta Products have to be heated or fried at the same temperatures and therefore, the complainant cannot attribute false claims in this behalf. However, a perusal of a third competitor's product packaging for frozen Kofta under the brand name Mon O Salwa indicates that a) the ingredient section lists the items Chicken Breast, Fresh Coriander, Salt, Fresh Onion, Fresh Green Chilli and Spices and b) the cooking instructions section states "Fry frozen Mon O Salwa in hot oil on medium heat for 3-5 minutes or till they become golden brown" c) there are ten pieces in a box d) the ingredients and cooking instructions are placed at the back of the box. It is also worth mentioning that Mon O Salwa has predominately yellow packaging with the trademark/logo of the colours red and yellow and hence, is with respect to all the aforementioned attributes is completely distinct from the Respondent and Complainant's packaging. Therefore, the Respondent's submission does not have ground as even though Kofta products may have to be heated or fried it does not allow the Respondent to copy the ingredients in identical sequence and use the same words as the Complainant with reference to cooking instructions.
- 4.12 In view of facts before us, it is safe to infer that the Respondent has imitated the Complainant's packaging and the conduct of the Respondent falls under the ambit of Parasitic Copying "*Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, colour combination and graphic arrangement) but usually there is just enough difference to avoid a clear cut trade mark infringement. Still they often generate deception or confusion among consumers*"⁶
- 4.13 Even though it is not important to establish whether actual deception has occurred under Section 10 of the Act, the Inquiry Officers conducted a consumer survey at medium and large retail outlets to assess consumer perceptions regarding the Complainant's and Respondent's packaging. Due to resource and time constraints the survey could not be conducted on a large scale. The methodology employed comprised of designing a questionnaire consisting of three questions; Q1 Do you think the overall packaging of K&N and Dawn for frozen foods is similar? Q2 If yes, to what extent is it similar on a scale of 1 to 10, 10 being extremely similar and 1 being totally different? Q3 Would you ever find yourself confused between the two brands? An officer of the Commission administered a 100 questionnaires at the frozen food section of various retailers in Islamabad. It was reported that few questionnaires i.e 100 could only be

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

administered owing to the fact that majority of shoppers frequenting the store on those particular days were illiterate and/or not familiar with the English language.

- 4.14 The results of the questionnaire were analysed and the conclusion reached is that 82 percent of the consumers voted positive in relation to Q1 i.e, in their opinion the packaging of K&N and Dawn is similar. For Q2 which required a rating of the extent to which both are similar, an average was calculated, which came to circa 6.79 ~ 7 on a scale of 1 to 10. Further with respect to Q 3 i.e whether consumers would find themselves confused between the two brands, 49 percent reported out of the total 100 that they are likely to be confused and out of the 82 percent that reported affirmative to Q1 60 percent reported that they were likely to be confused. The remaining 18 percent reported that they did not find the overall packaging to be similar and as a consequence would not find themselves confused between the true brands.
- 4.15 In view of the survey results which depict a majority of the population at 82 percent finding the packaging to be similar and 49 percent reporting that they are likely to be confused, the chances of consumers getting deceived are high. It is important to note that for the purpose of Section 10 a consumer is broadly defined as an “ordinary consumer” as opposed to a reasonable or prudent consumer as is the case in the EU to take into account circumstances, in particular levels of literacy specific to the Pakistani context. To this extent, the survey had its limitation in that it could not take account of a large body of consumers and buyers- drivers and cooks that are commonly sent to the market to purchase products on the consumer’s behalf.
- 4.16 As mentioned earlier, the Complainant has submitted consumer accounts in the form of letters from aggrieved consumers who purchased the wrong product owing to the similarity in packaging. It is evident from a perusal of these that at various instances consumers have also complained to the Complainant that their packaging is similar to the Respondent’s as per one email sent by Mrs. Somia dated September 17, 2012 *“What happened is that the colour scheme and packaging is so similar (to Dawn) that I did not notice that it was not K&N’s product. As your company’s loyal and first customers I would say you should change your colour scheme, theme and any other stuff which no one can copy or cheat your product.”* As a contact no. was provided the Inquiry Officers, in an attempt to verify the authenticity of this email, called on the number provided and its authenticity was confirmed. Further, many buyers place reliance on colour/shapes/images as per one letter dated March 20, 2013 *“I sent my driver to Hajjis store with a grocery list which included K &N burger patties. He returned with the product but it was of Dawn Foods not K & N’s. Upon pointing his mistake he being an illiterate replied that since I had told him it would be a red box, he accepted it from the shop keeper, looking at the colour. He could not make out the difference in name”.* It is pertinent to note that, in a world of limited resources, although some consumer have reported their grievances not every consumer misled by the similarity in packaging would be able to expend the time and energy required to inform the Complainant or relevant authority.

- 4.17 Statistics show that an average consumer does most of his shopping on auto pilot, shoppers have a limited ability to focus, absorbing only between 5 and 7 pieces of information in a given time frame. This means that the brain generally tries to keep things simple by relying on shape and colour as simple search mechanisms⁷. Consumers base their purchasing decisions on first impressions of the product exterior and do not engage in a considered examination of the product⁸. This suggests, that even a reasonable/discerning consumer would not be able to differentiate between the Complainant and Respondent's packaging at a cursory glance let alone an ordinary consumer.
- 4.18 The Complainant has submitted that, in large supermarkets frozen products are kept in large freezers alongside each other and it becomes difficult to differentiate between them. In smaller stores, the Respondents' products are deliberately maneuvered to be kept alongside the Complainants', and in several instances reported to the complainant, the Respondent's deceptively packaged products have been kept in K&N's branded freezers supplied by the Complainant. With reference to this, research shows that discriminatory shelf positioning can affect consumer's purchase decisions and moving a product from the worst position to the best position on the shelf can increase sales up to 59 %⁹. As is evident from a perusal of the images (reference is made to Annex 2) of the Complainant's and Respondent's product being placed alongside in freezers, at a cursory glance it is very likely that even a prudent consumer would be misled let alone an ordinary consumer.
- 4.19 The Complainant further has submitted that, the Respondent has copied the Complainant's distinctive trademark COMBO WINGS used for its chicken wings. The term COMBO WINGS was first adopted by the Complainant and has been approved by the Registrar of Trademarks for registration. In addition, the Complainant also submitted a certificate of copyright registration for the work of the word "K&N's Combo Wings" dated 30, June 2008 with the disclaimer "please note that the title/name/brand/mark given by the applicant in the application form or appearing on "work" is not registered but only the expression/style/get up of the work is registered/protected under copy right law". The Respondent has submitted that Combo Wings is a generic term which is used in relation to a specific selection and combination of chicken wings and shoulder blade and the word Combo Wings bears a direct reference to the kind, character, nature and quality of the product.

⁷ Tony Durham, Report on 2012 Symposium on Retail Competition "Shopper Behavior: how choices are made"

⁸ Jacobs vs Fruitfield Group Ltd 2007 published in "Misleading Packaging Practices; Breifing Paper" Directorate General for Internal Policies.

⁹ *Ibid*

- 4.20 With reference to the term Combo Wings research shows that this term is generic and is often used online¹⁰ on websites such as food blogs¹¹ and in recipe books. Moreover, a multitude of eateries¹² and a grocery store¹³ have used this term to refer to items on their menus and shelves without allegations of breaching intellectual property rights. For the foregoing reason it appears that the term “combo wings” is already generic and in common use prior to K&N’s use of it for its own products. This does not denote any special recipe or exclusive brand of K&N, and by being granted Trade mark in such a term K&N would be given an unfair advantage in the food industry by having exclusive possession of a descriptive term, which is commonly used for its primary meaning. However, since the Respondent has copied so many other aspects of the Complainant’s packaging, the subsequent use of the term COMBO WINGS by the Respondent strengthens the Complainant’s allegation as overall marketing rather than isolated instances is to be considered in deceptive marketing cases.
- 4.21 It is important to note, that businesses spend a tremendous amount of resources to build their brand identity, distinguish their products from competitors and build a reputation in the market. The four principle devices undertakings use to distinguish themselves are trade names, trade marks, service marks and trade dress. Broadly speaking, a trade mark can be anything that individualizes that good and services of a given enterprise and distinguishes them from the goods and services of others. With increased competition and sophistication of means of distinguishing a product trademarks can be sounds, scents and colour, for example T Mobile ring tone composed by Lance Massey and the Cadbury’s colour purple. These elements serve as trademarks, provided that they perform the function of uniquely identifying the commercial origin of products and/or distinguishing the product. Trade dress or packaging is also a principle component undertakings use to distinguish themselves and it refers to a product’s physical appearance- size, shape, texture and design, the way a product is presented or wrapped.
- 4.22 The Respondent’s marketing of its product in very similar packaging to the Complainant certainly would not only affect the consumer’s capacity to make an informed choice and cause deception but would also hinder competition as it would be no longer based on honesty and fairness. One of the main aims of the Act is to ensure that competition is fair and not distorted. Tests have shown that where products are packed in a similar way, consumers get confused and sales of the imitated product are reduced in a way that is not the case when the packaging is clearly different from the brand¹⁴.
- 4.23 In view of the above, The Respondent appears to be in violation of Section 10 of the Competition Act 2010, in particular, Section 10 (2) (d) which prohibits

¹⁰ Such as on http://www.yelp.com/biz_photos/bonchon-chicken-leonia#5ZWjncz9mrQhmeHuDJER-w

¹¹ Such as <http://momkfun.blogspot.com/2013/02/chicken-combo-wings.html> and <http://www.eatingforsanity.com/2012/10/jake-melnicks-corner-tap.html>

¹² View Menu on <http://www.yellowpages.com/memphis-tn/mip/hot-wings-express-1085192>, and see <http://www.tidesnahant.com/tidesmenu.pdf> and <http://www.elsas.com/Appetizers.html>

¹³ Namely Tesco in the United Kingdom; <http://www.tesco.com/groceries/Product/Details/?id=266595596>

¹⁴ Tony Durham, Report on 2012 Symposium on Retail Competition “Shopper Behavior: how choices are made”

*fraudulent use of another's trademark, firm name, or **product labeling or packaging***; and its conduct also appears to be capable of harming the business interest of the Complainant in terms of Section 10 (2)(a). It is proposed that these prima facie violations under the Act, warrant initiation of proceedings against M/s A. Rahim Foods under Section 30 of the Act.

Marryum Pervaiz
Assistant Director
Enquiry Officer

Noman Laiq
Joint Director
Enquiry Officer

Annex-1

K&N's Pack Front



Dawn Foods Pack Front: New



Dawn Foods Pack Front: Old



K&N's Pack Front



Dawn Foods Pack Front: New



Dawn Foods Pack Front: Old



A handwritten signature in black ink, consisting of stylized, overlapping letters.



Complainant's packaging



Respondent's packaging



A handwritten signature in black ink, appearing to be "R. S." or similar.

