

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. NIMCO CORNER
AGAINST M/S. MR. NIMKO CORNER & M/S. KARACHI NIMCO FOR
DECEPTIVE MARKETING PRACTICES**

BY

MARRYUM PERVAIZ & FAIZ-UR-REHMAN

DATED: February 15, 2019

1. BACKGROUND

- 1.1 Mr. Siraj Nisar Jan, a duly constituted attorney of Mr. Muhammad Usman, (hereinafter referred to as the ‘**Complainant**’) has filed a complaint through M/s Vellani and Vellani Advocates, Karachi against Malik Maaz and Malik Azeem trading as Mr. Nimko Corner (hereinafter referred to as the ‘**Respondent No. 1**’) and M/s. Karachi Nimco (hereinafter referred to as the ‘**Respondent No. 2**’), jointly referred as “**Respondents**”, under section 10 of the Competition Act, 2010 (the ‘**Act**’) on account of their involvement in deceptive marketing practices.
- 1.2 The Complainant alleged within the Complaint that the Respondents are involved in fraudulent use of the registered trade mark, logo and the design of the packaging including the overall trade dress etc of the Complainant. The Complainant also alleged that by using a highly similar trade names, of “*Mr. Nimko Corner*” and *Karachi Nimco*, taglines, packaging, color scheme, and overall trade dress, the Respondents are illegally capturing the clientele of the Complainant.
- 1.3 Based on the preliminary fact finding, the Commission initiated an enquiry in accordance with sub Section (2) of Section 37 of the Act by constituting an Enquiry Committee (hereinafter referred to as an ‘Enquiry Committee’). The Enquiry Committee was directed to conduct enquiry into the concerns expressed in the Complaint and to submit the enquiry report by giving their findings and recommendations, *inter alia* on the following:-

“Whether the allegations leveled in the Complaint constitutes a prima facie violation of Section 10 of the Act?”

2. COMPLAINT

2. This section summaries the contentions raised in the complaint against Respondent No. 1.
- A. Statement of Facts:**
- 2.1 The Complainant has been carrying out the business of processing, marketing and selling foods such as fried lentils, chewra, dall mooth, coated nuts and chips etc. (hereinafter referred to as ‘**Snack Foods**’) under the firm name Nimco Corner and also under the NIMCO Trade Marks. The Complainant established its outlet at Mochi Gali No. 3, Bhorī Bazar Saddar, Karachi in 1965.
- 2.2 The Complainant has over the years developed and designed distinctive logos and packaging to be used in connection with the goods manufactured/processed by the Complainant which have been used throughout Pakistan and internationally for many years. Such packaging is in the distinctive color scheme of red, yellow and blue, with the “Original Brand since 1947”, the Nimco Corner logo (that is, “NIMCO” written in unique font white inside a red rectangle with “Corner” written below it in blue), the Nimco Snacks logo in Urdu (that is, a red oval

with the words “Nimco Snacks” in white), a tea pot, tea cup and saucer, a blue and white striped device with names of the Snack Foods in circles and the address of the Complainant below, and words “FRESH CRISP TASTY” “TAAZA, KHASTA AUR LAZEEZ”, “DAAWAT, ISRANA, TAQREEB-E- SALLGIRA AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB” , AND “ OLD Spice Snacks” (hereinafter referred to as “ **NIMCO Packaging**”).

- 2.3 It was further stated that the Complainant has trademark registration under Nos. 53499 and 56759 in Pakistan in class 30 under Snack Foods which date as far back as 1970. Copy trademark registration certificate is attached as **Annexure-A**). The said registration cover the following features: words NIMCO SNACKS (in Urdu and English): the Nimco Corner logo (that is, “NIMCO” written in unique font while inside a red rectangle with “Corner” blue written below it): Nimco Snacks Logo in Urdu (that is, a red oval with the words “Nimco Snacks” in white)” the words “ FRESH, CRISP and TASTY” “TAAZA, KHASTA AUR LAZEEZ” and “DAAWAT and ISRANA, TAKREEB, SALGIRA AUR COCKTAIL PARTIES KI LIYE BEHAD MARGHOOB” and a striped device displaying the Complainant’s store address below (hereinafter collectively referred to as “**NIMCO trade marks**”).
- 2.4 The Complainant is the sole and true proprietor of the firm name Nimco Corner, NIMCO Packaging and NIMCO trade marks. The Complainant’s firm, Nimco Corner was one of the first retail stores in Pakistan to specialize in selling Snack Foods. The Complainant has since used the firm name, distinctive NIMCO Packaging and NIMCO trade marks developed and designed by the Complainant in relation to snack foods throughout Pakistan and extensively. The Complainant has also expanded by opening up a new branch in Clifton, Karachi as a result of its extensive and widespread sales.
- 2.5 As a result, of the Complainant’s long standing business of 60 years and its high quality products, and marketing the Complainant has become market leader in Pakistan in regard to the said snack foods. Moreover, NIMCO Packaging and NIMCO trade marks have become well-known and a house-hold name throughout Pakistan. The goods of the Complainant are instantly and widely recognized by the Complainant’s firm name, NIMCO trademarks and NIMCO Packaging by the general public in Pakistan.
- 2.6 Thus, as a result of the above, the Pakistani Public have for decades been familiar with and had knowledge of the Complainant’s firm name, NIMCO Packaging and NIMCO trade marks. Moreover, as a result of the long standing use and extensive sales and marketing of the Complainant’s Snack Foods throughout Pakistan a close association has been created between the complainant and the complainant’s firm name, the NIMCO trademarks and NIMCO Packaging. As a result the Complainant has developed extensive goodwill associated with Complainant’s firm name, NIMCO Packaging and NIMCO trade marks and as such no third party may use the same or confusingly similar firm name, NIMCO Packaging or NIMCO trade marks without authorization of the Complainant.

- 2.7 It was submitted that the Respondent No. 1 has resorted to, and continues to undertake, deceptive marketing contrary to the provisions of section 10 of the Act by using the firm name Mr. Nimko Corner in regard to Snack Foods packaging which is in the identical color scheme of red, blue and yellow to that of the Complainant's Snack Foods packaging, which has a MR. NIMKO CORNER logo (that is, the words "Mr. Nimco Corner" in white in red triangle") in English and Urdu, a tea cup and saucer, a striped device with the names of the Snack Foods in ovals and words "Original Brand", "Old Spice Snacks", KHASTA, TAAZA AUR LAZEEZ", "DAAWAT ISRNA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" and "CRISP, FRESH and TASTY", and the marks MR. NIMKO CORNER logo (that is, the words "Mr. Nimco Corner" in white in red triangle") in English and Urdu, a tea cup and saucer, a striped device with the names of the Snack Foods in ovals and words "Original Brand", "Old Spice Snacks", KHASTA, TAAZA AUR LAZEEZ", "DAAWAT ISRNA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" and "CRISP, FRESH and TASTY". The offending Firm Name, Offending Packaging and Impugned Marks for the same class of goods are identical and confusingly and/or deceptively similar of those the Complainant. Further, the Mr. Nimko Corner logo has the registered symbol although the marks has not been registered at the Trade Marks Registry. It was submitted that the adoption of the Offending Firm Name, Offending Packaging and Impugned Marks by the Respondent No. 1 and false and misleading (R) symbol is being used with the mala fide intent to confuse and deceive the unwary consumer and exploit and unduly benefit firm the reputation and goodwill of the Complainant in respect of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks and to disrupt competition in the markets.
- 2.8 The Complainant alleged that the Respondent No. 1 has also recently applied for trade mark registration for Impugned Marks under application No. 364994 which is pending at the trade marks office and which the Complainant intends to oppose if the application is allowed to proceed for advertisement in the Trade Marks Journal for inviting opposition from third parties.
- 2.9 It was further submitted that Respondent No. 1 has a Facebook page www.facebook.com/mr.nimko/. Which displays the Offending Firm Name in relation to the sale of Snack Foods. Such use of the Offending Firm Name will inevitably lead to confusion and deception amongst the public. Further, on the Facebook page the font and color scheme used by the Respondent No. 1 is entirely different from those which the Respondent No. 1 uses to market his Snack Foods, as such, clearly indicating that the Respondent No. 1 has deliberately adopted and copied the Complainant's firm name, distinctive red, blue and yellow color scheme and overall get-up of the NIMCO packaging and distinctive, NIMCO trade marks to market his own foods in order to confuse and deceive the public in to believing that the Respondent' No. 1's goods are those of the Complainant. Moreover, the Facebook page states that the Respondent No. 1's firm name is M.R. Foods which further , indicates that the Respondent No. 1 is using the offending Firm Name Mr. Nimko Corner with *mala fide* intent is order to reap benefits form the goodwill associated with Complainant's firm

name. Further, the page states that “Mr. Nimko is a registered trademark of MR Foods, the trademark was officially registered in the year 2007” which is a false and misleading statement.

2.10 It was submitted that the Respondent No. 1 has also recently opened a store to sell Snack Foods with packaging aforementioned, under the offending Firm Name. It was submitted that the said store has been deliberately opened by the Respondent No. 1 in the same vicinity as the Complainant and that too in a confusingly similar corner location as of the Complainant’s Nimco Corner store. The Respondent’ No.1 s opening of a shop in such a location is likely to and has confused and deceived unwary customers into believing that his shop is the shop of the Complainant’s and is a clear indication of the *mala fide* intent to exploit and unduly benefit from the reputation and goodwill of the Complainant which will inevitably cause financial loss to the Complainant.

B. Summary of the contravention of Section 10 of the Act:

2.11 It was submitted that through each of the above discussed actions and practices (including the false statement that "Mr. Nimko" is a registered trade mark), the Respondent No. 1 has every intention to confuse and deceive the unwary consumers and to take unfair advantage of the reputation and goodwill of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks (which reputation and goodwill has over many years accrued in favour of the respective Complainant due to extensive use and advertisement) and to secure for itself undue business advantage which the Respondent No.1 would not have achieved otherwise. Such actions and practices are clearly prohibited under section 10 of the Act and, in particular, contravene the provisions of sub-section (1) and clauses (a), (b) and (d) of sub-section(2) of section 10.

2.12 The Respondent No. 1 has undertaken and continues to undertake the above discussed actions and practices with full knowledge of the proprietary rights of the Complainant, in respect of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks. In fact, the Respondent No. 1 's use of the Offending Firm Name, Offending Packaging and Impugned Marks (which are identical and confusingly similar to those of the Complainant’s) clearly demonstrates the Respondent No. 1 's ulterior motive of misleading and deceiving the unwary consumers to make a transactional decision which the consumers would not have otherwise taken, and unfairly competing with the Complainant in Pakistan, and as such, securing a business advantage for itself in the local market and harming the business interests of the Complainant.

2.13 The Complainant further submitted that each of the above discussed actions and practices of the Respondent No. 1 are deliberately and systematically calculated to harm the business interests of the Complainant in Pakistan. The Respondent No. 1 has a different firm name M.R. Foods and different colour scheme for marketing its Snack Foods on Facebook and but it is deliberately using a virtually identical firm name, packaging and marks as that of the Complainant’s in order to confuse the public into thinking that the Respondent No. 1’s goods

emanate from the Complainant and as a result reap benefits of the goodwill associated with the Complainant.

- 2.14 The subject complaint presents a very clear case of "copycat packaging" and parasitic copying. The Respondent No. 1 has deliberately copied the over-all impression/look/feel and misappropriated the distinctive and aesthetic design elements of the complainant's NIMCO Packaging, NIMCO trade marks and firm name with regard to Snack Foods, to unfairly compete with the Complainant. By undertaking the above discussed actions and practices, the Respondent No. 1 intends to trade off the reputation and goodwill of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks thus taking unfair advantage of the investments made by the Complainant on the brand development and innovation of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks.
- 2.15 The Offending Firm Name, Offending Packaging and Impugned Marks of the Respondent No. 1 's products are virtually identical and confusingly similar to the Complainant's firm name, NIMCO packaging and NIMCO trade marks. In this connection, consumers mostly base their purchasing actions on their first impressions of the product packaging and do not engage in a detailed and considered examination of the product itself or the packaging. As such, the unwary consumers of Snack Foods are prone to look at the over-all impression of the Offending Firm Name, the Impugned Marks and colour scheme and general elements on the Offending Packaging (which are undoubtedly identical and confusingly similar to and copied from the Complainant) and relying on the above features, would make the transactional decision.
- 2.16 The above discussed practices have enabled and continue to enable the Respondent No. 1 to earn profits to which it is not in equity or good conscience entitled and have unjustly enriched and will continue to unjustly enrich the Respondent No. 1 at the expense of the Complainant.


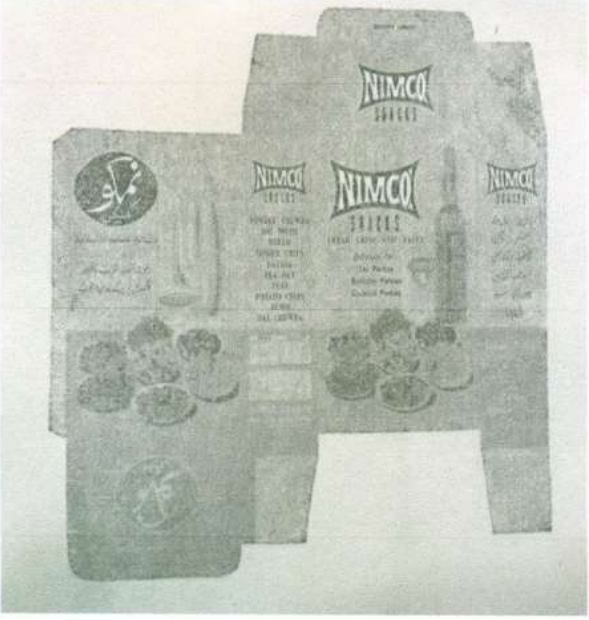
C. Presentation in support of the contraventions which have taken place by the Respondent No.1

i. Firm name and Nimco logo of Complainant and Respondent No.1

| COMPLAINANT | RESPONDENT |
|--|---|
| <p style="text-align: center;">Firm Name NIMCO CORNER</p> | <p style="text-align: center;">Firm Name MR. NIKCO CORNER</p> |
| <p style="text-align: center;">Logo in English</p>  <p>The logo for the complainant features the word "NIMCO" in large, bold, red letters with a white outline, set against a yellow background. Below it, the word "CORNER" is written in smaller red letters. Above "NIMCO", the text "TRADE MARK REGISTERED" is visible in small black letters.</p> | <p style="text-align: center;">Logo in English</p>  <p>The respondent's logo features the word "NIMKO" in large, bold, red letters with a white outline, set against a red background. Below it, the word "CORNER" is written in smaller red letters. Above "NIMKO", there is a small red signature-like mark.</p> <p>("R" sign is a false and misleading statement that the Respondent's logo is registered.)</p> |
| <p style="text-align: center;">Logo in Urdu</p>  <p>The Urdu logo for the complainant features the word "نمکو" (Nimko) in large, white, stylized Urdu script, set against a red oval background. Below it, the word "کونر" (Corner) is written in smaller white Urdu script. To the left of "نمکو", the word "سٹیکس" (Sticks) is written in smaller white Urdu script.</p> | <p style="text-align: center;">Logo in Urdu</p>  <p>The Urdu logo for the respondent features the word "نمکو" (Nimko) in large, white, stylized Urdu script, set against a red background. Below it, the word "کونر" (Corner) is written in smaller white Urdu script. A small registered trademark symbol (®) is visible to the left of "نمکو".</p> <p>("R" sign is a false and misleading statement that the Respondent's logo is registered.)</p> |

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ii. Trade Marks of Complainant and Respondent No.1.

| COMPLAINANT | RESPONDENT |
|--|--|
| <p data-bbox="256 436 808 478">Copies of Trade Marks as Applied</p>  <p data-bbox="256 1062 553 1094">Registered since 1972.</p>  <p data-bbox="256 1745 591 1776">As Registered since 1970.</p> | <p data-bbox="881 436 1406 478">Copy of Trade Marks as Applied</p>  <p data-bbox="881 884 1143 915">Pending since 2014.</p> |

iii. Packaging of Complainant and Respondent No.1 .



Close-up (reverse side)



Close-up (reverse side)



Packaging (front)



Packaging (front)





2.17 As is clearly evident from the above comparative representations of the Complainant and Respondent No. 1's firm names, packaging and marks the following elements of the Complainant have been copied by Respondent No. 1:

- The Respondent No. 1's firm name is Mr. Nimko Corner which is virtually and phonetically identical to the Complainant's firm name Nimco Corner.
- The Respondent No. 1 is infringing and passing off the following trade mark elements of the Complainant by using and applying for registration of:
 - the words "Nimko Corner" in English and in Urdu which is virtually and phonetically identical to the trade mark NIMCO CORNER, in which the Complainant hold exclusive rights in English and in Urdu.
 - *the phrases "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT IWRANA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" which is conceptually, visually and phonetically identical and*

confusingly similar to the phrases "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" which has been coined and used extensively by the Complainant since 1972.

- The striped device at the bottom of the trade mark and bag is visually and conceptually identical to the striped device developed, designed, registered and used extensively by the Complainant since 1972.
- The Respondent No. 1 is copying NIMCO Packaging in the following manner:
 - the Respondent No. 1's bag has a red, white and yellow colour scheme, a Mr. Nimco Corner logo mark in red and white on top, the Words "FRESH, CRISP AND TASTY" written in yellow in the centre, then the business' website written in a separate band below and a striped device with the names of Snack Foods written within ovals shapes and the address of the Respondent No.1 provided at the bottom, which is virtually identical to that of the Complainant's bag.
 - The packet of the snack foods is also identical to the NIMCO Packaging. In particular the Offending Packaging has the identical colour scheme (red, yellow and blue), structure (overall yellow with the logo in red and white on top, information and tea devices in the center, and seller's information in blue at the bottom), elements (saucer and tea cup, size of package) and wording "Nimko Corner", "Original Brand", "Old Spice Crips", "FRESH, CRISPY, TASTY", "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" and names of Snack Foods.

2.18 In view of the above, it is obvious that the adoption by the Respondent No. 1 of the virtually identical Offending Firm Name, Impugned Mark and Offending Packaging as that of the Complainants is not a coincidence and that the Respondent No. 1 has with full knowledge and *mala fide* intention copied the Complainant in order to reap benefits and take advantage of the goodwill associated with the long standing use of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks which is likely to cause damage to the Complainant's goodwill and reputation as well as dilute the NIMCO trade marks and result in financial loss of the Complainant.

D. Reliefs sought:

2.19 The Complainant humbly and respectfully requested the Hon'ble Commission to conduct an enquiry under section 37(2) of the Competition Act read with Regulation 16 of the

Competition (General Enforcement) Regulations, 2007 against the Respondent No.1 for deceptive marketing practices and to initiate formal proceedings against the Respondent No. 1 under section 30 of the Act read with Regulation 22 of the Competition (General Enforcement) Regulations 2007.

2.20 The Complainant also requested the Commission to grant the following reliefs:-

- i. to pass orders under section 31(c) of the Act requiring the Respondent No.1 to refrain from deceptive marketing practices, that is, to cease the production, sale, distribution, use, display and/or marketing of the Offending Firm Name Mr. Nimko Corner, Offending Packaging and Impugned Marks, which are identical and confusingly and deceptively similar to firm Complainant's firm name, NIMCO Packaging and NIMCO trade marks and any statements that the Respondent No.1 has any registered marks in respect of "Nimco"
- ii. to order removal of, confiscate and destroy all use of the Offending Name, Offending Packaging, Impugned Marks and false and deceptive use of the ® symbol or statement that the Respondent No.1 has any registrations with regard to "Nimco".
- iii. to impose penalties under section 38 of the Act;
- iv. to pass an interim order under section 32 of the Act requiring the Respondent No.1 to refrain from deceptive marketing practices in order to prevent further irreparable loss and damage to the business and goodwill of the Complainants; and
- v. to give such other interim and /or final relief as this Hon'ble Commission may deem fit.

2.21 This section summaries the contentions raised in the complaint against Respondent No. 2.

E. Statement of Facts:

2.22 The Complainant stated that it owns and has been carrying out a business of processing, marketing and selling foods such as fried lentils, chewra, dall mooth, coated nuts and chips etc. under the firm name Nimco Corner and also under the NIMCO Trade Marks since 1947. The Complainant established its outlet at Mochi Gali No. 3, Bhori Bazar Saddar, Karachi in 1965.

2.23 The Complainant has over the years developed and designed distinctive logos and packaging to be used in connection with the goods of the Complainant which have been used throughout Pakistan and internationally for many years. Such packaging is in the distinctive color scheme of red, yellow and blue, with the "Original Brand since 1947", the Nimco Corner logo (that is, "NIMCO" written in unique white font inside a red rectangle with "Corner" written below it in blue), the Nimco Snacks logo in Urdu (that is , a red oval

with the words “Nimco Snacks” in white), a tea pot, tea cup and saucer, a blue and white striped device with names of the snack foods in circles and the address of the Complainant below, and words “FRESH CRISP TASTY” “TAAZA, KHASTA AUR LAZEEZ”, “DAAWAT, ISRANA, TAQREEB-E- SALLGIRA AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB” , AND “ OLD Spice Snacks” .

- 2.24 It was further stated that the Complainant has trade mark registration under Nos. 53499 and 56759 in Pakistan in class 30 under Snack Foods which date as far back as 1970. The said registration cover the following features: words NIMCO SNACKS (in Urdu and English): the Nimco Corner logo (that is, “NIMCO” written in unique font while inside a red rectangle with “Corner” blue written below it): Nimco Snacks Logo in Urdu (that is, a red oval with the words “Nimco Snacks” in white)” the words “ FRESH, CRISP and TASTY” “TAAZA, KHASTA AUR LAZEEZ” and “DAAWAT and ISRANA, TAKREEB, SALGIRA AUR COCKTAIL PARTIES KI LIYE BEHAD MARGHOOB” and a striped device displaying the Complainant’s store address below.
- 2.25 The Complainant is the sole and true proprietor of the firm name Nimco Corner, NIMCO Packaging and NIMCO trade marks. The Complainant’s firm, Nimco Corner was one of the first retail stores in Pakistan to specialize in selling Snack Foods. The Complainant has since used the firm name, distinctive NIMCO Packaging and NIMCO trade marks developed and designed by the Complainant in relation to Snack Foods throughout Pakistan and extensively. The Complainant has also expanded by opening up a new branch in Clifton, Karachi as a result of its extensive and widespread sales.
- 2.26 As a result, of the Complainant’s long standing business of 60 years and its high quality products, and marketing the Complainant has become market leader in Pakistan in regard to the said Snack Foods. Moreover, NIMCO Packaging and NIMCO trade marks have become well-known and a house-hold name throughout Pakistan. The goods of the Complainant are instantly and widely recognized by the Complainant’s firm name, NIMCO trademarks and NIMCO Packaging by the general public in Pakistan.
- 2.27 Thus as a result of the above, the Pakistani Public have for decades been familiar with and had knowledge of the Complainant’s firm name, NIMCO Packaging and NIMCO trade marks. Moreover, as a result of the long standing use and extensive sales and marketing of the Complainant’s Snack Foods throughout Pakistan a close association has been created between the complainant and the complainant’s firm name, the NIMCO trademarks and NIMCO Packaging. As a result, the Complainant has developed extensive goodwill associated with Complainant’s firm name, NIMCO Packaging and NIMCO trade marks and as such no third party may use the same or confusingly similar firm name, NIMCO Packaging or NIMCO trade marks without authorization of the Complainant. Any unauthorized use of the Complainant’s firm name, NIMCO Packaging or NIMCO trademarks, which is the same or confusingly similar to that of the Complainant amounts to

deceptive marketing practice and is prohibited under section 10 of the Act, particularly clause (a), (b) and (d) of sub-section (2) of section 10 .

- 2.28 In connection to the above, while the Complainant is formally carrying out Nimco Corner business in Pakistan, the Snack Foods are available internationally through different trade channels, including parallel importation by third parties and by individuals bringing gifts from abroad for their families in Pakistan.
- 2.29 It was submitted that the Respondent No. 2 has resorted to, and continues to undertake, deceptive marketing contrary to the provisions of section 10 of the Act by using the firm name Karachi Nimco in regard to Snack Foods ; packaging which is in the identical colour scheme of red, blue and yellow to that of the Complainant’s Snack Foods packaging, which has a Karachi Nimco logo in white inside a red oval, and also has a yellow background identical to the registered trademark of the Complainant”)in English and Urdu, a striped device with the appropriate weight of the packet mentioned and description of the product such as, TAAZA, KHASTA, AUR LAZEEZ” and “DAAWAT ISRNA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB”; and the marks KARACHI NIMCO logo (that is, the words Karachi Nimco”in a red oval and rectangle) in English TAAZA, KHASTA, AUR LAZEEZ” and “DAAWAT ISRNA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB”. The offending Firm Name, Offending Packaging and Impugned Marks for the same class of goods are identical and confusingly and/or deceptively similar of those the Complainant.
- 2.30 It was further submitted that Respondent No. 2 has a Facebook page www.facebook.com/karachinimco/. Which displays the Offending Firm Name in relation to the sale of snack foods. Such use of the Offending Firm Name will inevitably lead to confusion and deception amongst the public.
- 2.31 It was alleged that the Respondent No. 2 has also recently opened a store to sell snack foods with packaging aforementioned, under the Offending Firm Name. It was submitted that the said store has been deliberately opened by the Respondent No.2 in the same vicinity as the Complainant and that too in a confusingly similar corner location as of the Complainant’s Nimco Corner store. The Respondent No. 2’s opening of a shop in such a location is likely to and has confused and deceived unwary customers into believing that his shop is the shop of the Complainant’s and is a clear indication of the *mala fide* intent to exploit and unduly benefit from the reputation and goodwill of the Complainant which will inevitably cause financial loss to the Complainant.

F. **Summary of the contravention of section 10 of the Act:**

- 2.32 It was submitted that through each of the above discussed actions and practices, the Respondent No. 2 has every intention to confuse and deceive the unwary consumers and to take unfair advantage of the reputation and goodwill of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks (which reputation and goodwill has over many

years accrued in favour of the respective Complainant due to extensive use and advertisement) and to secure for itself undue business advantage which the Respondent No.2 would not have achieved otherwise. Such actions and practices are clearly prohibited under section 10 of the Act and, in particular, contravene the provisions of sub-section (1) and clauses (a), (b) and (d) of sub-section(2) of section 10.

- 2.33 The Respondent No.2 has undertaken and continues to undertake the above discussed actions and practices with full knowledge of the proprietary rights of the Complainant, in respect of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks. In fact, the Respondent No. 2 's use of the Offending Firm Name, Offending Packaging and Impugned Marks (which are identical and confusingly similar to those of the Complainant's) clearly demonstrates the Respondent No. 2 's ulterior motive of misleading and deceiving the unwary consumers to make a transactional decision which the consumers would not have otherwise taken, and unfairly competing with the Complainant in Pakistan, and as such, securing a business advantage for itself in the local market and harming the business interests of the Complainant.
- 2.34 The Complainant further stated that each of the above discussed actions and practices of the Respondent No. 2 are deliberately and systematically calculated to harm the business interests of the Complainant in Pakistan. The Respondent No. 2 is also marketing its Snack Foods on Facebook through similar get up and images as well as using deceptively similar trademark of the Complainant and as such is deliberately using a virtually identical firm name, packaging and marks as that of the Complainant's in order to confuse the public into thinking that the Respondent No. 2's goods emanate from the Complainant and as a result reap benefits of the goodwill associated with the Complaint.
- 2.35 The subject complaint presents a very clear case of "copycat packaging" and "parasitic copying". The Respondent No. 2 has deliberately copied the over-all impression/look/feel and misappropriated the distinctive and aesthetic design elements of the NIMCO Packaging, NIMCO trade marks the Complainant's and firm name with regard to Snack Foods, to unfairly compete with the Complainant. By undertaking the above discussed actions and practices, the Respondent No. 2 intends to trade off the reputation and goodwill of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks thus taking unfair advantage of the investments made by the Complainant on the brand development and innovation of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks.
- 2.36 The Offending Firm Name, Offending Packaging and Impugned Marks of the Respondent No. 2 's products are virtually identical and confusingly similar to the Complainant's firm name, NIMCO packaging and NIMCO trade marks. In this connection, consumers mostly base their purchasing actions on their first impressions of the product packaging and do not engage in a detailed and considered examination of the product itself or the packaging. As such, the unwary consumers of Snack Foods are prone to look at the over-all impression of the Offending Firm Name, the Impugned Marks and colour scheme and general elements



on the Offending Packaging (which are undoubtedly identical and confusingly similar to and copied from the Complainant) and relying on the above features, would make the transactional decision.

2.37 The above discussed practices enable the Respondent No. 2 to earn profits to which it is not in equity or good conscience entitled and have unjustly enriched and will continue to unjustly enrich the Respondent No. 2 at the expense of the Complainant.


G. **Presentation in support of the contraventions which have taken place by the Respondent No. 2:**


i. **Firm name and Nimco logo of Complainant and Respondent No. 2**

| COMPLAINANT | RESPONDENT |
|---|--|
| Firm Name NIMCO CORNER | Firm Name KARACHI NIMCO |
| Logo in English  | Logo in English  |

| COMPLAINANT | RESPONDENT |
|---|--|
|  |  |

ii Trademark of Complainant and Respondent No.2

| COMPLAINANT | RESPONDENT |
|--|--|
| <p data-bbox="219 422 781 464">Copies of Trade Marks as Applied</p>  <p data-bbox="219 1060 519 1094">Registered since 1972.</p> | <p data-bbox="1096 430 1161 464">N/A</p> |

| COMPLAINANT | RESPONDENT |
|---|------------|
|  | |

iii Packaging of Complainant & Respondent No.2

| COMPLAINANT | RESPONDENT |
|--|---|
| <p data-bbox="375 394 678 430">Packaging (front)</p>  | <p data-bbox="1003 394 1307 430">Packaging (front)</p>  |

| COMPLAINANT | RESPONDENT |
|--|---|
| <p data-bbox="451 1308 597 1344">Close-up</p>  | <p data-bbox="1044 1308 1190 1344">Close-up</p>  |

Close-up (reverse side)



Packaging (front)

Close-up (reverse side)

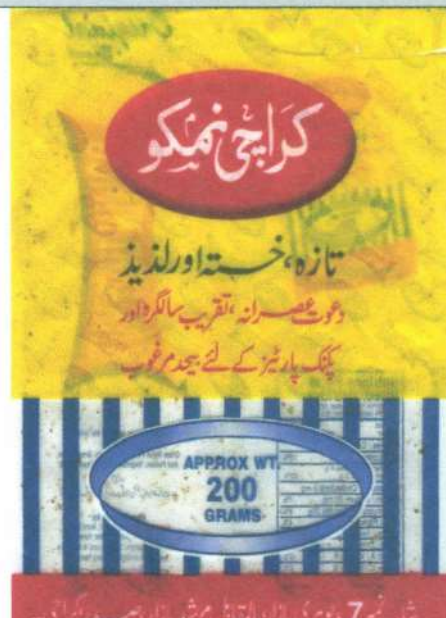


Packaging (front)

COMPLAINANT



RESPONDENT





2.38 As is clearly evident from the above comparative representations of the Complainant and Respondent No. 2's firm names, packaging and marks the following elements of the Complainant have been copied by Respondent no.2:

- The Respondent No. 2's firm name is Karachi Nimco which is virtually and phonetically identical to the Complainant's firm name Nimco Corner.
- The Respondent No. 2 is infringing and passing off the following trade mark elements of the Complainant by using and applying for registration of:

-the words "Nimko Corner" in English and in Urdu which is virtually and phonetically identical to the trade mark NIMCO, in which the Complainant hold exclusive rights in English and in Urdu.

- the phrases "TAAZA, KHAUSTA AUR LAZEEZ" and "DAAWAT IWRANA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" which is conceptually, visually and phonetically identical and confusingly similar to the phrases "TAAZA, KHAUSTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" which has been coined and used extensively by the Complainant since 1972.

- The striped device at the bottom of the trade mark and bag is visually and conceptually identical to the striped device developed, designed, registered and used extensively by the Complainant since 1972.

- The Respondent No. 2 is copying NIMCO Packaging in the following manner:
 - the Respondent No. 2 's bag has a red, white and yellow colour scheme, a Karachi Nimco logo mark in red and white on top, with “Original since” 1966 falsely written on top left; then the business address and website written below which is virtually identical to that of the Complainant's bag.

-The packet of the Snack Foods is also identical to the NIMCO Packaging. In particular the Offending Packaging has the identical colour scheme (red, yellow and blue), structure (overall yellow with the logo in red with trademark registered sign falsely displayed next to it and blue and white stripes in the middles, red band below containing business address and details); further the identical words, "*TAAZA, KHAATA AUR LAZEEZ*" and "*DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB*" are also written in same font.

2.39 In view of the above it is obvious that the adoption by the Respondent No. 2 of the virtually identical Offending Firm Name, Impugned Mark and Offending Packaging as that of the Complainants is not a coincidence and that the Respondent No.2 has with full knowledge and *mala fide* intention copied the Complainant in order to reap benefits and take advantage of the goodwill associated with the long standing use of the Complainant's firm name, NIMCO Packaging and NIMCO trade marks which is likely to cause damage to the Complainant's goodwill and reputation as well as dilute the NIMCO trade marks and result in financial loss of the Complainant.

H. Reliefs sought:

2.40 The Complainant humbly and respectfully requested the Hon'ble Commission to conduct an enquiry under section 37(2) of the Act read with Regulation 16 of the Competition (General Enforcement) Regulations 2007 against the Respondent No.2 for deceptive marketing practices and to initiate formal proceedings against the Respondent No.2 under section 30 of the Act read with Regulation 22 of the Competition (General Enforcement) Regulations 2007.

2.41 The Complainant also requested the Commission to grant the following reliefs:-

- i. to pass orders under section 31(c) of the Act requiring the Respondent No.2 to refrain from deceptive marketing practices, that is, to cease the production, sale, distribution, use, display and/or marketing of the Offending Firm Name Karachi Nimco, Offending Packaging and Impugned Marks, which are identical and confusingly and deceptively similar to firm Complainant's firm name, NIMCO Packaging and NIMCO trade marks and any statements that the Respondent No.2 has any registered marks in respect of "Nimco".
- ii. to impose penalties under section 38 of the Act;
- iii. to pass an interim order under section 32 of the Act requiring the Respondent No.2 to refrain from deceptive marketing practices in order to prevent further irreparable loss and damage to the business and goodwill of the Complainants; and
- iv. to give such other interim and /or final relief as this Hon'ble Commission may deem fit.

3. SUBMISSION OF THE RESPONDENT NO.1

- 3.1 The complaint was forwarded to the Respondent No. 1 by the Enquiry Committee for comments on December 27, 2017. Upon receiving the complaint, Respondent No. 1 requested for an extension in time limit through letter dated January 01, 2018, which was granted vide letter dated January 09, 2018.
- 3.2 The Respondent No.1, submitted its reply through its legal counsel Mr. Sajid Latif, Advocate High Court vide letter dated January 12, 2018. The contents of the reply are provided below:
- 3.3 Firstly, the legal objections were raised which are as under:-
- 3.4 That the complaint has been made against the object of the law where in it is provide free competition in all spheres of commercial and economic activity to enhance economic efficiency and to ensure free competition.
- 3.5 That the complaint is based upon the infringement of trade mark as the enquiry before this forum is coram non judice and the complaint is liable to be dismissed or returned for filling the same in proper forum.
- 3.6 The complaint is liable to be rejected under regulation 5 read with regulation 4 and 9 (2) of Competition Commission (General Enforcement) Regulations, 2007 for its non-

compliance as no exemption has been sought by the complainant as it is based upon contra formain statute.

- 3.7 That unless the complainant has not established his dominant position amongst his competitors in relation of his product before this forum, the complaint is liable to be rejected at once.
- 3.8 That it is mandatory upon the complainant before filling the complaint to qualify himself as they had not contravene the object of section 4 which effect of preventing, restricting or reducing competition otherwise it would be treated as convicium.
- 3.9 That the complaint has been filed in order to achieve their nefarious designs to prevent new entries and to monopolize the market as per regulation 3(f) of the Regulations 2007.
- 3.10 The complainant has no exclusive right to use descriptive words in terms of section 4(6) of the trademark and neither any right could be infringed in terms of place of business the shop of the respondent is far away from the complainant shop.
- 3.11 The Respondent No. 1 is a proprietorship concern and carry out business at shop No. 5 Saifee Building Parsi Gali Mir Karamali Talpur Road Saddar, Karachi by processing and selling snacks/food items such as chevda, dalmouth, chips, fired lentils, peanuts, chickpeas, flaked rice ext which is being widely used all around in Pakistan and are preparing/processing/selling almost at every bakery in the name of Nimko viz a viz hundreds of other shops/firms are also manufacturing having same color shape and slight difference in prices being commonly known as Nimko, cahanachur etc. no one has exclusive domain over these items neither in Pakistan nor in india.
- 3.12 That the Respondent No. 1 has been marketing high quality chevda, dalmouth , chips, fried lentils , peanuts, chickpeas, flaked rice etc. under the brand/trade mark name Mr. Nimko corner since long and since adoption of trade mark Mr. Nimko Corner which is quite distinguished from the Complainant's firm Nimco Corner and the Respondent No 1 has gained good response from general public for their quality, taste and price under the trademark/ name Mr. Nimko corner exclusively become associated with the Respondent no 1 and non-else. The Complainant in order to miss guide this Hon'ble Commission wrongly coated wrong facts as uses of the phrase which is not protected and is a general phrase and hundreds of firms use the phrase Khasta Taaza or Lazeez. The Complainant has no exclusive rights over the same even otherwise the Respondent no 1's trademark is cup and a saucer while the complainant represent through Teapot cup and saucer they are denoting themselves with Nimco Corner . The Complainant mixed up this issue in a technical way in order to confuse the Commission.
- 3.13 That the Respondent No 1 in order to distinctive its quality products from other competitors using different and distinctive trademark/trade dress which has created and adopted in the year 2014 and since that it has been using by the Respondent No.1.

- 3.14 Respondent No. 1 denied allegations of the complainant as it required strict proofs with documentary evidence in respect of their claim to establish that both the brands are phonetically and colors scheme used in packaging are similar.
- 3.15 That the complaint is not maintainable on the grounds mentioned in the complaint as the Complainant's trademark is Nimco Snacks and their trading address in Nimco Corner Bhoori Bazaar, Mouchi Gali No. 3 Saddar Karachi while Respondent no 1 adopted trademark is Mr. Nimko Corner, having address Shop No . C-5 Saify building. The Complainants trademark is different from the Respondent no 1 trademark as a whole phonetically as well as appearance is dissimilar to each other. It is well settled principal that mark is whole thing and therefore, it should be compared as a whole and it is wrong to dissect mark and show that each of its components parts is not distinctive.
- 3.16 That mark of the Respondent No. 1 is to be compared as whole with the Complainant's mark as it appears different and is not deceptive in nature. The Complainant in order to achieve his desires as mentioned in regulation 3(f) intends to monopolize himself which is against other firms including Respondent No. 1.
- 3.17 That the Complainant failed to point out all those trademark namely already registered and pending in the Trade Mark Registry Government of Pakistan near to similar with each other with prefix similar and suffix similar.
- 3.18 That the Respondent No. 1 trademark label color scheme calligraphy and label design artistic work and features neither having and resembling nor matching to the similarity of trademark used as with the Complainant and apparently both are different and distinguish with each other with the design mark and trade as such question of confusing Complainant purchasers/clients is misconceived it is further to be pointed out that the Respondent No.1 has not passed off the copy rights.
- 3.19 That the Respondent No. 1 has its own brand Mr. Nimko Corner upon which we have the right and privilege as granted under the law and the Respondent No. 1 has not done any act to deprive the Complainant from their legitimate profit or having cause any damage to their reputation or goodwill as our trademark is distinguishable in all respect with the trademark of the Complainant neither it match or it resembles to the trademark of the Complainant as well packaging hence question of alleged deceiving or confusion or creating impression of your goods to public does not arise at all.
- 3.20 That the Respondent No. 1 has not done any act which may amount to infringement of the label design or trademark of the Complainant and has not violated any provision of the copy right ordinance as such the injunction and damages is not made out at all under the ordinance as well as under the Pakistan Penal Code wherein it has been defined as act of counterfeiting which is misconstrued by the Complainant and it amount to harassment, illegal threat in order to make supremacy on the name of Nimko which is a tradition name of the items contains Chevda, Dalmouth, chips, fried lentils, peanuts, chickpeas, flaked rice and no one could claim his exclusive domain on these items even otherwise the word Nimko is a general word which is collectively used for certain eatable items having salty

taste as such the proceeding initiated having no strength at all and is liable to be dismissed. That the Respondent No. 1 has do hereby enclosed the search reports of trademark Nimko in calls 30 and 40 which is enclosed for the perusal of this Hon'ble Commission.

- 3.21 In view of the above said submissions it was requested that the Hon'ble Commission may kindly dismiss the Complaint by imposing cost on the Complainant being bad in law and facts.

4. REJOINDER BY THE COMPLAINANT IN RESPONSE TO THE SUMISSIONS OF RESPONDENT NO.1

- 4.1 The comments/reply of the Respondents No. 1 was forwarded to the Complainant for its comments/rejoinder vide letter dated January 18, 2018.
- 4.2 The Complainant submitted its rejoinder vide letter dated January 27, 2018, the contents of which are reproduced below:
- 4.3 It was denied that the subject complaint has been made against the object of the law and particularly against the letter and spirit of the Act. It was submitted that the Respondent No. 1's commercial and economic activities do restrict free competition nor do they amount to anti-competitive behavior.
- 4.4 It was further denied that the complaint filed is conram no judice or that the same is liable to be dismissed. It was submitted in accordance with clause (d) of sub-section (2) of section 10 of the Act. It has been specifically clarified that the fraudulent use of another's trade mark, firm name, or product labelling or packaging shall be deemed to be a form of deceptive marketing practices and is prohibited. As such, the complaint is well within the purview of the Act and has been filed at the proper forum.
- 4.5 It was also denied that the complaint is liable to be rejected under regulation 5 read with regulation 4 and 9(2) of the Competition Commission (General Enforcement) Regulations, 2007 or is contrary to the form of the statute. It was submitted that the said regulations deal with exemptions and the Complainant has not and is not required to file for any exemption under the Act in respect of the subject complaint.
- 4.6 It was vehemently denied that the complaint is liable to be rejected unless the Complainant establishes a dominant position in relation to Snack Foods amongst his competitors or that the Complainant contravenes the object of section 4 of the Act. It was submitted that the Complainant is not required to fulfill any criteria under section 3 or 4 of the Act to be able to maintain the complaint. Further, the Complainant has established that the Respondent No. 1 is liable under the Act for carrying out deceptive marketing practices by deliberately selling Snacks Foods under the firm name, trade mark and packaging which is identical to the Complainant.

- 4.7 It was again denied that the Complainant is in violation of sub-section (f) of section 3 of the Act which the Respondent No.1 appears to have erroneously referred; to as "regulation 3(f) of the Regulations 2007" or that the Complainant has no exclusive right to use the word NIMCO. It was submitted that the reference to sub-section (6) of Section 4 of the Act is nonsensical given that the Complainant has been using the firm name "Nimco Corner" in relation to Snack Foods since the last 60 years and that the word NIMCO has been coined and used by the Complainant in order to distinguish its goods from those of those of others in the same trade. The Complainant has developed and designed distinctive logos and packaging used throughout Pakistan and internationally for many years in connection with Snack Foods. Further, the Complainant has trade mark registrations in Pakistan since 1970 and 1972 under numbers 53499 and 56759 covering the features: words NIMCO SNACKS (in Urdu and English); the Nimco Corner logo (that is, "NIMCO" written in a unique font white inside a red rectangle with "Corner" blue written below it); Nimco Snacks logo in Urdu (that is, a red oval with the words "Nimco Snacks" in white); the words "FRESH, CRISP and TASTY", "TAAZA, KHASTA AUR LAZEEZ" and " DAAWAT and ISRANA, TAKREEB, SALGIRA AUR COCKTAIL PARTIES KE LIYE BEHAD MARGHOOB"; and a striped device displaying the Complainant's store address below and the Complainant has been paying the registration fee to maintain the NIMCO trade marks since almost fifty years. As such, the Complainant undoubtedly has the right to use its firm name, packaging and trademarks exclusively. Moreover, it was denied that the Respondent No. 1's place of business is far away from the Complainant's place of business. It was submitted that the location of the Respondent No.1's place of business is very close to the Complainant's place of business as is evident from their addresses and is also a corner shop in the same manner as that of Complainant's shop and such actions are being carried out by the Respondent No. 1 in order to market the products as that of the Complainant and inevitably deceive customers. As such, the Complainant maintains the list on accord of the deceptive marketing practices that are being carried out by the Respondent No.1.
- 4.8 The Complainant admitted to the extent that Complainant carries out business at shop No. 5, Saifee Building, ParsiGali, Mir KaramaliTalpur Road, Saddar, Karachi by selling Snack Foods. It was denied that the Respondent No. 1 widely uses or sells its Snack Foods extensively in Pakistan or is in every bakery in under the name Nimko and is put to strict proof of the same. It was vehemently denied that other shops/firm are selling Snack Foods under the NIMCO trade marks. It was submitted that the expression NIMCO was coined by the Complainant and while no one has exclusive domain over the Snack Food items the Complainant does have valid registered NIMCO Trade Marks in his name since 1970 so as to maintain a list to restrain others from using NIMCO. The Complainant's allegation is in respect of the Respondent No. 1's use of the firm name Mr. Nimco Corner, mark which is identical to the NIMCO Trade Mark, and packaging of Snack Foods which is identical to and a parasitic copy of the Complainant's packaging of Snack Foods. Such activities by the Respondent No.1 to fraudulently misinforming the public of the origin and quality of

the Snack Foods and copying the firm name and packaging and infringement of the NIMCO trade mark clearly amounts to deceptive marketing practices.

- 4.9 It was specifically denied that the Respondent No. 1 has been selling Snack Foods under the firm name or trade mark Mr. Nimko Corner since a long time or that the mark and firm name used by the Respondent No. 1 are in any way distinguishable from that firm name or NIMCO trademarks of the Complainant. It was vehemently denied and put to strict proof that that Respondent No. 1 has any goodwill associated with the impugned mark NIMKO being used by it and that the 'same is exclusively associated with the Respondent No. 1 and no one else. It was submitted that no evidence has been submitted by the Respondent No. 1 in support of the claims of goodwill associated with the firm name, mark of packaging being sued by it. Moreover, it was submitted that no misquotations have been made by the Complainant and that the Complainant enjoys exclusive rights over the phrase "TAAZA, KFIESTA AUR LAZEEZ" which the Complainant coined and has obtained Trade Mark registrations. The Complainant has in no way mixed any paragraphs of the complaint and has no intention to deceive the Commission given that the complaint is a clear cut case of deceptive marketing practices being carried out by the. The allegations made by the Respondent No. 1 against the Complainant are an attempt by it to cover up it's the illegal use of its firm name, the NIMCO trade mark, and packaging.
- 4.10 It was submitted that it is impossible that the Respondent No. 1 had no knowledge of the Complainant's firm name, well-known yellow packaging comprising distinctive elements and NIMCO trademarks and brand name used extensively by the Complainant throughout Pakistan since the past 60 years. As such it vehemently denied that the Respondent No. 1 have only in 2014 created an identical firm name, packaging, and trade mark as that of the Complainant. It was submitted that the Respondent No. 1 has deliberately and with full knowledge copied the firm name, packaging and NIMCO trademarks of the Complainant in order to deceive consumers and reap benefits from the tremendous goodwill associated with the Complainant's firm name, packaging, NIMCO trademarks, and Snack Foods quality of the Complainant.
- 4.11 It was humbly submitted that the Complainant has provided evidence that the firm name, trademarks and packaging of the Respondent No. 1 is identical to the Complainant.
- 4.12 It was specifically denied that the complaint is not maintainable. It was submitted that the Complainant has exclusive rights to the word NIMCO which has been coined by the Complainant and registered by the Complainant without any disclaimer imposed thereon. It was denied that the shops of the Respondent No. 1 and the Complainant are located in different places and it was submitted that the addresses of the Complaint and Respondent No. 1 indicate that both the stores are in Bohri Bazar, Saddar, Karachi. Moreover, when the packaging of the Complainant and Respondent No. 1 are compared as a whole they clearly appear to be identical. It was denied that the Complainant is in any way attempting to monopolies the market by filing the complaint. It was submitted that the complaint filed

by the Complainant is maintainable and that the Respondent No. 1's adoption of the firm name, trademarks and packaging of the Complainant amounts to deceptive marketing practice.

- 4.13 It was denied that there are any registered trademarks which are similar to the NIMCO trade marks other than those of the Complainant. In this connection it was submitted that majority of the trade mark applications for NIMCO or NIMKO marks at the Trade Marks Registry in Pakistan are still pending. Further, the only registered mark for NIMCO in class 30 are those of the Complainant and other NIMCO or NIMKO marks in class 30 have been published with a disclaimer on the word NIMCO or NIMKO. As such, the Complainant maintains exclusive rights over the word NIMCO to-date.
- 4.14 It was submitted that each and every design, artistic work, and feature of the Respondent No. 1's firm name, brand name and packaging is identical to and parasitic copy of the Complainant's and that confusion between the firm name, marks and packaging of the Respondent No. 1 and Complainant is inevitable and continuing. It was submitted that the Respondent NO. 1 has no trade mark registration or copyrights in the mark and/or packaging it is using. Further, the Respondent No. 1's fraudulent use of the Complainant's firm name, registered NIMCO trademarks, and packaging clearly amounts deceptive marketing practice under sub-section (d) of section 10 of the Act. Moreover, features on the Respondent No. 1's packaging such as "Original Brand"; false nutritional facts on its packaging and replicating the packaging of the Complainant amounts to distribution of false and misleading information with respect to the quality and place of production and is capable of and has harmed the business interest of the Complainant. As such, the Respondent No. 1 is clearly carrying out deceptive marketing practices under sub-section (1) and (2) of section 10 in addition to sub-section (d) of section 10 of the Act.
- 4.15 It was denied that Respondent No. 1 has not violated copyright, trademarks, Competition, and Pakistan Penal Code laws and it was also denied that the complaint has been filed by the Complainant to harass the Respondent No. 1. The Complainant is a market leader in Snack Foods in Pakistan and the word NIMCO has been coined and adopted by the Complainant with respect to Snack Foods since the past 60 years. It was submitted that perusal of the Trade Mark search reports reveal that most of the marks listed are not NIMCO or NIMKO marks. Further, majority of the trade mark applications for NIMCO or NIMKO cited in the search report are still pending or do not related to class 30 which is the class in which the Complainant maintains its NIMCO trademarks registration. Moreover, the registered NIMCO mark listed in the search report is that of the Complainant himself and any other NIMCO or NIMKO marks have been published with a disclaimer on the NIMCO or NIMKO. As such, the Complainant maintains exclusive rights over the word' NIMCO which can in no way be deemed a "general word" as alleged by the Respondent No.1.

4.16 It was reiterated that the Complainant enjoys exclusive rights in the firm name NIMCO CORNER, the NIMCO trademarks and packaging thereof through its copyrights, extensive and long standing use, well known reputation and trademarks registrations therein which the Respondent No. 1 has fraudulently and illegally adopted. The Respondent No. 1 is undeniably carrying out deceptive marketing practices under section 10 (a)(b) and (d) of the Act and as such, the complaint is in no way liable to be dismissed. The Complainant humbly and respectfully requested the Honorable Commission to pass orders under section 31(c) of the Act requiring the Respondent No. 1 to refrain from deceptive marketing practices, that is, to cease the production, sale, distribution, use, display and/or marketing of the Offending Firm Name Mr. Nimko Corner, Offending Packaging and Impugned Marks, which are identical and confusingly and deceptively similar to firm Complainant's firm name, NIMCO Packaging and NIMCO trademarks and any statements that the Respondent No. 1 has any registered marks in respect of NIMCO. Also to order removal of, confiscate and destroy all use of the Offending Firm Name, Offending Packaging, Impugned Marks and false and deceptive use of the ® symbol or statement that the Respondent No.1 has any registrations with regard to NIMCO. The Complainant further requested to impose penalties under section 38 of the Act against the Respondent No. 1 and to pass an interim order under section 32 of the Act requiring the Respondent No. 1 to refrain from deceptive marketing practices in order to prevent further irreparable loss and damage to the business and goodwill of the Complainant; and to give such other interim and/or final relief as this Honorable Commission may deem fit.

5 SUBMISSIONS OF THE RESPONDENT NO. 2

- 5.1 The complaint was forwarded to Respondent No. 2 by the Enquiry Committee for comments on May 17, 2018 and later reminders were issued on May 31, 2018 and June 08, 2018.
- 5.2 The Respondent No.2 submitted its reply vide letter dated June 06, 2018. The contents of the reply are provided below
- 5.3 Firstly, the legal objections were raised which are as under:-
- 5.4 That the complaint as framed u/s 10 of the Act is not maintainable under the law and same is liable to be dismissed.
- 5.5 That the complainant filed instant complaint without having any genuine cause of action against the Respondent No. 2.
- 5.6 That the Complainant suppressed material fact from this Hon'ble Commission, in order to achieve his ulterior motives, by defeating the ends of justice.

- 5.7 That the complainant approached this Hon'ble Commission with unclean hands, as such under reply complaint is not maintainable, and same is liable to be dismissed with compensatory cost.
- 5.8 That the description of complainant's business internal activities, address etc. and same having no concern with the answering Respondent No.2, requires no comments/reply of the Respondent No. 2. Print-outs of the Complainants' website and photographs of Nimco Corner out in Bohri Bazar, in fact, has no concern with the Respondent No. 2, as such, same require no comments from the Respondent No. 2.
- 5.9 That the business activities of the complainant having no nexus with the business of Respondent No. 2, as such needs no comments.
- 5.10 It was submitted that the complainant unnecessarily for his malafide intention and ulterior just to confuse and misguide this Hon'ble Commission, has intentionally repeated and created deliberate complication in his story just to confuse the mind of this Hon'ble Commission and achieve his ulterior motives, otherwise, matter is very simple that the complainant has been carrying on his business under the name and style of "Nimco Corner" while the Respondent No. 2 has been carrying on his own separate business under the name and style of "Karachi Nimco" both in the same locality, i.e. Bohri Bazar, Saddar, Karachi, but the Complainant with his malafide intention has willfully created so many technicalities in the description of his business, which in fact has no need to be placed before this Hon'ble Commission. It is pertinent to mention here that for the last more than 50 years the Respondent No. 2 has been running his own shop/business, without giving any complaint to his other business competitors, but the complainant for reasons best known to him, most probably being jealous to the business of Respondent No. 2, has lodged this false and baseless complaint without any just cause. It was stressed that there are many other competitors in the locality, but no one ever raised any complaint against the Respondent No. 2, but the Complainant, who appears a habitual complainant sometimes back had also initiated such type of fake and fabricated proceedings against the Respondent No. 2, but same was dismissed accordingly. It is also clarified herewith that the Respondent No. 2 being a prominent and leading business has been carrying his own business with his own logo and style, without committing any deceptive marketing practices, rather the it is strictly adhesive to the fair business practices both externally and internally, but the complainant being jealous nature person has been working negatively due to the boosting business activities of the Respondent No. 2, for which he has moved under reply complaint, which under the law is not maintainable, but same is liable to be dismissed with heavy compensatory cost.
- 5.11 That being misleading, misconceived and after-thought story of complainant and it was respectfully submitted that allegations of the complainant are nothing but representation of his venomous reaction to the increasing marketing & business activities of Respondent No. 2, otherwise, even a blind person can differentiate in the printed materials of both the Complainant and Respondent No. 2, because there is no similarity, confusion and matching in the packaging, packing, selling and other materials of the Complainant and Respondent No. 2.

- 5.12 That being false, frivolous and concocted story of Complainant, strict proof lies upon him, as the comparative representations of the complainant and Respondent No. 2's business are showing itself the true story, as Logos in Urdu, Logos in English, Packaging (reverse side) of both parties, i.e. complainant and Respondent No. 2 are themselves showing the true and factual position, as the crystal clear differences between are evident even to a blind-man but the complaint being blind in greed and jealousy is not seeing such a big difference, but obstinately has been alleging unfair competition marketing practices on the part of Respondent No. 2, for which strict proof lies upon the complainant.
- 5.13 It was respectfully submitted that in the light aforementioned facts and circumstances, the Complainant has miserably failed to make any case against the Respondent No. 2, as such he is not entitled for any relief as sought by him, rather his complaint being not maintainable under the law is liable to be dismissed with heavy compensatory cost in favour of the Respondent No. 2.

6. REJOINDER BY THE COMPLAINANT IN RESPONSE TO THE SUMISSIONS OF RESPONDENT NO.2

- 6.1 The comments/reply of the Respondent No. 2 were forwarded to the Complainant for its comments/rejoinder vide letter dated June 11, 2018.
- 6.2 The Complainant submitted its rejoinder vide letter dated June 21, 2018, the contents of which are reproduced below:
- 6.3 It was specifically denied that the subject Complaint as framed under section 10 of the Act is not maintainable under the law or that same is liable to be dismissed.
- 6.4 It was denied that the subject complainant has been filed without having any genuine cause of action against the Respondent No. 2.
- 6.5 It was vehemently denied that the Complainant has suppressed any material facts whatsoever from this Hon'ble Commission, in order to achieve any ulterior motives, which defeats the ends of justice.
- 6.6 It was again denied that the Complainant approached this Hon'ble Commission with his unclean hands, as such under reply Complaint is not maintainable, and same is liable to be dismissed with compensatory cost.
- 6.7 It was denied that the Complainant is attempting to boost or advertise its business by filing the Complaint or by making any statements with regards to the well-known status of the Complainant's Trade Marks and business. It was submitted that it is essential under the subject claim to demonstrate the long standing and well-known reputation enjoyed by the Claimant across Pakistan, which clearly indicates that the Respondent No. 2 has knowledge

of the Complainant's trademarks which have been registered since the 1970's and the good being sold there under since the past 50 years and as well as the Complainant's shop which has been established since the time of partition. Further, this demonstrates the ulterior motives behind the Respondent No. 2's activities in copying the trade name, trade mark and packaging of the Claimant.

- 6.8 It was further denied that the Complainant has unnecessarily with malafide intention and ulterior attempted confuse and misguide this Honorable Commission, or has intentionally repeated and created any complicated or technical story in order to confuse the mind of this Honorable Commission which was erroneously been referred to as the Honorable "Court" in the response. Further, it was vehemently denied that the Respondent No. 2 has been running his own shop/business for 50 years and is put to strict proof. It was submitted that the Respondent No. 2 has not filed any proof or evidence which even merely indicates that the Respondent No. 2's business is being carried on since the past 50 years and it was submitted that such statement has been falsely made by the Respondent No. 2 in order to deceive this Honorable Commission. It was denied that the Respondent No. 2 has not given any complaints to the claimant or other businesses in the vicinity or that the claimant has lodged a false and baseless Complaint without any just cause. It was further denied the Complainant, is a habitual Complainant has initiated any fake and fabricated proceedings against the Respondent No. 2 which was dismissed, for which proceeding the Respondent No. 2 has failed to provide any further details. It was submitted that many copycat stores have recently sprung up in Bohri Bazaar, the locality of the Complainant's store, and that the Complainant is taking action against such traders. It was stressed that the Complainant, like many successful businesses, is a victim of an environment in which deceptive marketing and infringement of trademarks and copyrights continues to foster and that the mentality of such infringers who attempt to justify such behavior make it continuously difficult to curb such behavior. It was submitted that such actions and ulterior motives are not only harming the business of the Complaint but ultimately the overall economy. It was denied that the Respondent No. 2 is a prominent and leading business has been carrying his own business with his own logo and style, without committing any deceptive marketing practices. It was vehemently denied that the law is not maintainable, or is liable to be dismissed with any cost.
- 6.9 It was specifically denied that the contents of the Complaint are in any way misleading, misconceived and after-thought story of Complainant. It was also submitted that the trade name, trademarks and packaging of the Respondent No. 2 is identical and a copycat of that Complainant. This is clearly visible from the representations and samples submitted by the Complainant in the subject Complaint and that such similarity cannot be denied or justified by the Respondent No. 2 in any manner.
- 6.10 Further, the relevant documents in the Response clearly illustrate the similarity between the trade name, trademarks, and packaging of the claimant and the Respondent No. 2. That such similarity proves that these have been deliberate and strategically copied by the

Respondent No. 2 in order to reap benefit from the goodwill associated with the trade name, trademarks and packaging and high quality goods of the Complainant.

- 6.11 It was stated that it's a ridiculous statement by the Respondent No. 2 that the comparative representations of the Complainant and Respondent No. 2 's Logos in Urdu, Logos in English, Packaging (reverse side) show any clear differences. It was submitted that the similarity between the Complainant and Respondent No. 2's packaging is self-evident and requires no further explanations or repetitions as to how the packaging is confusingly similar.
- 6.12 It was vehemently denied that the Complainant has miserably failed to make any case against the Respondent No. 2, and is not entitled for any relief as sought by him. It was reiterated that the Complainant enjoys exclusive rights in the firm name NIMCO CORNER, the NIMCO trademarks and packaging thereof through its copyrights, extensive and long standing use, well known reputation and trademarks registrations therein which the Respondent No. 2 has fraudulently and illegally adopted. The Respondent No. 2 is undeniably carrying out deceptive marketing practices under section 10 (a)(b) and (d) of the Act and as such, the Complaint is in no way liable to be dismissed.
- 6.13 The Complainant humbly and respectfully requested the Honorable Commission to pass orders under section 31(c) of the Act requiring the Respondent No. 2 to refrain from deceptive marketing practices, that is, from displaying false information, to cease the production, sale, distribution, use, display and/or marketing of the Offending Firm Name Karachi Nimco, Offending Packaging and Impugned Marks, which are identical and confusingly and deceptively similar to firm Complainant's firm name, NIMCO Packaging and NIMCO trademarks and any statements that the Respondent No.2 has any registered marks in respect of "Nimco".Also to impose penalties under section 38 of the Act. To pass an interim order under section 32 of the Act requiring the Respondent No.2 to refrain from deceptive marketing practices in order to prevent further irreparable loss and damage to the business and goodwill of the Complainants; and to give such other interim and/or final relief as this Honorable Commission may deem fit.

7. ANALYSIS

- 7.1 In the following paragraphs the facts and evidence submitted by the Complainant and Respondents are analyzed and discussed in order to reach a conclusion regarding the issues at hand, i.e., whether the Respondents have copied the Complainant's trademark, firm name, or product labeling or packaging, in doing which, has potentially harmed the Complainant and mislead consumers, *prima facie*, in violation of Section 10 of the Act.

7.2 Whereas 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.*

7.3 Before discussing the submissions of the Complainant and Respondents, 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”¹.

7.4 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.*”²

¹ Giuseppe Abbamonte, “Copycat Packaging, Misleading Advertising and Unfair Competition”

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

7.5 For clarity, the information provided by both the Respondents and the Complainant is analyzed separately.

Respondent No.1 (Mr. Nimko Corner):

7.6 It is evident from the information gathered during the enquiry that Complainant had an existence prior to the establishment of the Respondent No.1 in the snack food category. It has a trademark registered in Pakistan bearing Nos. 53499 and 56759 in class 30 under snack foods category since 1970. However, the trademark registry gives no right to the exclusive use of Kettle, cup and saucer. (Registration certificates already attached Annex 'A')

7.7 According to the submissions made by the Complainant the said registration cover the following features: words NIMCO SNACKS (in Urdu and English), the Nimco Corner logo (that is, "NIMCO" written in unique font inside a red rectangle with the word "Corner" written below the box), Nimco Snacks Logo in Urdu (that is, a red oval with the words "Nimco Snacks" in white)" the words " FRESH, CRISP and TASTY" "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT e ISRANA, TAKREEB, SALGIRA AUR PICNIC PARTIES KI LIYE BEHAD MARGHOOB" and a striped device displaying the Complainant's store address.

7.8 Whereas, the Respondent No.1 has applied for the registration of Trade Mark and file an application to Trademark registrar bearing number 364994 on June 25, 2014, under class 30, which is still pending.

7.9 It is evident from the above submissions that the Complainant has a registered trademark long before the inception of the Respondent No.1.

7.10 In order to establish whether parasitic copying may have occurred, it is important to compare elements of the Complainant's and Respondent No.1's packaging to assess similarities. Therefore, the front and the back view of both Complainant and Respondent No.1's packaging was taken and placed below:

FRONT VIEW OF COMPLAINANT'S PACKAGING



FRONT VIEW OF RESPONDENT NO.1'S PACKAGING



- 7.11 If we generally look at both the packaging, there is no difference in the colours used by the Respondent No.1. Even the tone/ shades of major colours i.e; yellow, red and blue, used by the Respondent No.1 is deceptively similar to the Complainant.
- 7.12 For a deep analysis, we will compare both the packaging with respect to the placement of words, designs and symbols. In the left side of the packaging of the Complainant word nimco snack is written in urdu in white colour inside a red oval box. While, in the left side of the Respondent No.1's packaging, Mr. Nimco Corner is written in urdu in white colour inside a red triangular box.
- 7.13 The Complainant's packaging has a picture of a kettle, cup and saucer at the right corner in blue and white colour. Similarly, the Respondent No.1's Packaging also has a picture of a cup and saucer at the right corner in blue and white colour. The Nimco logo in Complainant's packaging is followed by the words **"TAAZA, KHASTA AUR LAZEEZ"** (in black colour) **"DAAWAT e ISRANA, TAKREEB, SALGIRA AUR PICNIC PARTIES KI LIYE BEHAD MARGHOOB"** (in red colour). Exact similar words have been written by the Respondent No.1 on its packaging with the same color scheme. The placement of Respondent No.1's text is also similar to that of the Complainant i.e; immediately below the title box of Nimco.

- 7.14 Both the packaging are having a strip design separated by the white colour. Inside the strips design the Complainant has an oval box whereas, the Respondent No.1 has a triangular box. Both the boxes are transparent with the boundary of blue colour.
- 7.15 The bottom of both the Complainant's and Respondent No.1's packaging is followed by the location address of the shop along with the website address. Addresses are written in the similar white colour. The Complainant has used red colour in the background of the address whereas, the Respondent No.1 has used blue colour.
- 7.16 It is also pertinent to mention here that the Complainant is using the word 'registered' in urdu with its brand name Nimco and also using the symbol 'R' in circle to ensure its registration with trademark registry. Similarly, Respondent No.1 is also using the symbol 'R' in circle with Mr. Nimco, which clearly reflects that the Respondent No.1's trademark is also registered under the law. It is also using the phrase on the back side of the packaging '*Mr. Nimco Corner is a registered Trademark*'. Whereas, according to the submissions made by the Respondent No.1, its registration application is still pending with the trademark registry for approval.
- 7.17 Now if we take a look at the packaging of the Respondent No.1 from the back side. It has been observed that the color scheme of the Respondent No.1 is again similar to the Complainant.

COMPLAINANT'S PACKAGING



RESPONDENT NO.1'S PACKAGING



- 7.18 The Complainant is using its brand name 'Nimco' in English at the left side of the packaging with white colour in red box. Similarly, the Respondent No.1 is using the word 'Nimko' side of the packaging with the same colour scheme. Again the Respondent No.1 is using the word 'R' in round circle to show its registration with trademarks registry. The Respondent is also using the word 'Original' on the packaging like the Complainant.
- 7.19 On the right side of the packaging, the Complainant has used the picture of the whole front side of the packaging. Likewise, the Respondent No.1 has also used the picture of front side of the packaging at the right corner of the back side
- 7.20 Surprisingly, the whole box containing the nutrition facts of the Respondent No.1 is similar to the Complainant. In both the packagings, the box contains a title of '**Nutrition Facts Valeur Nutritive**' with similar contents and proportions.
- 7.21 The words used by the Respondent No.1 on the back side of the packaging '**Contains one or more of the following ingredients**' are also imitated from the Complainant's packaging with the same line of ingredients. Moreover, the Complainant has made a claim that '**Nimco is a registered Trademark**' is also copied by the Respondent No.1 with the slight change in name i.e; 'Mr. Nimko Corner is a registered Trademark'.
- 7.22 The portion showing the storage instructions along with four pictures in boxes at the bottom of the packaging of the Respondent No.1 are also exactly similar to the Complainant.
- 7.23 The enquiry committee visited the premises of the Complainant and Respondent No.1 for further verification. The main location of both the outlets was same i.e; Bhoru Bazar, Saddar, Karachi. However, streets inside the market were different but nearby. The enquiry committee has also made certain purchases in order to check the packaging of both the parties.



| Qty | PARTICULARS | Rate | AMOUNT |
|-------|-------------|------|--------|
| 3 | Chips | 160 | 480 |
| 7 | Chips | 200 | 1400 |
| 7 | Chips | 80 | 560 |
| 4 | Chips | 100 | 400 |
| 1 | Chips | 20 | 20 |
| 1 | Chips | 80 | 80 |
| 1 | Chips | 160 | 160 |
| Total | | | 2159 |

7.24 The complete address of the Complainant is 'Mochi Gali No. 3, Bhori Bazar Saddar, Karachi' whereas the address of Respondent No.1 is 'C-5, Saifi Building, Parsi Gali, Bori Bazar Saddar, Karachi'. View of the outlets of both the Complainant and the Respondent No.1 is as under:

COMPLAINANT'S OUTLET IN BHORI BAZAR SADDAR, KARACHI



RESPONDENT NO.1'S OUTLET IN BHORI BAZAR SADDAR, KARACHI



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- 7.25 We, the Enquiry Committee, find it pertinent to mention here that since the market of both the outlets is same i.e; Bhorī Bazar, Saddar, Karachi. The similar location of both the outlets has a capability to deceive the consumer about the manufacturer of the snack food he/she is buying. Furthermore, the streets in the main market are confusingly similar. Therefore, for an ordinary consumer, it is very difficult to judge the actual location of the Complainant.
- 7.26 Moreover, if we look at the title of the shops closely, the Respondent No.1 is using the word 'Mr.' along with the name 'Nimko Corner'. However, the word 'Mr.' is not at all readable even if we try to read it careful and closely. This is because of the colours and size of the text used by the Respondent No.1 on the billboards. With yellow background, the Respondent No.1 is using white colour to write the word 'Mr.' Also the font used by Respondent No.1 to write the text is very thin and small in size.
- 7.27 It is evident, that all these efforts were made by the Respondent No.1 to hide the word 'Mr.' from the consumers, so that the consumer may misjudged the name and made purchases thinking it as the Complainant's outlet. The mere vague image of the word 'Mr.' has made the name of Respondent No.1's outlet exactly similar to the Complainant's outlet.
- 7.28 It has also been observed that the Complainant is using a website address on its packaging i.e; www.nimcoonline.com, which is properly working under the brand name. However, the website address of the Respondent No.1 as shown on its packaging www.mrnimko.com is found inactive.
- 7.29 From the discussion above, it can safely be concluded that the Complainant is running its business under a registered trademark far prior to the establishment of the Respondent No.1. The Respondent No.1 is not only using the same colour scheme of the Complainant but the design, placement of text and symbols on its packaging is also similar to the Complainant.
- 7.30 Moreover, the Respondent No.1 is claiming its trademark as registered on the packaging of the snack food. However, according to the submissions made by the Respondent No.1, its registration application is still pending with the trademark registry for approval.
- 7.31 The outlets of both the Complainant as well as the Respondent No.1 are located in the same vicinity which can also cause a further confusion in the mind of the consumer.
- 7.32 Before going to proof the, *prima facie*, violation of Section 10 of the Act by the Respondent No.1, it is important to analyze the submissions of Respondent No.2 as well.

RESPONDENT NO.2 (KARACHI NIMKO):

- 7.33 The Respondent No. 2 has submitted that it has been carrying on his own separate business under the name and style of “Karachi Nimco”. Both the Respondent No.2 and the Complainant are in the same locality, i.e. Bohri Bazar, Saddar, Karachi. The Respondent No. 2 also claimed that it is running its business from the past 50 years. However, no proof of the same has been submitted to the enquiry committee.
- 7.34 It is evident from the information gathered during the enquiry that Complainant had an existence prior to the establishment of the Respondent No.2 in the snack food category. It has a trademark registered in Pakistan bearing Nos. 53499 and 56759 in class 30 under snack foods category since 1970. However, the trademark registry gives no right to the exclusive use of Kettle, cup and saucer. (Registration certificates already attached Annex ‘A’)
- 7.35 According to the submissions made by the Complainant the said registration cover the following features: words NIMCO SNACKS (in Urdu and English): the Nimco Corner logo (that is, “NIMCO” written in unique font inside a red rectangle with the word “Corner” written below the box), Nimco Snacks Logo in Urdu (that is, a red oval with the words “Nimco Snacks” in white)” the words “ FRESH, CRISP and TASTY” “TAAZA, KHASTA AUR LAZEEZ” and “DAAWAT e ISRANA, TAKREEB, SALGIRA AUR PICNIC PARTIES KI LIYE BEHAD MARGHOOB” and a striped device displaying the Complainant’s store address.
- 7.36 Whereas, the Respondent No.2 has not even applied for the registration of its trademark. It is therefore evident from the above submissions that the Complainant has a registered trademark long before the inception of the Respondent No.2.
- 7.37 Now in order to establish whether parasitic copying may have occurred, it is important to compare elements of the Complainant’s and Respondent No.2’s packaging to assess similarities. Therefore, the front and the back view of both Complainant and Respondent No.2’s packaging was taken and placed below:

FRONT VIEW OF COMPLAINANT'S PACKAGING



FRONT VIEW OF RESPONDENT NO.2'S PACKAGING



- 7.38 If we generally look at both the packagings, there is no difference in the colours used by the Respondent No.2. Even the tone/ shades of major colours i.e; yellow, red and blue, used by the Respondent No.2 is deceptively similar to the Complainant.
- 7.39 For a deep analysis, we will compare both the packaging with respect to the placement of words, designs and symbols. In the left side of the packaging of the Complainant word 'nimco snack' is written in urdu in white colour inside a red oval box. While, in the middle of the Respondent No.2's packaging, 'Karachi Nimco' is written in urdu in white colour inside a red oval box. It is also pertinent to mention that the Respondent No.2 has not only using the similar colour for writing the brand name rather using the same style and size of font for writing the word 'Nimco', as used by the Complainant. Furthermore, the Respondent No.2 is using an oval shape red box to write the brand name which is exactly similar to the Complainant's oval shape red box.
- 7.40 The Complainant's packaging has a picture of a kettle, cup and saucer at the right corner in blue and white colour. The Nimco logo in Complainant's packaging is followed by the words **"TAAZA, KHASTA AUR LAZEEZ"** (in black colour) **"DAAWAT e ISRANA, TAKREEB, SALGIRA AUR PICNIC PARTIES KI LIYE BEHAD MARGHOOB"** (in red colour). Exact similar words have been written by the Respondent No.2 on its packaging with the same color scheme. Interestingly, the placement of Respondent No.2's text is also similar to that of the Complainant i.e; immediately below the title box of Nimco.
- 7.41 Both the packaging are having a blue strip design separated by another colour. Inside the strips design the Complainant has an oval box with a blue boundary. The oval box identifies

the weight of the packaging. The Respondent No.2 is also following the same pattern of an oval box with blue boundary inside the strip design. The oval design of Respondent No.2 also identifies the weight of the packaging exactly in a similar way the Complainant is doing.

- 7.42 The bottom of both the Complainant's and Respondent No.2's packaging is followed by the location address of the shop along with the website address. Addresses are written in the similar white colour with a red colour background. The Respondent No.2 additionally mentioned its telephone contact as well. Let's take a clear look of the bottom of both the packagings.

BOTTOM OF THE COMPLAINANT'S PACKAGING



BOTTOM OF THE RESPONDENT NO.2'S PACKAGING



7.43 Now if we take a look at the packaging of the Respondent No.2 from the back side. It has been observed that the color scheme of the Respondent No.2 is again similar to the Complainant.

COMPLAINANT’S PACKAGING



RESPONDENT NO.2’S PACKAGING



7.44 The Complainant is using its brand name ‘Nimco’ in English at the left side of the packaging with white colour in red box. The red rectangular box is headed by the word ‘Original’ written in a specific font style. Similarly, the Respondent No.2 is using the words ‘Karachi Nimco’ on the right side of the packaging in yellow colour. Same red colour rectangular box has been used by the Respondent No.2 headed by the word ‘Original’ in the same font style as used by the Complainant.

7.45 On the right side of the packaging, the Complainant has used the picture of the whole front side of the packaging. Likewise, the Respondent No.2 has also used its picture of the front side of the packaging at the left corner of the back side.

7.46 Surprisingly, the whole box containing the nutrition facts of the Respondent No.2 is similar to the Complainant. In both the packagings, the box contains a title of ‘**Nutrition Facts** **Valeur Nutritive**’ with similar contents and proportions.

7.47 The words used by the Respondent No.2 on the back side of the packaging ‘**Contains one or more of the following ingredients**’ are also imitated from the Complainant’s packaging with the similar line of ingredients.

COMPLAINANT'S OUTLET IN BHORI BAZAR SADDAR, KARACHI



RESPONDENT NO.2'S OUTLET IN BHORI BAZAR SADDAR, KARACHI



- 7.51 We, the Enquiry Committee, find it pertinent to mention here that since the market of both the outlets is same i.e; Bhoori Bazar, Saddar, Karachi. The similar location of both the outlets has a capability to deceive the consumer about the manufacturer of the snack food he/she is buying. Furthermore, the streets in the main market are confusingly similar. Therefore, for an ordinary consumer, it is very difficult to judge the actual location of the Complainant.
- 7.52 Moreover, if we look at the billboards of the shops closely, the Respondent No.2 is using the same colours and design patterns as the Complainant is using. The oval shape red colour box in which the word 'Nimco' is written in urdu is exactly the same. Furthermore, the font style of the word 'Nimco' used by the Respondent No.2 is also deceptively similar to the Complainant's title.
- 7.53 It is evident, that all these efforts were made by the Respondent No.2 in order to confuse the consumer. It is very likely that the consumer may misjudge the name of the outlet and make purchases from the Respondent No.2's outlet thinking it as the Complainant's outlet.
- 7.54 It has also been observed that the Complainant is using a website address on its packaging i.e; www.nimcoonline.com, which is properly working under the brand name. However, if we examined the website address of the Respondent No.2, as shown on its packaging, www.karachinimco.com, it diverts the user to some other unknown website.
- 7.55 From the discussion above, it can safely be concluded that the Complainant is running its business under a registered trademark far prior to the establishment of the Respondent No.2. The Respondent No.2 is not only using the same colour scheme of the Complainant but the design, placement of text and symbols on its packaging is also deceptively similar to the Complainant.
- 7.56 Moreover, the Respondent No.2 has failed to submit any proof of the establishment of its business or any registration of trademark prior to the business of the Complainant.
- 7.57 The outlets of both the Complainant as well as the Respondent No.2 are also located in the same vicinity which can also cause a further confusion in the mind of the consumer.
- 7.58 Before drawing any conclusion about the conduct of both the Respondents and issue in hand it is important to consider that 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:

"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."³

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

7.59 Therefore, in view of the comparison drawn under para no.7.6 to 7.58, the similarities found in the elements of the packaging of the Complainant and the Respondents are enhanced because of the use of similar colours by the Respondents, thereby passing off its product as that of the Complainant.

7.60 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 Act⁴.

7.61 In view of facts, it is safe to infer that the Respondents have imitated the Complainant's packaging and the conduct of the Respondents falls under the ambit of Parasitic Copying, 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 consumers⁵”

7.62 In light of the analysis above, the act of the Respondents appears to be in violation of Section 10 (1) of the Act in terms of Section 10 (2) (d) which prohibits ***fraudulent use of another's trademark, firm name, or product labeling or packaging***; where their conduct appears to be infringing upon the rights of the Complainant through fraudulent use of Complainant's trademark, packaging, color scheme, design and get up of products, trying to pass off their product as that of the Complainant.

7.63 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.”

⁴ [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’

⁵ Jorge Novais Goncalves, EC, DG Internal Market and Services “Similar Packaging: an IP, competition or a consumer protection matter?”

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.”⁶

- 7.64 The Commission, as quoted in the above para, 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.
- 7.65 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 mechanisms⁷. Consumers base their purchasing decisions on first impressions of the product exterior and do not engage in a considered examination of the product⁸. This suggests, that even a reasonable/discerning consumer would not be able to differentiate between the Complainant and Respondent’s packaging at a cursory glance let alone an ordinary consumer. 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 brand⁹.
- 7.66 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.
- 7.67 In this case, it is apparent that the Respondents have used imitated packaging as a ploy to reap benefit out of the investments made by the Complainant in its goodwill earned since 1970. 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

⁶ [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’

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

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

⁹ Tony Durham, Report on 2012 Symposium on Retail Competition “Shopper Behavior: how choices are made”

products. Moreover, the Respondent No.1 also marketed itself as a registered brand however, the trademark registration is still pending with the relevant authority.

- 7.68 In view of the facts above, it appears that the act of the Respondents is not only capable of harming the business interest of the Complainant but the Respondents are also distributing false and misleading information to consumers related to the manufacturer of the products, character, properties and quality of goods, in violation of Section 10 (1) in terms of Section 10(2)(a)&(b) of the Act.

8 RECOMMENDATIONS/CONCLUSION

- 8.1 In light of the facts, it appears that the conduct of the Respondents, *prima facie*, amounts to passing off its products as that of the Complainant's through fraudulent use of Complainant's trademark, packaging, color scheme, design and get up of products, 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*.
- 8.2 In view of the analysis, it also appears that the conduct of the Respondents, *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 and quality of goods via similar/identical packaging, in violation of Section 10(1), in terms of Section 10(2)(a)&(b) of the Act.
- 8.3 The deceptive marketing practices have a direct impact on the public at large. It is in the interest of the general public and fair competition in the market that 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 initiating proceedings against M/s Mr. Nimko Corner and M/s Karachi Nimco under Section 30 of the Act.

Marryum Pervaiz
Joint Director
Enquiry Officer

Faiz ur Rehman
Deputy Director
Enquiry Officer