

# **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 FEROSONS LABORATORIES LTD.  
AGAINST NEUCON PAKISTAN FOR DECEPTIVE MARKETING  
PRACTICES**

**BY**

**Faiz ur Rehman, Riaz Hussain & Urooj Azeem Awan**

**Dated: March 05, 2018**

## 1. BACKGROUND

- 1.1. M/s Ferozsons Laboratories Limited (hereinafter referred to as the ‘**Complainant**’) filed a complaint against M/s Neucon Pakistan (hereinafter referred to as the ‘**Respondent**’) for alleged violation of Section 10 of the Competition Act, 2010 (the ‘**Act**’) i.e., deceptive marketing practices.
- 1.2. The Complainant alleged that the Respondent is disseminating false and misleading information to consumers by distributing counterfeit packs of Biofreeze Gel and Biofreeze Spray (the ‘**Products**’) in the market and fraudulently using its trademark, which is capable of harming the business interest of the Complainant.
- 1.3. Keeping in view the above, the Competent Authority of the Competition Commission of Pakistan (the ‘**Commission**’) has initiated an Enquiry in accordance with sub-Section (2) of Section 37 of the Act by appointing Mr. Faiz ur Rehman, Assistant Director (OFT), Mr. Riaz Hussain, Assistant Director (OFT) and Ms. Urooj Azeem Awan, Management Executive (OFT), as the enquiry officers (hereinafter referred to as the ‘**Enquiry Committee**’). The Enquiry Committee was directed to conduct the enquiry on the issues raised within the complaint and to submit the enquiry report by giving their findings and recommendations *inter alia* on the following:
  - (i). *Whether the allegations levelled in the complaint filed by the Complainant constitute a, prima facie, violation of Section 10 of the Act?*

## 2. THE COMPLAINT

- 2.1 The Complainant is a public limited company founded in 1956 and listed on the Pakistan Stock Exchange (‘**PSX**’). It was submitted that the Complainant is an official distributor and right holder in Pakistan for a complete range of its branded product, BIOFREEZE®, in partnership with Performance Health, USA. It was submitted that Biofreeze is the number one clinically recommended brand for cold therapy pain relief in the USA, rated by the healthcare professionals and licensed by Performance Health, Inc. USA.
- 2.2 It was further submitted that the Complainant is enlisted as the authorized importer of Performance Health, USA products with the Drug Regulatory Authority of Pakistan (DRAP), for the product range (Spray, Gel and Roll-on). It was also submitted that its trademark is duly registered in the USA and in Pakistan with the Intellectual Property Organization of Pakistan (IPO) (*Copy of trademark registration in USA and with IPO-Pakistan is attached as Annexure - A*). The Complainant also submitted copy of DRAP Enlistment details for all its product range.
- 2.3 The allegations levelled in the complaint are stated as under:

- i. That a company named Neucon Pakistan located at C-2, Al Shams Centre, B-39, Block-13/A, Gulshan-e-Iqbal, University Road, Karachi, is responsible for the distribution of counterfeit packs of Biofreeze Gel and Biofreeze Spray in the Pakistani market.
  - ii. That a comparison between the packing of Complainant's products and the counterfeit packing by the Respondent reveals major similarities between the two, and is highly likely to deceive and cause confusion in the minds of consumers.
  - iii. That the counterfeit product has significantly damaged the Complainant's business to an extent where they are requesting the principals to discontinue business with them. It was alleged in the complaint that the counterfeit product may also cause significant harm to the consumer as whereabouts of its manufacturing and product standards cannot be verified. Therefore, in light of the lack of information regarding the safety of the ingredients used in the counterfeit products, not only distribution of the counterfeit products is likely to cause dilution of the Complainant's goodwill which the Complainant has built over the years in terms of the visual distinctiveness of the product, but it is in the public interest to take cognizance of such unlawful distribution.
- 2.4 It was submitted that the Complainant has dispatched a letter notifying DRAP about the counterfeit product being distributed in the market by the Respondent.
- 2.5 In the spirit of fair business practices and to protect the rights of consumers, Complainant, humbly requested the Commission to take action against the Respondent for violation of the Act.

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

- 3.1 In order to proceed further, the Complaint was forwarded to the Respondent for its comments. The Respondent's reply was received by the enquiry committee dated 16<sup>th</sup> of August, 2017, which comprised of the following main points:
- (i) The Respondent submitted that it was never the proprietor or partner in the firm M/s Neucon Pharma.
  - (ii) That the Respondent is the sole proprietor of M/s Neucon Pakistan having National Tax Number 0367047-3 and CNIC No. 42201-9740301-3.
  - (iii) That the complaint regarding counterfeit of Biofreeze Spray and Gel of Complainant is not fair and correct.
  - (iv) That the name of the product of the Complainant is 'BIOFREEZE' whereas the product name of the Respondent is 'BYQFREEZ HPQR', which does not resemble the prior.

- (v) That the ingredients of the Respondent's product are much different than the Complainant's product.
- 3.2 In light of the above the Respondent provided the supporting documents along with copy of Respondent's packaging. The Respondent also requested the Commission to drop the proceedings initiated against it and withdraw the complaint in the interest of justice.
- 3.3 The reply submitted by the Respondent required further clarification, therefore, he was called for a meeting at the office of the Commission via letter dated 21<sup>st</sup> of August, 2017, along with all relevant documents in support of the defense raised. The reply of the Respondent was also shared with the Complainant via letter dated 18<sup>th</sup> of August, 2017, for comments/rejoinder, if any. However, the Respondent submitted via letter dated 12<sup>th</sup> of September, 2017, that it was not able to appear for a meeting with the Enquiry Committee due to health related issues.
- 3.4 Based on the issues, a virtual meeting was conducted with the Respondent over Skype dated 21<sup>st</sup> of September, 2017, wherein the Respondent made the following submissions:
- i. That it does not have any employees for its business operations and it does not own the first reply that was submitted by it through Jillani & Jillani Law Associates to the Commission. The Respondent further clarify that the letter of the Commission was received during the hospitalization of the Respondent therefore the contents of the reply were not according to the wishes and will of the Respondent itself. Therefore, the Respondent requested to discard the reply.
  - ii. That it had been sole distributor of the product Biofreeze by M/s Performance Health in Pakistan since year 2003 to 2014 under the name of Neucon Pharma. The Respondent could not meet the sales requirement of the product, therefore, its distributorship was cancelled by M/s Performance Health approximately around early 2014. Later, the name Neucon Pharma was discarded and instead the name Neucon Pakistan was adopted by the Respondent to conduct its business.
  - iii. The distributorship of Biofreeze was later awarded to the Complainant by M/s Performance Health in the following months.
  - iv. When it came to Respondent's knowledge that the Complainant was now distributing the product in the market, it started sale of its own product with an altered packaging and a different name. The Respondent has currently only four (04) distributors for it products.
  - v. That it does not possess a trademark of the product or name. Furthermore, since this cryotherapy product is prescribed by a physician, a customer does not make the decision of buying the product, that's why the customer is not deceived. Rather, the customer only buys what the physician prescribes.

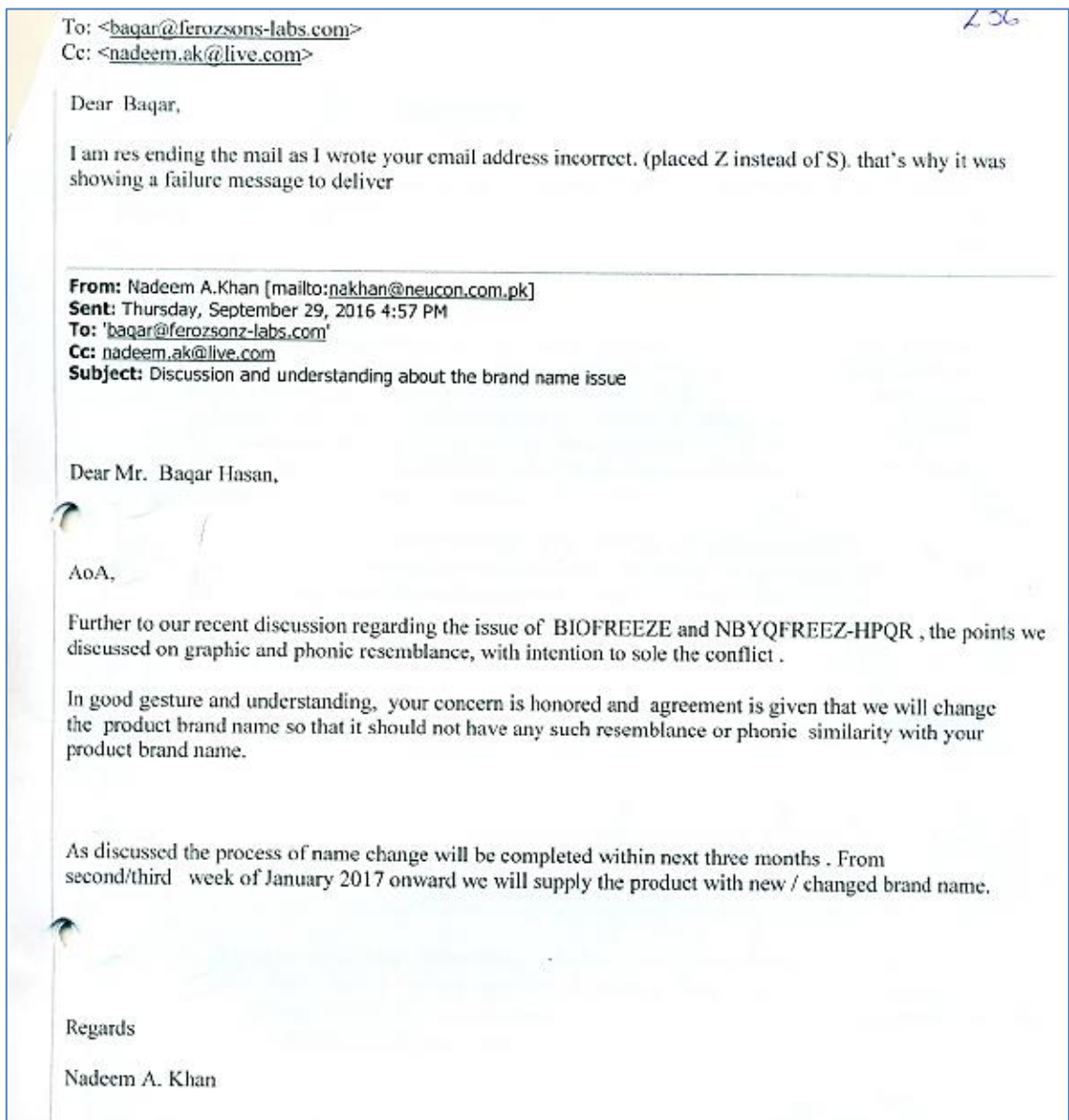
- vi. During this time period the Respondent was also in communication with the Complainant to withdraw the product from the market and change its brand name due to the issues cited by the Complainant within the complaint. Since the Respondent was not in good health and had to undergo surgery in emergency, it could not meet the understanding with the Complainant. Therefore, the Complainant proceeded to file a complaint with the Commission.
  - vii. That its product cannot be called as counterfeit of the Complainant's product since there are a lot of differences in the packaging of both products, whereas a counterfeit product is exactly alike even to the extent of the manufacturer. The Respondent submitted that its product's name was 'NBYQFREEZ – HPQR' which is also different from that of the Complainant's. Furthermore, the Complainant's product is sold in soft tubes whereas the Respondent's product is sold in a hard tube inside a carton packaging. However, the Respondent accepted that there was a mimicry effect in the brand name of both the products, specifically in the first part of the name.
  - viii. The mimicry effect was the reason the Respondent had accepted to completely withdraw from this name. However, the Respondent submitted that its sale is so less that it does not make a difference or harm the Complainant's business. He also submitted that since he was preparing to change the name of the product, therefore, it did not hold any awareness campaign for the stockiest, dealers and pharmacists to draw a distinction between both products. However, the Respondent did ask doctors to write the name of Neucon when writing prescription for patients.
  - ix. That its product is being distributed only in Karachi, Lahore and Peshawar and manufactured under private labelling agreement with M/s Diafarm in Denmark. The product is imported in Pakistan in form of tubes or bottles which are then packaged into cartons in Pakistan.
  - x. The Respondent accepted that after cancellation of its distributorship with M/s Performance Health, it was under the impression that M/s Performance Health will not venture into Pakistan again due to lack of sales, that's why it designed a similar package to launch its own product with similar characteristics and function.
- 3.5 Following the meeting, a rejoinder was also received from the Complainant. However, due to Respondent's submission that it did not own its reply and lack of power of attorney, the Complainant was informed through a letter dated 5<sup>th</sup> of October, 2017, that the response of the Respondent does not hold any legal value due to the lack of power of and is therefore denied. Similarly the rejoinder of the Complainant on the said response was therefore also denied.
- 3.6 The Respondent later submitted a written reply dated 12<sup>th</sup> of October, 2017, wherein it submitted that the brand name NBYQFREEZ – HPQR looks partially similar with

Complainants products BIOFREEZE and some alphabets also appear graphically similar which causes confusion. The Respondent accepted this negligence and requested pardon to this act.

- 3.7 Furthermore, the Respondent submitted that it will withdraw its conflicting brand from the market by 30<sup>th</sup> of November, 2017. In addition to this, the Respondent submitted that some of the allegations raised by the Complainant had been cited unfair. It submitted that it is a very small company whose sales do not have any impact on the sales of that of the Complainant which is a very big company. All possible cooperation was also assured by the Respondent in its reply.


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

- 4.1 The first reply dated 16<sup>th</sup> of August, 2017, of the Respondent was sent to the Complainant for rejoinder on August 18, 2017. The rejoinder of the Complainant was received via a letter dated 29<sup>th</sup> of August, 2017.
- 4.2 The rejoinder stated para wise comments on the Respondent's reply along with a diagram of similarities between the two products (Biofreeze Original vs. Counterfeit). Major submissions are summarized as under:
- a. It was submitted that for the purposes of present complaint, wherever the word/name 'Neucon Pharma' has been used or addressed, it shall mean or include 'Neucon Pakistan'. It was submitted that the overall packaging of the products being sold by the Respondent is imitation/counterfeit of Complainant's products.
  - b. It was submitted that the slight difference in the spellings of Complainant's product 'BIOFREEZE' and the imitated product 'BYQFREEZ' is almost unnoticeable due to the manner and color scheme employed by the Respondent.
  - c. It was submitted that the complaint regarding the counterfeit pain relieving product has been rightly filed and any allegations to the contrary by the Respondent are false and unsubstantiated by any credible evidence.
  - d. It was submitted that due to proliferation of counterfeit product 'BYQFREEZ' by the Respondent in the market, the Complainant with the original enlisted product suffered a substantial loss.
  - e. It was submitted that the sole proprietor of the Respondent, namely Mr. Nadeem A. Khan has himself admitted in email correspondence with the Complainant that the deceptive similarities between the two products are valid and that the Respondent agrees to change the name of its brand. However, the Respondent refused to honor its words and kept marketing and selling the counterfeit of Complainant's product. An image of the emails between Complainant and the Respondent is reproduced hereunder for reference:




- 4.3 This rejoinder of the Complainant was received on the discarded reply of the Respondent and therefore the Enquiry Committee decided not to include it in the analysis of the case. However, the information so received was crucial for the Enquiry Committee therefore main elements of the reply were taken into consideration.
- 4.4 The Complainant in the meanwhile submitted another letter dated 16<sup>th</sup> of October, 2017, when it was informed that its initial rejoinder will not be made a part of this enquiry. The Complainant in this letter submitted its signed and authenticated sales loss data, doctor's prescriptions from different regions and copy of distribution agreement between the

Complainant and M/s Hygienic Corp. It was requested by the Complainant to keep copy of the distribution agreement confidential at the time of enquiry and be returned to the Complainant with no records kept after the proceedings. The authenticated sales loss data is reproduced hereunder for reference:



**FEROZSONS**  
LABORATORIES LIMITED




October 13, 2017

**To Whom It May Concern**

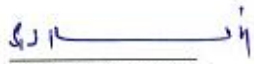
We, undertake that the below mentioned "Sales Loss Data" of Biofreeze Range is correct to the best of our knowledge and record.

BIOFREEZE Sales Loss Data (In PKR) July 2016-June 2017				
Biofreeze SKUs	Trade Price	Stock Disposed Off	FOC Sales	Total
Biofreeze 2oz Gel	435.9	33	4,391	4,424
Biofreeze 3oz Gel	617.53	2,598	--	2,598
Biofreeze 4oz Gel	617.53	--	--	--
Biofreeze 4oz Spray	762.82	1,934	73	2,007
<b>Total Value</b>	--	<b>3,094,022</b>	<b>1,969,723</b>	<b>5,063,744</b>
Biofreeze Team Salaries	--	--	--	<b>1,423,198</b>
<b>Total Losses</b>	--	--	--	<b>6,486,942</b>

For and on behalf of Ferozsons Laboratories Limited,



Business Unit Head



Chief Finance Officer

4.5 The final written reply of the Respondent was thereby sent to the Complainant for rejoinder via letter dated 17<sup>th</sup> of October, 2017.



4.6 The Complainant's rejoinder was received via letter dated 24<sup>th</sup> of October, 2017, wherein the Complainant reiterated its assertions made within the complaint and prior replies. The comments submitted are summarized hereunder:

- i. A diagram of similarities for reference between original and infringed product was submitted again by the Respondent. It further submitted that the Respondent had itself accepted its wrongdoing and is therefore liable under the relevant sections of the Act.
- ii. The Respondent is continuously buying time to prolong unfair advantage to sell its counterfeit product. The Respondent itself had agreed on withdrawing its infringing product from the market by 29<sup>th</sup> of September, 2017. However, the Respondent failed to honor its word.
- iii. The Complainant requested that the Commission award it exemplary damages in the matter which are to be recovered from the Respondent.
- iv. That the name/word 'Neucon Pharma' used in the original complaint may be taken in the meanings of 'Neucon Pakistan'.
- v. It was further submitted that the Complainant has also filed a suit with the Intellectual Property Tribunal, Lahore, against the infringement of its registered trademark. The Hon'ble Tribunal has in the matter passed an interim/restraining order dated 8<sup>th</sup> of June, 2017 in the favour of the Complainant.
- vi. Moreover, the slight difference in the spellings of the Complainant's trademark Biofreeze to NBYQFREEZ – HPQR is almost unnoticeable due to manner and color scheme of writing.
- vii. The complaint on the merits has been rightly filed by the Complainant and any allegations to the contrary by the Respondent are false and unsubstantiated.
- viii. The Complainant prayed that any other consequential relief as deemed appropriate by the Commission may be allowed.

## **5. ANALYSIS**

5.1 The mandate of this enquiry report is to determine whether the allegations levelled by the Complainant constitute a, *prima facie*, violation of Section 10 (1) of the Act i.e.

*(1) No undertaking shall enter into deceptive marketing practices;*

This, in particular, will lead towards violation of Section 10 (1), read with Section 10 (2) (a), (b) and (d) of the Act i.e.

- (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;*
- (d) *fraudulent use of another’s trademark, firm name, or product labelling or packaging;*

5.2 A ‘Trademark’ is defined under the Trademark Act, 1940, as,

- 1. *“trade mark” means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person.”<sup>1</sup>*

Therefore, a trademark is a distinguishable sign, mark, design or expression which differentiates goods and services of the producer from that of its competitors.

5.3 International Trademark Association defines trade dress as, *“Trade dress is the overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others. It may include the design or shape/configuration of a product; product labeling and packaging; and even the décor or environment in which services are provided. Trade dress can consist of such elements as size, shape, color and texture, to the extent that such elements are not functional. In many countries, trade dress is referred to as ‘get-up’ or ‘product design.’”<sup>2</sup>*

5.4 For the purposes of this Enquiry Report, the trade dress shall be taken in the meanings of product labelling and packaging, in accordance with Section 10 of the Act.

5.5 The Unfair Commercial Practices Directive 2005 (UCPD), defines prohibited commercial practices as also *“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>3</sup>*

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<sup>1</sup> [http://www.acif.org.pk/Files/TradeMarkAct\\_1940.pdf](http://www.acif.org.pk/Files/TradeMarkAct_1940.pdf)

<sup>2</sup> <http://www.inta.org/TrademarkBasics/FactSheets/Pages/Trade-Dress.aspx>

<sup>3</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> ,

- 5.6 Now in order to form an analysis it would be crucial to draw a comparison between the Respondent's product packaging and the Complainant's packaging. However, before moving on, it is important that the analysis be formed keeping in mind a consumer. For the purposes of the Act, the Honorable Commission has held in its order In the Matter of M/s China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited<sup>4</sup> (hereinafter referred to as the '**Zong Order**') that the term consumer, as referred to in Section 10 of the Act, has to be construed in the widest sense so as to refer to the '*ordinary consumer*,' which is distinct from the concept of the '*ordinary prudent man*,' as evolved under Contract Law. The Zong Order further holds that 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 "*when looking at a deceptive commercial practice.*"
- 5.7 On the basis of information presented above and in light of submissions made by the Complainant and the Respondent, the Enquiry Committee will analyze whether the act of the Respondent has violated Section 10 (1) of the Act.
- I. Whether the Respondent's conduct pertains to *fraudulent use of another's trademark, firm name, or product labelling or packaging, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (d) of the Act;***
- 5.8 The Complainant's products include herbal cryotherapy products, i.e., Biofreeze Gel, Biofreeze Spray and Biofreeze Roll On. The Complainant has filed the complaint in terms of its Biofreeze Gel and Biofreeze Spray only, since the Respondent does not manufacture or sell a product similar to the Roll On category. Therefore, the analysis in this enquiry report will be limited to Spray and Gel only that appears similar or identical to the Complainant's registered trademark.
- 5.9 Both of the Complainant's products are available in plastic containers, i.e., Biofreeze Spray in a plastic bottle with a spray nozzle and Biofreeze Gel in a plastic tube, specifically. The tube and bottle of both are colored white with the brand name BIOFREEZE appearing in a deep green color on the face of the containers. The brand name has the alphabet 'R' at its end in hypertext displaying that the name has been registered and protected under relevant laws. The brand name on both the product packaging is preceded by an image of menthol or berry leaves in a box pattern. The text '*Pain Relieving Gel*' and '*Pain Relieving Spray*' appears under the brand name in blue color, respectively. The back of the packaging list drug facts, active ingredients, product uses, warnings, directions and inactive ingredients accompanied by the logos of M/s Performance Health and the Complainant at the bottom. Front and back of the Complainant's product packaging of Spray and Gel is reproduced hereunder for reference:

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<sup>4</sup> <http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%202029-09-09%20.pdf>

(Face of Packaging)



(Back of Packaging)



- 5.10 For ease of reference, the Complainant's 'BIOFREEZE' logo, its shape, font type, size, and colors symbolized will be denoted as 'trademark' in this enquiry report. Whereas, the color combination, images, shapes, texts and their locations on the packaging will be referred to as 'product labelling and packaging' in this enquiry report.
- 5.11 Therefore, the comparison of the packaging of both the parties is drawn hereunder keeping in mind the perspective of an ordinary consumer.
- 5.12 The face of the packaging of Respondent's products displays the products name, i.e., NBYQFREEZ – HPQR. The word NBYQFREEZ in arranged horizontally whereas the word HPQR is aligned vertically at the end of the horizontal text. The letter 'N' of the name is written in horizontal stripes font with a figure of an athlete at its center, which in a glance appears to be an image and not a letter. Therefore, the letter 'N' is only recognizable at a closer look.
- 5.13 Similarly, the letter 'Y' and letter 'Q' are also barely recognizable. The letter Y has also been displayed in a horizontal stripes font with a dot over the letter. The letter appears greatly to be the letter 'i' at first sight. Even at a closer look it is hard to identify the letter as Y due to the dot placed on it. The small line at the bottom of the letter 'Q' has been shaped as menthol leaves. Due to these graphical leaves, the letter Q appears to be the letter 'O' with a design element at its bottom since the product is menthol based.
- 5.14 Trademarks on both the Respondent's and the Complainant's products are displayed in a deep green and similar font type on white backgrounds.

- 5.15 Therefore, the letters in Respondent's brand name 'NBYQFREEZ' can easily be mistaken to that of the Complainant's trademark 'BIOFREEZE'. An image of both is displayed hereunder for ease of reference:

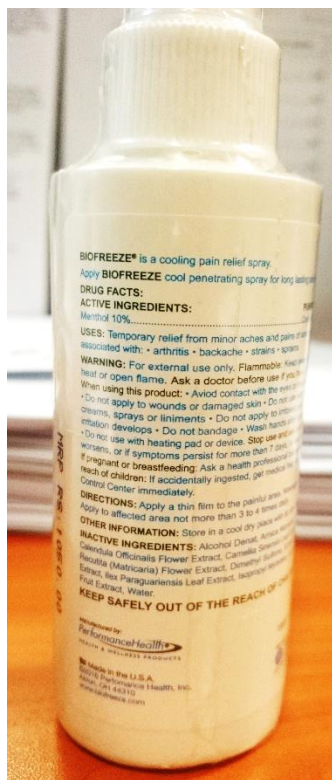
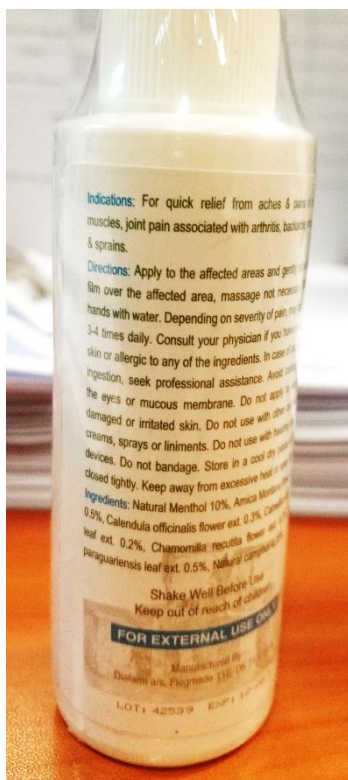


- 5.16 The brand name on the Respondent's products is followed by the text '*Quick Pain Relieving Ice Spray*' and '*Quick Pain Relieving Ice Gel*' in blue color respectively. A similar text in blue color is produced on the face of the Complainant's products reading '*Pain Relieving Spray*' and '*Pain Relieving Gel*', respectively. The placement of the text on both the parties' respective products is also exactly the same. The same can be viewed in the image produced in Para. No. 5.15 above.
- 5.17 Moreover, a letter 'R' is produced in hypertext at the end of the brand name on the Respondent's products, similar to that of the Complainant's. It is pertinent to mention here that the trademark of the Complainant has been duly registered by the relevant authorities as referred to in Para No. 2.2 above, whereas the Respondent had expressly submitted that it has not obtained any registrations for its brand name, either national or international.
- 5.18 The packaging of the Complainant and the Respondent is different in ways that the Respondent's products are sold in carton packaging over the white plastic containers whereas the Complainant's products come without the carton covers.

- 5.19 The carton packaging of the Respondent is green in color with the trademark, product labelling and packaging identical to the one on the plastic containers inside. The carton packaging of the Respondent is reproduced hereunder for reference:



- 5.20 The back of the packaging of the Respondent's product displays indications followed by directions and ingredients. The Enquiry Committee did not find the descriptions under these heads in verbatim with the Complainant's packaging, and therefore are not brought under discussion in this enquiry report. However, the colors used for description are exactly alternative to those of the Complainant. The Complainant has presented headings in green color and description under them in blue color, whereas the Respondent's presentation is exactly vice versa. Images of back of the both the Complainant and the Respondent's products is given hereunder for reference:



- 5.21 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. Consumers base their purchasing decisions on first impressions of the product exterior and do not engage in a considered examination of the product<sup>5</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.
- 5.22 Since parasitic copying is adopted by copycats with the purpose of boosting sales by passing off its goods as that of the legit manufacturer, the underlying motive not only causes confusion in the mind of an ordinary consumer but also causes loss of sales to the legit manufacturer.
- 5.23 Similarly, the colors used by the Complainant are not the intellectual property of the Complainant, nor does it have 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:

<sup>5</sup> Jacobs vs. Fruitfield Group Ltd 2007 published in “Misleading Packaging Practices; Briefing Paper” Directorate General for Internal Policies.

*"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>6</sup>

5.24 It seems pertinent to consider what the Honorable Commission has previously declared on similar issues. Reference has been made to In the Matter of Complaint filed by M/s. DHL Pakistan (Pvt.) Ltd<sup>7</sup> (hereinafter the '**DHL Order**'), Para 47 of the Order, the Honorable Commission has held:

*'In a larger sense, trademarks promote initiative and enterprise worldwide by rewarding the owners of trademarks with recognition and financial profit. Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. This enables people with skill and enterprise to produce and market goods and services in fair conditions, thereby facilitating international trade.'*

5.25 It is pertinent to note here that the Respondent has expressly accepted through its letter and virtual meeting that it had designed a packaging similar to that of the Complainant. That same can be validated from its prior correspondence with the Complainant wherein it had agreed to withdraw the product from the market. However, the same was never brought in action by the Respondent which led the Complainant to file a complaint with the Commission.

5.26 The Respondent had also submitted to the Commission in two of its correspondences in different time spans, within which it committed to withdraw product from the market. The Respondent had first submitted that it would be able to withdraw product by 31<sup>st</sup> of October, 2017, later it submitted to do the same by 30<sup>th</sup> of November, 2017. The same had been going on between the Complainant and the Respondent for over a year due to which the Complainant decided to pursue the issue on a legal forum.

5.27 This shows a lack of intention on part of the Respondent to withdraw its infringing product from the market. It also shows that the Respondent is fraudulently attempting to buy time in order to be able to continue sale of its product.

5.28 Furthermore, looking at the overall image of the Respondent's and the Complainant's products, the differences are so unnoticeable as compared to the similarities between the packaging that the manufacturer name can be easily overlooked. Furthermore, since the Respondent does not possess any registration of trademark or copyright, the rights of the use of infringed trademark, product labelling and packaging lies with the Complainant.

5.29 The Commission had investigated a similar issue, in the matter of *M/s K&N's Foods (Pvt.) Ltd vs. M/s Rahim Foods Limited*, wherein it set a benchmark for consideration and consequent adjudication of cases. The Commission in the referred case held that the

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<sup>6</sup> <http://openjurist.org/542/f2d/611/beneficial-corporation-v-federal-trade-commission#fn6>

<sup>7</sup> [http://www.cc.gov.pk/images/Downloads/dhl\\_pakistan.pdf](http://www.cc.gov.pk/images/Downloads/dhl_pakistan.pdf)



Commission considers it appropriate to examine the packaging, product labelling and 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>8</sup>. It further held 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>9</sup>*

5.30 In this case, it is apparent that the Respondent has used imitated packaging in terms of trademark, product labelling and packaging as a ploy to reap benefit out of the investments made by the Complainant in its goodwill, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (d) of the Act.

**II. Whether the Respondent’s conduct pertains to 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, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (b) of the Act;**

5.31 The Honorable Commission has, in the case of Proctor and Gamble Pakistan (Pvt.) Limited (2010 CLD 1695<sup>10</sup>), noted that misleading information includes any information that is capable of giving a wrong impression or idea, or is likely to lead to an error of conduct, thought or judgment, or which tends to misinform or misguide the consumer. It is furthermore an established view that it is not necessary that the deceptive information cause actual deception, but it is in fact sufficient that the misleading information tends to cause deception amongst the ordinary consumers.

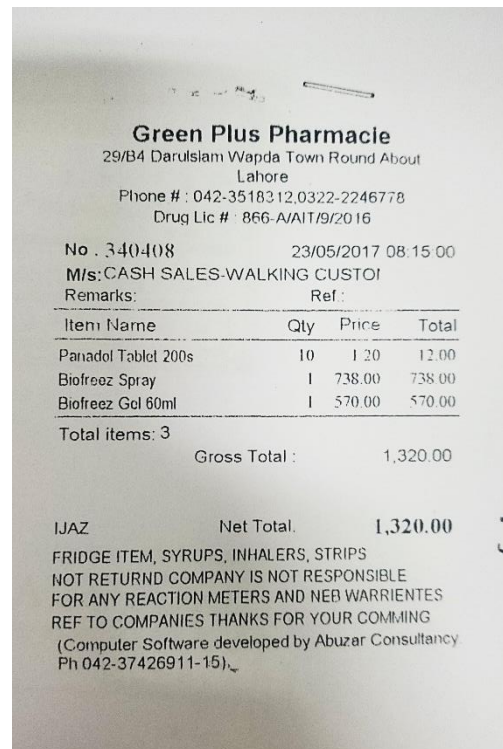
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<sup>8</sup> [In the Matter of show cause notice issued to M/S A.Rahim Foods \(Private\) limited for deceptive marketing practices.](#) Para no 17, sub –para ‘c’

<sup>9</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’

<sup>10</sup> <http://www.cc.gov.pk/images/Downloads/Proctor-and-Gamble-Order-Finalized.pdf>

5.32 The Enquiry Committee deemed it fit to bring into consideration the fact that such herbal pharmaceutical products are sold to the customers originally on the prescription of the doctor. In this case the Complainant had produced several prescriptions from various cities citing the name of Complainant's product Biofreeze on the prescription. The Complainant had also produced an invoice from Punjab Medical Store and from Green Plus Pharmacy dated 23<sup>rd</sup> of May, 2017, wherein product Biofreeze was sold to the Complainant. However, the prices of the Biofreeze Spray and Gel on the invoices were PKR 738 and PKR 570, respectively. An image of the invoices is reproduced hereunder for reference:



5.33 It is observed that the prices of the Complainant's Biofreeze Spray and Gel are PKR 1050 and PKR 600, respectively. Whereas, the prices of the Respondent's NBYQFREEZ – HPQR Spray and Gel are PKR 738 and PKR 570, respectively. In view of the price comparison and invoice produced above, it is clear that the Respondent's product NBYQFREEZ – HPQR was sold to the Complainant in the name of its own product Biofreeze.

5.34 The Enquiry Committee also attempted to validate the same through a purchase of its own in Lahore. The Enquiry Committee approached Orange Pharmacy situated outside the Jinnah Hospital, and asked the pharmacist to provide Biofreeze Gel and Biofreeze Spray. The pharmacist provided the Respondent's Products i.e. NBYQFREEZ – HPQR Spray & Gel, however, the invoice generated by the pharmacy named the Complainant's

product. Consequently, the price charged by the pharmacist was that of the Respondent's product i.e. PKR 570 and PKR 738. An image of the invoice obtained by the Enquiry Committee is reproduced hereunder for reference:



- 5.35 In view of above, it is clear that the customer is being greatly deceived by the Respondent into buying its products in lieu of the Complainant's. Furthermore, the customers have no say in the matter since they are not diligent to differentiate between the two similar products.
- 5.36 Moreover, as discussed in Para No. 5.17 above, the Respondent had printed the letter 'R' in hypertext at the end of the brand name on the packaging to indicate that it's given brand name is registered under the intellectual property laws of the land.
- 5.37 However, the Respondent's brand name 'NBYQFREEZ – HPQR' is not registered with the IPO-Pakistan. Additionally, the product is delivered to the Respondent by M/s Diafarm under a private label agreement which means that its product's brand name has not been registered under any international laws of intellectual property either. Therefore,

printing the letter ‘R’ following the brand name NBYQFREEZ – HPQR on the packaging is also capable of misleading the consumer into thinking that the brand name is a registered mark of the Respondent.

- 5.38 Therefore, the Respondent is, *prima facie*, engaged in distributing false and misleading information to the consumer related to the price of goods, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (b) of the Act.

**III. Whether the Respondent’s conduct pertains to distribution of false or misleading information that is capable of harming the business interests of another undertaking, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) of the Act;**

- 5.39 The Commission, as quoted in Para No. 5. 29<sup>11</sup> 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) of the Act.

- 5.40 The Complainant had reported losses in its sales figures as referred to in Para No. 4.4 above. Therefore, it is evident from the analysis drawn above and considering the sales loss data of the Complainant that the Respondent has not only intended to steal the brand identity and uniqueness of the Complainant’s products but also to inflict damage in the form of loss of sales to the Complainant.

- 5.41 In view of the facts above, it appears that the Respondent’s conduct is capable of harming the business interests of the Complainant (supported by reported losses), in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) of the Act.

**6. CONCLUSION AND FINDINGS:**

- 6.1 This enquiry report aimed at examining whether the allegations of the Complainant against the Respondent for infringing its trademark, product labelling and packaging constitute, *prima facie*, violation of Section 10(1) of the Act or not.

- 6.2 M/s Performance Health, Inc., applied for the registration of trademark with the title, ‘BIOFREEZE COLD THERAPY PAIN RELIEF’, at the United States Patent and Trademark Office in 2012, which was awarded to the Complainant’s manufacturer. The registry stated colors green and light blue as a claimed feature of the mark. However, it did not establish an exclusive right over the text ‘Cold Therapy Pain Relief’.

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<sup>11</sup> *Ibid*, Para. 5.29.

- 6.3 M/s Performance Health, Inc., also registered its trademark 'BIOFREEZE' with the Intellectual Property Organization of Pakistan, effective from 28<sup>th</sup> of August, 2009. The trademark registration certificates in Pakistan as well as the United States proves that M/s Performance Health, Inc., is the first and rightful owner of the subject trademark. Moreover, the Complainant is its only registered distributor in Pakistan.
- 6.4 Therefore, the Respondent was not authorized by the Complainant to use its registered trademark or a confusingly similar connotation. It can thus be certainly concluded that the Respondent is involved in trademark infringement.
- 6.5 Moreover, the Respondent is not only copying the Complainant's trademark, but is also completely imitating its product labelling and packaging. The slight alterations made by the Respondent are insignificant and the packaging by the Respondent still resembles greatly to that of the Complainant. Analyzing it as a whole, the Respondents is using a similar/identical product labelling or packaging and same or slightly differentiated trademark, due to which its products appear confusingly similar to that of the Complainant's products.
- 6.6 Consequently, this behavior of Respondent is evidently capable of deceiving the consumers who are looking for the brand *Biofreeze*, which in turn would also result in causing damage to the business interests of the Complainant.
- 6.7 It was observed in the case of Astra-Idl Limited vs Ttk Pharma Limited on 13 June, 1991, that the product of Defendant, i.e., Betalong, was found to be visually, phonetically and structurally similar to the trademark of the Plaintiff, i.e., Betaloc. It was found to be so near and close to the registered mark of the Plaintiff that it was likely to cause confusion if the Defendant was permitted to use the said mark 'Betalong'.<sup>12</sup>
- 6.8 Therefore, even if it is assumed that the Respondent in this case chose a slightly modified trademark, the rest of the packaging is so similar to the original packaging of the Complainant that the consumer would easily accept one for the other. Therefore, it is clear that the Respondent, by imitating not only the Complainant's trademark, but also its product labelling and packaging, is trying to induce consumers into buying its goods instead of that of the Complainant's. Thus violating Section 10 2 (d) of the Act.
- 6.9 The act of the Respondent is not only involved in distribution of false and misleading information to consumers regarding price of its products but also harming the business interests of the Complainant, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) & (b) of the Act.

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<sup>12</sup> <https://indiankanoon.org/doc/487303/>

- 6.10 In view of the preceding paras, it appears that the Respondent is using a trademark confusingly similar to the registered trademark of the Complainant. Therefore, the Respondent has, *prima facie*, entered into deceptive marketing practices in terms of the provisions of Section 10 (2) (a) (b), and (d) of the Act.

## **7. RECOMMENDATIONS**

- 7.1 A vast number of population in Pakistan is illiterate or not substantially literate. In such circumstances, many of the patients do not have the knowledge to gauge the quality of medicines in case of OTC drug. They mostly rely on either the doctor or the pharmacist for such information. In this situation, various marketing strategies and incentives help the dishonest elements producing deceptively similar drugs in further increasing their profit margins.
- 7.2 The deceptive marketing practices have a direct impact on the public at large and therefore, it is in the interest of the general public and fair competition in the market that the undertakings should be stopped from marketing their products in an unfair and misleading manner and be encouraged to resort to marketing practices which are transparent and give consumers true and correct information.
- 7.3 Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings under Section 30 of the Act against M/s Neucon Pakistan for violation of Section 10 of the Act.

Faiz ur Rehman  
(Enquiry Officer)

Riaz Hussain  
(Enquiry Officer)

Urooj Azeem Awan  
(Enquiry Officer)