

# **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 EASTERN PRODUCTS (PVT.)  
LIMITED AGAINST M/S MASTER FOOD INDUSTRIES FOR DECEPTIVE  
MARKETING PRACTICES**

**BY**

**Marryum Pervaiz & Riaz Hussain**

**Dated: October 15, 2019**

## 1. BACKGROUND

- 1.1 M/s Eastern Products (Pvt.) Limited (the ‘**Complainant**’) through The Eastern Law Firm, filed a complaint against M/s Master Food Industries (the ‘**Respondent**’) with the Competition Commission of Pakistan (the ‘**Commission**’) for alleged violation of Section 10 of the Competition Act 2010 (the ‘**Act**’), pertaining to Deceptive Marketing Practices.
- 1.2 It was alleged in the complaint that the Complainant is in the business of production, marketing and sale of tea and other products and the Respondent has copied/imitated the registered trademark and copyrighted packaging of the Complainant, and by doing so has distorted healthy competition in the market.
- 1.3 Based on the preliminary fact finding, the Competent Authority initiated an enquiry in accordance with sub section (2) of Section 37 of the Act by appointing Ms. Marryum Pervaiz, Joint Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT) as enquiry officers (collectively the ‘**Enquiry Committee**’) to conclude the enquiry.
- 1.4 The aim of the enquiry was to determine;

*“Whether the allegations leveled against the Respondent under the complaint constitute, prima facie, in violation of Section 10 of the Act?”*

## 2. THE COMPLAINT:

- 2.1 This section summarizes the contentions raised in the complaint:
- 2.2 The Complainant is a well-known registered Company and carrying on country wide business reputedly since 1990 as manufacturer, importer, exporter, blender and merchant of tea and other products under the registered trade mark and copy right trade dress and packaging/labelling “VITAL TEA” (the ‘**Product**’).
- 2.3 The said trade mark along with its graphically presented registered artwork/design/label which is exclusively adopted and registered by the Complainant with its all prominent features. The Complainant products packaging along with its devices as whole are stand registered with Intellectual Property Offices, i.e. Trade Mark Registry and Central Copyright Registry, Govt of Pakistan. The image of registered trademark of the Complainant is depicted below:



- 2.4 The Complainant, in order to distinguish its goods from those of other competitors in the same line of business, adopted design/work/trademark and trade dress/label “VITAL TEA” along with distinctive device of rising sun, dual encircled leaf, golden coin with encircled letters of company name and wavy dual lined green shield on its trade dress for more than 20 years. The label and/or layout, design and graphically designed packaging of the Complainant is in use in respect of tea and the get up including complete graphical representation of label/packaging are stand registered as label or artwork /design/trademark of the Complainant products. The said distinguishable packaging appears on all the advertisement material, stationary as well as on the packaging of the products.
- 2.5 It has been submitted that to safe guard its proprietary rights in the copyright work and trademark label/packaging of the Product, the Complainant obtained registration from Trademark Registry, as well as Central Copyright Registry, Intellectual Property Organization (IPO), Pakistan. The trademark and copyright are stand registered and protected under the Trademark and Copyright laws in Pakistan.
- 2.6 The Complainant submitted that its well-known trademark VITAL TEA along with its design is registered with the IPO Pakistan under Registration No. 144883 and Registration No. 210169 in class 30. The trade dress, design, getup, type settings, packaging scheme and artwork of whole packaging are also registered with Central Copyright Registry, Govt of Pakistan under the Registration No. 24032-copr. **Copies of trademark certificates and copyright certificate are attached as Annexures-A&B).**
- 2.7 The Complainant is one of the most successful and popular blender and producer of packed tea products for the last two decades. The Complainant also exports its products under the trademark and trade dress ‘VITAL TEA’. The product of the Complainant has a unique identification in the export market under the said trademark.
- 2.8 The Complainant introduced various brands in tea market, however, the Product was the first brand of the company. The leading brand along with its trade dress and distinguishable prominent features are stand registered with the Trademark Registry. The Complainant was the original registered owner of the said trademark since decades. The trademark of the

Product was registered in Pakistan in relation to variety of products including tea as early as 1996.

- 2.9 The business of the Complainant has been in successful operation for many years and has since acquired outstanding goodwill and reputation for its packed tea. The Complainant is a regular taxpayer of the country and supplying quality products in the market. The packaging of the Product is well recognized among the Asian and European Pakistani consumers. The Complainant ensured that the Product under the trademark 'VITAL TEA' were made under strict hygienic condition and the quality standards were certified by the Pakistan Standards & Quality Control Authority (PSQCA), Government of Pakistan.
- 2.10 The product under the trade name 'VITAL TEA' along with its trade dress and getup is not only a trademark label/pack carrying enormous goodwill and reputation but in fact, one of the famous, well-known brand in distinctive packaging in Pakistan and abroad. The sole objective of the trademark and copyright registration was to strengthen wall of protection for the brand and to keep its legal sanctity and integrity intact as well as to assert the Complainant has exclusive right to use 'VITAL TEA' trademark.
- 2.11 Specimen of the Complainant's product, bearing trademark as well as distinctive package color scheme, design and get up is depicted hereunder:



- 2.12 It was submitted that the Complainant is actively marketing and selling all of its products bearing the Complainant's genuine color scheme, design and get up, and has one of the largest supply and distribution network in Pakistan. Under the prevailing Merchandising Marks Act, Competition Act, 2010, Copyright Ordinance 1962 and Trademark Ordinance 2001, whosoever unlawfully or without consent exploits, adopts false description, adopts deceptive labels by parasitic copying or use such label identical or confusingly similar to

another registered trademark, will, *inter alia*, be held liable for deceptive marketing, copyright and trademark infringement.

- 2.13 The Complainant alleged that the Respondent has adopted/copied its registered trademark and copyrighted packaging. The Respondent is deceptively using the Complainant's genuine color scheme, design and get up during the course of marketing/advertisement. Therefore, the Respondent is disseminated false and misleading information to the consumers and is causing harm to the business interest of the Complainant. The Complainant further submitted that the Respondent is not only indulged in deceptive marketing practices and infringement of its registered trademark and copyright but also supplying low quality products in the market as compare to the Complainant's products.
- 2.14 The Complainant noticed that products under title "VILAL TEA" has been supplied in the market with a similar/identical packaging of its Product. The Respondent intentionally adopted the Complainant's genuine color scheme, design and get up to deceive the consumers. The Complainant received complainant from various distributors about infringement and deceptive malpractices of the Respondent and attempt of passing off.
- 2.15 The Complainant pointed out that previously Respondent filed an application for registration of trademark with the Trade Mark Registry and attempt to register the similar label design and the same was opposed by it. The Complainant submitted that it was revealed that the Respondent not only copied its registered packaging but also representing themselves as registered trademark owner and approved manufacturer by the Government. Bodies. The products sold under Complainant's genuine packaging color scheme, design and get up have acquired a high reputation and goodwill in Pakistan, which belongs to the Complainant and the use of a similar trademark and color scheme, design and get up by another entity would result in misrepresentation made in the course of trade to potential customers, which amounts to infringement of rights of Complainant and which may injure the business or goodwill of the Complainant.
- 2.16 The Complainant has requested the Commission to initiate proceedings under Section 37 and to prepare the report specifically under the provision of Section 10(1) and 10(2) for "Deceptive Marketing Practices", specifically related to the fraudulent use of trade mark/design/packaging of Complainant's Product. The Complainant also believed that this is the violation of Section 10 (1) in general and in particular clause (a) & (d) of sub-section 10 of the Act. The Complainant requested that the enquiry officers, appointed by the Commission, conduct inspection to the premises of Respondent and directed them to furnish all the related documents or detail of its business including the Registration details with Government bodies and receipt/documents relate to their marketing and offer to sale, from the date of its launching. The use of similar/identical packaging to that of the Complainant's Product constitutes 'Deceptive Marketing Practices' and a violation of Section 10 of the Act.
- 2.17 The Complainant alleged that the Respondent is representing itself as a register proprietor of the alleged product and presenting some forged documents including receipt and acknowledgement of trademark application No. 422560 filed on 13 August, 2018. This is being done in order to get the trust of the distributors and the shop keepers.

- 2.18 The Complainant alleged that the product packs' manufactured by the Respondent under the name and style of 'MASTER FOOD INDUSTRIES' are forged one and there is no any existence of the company under the name and style of 'MASTER FOOD INDUSTRIES' and the Respondent is using false description and never pay a penny to Federal Board Of Revenue (FBR) Government of Pakistan while the Complainant is one of the leading tea company and paid heavy taxes to FBR. The Complainant is a valuable exporter of the Product in Asian and European countries. The Complainant also noticed that the manufacturer address is not mentioned on the products of the Respondent thereby creating difficulty in taking any legal action against them. The Complainant prayed that enquiry under Section 37 (2) of the Act, be initiated and Respondent's tax evasion matters may please be forwarded to FBR.
- 2.19 The Complainant further claimed for Interim relief under Section 32 of the Act, read with Regulation 25 of the General Enforcement Regulations 2007.
- 2.20 The Complainant believes that they are the original registered owner of the trademark as defined under Section 39 (2) of Trademark Ordinance 2001. The Respondent has been trading with *mala fide* intention and involved in deceptive marketing practices, leading to infringement and passing off the Product. The design, color combination, shape, graphics, getup and packaging used by Respondent is not genuine and they purely used a false description for passing off their products as those of Complainant. The adoption, promotion of Respondent products intend to deceive general public. The Complainant further submitted that by imitating its products, the Respondent wants to induce consumers and retailers to buy their products instead of the Complainant.
- 2.21 The Respondent, in bad faith, has copied the trademark along with the dominant features of the Complainant's Product packaging. The trade dress of VITAL Label, 'a style or arrangement of dress', and copyrighted text is identically copied by the Respondent. The Complainant brand and its distinctive packaging have an image in local and international markets. The Respondent submitted a proposed application bearing No. 422560 in class 30 with Trade Mark Registry, Government of Pakistan and immediately started manufacturing under the brand name 'VilAL TEA' along with identical trade dress and design which are stand registered under Trade Mark Ordinance 2001 and protected under Copyright Ordinance 1962. The Complainant also rely and draw attention of Honorable Commission towards reported case law '*A Rahim Foods Products dated 8<sup>th</sup> Feb 2016, reported as 2016 CLD 1128*' in which the Commission absorbed that "***Parasitic copying***" of trade mark and trade dress of a brand is inherent in all cases of 'fraudulent use' of another trademark, labeling & packaging is misleading and deceptive play with the end purpose of boosting sale as the potential purchaser is likely to mistake and perceive new products which employee parasitic copying to be off better quality then they infact are or as equivalent to the aggrieved competitor whose packaging has been copied.
- 2.22 The Complainant alleged that the Respondent has deliberately and maliciously adopted and copied complainant's trademark, in order to pass off their inferior quality goods as those either directly originating from the Complainant or at least with some commercial connection with the Complainant such as associates, agency and so on.

- 2.23 The Complainant further alleged that the Respondent is deceiving the innocent public who have so much faith in the Complainant's Product. The Respondent's trademark 'VilAL TEA' strikingly resembles with the Complainant's registered trademark 'VITAL TEA' so that the consumer might think that both are same if placed in same shelf.
- 2.24 The Complainant further alleged that the Respondent is unlawfully representing itself as an agent/distributor of the Complainant and supplying inferior quality products in Pakistan under the trade name 'VilAL TEA'. Furthermore, the Respondent is unfairly riding upon the goodwill of Complainant which results business loss to the Complainant.
- 2.25 The Complainant prayed for the following judgments:
1. **Prohibiting and restraining the Respondent** and its representatives including agents, dealers, distributors, or anyone acting through him or on its behalf jointly and severally from all kind of Deceptive Marketing and unlawfully exploiting and using the registered trademark.
  2. **To Constitute Enquiry** board or appoint teams of officers for inspection of premises of Respondent specifically to investigate value of goods manufactured and supplied.
  3. **To Direct** the Respondent from further use of the registered trademark.
  4. **To impose a financial penalty** of PKR 10 Million for using false description.
  5. **To impose financial penalty** of PKR 10 Million for falsely using Ghost Company and the Complainant may be rewarded PKR 10 Million under reward information scheme.
  6. **To impose additional penalty** of an amount equal to PKR 1 Million per month till the restrain order of tribunal or the date on which violation ends.
  7. **An Order** for the compensation for loss of goodwill/reputation to the Complainant.
  8. Cost of proceeding to be granted to the Complainant.
  9. Any other relief the Commission may feel just and proper.

### **3. SUBMISSIONS OF THE RESPONDENT:**

- 3.1 The complaint along with its annexures was forwarded to the Respondent for its comments vide letter dated December 19, 2018. The Respondent vide, an undated letter requested for an extension in time of further 30 days to file comments to the complaint. The Respondent was given an extension till February 18, 2019. The Respondent vide his letter dated February 22, 2019, requested again for extension in time of further 10 days to submit the comments. Considering the request, the Enquiry Committee granted an extension of further 10 days to the Respondent vide its letter dated February 22, 2019.
- 3.2 The authorized representative for the Respondent submitted a reply on its behalf on March 02, 2019.
- 3.3 The reply stated that the Respondent is a partnership concern duly registered with the Registrar of the Firms, Bahawalnagar, under the Partnership Act, 1932. The Respondent submitted that its firm was registered on 12<sup>th</sup> of August, 2017, with the intent to acquire, manufacture, process and sell tea products. The Respondent launched its first product with the name of '**Asli Master Tea**'. However, the venture was not very successful therefore, it

was discontinued shortly (**Copy of the Respondent's registration certificate is attached as Annexure- C**).

- 3.4 The Respondent submitted that in September, 2018, it started operating with the sale of another packaged tea product namely '**VilAL TEA**'. However, within a matter of two months, in November, 2018, a complaint was filed by the Complainant with the Commission, against the Respondent.
- 3.5 The Respondent accepted that due to lack of knowledge of relevant laws and mediocre education, they mistakenly created a packaging for its product 'VilAL TEA' which was very similar to the Complainant's tea brand 'VITAL TEA'. However, the quality of its product is undisputed and the claim of the Complainant as to its questionable quality demands proof, in absence of which the complainant itself has resorted to slander.
- 3.6 The Respondent admitted that it has created a packaging very similar to that of the Complainant's Product. However, the Respondent, by no means whatsoever, introduced its product 'VilAL TEA' as a new brand of the Complainant in the market and hence the burden of proof lies on the Complainant. Furthermore, the Respondent filed an application on 13<sup>th</sup> of August 2018, for registration of its trademark 'VilAL TEA' with the IPO. However, the same has yet not been opposed by the Complainant nor it has been registered by the IPO and the matter is still pending. Therefore, the Complainant claiming to have opposed the application has denied (**Copy of trademark application of the Respondent is attached as Annexure- D**).
- 3.7 The Complainant's demand to furnish the tax identity, bank statements, details of partners, registrations with government bodies, income tax assessment orders, tax returns, copies of orders received from the customers, details of persons to whom product is sold and taxes paid by the Respondent to the authorities are irrelevant to the case and any such demands may be dismissed.
- 3.8 The Respondent denied the allegation that it has not disclosed its manufacturer address on product packaging. The Respondent has submitted packaging of its product for reference which is depicted below:







- 3.9 The Respondent has only been engaged in sales of ‘VilAL TEA’ since September, 2018 and therefore, to date only six (6) months have passed. However, the manual sales ledger has kept by the Respondent and can be supplied to the Enquiry Committee if necessary, under condition that the same may not be shared with the Complainant, as it is sensitive information of the Respondent’s business.
- 3.10 The Respondent persist that it has indeed filed an application for registration of its trademark ‘VilAL TEA’ and hence has not produced any false documents.
- 3.11 The Respondent submitted that the matter of its business dealing with the FBR is in no way a concern of the Complainant nor is it a matter relevant to the current proceedings.
- 3.12 The Respondent accepted the allegations raised in the complaint to the extent that it, being ignorant to relevant laws, has mistakenly created packaging very similar to that of the Complainant’s Product packaging. However, the same was done only due to the fact that various such teas with similar/identical packaging to that of the Complainant’s exists in the local jurisdiction where the Complainant and Respondent both are engaged in business. It is a popular trend in the smaller jurisdictions of Southern Punjab to sell tea in similar/identical packaging to that of the Complainant, which is why the Respondent being not literate enough, also fell behind the bandwagon of creating a very similar packaging. The Respondent, for reference, has submitted packaging of various similar tea brands available in local market. Keeping in view the local dynamics, the Respondent submitted that it was not only one at fault, the Complainant should to take legal action against all such tea brands.
- 3.13 The Respondent admitted that it has created a very similar packaging to that of the Complainant’s, even if mistakenly. However, the Respondent denied the allegation that it has introduced itself to the market as a new brand of the Complainant. The Respondent, in ignorance, had merely tried to do the business the way it was popular to do in the locality, without knowledge of the relevant laws and its repercussions.

- 3.14 As for as the damage to the Complainant is concerned, the Respondent submitted that it had merely started its business operation and conducted business for two months when the Complainant moved to file its complaint with the Commission.
- 3.15 The Respondent humbly submitted that it has started its business with a sheer capital of approximately PKR 2 million. This was the total of its complete liquid assets which were invested in order to engage in a business in the form of a partnership.
- 3.16 The Respondent registered itself as a partnership firm and obtained a valid National Tax Number. Through assistance, the Respondent filed its income tax and sales tax duly with the FBR, despite the firm being not operational or profitable for most of the period since its inception.
- 3.17 However, due to the lack of knowledge about the Competition law as well as other laws of the country, the Respondent followed the local market dynamics. The concept of designing tea products similar/identical to the Complainant's Product is so prevalent in the local market that it appeared profitable and it has also engaged itself in the same practice.
- 3.18 The Respondent, on becoming aware about the relevant laws since the Complaint has filed against it, take full responsibility of the fault it has mistakenly committed and designed a packaging similar/identical to that of the Complainant's in ignorance.
- 3.19 The distribution of its product 'VilAL TEA' is limited to a very small jurisdiction and the business has yet to recover the cost spent in making it operational. Therefore, the Respondent has not been able to cause any great harm to the Complainant's business. Furthermore, the cost of the current litigation is already a burden on it.
- 3.20 In light of the submissions, the Respondent accept the use of the similar/identical packaging to that of the Complainant and submit its intension to comply with the laws of the Commission at the earliest. The Respondent has agreed to change its product packaging substantially and rebrand its products in light of the relevant laws.
- 3.21 The Respondent has shown its intension of rebranding and rectifying in writing and requested the Commission to take a lenient view in the matter. The Respondent further requested the Commission to grant sufficient time to rebrand its tea products.
- 3.22 Furthermore, Respondent was also willing to comply with any directions of the Hon'ble Commission, as it deemed fit.

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

- 4.1 The reply of the Respondent was sent to the Complainant for rejoinder on March 06, 2019.
- 4.2 On 18<sup>th</sup> of March, 2019, the Complainant submitted its rejoinder/comments via its legal counsel on the reply of the Respondent to the complaint.
- 4.3 The Complainant requested to consider its complaint as an integral part of the rejoinder. Furthermore, it has been submitted that the reply of the Respondent on facts is incorrect as

having no cogent reason on the basis of which they started business and copied the Complainant's Product packaging.

- 4.4 Moreover, it was requested to fix its complaint for further proceedings and arguments at the earliest to meet the end of the justice.

## 5. ANALYSIS:

- 5.1 In the following paragraphs the facts and evidence submitted by the Complainant and Respondent are analyzed and discussed in order to reach on a conclusion regarding the issues at hand, i.e., whether the allegations leveled against the Respondent under the complaint constitute, *prima facie*, in violation of Section 10 of the Act or not?

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

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

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

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

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

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

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

- 5.3 Before discussing the submissions of the Complainant and Respondent, it is important to understand the stance of international competition legislation in the matters regarding "Parasitic Copying" or "Copycat Packaging". There is no specific definition of Copycat packaging however an appropriate definition could be:

*"Copycat packaging is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting, since normally it does not infringe intellectual property rights. The risk posed by copycat packaging is consumer confusion, and consequently distortion of their commercial behavior"<sup>1</sup>.*

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<sup>1</sup> Giuseppe Abbamonte, "Copycat Packaging, Misleading Advertising and Unfair Competition"

- 5.4 According to the Consumer Protection from Unfair Trading Regulations 2008, UK, a list of prohibited commercial practices, as transposed from the Unfair Commercial Practices Directive 2005 (UCPD), include at item no. 13 *“Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by the same manufacturer when it is not.”*<sup>2</sup>
- 5.5 It is evident from the information provided from both undertakings that the Complainant had an existence prior to the establishment of the Respondent in the tea product category. The Complainant has been using the trademark (word) ‘VITAL’ as a trademark since 1996. The trademark of the Complainant was initially registered in year 1997 in class 30 under the Trademark Ordinance 2001. Subsequently, the Complainant further modernized its trademark in the year 2005, which was registered under registration number 209447 dated May 21, 2005. On the other hand the Respondent was duly registered as Partnership concern with the Registrar of Firms, Bahawalnagar, under the Partnership Act, 1932. The Respondent also filed an application on 13<sup>th</sup> of August 2018, for the registration of trademark ‘VilAL TEA’ with the IPO. However, the same has yet not been opposed by the Complainant nor it has been registered by the IPO-Pakistan in favor of the Respondent and the matter is still pending. However, from the ‘*Statement of Particulars*’ within the ‘*Application for Registration of Trademark*’ provided in the annexures of the reply by the Respondent, it has been extracted that the imitated trademark along with logo has been in continuous use since September, 2018 by the Respondent.
- 5.6 In order to establish whether parasitic copying may have occurred, it is important to compare elements of the Complainant’s and Respondent’s packaging to assess similarities. Images of both the packaging are given below;



- 5.6.1 As per the packaging submitted by the Complainant, it is very clearly identifiable that the Respondent identically copied the Complainants’ logo, product labeling, creative

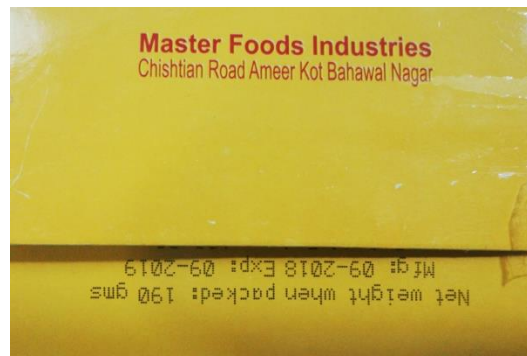
<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> , No 13 of Annex I

design element including placement of various details and language used by the Complainant.

- 5.6.2 The logo design has deliberately been used by the Respondent in the same place, with same color scheme and within the same design element on the packaging as that of the Complainant's, except for using the word 'VilAL' in the artistic design instead of VITAL. The only difference is that the word 'MASTER' has been placed in a smaller font beneath the infringed logo for distinction.
- 5.6.3 The border design element running on top and bottom, red bars with golden outline of the Complainant's packaging has been identically copied by the Respondent. Moreover, the Complainant's designed getup in yellow background with green shield, device of encircled leaf, the device of kettle & tea cup in white color, a device of dual encircled words 'EPP' along with rising sun, has also been copied by the Respondent in the same manner only by replacing the word EPP with the word MF. Images of front panel of both the packaging are given below:



- 5.6.4 The batch number, price, manufacturing & expiry date of the Product has been displayed by the Complainant along with its complete mailing address on the bottom of packaging. The Respondent has also displayed net weights along with batch number, manufacturing & expiry date on the same panel, the only difference is in font style which also appears similar. Images of bottom panel of both the packaging are given below:



5.6.5 The nutritional information displayed in English by the Respondent on the right panel of the packaging are identical/similar to the Complainant's packaging with a minor difference of logo of Pakistan Standards and Hilal Certification logo displayed by the Complainant. The only difference observed in the right panel of two packaging is the presence of process of tea making placed by the Respondent. Images of right panel of both the packaging are given below:



5.6.6 The left panel of the Complainant's packaging displays logo under its firm name in English language which have been copied by the Respondent in an identical fashion. However, the Respondent used an array of green fields under its firm name on left panel of the packaging. The Complainant displayed a statement, "A blend of imported quality teas specially selected by our master blenders for the perfect cup of tea", on left panel of its Product packaging which has also been copied by the Respondent in the same manner. Images of left panel of both the packaging are given below:



5.6.7 On the top panel of the packaging of the Complainant appears the VITAL TEA Logo with a small paragraph underneath a statement “No.1 Quality”. The same pattern has been copied by the Respondent. Images of top panel of both the packaging are given below:



5.6.8 In addition to the above images, the general color scheme of the packaging of Respondent is similar/identical to that of the Complainant, which along with imitated design can easily cause confusion in the mind of the consumers.

5.7 In furtherance of the comparison of elements, it is pertinent to shed light upon packaging of various prominent market players in the tea product category. Three of the prominent competitors in the category are TAPAL DANEDAR, Brooke Bond Red Label and Lipton Yellow Label. For the sake of brevity and fair comparison, product ‘black tea’ is being used as an example from all three of the competitors alongside the Complainant’s and Respondent’s packaging as under:



5.8 It is visible in the images above that shades of Red and Yellow color are dominant and specific to the product ‘black tea’. Similarly, all three competitors have completely distinctive trademarks, logos, design, color scheme and trade dress for the same product. Therefore, it is safe to conclude that every brand in the given example, other than the Respondent, has tried to capture the market with their own distinct logo, packaging design and color scheme. However, the packaging of the Respondent is very similar/identical to that of the Complainant with very slight and easily overlooked differences.

5.9 It is important here to consider that colors used by the Complainant are not the intellectual property of the Complainant, nor does it has the sole right to use those colors in the relevant product category. However, it has been held by the U.S. Court of Appeals in the matter of Beneficial Corp v. FTC, 542 F. 2d 611 (3rd Circuit. 1976) that:

*"The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context."*<sup>3</sup>

Therefore, in view of the comparison drawn under para no. 5.7 & 5.8 above, the similarities found in the elements of the packaging of Complainant and Respondent is enhanced because of the use of similar colours by the Respondent, thereby passing off its product as that of the Complainant. All other three competitors referred to under para no. 5.7 are using shades of Red and yellow, yet due to stark differences in their design elements, the packaging do not appear similar or identical to each other and each has its own distinct appearance.

- 5.10 The Commission, in the matter of *M/s K&N's Foods (Pvt.) Ltd vs. M/s Rahim Foods Limited*, in order to set a benchmark for the Commission's consideration and consequent adjudication of cases, held that the Commission considers it appropriate to examine the packaging and product labelling appearance of a finished product as a whole which may collectively include visually confusing resemblances in elements of color scheme, layout style, design, images, labels, font usage etc., instead of each individual similarity in isolation, to come to its determination as to a contravention under Section 10 (2)(d) of the Act<sup>4</sup>.
- 5.11 It has also been observed that the Respondent's trademark "VilAL TEA" is a derivative of the trademark of the Complainant "VITAL TEA". Therefore, it can safely be assumed that the name VilAL has not come into existence out of creativity but rather has risen out with malafide intent in order to ride upon the goodwill of the Complainant.
- 5.12 Moreover, it is pertinent to mention again that the Complainant has been in use of VITAL Logo design since year 1997, copyright for which had been obtained in year 2003 under Registration No. 24032-Copr. However, the Respondent, with intention to register its trademark in the imitated 'VilAL' logo, filed an application with the IPO in 2018.
- 5.13 In view of the facts, it is safe to infer that the Respondent has not only used the deceptively similar trademark but it has also been imitated the Complainant's packaging. Therefore, the conduct of the Respondent falls under the ambit of Parasitic Copying also, which means;

*"Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, color combination and graphic arrangement) but usually there is just enough difference to avoid a clear cut trade mark infringement. Still they often generate deception or confusion among consumers"*<sup>5</sup>

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<sup>3</sup> <http://openjurist.org/542/f2d/611/beneficial-corporation-v-federal-trade-commission#fn6>

<sup>4</sup> [In the Matter of show cause notice issued to M/S A.Rahim Foods \(Private\) limited for deceptive marketing practices.](#) Para no 17, sub –para 'e'

<sup>5</sup> Jorge Novais Goncalves, EC, DG Internal Market and Services "Similar Packaging: an IP, competition or a consumer protection matter?"



- 5.14 In light of the analysis above, the Respondent appears to be in, *prima facie*, violation of Section 10(1) in terms of Section 10 (2)(d) of the Act which prohibits *fraudulent use of another's trademark, firm name, or product labeling or packaging*; where its conduct appears to be infringing upon the rights of the Complainant through fraudulent use of Complainant's logo, packaging, color scheme, design and get up of products, trying to pass off its product as that of the Complainant.
- 5.15 It is also important to mention here that the Respondent admitted to the extent that it has created a packaging very similar to that of the Complainant's Product packaging. However, the Respondent denied that by no means whatsoever, introduced its product 'VILAL TEA' as a new brand of the Complainant in the market. The Respondent also submitted that, due to lack of knowledge of relevant laws, it has, mistakenly, created a packaging very similar to that of the Complainant's Product.
- 5.16 The Respondent accepted its wrongdoing and submitted that it was a popular trend in the smaller jurisdictions of Southern Punjab to sell tea brands in a similar packaging of the famous tea brands like the Complainant, which is why, the Respondent fell behind the bandwagon of creating a similar packaging. The Complainant also alleged that the Respondent has been engaged using packaging without any manufacturer address or information, however, the Respondent denied the allegation and submitted its packaging (reference in Para 3.8 above) displayed very clearly the manufacturer's address or information. It is also important to shed light on various other tea brands packaging submitted by the Respondent during the course of enquiry which, as per the Respondent, has been used in the same vicinity. Images of other similar tea brands available in the market are given below:





- 5.17 It is visible from the above images that various other tea brands manufacturers have also been used the Complainant's logo design and trade dress. It has also been observed that most of the brands, mentioned above, being manufactured in smaller jurisdiction where the Complainant already exists.
- 5.18 The Respondent, through its submissions to the enquiry committee, also requested the Complainant to take appropriate action against such undertakings, involved in parasitic copying. The same has been communicated to the Complainant.
- 5.19 The Respondent admitted the use of similar/identical packaging and has shown its intention to comply with the Competition Law. The Respondent agreed to rebrand its product packaging substantially in light of the relevant laws. The Respondent has requested to take a lenient view in the matter and a sufficient time may be granted to rebrand its tea product.
- 5.20 The Complainant has been in the practice of selling its products nationwide in distinctive color scheme, design and packaging since 1997, which was modernized in 2005. The copyright for artistic design of modernized logo had been obtained by the Complainant in

year 2003. The Complainant has enormously invested 22 years in building its reputation and goodwill in the relevant market. During the course of this time, the Complainant also incurred high costs in advertising its products on various media such as television, print and radio. However, the Respondent applied for the registration of trademark with an identical design in 2018, to which the Complainant has not filed an opposition. Since the Complainant established the prior used of VITAL mark thereby the rights resting automatically with the Complainant.

- 5.21 The Respondent started distributing its product in mimicked packaging since September 2018 in the same vicinity where the Complainant already exists. Therefore, it can be established from the information provided in the Complaint and submissions of the Respondent that the Respondent's product is distributed in the same geographical location, i.e. Bahawalnagar and adjacent localities.
- 5.22 In view of the above discussion, it can be established that the Complainant has a nationwide distribution channel with products available all around the country whereas the Respondent being a fairly new entrant, has a limited reach with its products available in Bahawalnagar only.
- 5.23 Furthermore, it is pertinent to consider that the Respondent has not indulged in advertising its products through any of the media used by the Complainant and the only form of marketing it has invested in, is through packaging and distribution. This fact is suggestive that the Respondent, through imitated packaging, did not invest in marketing strategies to create a unique brand identity or goodwill.
- 5.24 The Commission had held in the matter of *M/s K&N's Foods (Pvt.) Ltd vs. M/s Rahim Foods Limited* that “...the copycat incurs minimal cost and in fact none of the cost of investment and innovation in design that the market leader has spent to build goodwill and reputation of its brand assets in the relevant market. Hence, where product differentiation is insufficient, such a practice on part of the copycat has fatal consequences for the business of the market leader.”  
And  
“.... The Commission shall, therefore, be satisfied that the evidence adduced before it is conclusive, if the strikingly similar packaging and labeling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant.”<sup>6</sup>
- 5.25 The Commission, as quoted in para 5.24 above, explains that the Commission shall consider it enough that parasitic copying has occurred and damage has been inflicted upon the Complainant if an average consumer is found confused by strikingly similar packaging. This explains that there exists a direct relation between distribution of false or misleading information to a consumer and harm to business interest of an undertaking, referring to violation of Section 10 (1) of the Act in terms of Section 10 (2) (a) & (b) of the Act.

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<sup>6</sup> [In the Matter of show cause notice issued to M/S A.Rahim Foods \(Private\) limited for deceptive marketing practices.](#) Para no 17, sub –para ‘c’ & ‘d’

- 5.26 It is pertinent to consider that through copycat packaging differentiation among two products from different manufacturers is greatly reduced, thereby making it harder for an average consumer to choose. Statistics have shown that an average consumer does most of his shopping on an auto pilot. Shoppers have a limited ability to focus, absorbing only between 5 and 7 pieces of information in a given time frame. This means that the brain generally tries to keep things simple by relying on shape and color as simple search mechanisms<sup>7</sup>. Consumers base their purchasing decisions on first impressions of the product exterior and do not engage in a considered examination of the product<sup>8</sup>. This suggests, that even a reasonable/discerning consumer would not be able to differentiate between the Complainant and Respondent's packaging at a cursory glance let alone an ordinary consumer. Tests have shown that where products are packed in a similar way, consumers get confused and sales of the imitated product are reduced in a way that is not the case when the packaging is clearly different from the brand<sup>9</sup>.
- 5.27 Since parasitic copying is adopted by copycats with the purpose of boosting sales by passing off its goods as that of the original creator, the underlying motive not only causes confusion in the mind of an ordinary consumer but also causes loss of sales to the original creator.
- 5.28 In this case, it is apparent that the Respondent has used imitated packaging as a ploy to reap benefit out of the investments made by the Complainant in its goodwill over a period of 22 years. Not only has it intended to inflict damage in the form of loss of sales to the Complainant but also as a loss of brand identity and uniqueness of the Complainant's products. In view of the facts above, it appears that the Respondent's conduct is not only capable of harming the business interest of the Complainant but also involved in distribution of false & misleading information to consumers related to the origin/manufacturer of the products, character, properties and quality of product, in violation of Section 10(1) in terms of Section 10(2)(a) & (b) of the Act.

## **6. CONCLUSION AND RECOMMENDATIONS:**

- 6.1 In light of the facts, it appears that the conduct of the Respondent, *prima facie*, amounts to passing off its products as that of the Complainant's through fraudulent use of Complainant's logo, packaging, color scheme, design and get up of product, in violation of Section 10(1) in terms of Section 10 (2)(d) of the Act which prohibits *fraudulent use of another's trademark, firm name, or product labeling or packaging*.
- 6.2 In view of the analysis, it can also be concluded that the conduct of the Respondent, *prima facie*, has the potential to inflict harm upon the goodwill and business interest of the Complainant and cause confusion among customers through dissemination of false and misleading information related to character, properties, quality of products and place of production/origin via similar/identical packaging, in violation of Section 10(1) in terms of Section 10(2)(a)&(b) of the Act.

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

<sup>8</sup> Jacobs vs. Fruitfield Group Ltd 2007 published in "Misleading Packaging Practices; Briefing Paper" Directorate General for Internal Policies.

<sup>9</sup> Tony Durham, Report on 2012 Symposium on Retail Competition "Shopper Behavior: how choices are made"

6.3 The deceptive marketing practices have a direct impact on the public at large. It is in the interest of the general public and to create fair competition in the market, the undertakings should be stopped to market their products in an unfair and misleading manner and be encouraged to resort to the marketing practices which are transparent and give consumers/customers true and correct information. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiation of proceedings against M/s Master Food Industries under Section 30 of the Act for the, *prima facie*, violation of Section 10 of the Act.

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