

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 PEPSICO, INC. AGAINST M/S
MEZAN BEVERAGES (PRIVATE) LIMITED FOR ALLEGED DECEPTIVE
MARKETING PRACTICES**

BY

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Dated: June 28, 2021

1. BACKGROUND

- 1.1 M/s PepsiCo, Inc. (hereinafter referred to as the '**Complainant**'), through its authorized representative, M/s Vellani and Vellani Advocates, Karachi, filed a complaint against M/s Mezan Beverages (Private) Limited (hereinafter referred to as the '**Respondent**') with the Competition Commission of Pakistan (hereinafter referred to as the '**Commission**') for alleged violation of Section 10 of the Competition Act, 2010 (hereinafter referred to as the '**Act**').
- 1.2 The Complainant, which is a multinational corporation registered under the laws of the State of North Carolina, United States of America, alleged in its complaint that the Respondent, a food and beverages COMPANY established in 2016, has been marketing its product under the brand name '**Storm**' in packaging deceptively similar to that of the Complainant's product marketed under the brand name of '**Sting**', in clear violation of Section 10 of the Act. The Complainant alleged that the Respondent's brand is being packaged with the overall look/feel/get-up and the color scheme that is closely, deceptively and/or parasitically similar to the Complainant's brand. It was also alleged by the Complainant, evidenced with pictorial evidence, that the Respondent has imitated several well-renowned brands other than the Complainant's, which goes on to show the malafide intent on part of the Respondent to capitalize on the reputation and goodwill of others.
- 1.3 After ascertaining the preliminary facts, the Commission decided to appoint Ms. Marryum Pervaiz, Deputy Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT) as enquiry officers. However, during the course of enquiry Ms. Marryum Pervaiz was transferred to another department of the Commission therefore, the enquiry committee was reconstituted and Ms. Urooj Azeem Awan replaced with Ms. Marryum Pervaiz. Subsequently, the enquiry committee was once again reconstituted and Ms. Urooj Azeem Awan was replaced with Mr. Salman Zafar, Director (OFT) (hereinafter collectively referred to as the '**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. BACKGROUND

- 2.1 This section summarizes contentions raised in the complaint.
- A. Statement of Facts:**
- 2.2 The Complainant is a corporation organized and existing under the laws of the State of North Carolina, United States of America. It is a world famous consumer products company who have, over many decades, been manufacturing and selling a variety of convenient foods and

beverages, under various distinctive trademarks. In connection to its beverages business, the Complainant or its associated companies are the owners of and use several trademarks, including, but not limited to, Pepsi, 7UP, Mirinda, Mountain Dew, Aquafina and Sting. The complaint relates to one of such brands of the Complainant, namely, 'Sting', including its distinctive label and packaging.


- 2.3 The Complainant submitted that *Sting* is an energy drink and the product is recognized by its characteristic shape of the bottle with the punted bottom, the highly distinctive logo design, including the color scheme thereof, and the vibrant red color in which the product is available.
- 2.4 The Complainant submitted that the *Sting* logo features a tribal design, primarily in black and white, on a red color background, with the trademark *Sting* in white bold stylized lettering appearing diagonally in the middle of the described logo.
- 2.5 Over the years, different variations of the described logo have been developed and used by the Complainant in relation to *Sting* energy drinks in Pakistan. However, the over-all look/feel/get-up of the referred logo has remained unchanged.
- 2.6 The above referred trade dress plays a pivotal role in conveying the essence of the beverage to the adult consumer and as such, the adult consumer identifies and recognizes the beverage through its characteristic trade dress and packaging.
- 2.7 *Sting* was first adopted by the Complainant in 2003 in Vietnam and subsequently followed to Afghanistan, Bangladesh, Cambodia, Fiji, France, Laos, Malaysia, Pakistan and Philippines. In Pakistan, the product in its characteristic trade dress and packaging, was launched in the year 2009. The estimated sales of the beverage during the period from 2010 to 2017 were in excess of PKR. 55 billion.
- 2.8 The complainant also spends a considerable amount of money of advertisements on its beverage which include television commercials, newspapers and magazine advertisements, outdoor signage and point-of-purchase displays. (*Sample promotional material from various campaigns is attached as 'Annexure-A'*). The Complainant had spent an amount of Rs. 613 million on advertising/marketing in Pakistan from 2010 to 2015. The Complainant further submitted that since it had spent such heavy budgets on the marketing and promotion of the aforementioned packaging and design over a span of years, it had gained exclusive right to use the said trade dress or packaging and/or its elements, particularly in respect of energy drink.
- 2.9 The Complainant plead that third parties may not use such trade dress or packaging (or confusingly/ parasitically similar trade dress and packaging), or any of its elements without the authorization of the Complainant. Any use of the above without authorization of the Complainant amounts to fraudulent use of such and may mislead an unwary consumer, constituting deceptive marketing practices particularly under Section 10 (2) (d) of the Competition Act, 2010.

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2.10 In addition to the above, the Complainant owns registrations for a variety of *Sting*'s marks in multiple jurisdictions, including Pakistan.

B. Summary of Contraventions

- 2.11 It was submitted by the Complainant that the Respondent had resorted to, and continues to undertake, deceptive marketing practices, contrary to the provisions of Section 10 of the Act, *inter alia*, by using a trade dress and packaging in relation to its *Storm* energy drinks, which copies the over-all look/feel/getup of trade dress and packaging used by the Complainant. The adoption of the confusingly/deceptively/parasitically similar trade dress and packaging by the Respondent is fraudulent and with malafide intent to confuse and mislead the unwary consumer and unduly exploit the reputation and goodwill of the Complainant.
- 2.12 The Complainant, in evidence, submitted images of the Respondent's energy drink *Storm*, along with original receipts of purchase from Imtiaz Super Market, Bahadurabad, Karachi. (*The images of the bottle are attached for reference as 'Annexure-B'*).
- 2.13 The Complainant submitted that the shape of the bottle of the Respondent's *Storm* energy drink is identical/closely similar to that of the Complainant's *Sting* as both bottles have punted bottoms. Moreover, the label/packaging of the *Storm* energy drink has been designed in such a manner that it conveys the over-all impression/look/feel of the label/packaging of the Complainant's *Sting*.
- 2.14 Furthermore, the logo appearing on the front panel of the Respondent's *Storm* energy drink includes a design in the color combination of black and white, which in its entirety is deceptively/parasitically similar to the Complainant's *Sting* logo design. Moreover, the brand name *Storm* appears in bold in white lettering in the middle of the offending design, which is, exactly in the same place and manner as the trade mark *Sting* appears on the logo design. The Complainant pleads that the Respondent has also copied its traditional red color of *Sting* energy drink.
- 2.15 The Complainant also submitted that through the use of the above discussed trade dress and packaging and each of the offending feature as discussed above, the Respondent has every intention to confuse and deceive unwary consumers and take unfair advantage of the reputation and goodwill of the Complainant's energy drink. The Complainant has acquired this reputation and goodwill over many years in Pakistan and elsewhere due to its extensive use and advertisement. The Respondent is attempting to secure itself undue business advantage which it would not have achieved otherwise. Such use is prohibited under Section 10 of the Act in general and Section 10 (2) (d) of Act in specific.
- 2.16 Additionally, the offending trade dress and packaging of *Storm* energy drink is a classic example of 'copycat packaging' and/or 'parasitic packaging' of the Complainant's *Sting*

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energy drink. The Respondent has deliberately copied the over-all impression/look/feel and misappropriated the distinctive and aesthetic design elements of the trade dress and packaging to unfairly compete with the Complainant. The Respondent, through such tactics, attempts to take unfair advantage of the investments made by the Complainant on its brand development and product innovation of *Sting* energy drink.

2.17 The Complainant referred to the Commission's order in the matter of complaint filed by M/s K&N Foods (Pvt) Limited, against A. Raheem Foods Limited. It was present that the Commission made certain essential observations with regards to concepts of 'parasitic copying' and 'copycat packaging' and its direct co-relation to the fraudulent use of another's product labelling and packaging. The Complainant refers to and relies on the above referred observations to the uncompetitive actions on part of the Respondent.


2.18 The Complainant submitted that the referred Order of the Commission focuses on the concepts of parasitic and copycat packaging from the viewpoint of a target consumer. The offending trade dress of the Respondent's energy drink is a look alike and mimicry of the Complainant's energy drink. The consumers mostly base their purchasing decisions on their first impression of the product's trade dress and packaging and do not engage in a detailed examination of the product itself. Hence, the unwary consumer is more prone to look at the over-all impression of the trade dress and packaging, including the color scheme thereof, which is deceptively similar to and inspired from the Complainant's overall trade dress and packaging of *Sting*. Thus an unwary consumer can be easily duped into making the transactional decision of purchasing *Storm* under false pretenses instead of *Sting*.

2.19 The Complainant's concern over the issue is intensified considering, the products being of the same category, are displayed side by side on the same aisle at retail outlets, supermarkets and other points of sale across the country. An unwary consumer would at first instance be deceived as to the origin of the two products at the time of exercising the choice of purchase.

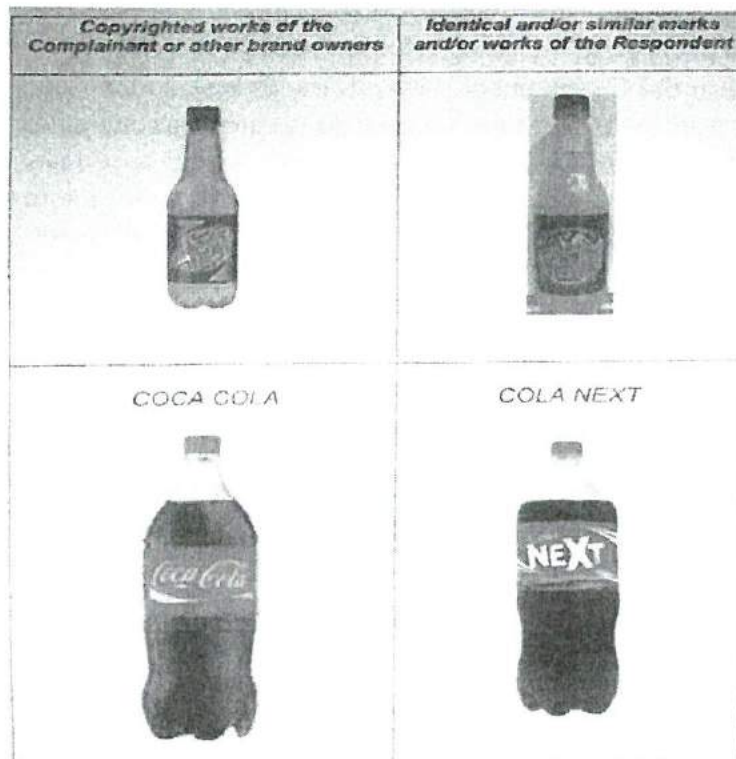
2.20 The Complainant quoted a specific excerpt from the Commission's referred Order which is reproduced hereunder:

"Examine the packaging and product labelling appearance of a finished product as a whole which may collectively include confusing resemblances in elements of color scheme, lay-out style, design, images, labels, font, usage etc., instead of each individual similarity in isolation."

2.21 Hence, in the present case, the offending trade dress and packaging of the Respondent's *Storm* energy drink, as a whole, is confusingly/parasitically similar to the trade dress and packaging of the Complainant's *Sting* energy drink. Similar/ closely resembling use of all the individual elements of the Complainant's trade dress and packaging by the Respondent, when viewed in totality, is highly likely to deceive an unwary consumer about the identity of the origin of the Respondent's product.

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- 2.22 It is submitted that the Respondent's attempt to pass off its product as that of the Complainant has the potential to harm and damage the Complainant's business, reputation and goodwill and could prove fatal to the Complainant.
- 2.23 The Complainant submits that the offending trade dress and packaging will resultantly dilute the brand value of the Complainant's energy drink, thereby harming its business interest in the process.
- 2.24 The Complainant presents that the Respondent is engaged in a pattern of such conduct and has adopted a number of marks which copy or confusingly resemble either the Complainant's marks or copyrighted works, or the copyrighted works of other reputable brand owners, which further shows the Respondent's intention to capitalize on the reputation and goodwill of others. *(A few sample copycat packaging of the Respondent with various brands is illustrated below).*



- 2.25 Respondent's use of the offending trade dress and packaging has enabled and continues to enable the Respondent to earn profits to which it is not in equity or in good conscience entitled, at the expense of the Complainant.

C. Prayers

- 2.26 In the interest of the fair market practice, the Complainant humbly and respectfully requested the Commission to conduct an enquiry under section 37(2) of the Act, read with Regulation 16 of Competition Commission (General Enforcement) Regulations, 2007, against the

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Respondent for engaging in deceptive marketing practices and to initiate formal proceedings against the Respondent under Section 30 of the Act, read with Regulation 22 of Competition Commission (General Enforcement) Regulations 2007.

D. Relief

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

- i. Pass an order under Section 31(c) of the Act requiring the Respondent to refrain from deceptive marketing practices, that is to cease production, distribution, sale and promotion of *Storm* energy drinks under the offending trade dress and packaging, which is confusingly, deceptively and parasitically similar to *Sting* energy drink;
- ii. To impose penalties under Section 38 of the act;
- iii. Pass an interim order under Section 32 of the Act requiring the Respondent to refrain from deceptive marketing practices in order to prevent further irreparable loss and damage to business and goodwill of the Complainant; and
- iv. To give such other interim and/or final relief as this Honorable Commission may deem fit.

3. CORRESPONDENCE WITH THE RESPONDENT AND THE COMPLAINANT:

- 3.1 A letter was written to the authorized representative of the Complainant dated 30th of August, 2018, wherein they were asked to submit the original packaging (bottle) of their own energy drink *Sting* and the Respondent's energy drink *Storm* for the purposes of the enquiry.
- 3.2 A reply was received from the Complainant dated 6th of September, 2018, which contained samples of both the energy drinks, as were requested by the Enquiry Officers.

I. REPLY OF THE RESPONDENT:

- 3.3 The complaint, vide letter dated 30th of August, 2018, was forwarded to the Respondent for comments. The Respondent, vide letter dated 17th of September, 2018, requested for extension in time period to file its comments to the complaint until 1st of November, 2018. The Respondent, vide letter dated 18th of September, 2018, was granted extension in time period until 15th of October, 2018. A reply was received from the Respondent dated 12th of October, 2018, the contents of which are summarized hereunder:

- 3.3.1 That the Respondent has filed a Writ Petition bearing No.241159/2018 titled "*Mezan Beverages (Private) Limited v. Federation of Pakistan and 2 others*" before the Honorable Lahore High Court, Lahore. Within the petition, Federation of Pakistan has been impleaded as the Respondent No.1 and Competition Commission of Pakistan and Ms. Marryum

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Pervaiz, Enquiry Officer, as Respondents 2 and 3, respectively. That the petition, *inter alia*, challenges the constitutionality and *vires* of the Competition Act, 2010 and questions the legality of the actions and proceedings initiated thereunder.

- 3.3.2 That the petition was fixed for hearing on 10th of October, 2018 before Justice Abid Aziz Sheikh of the Honorable Lahore High Court and the same issued notices to the Federation of Pakistan and the Commission. The Honorable Lahore High Court also directed tagging the petition with connected matters pending determination before the Honorable Full Bench of the Lahore High Court. That the Honorable High Court had granted an injunctive order, consequently staying further proceedings in the matter of this respective complaint pending before the Commission. That in light of the injunctive order, the Commission is requested to adjourn *sine die* the further proceedings in the matter till decision of the petition is given by the Honorable Full Bench.
- 3.4 On the receipt of the notice by the Commission from the Honorable Lahore High Court, Lahore, the Enquiry Officers were advised, via email from the Registrar to the Commission dated 15th of October, 2018, to not proceed any further with the enquiry until the decision of the stay or vacation of the injunctive order, whichever is earlier.
- 3.5 The Honorable Full Bench of the Lahore High Court, Lahore passed its judgement on the abovementioned writ petition on 26th of October, 2020. Based on this, the injunctive order against proceedings in the subject complaint stood vacated. Therefore, the Respondent was directed to furnish its comments to the subject complaint vide letter dated 4th of February, 2021. The Respondent replied, vide letter dated 15th of February, 2021, the contents of which are as under:
- 3.5.1 The Respondent reiterated its submissions regarding the writ petition aforementioned and the injunctive order issued previously in its favor. It further quoted the Honorable Full Bench's Judgement, and submitted that the Commission has challenged the judgement before the Honorable Supreme Court of Pakistan. That the Commission and the Respondent itself are aware that all the connected appeals in the matter of the writ petition are likely to be taken up the Honorable Supreme Court of Pakistan.
- 3.5.2 That in the circumstances when the petition has been partially allowed and the Commission is already in appeal against the Honorable Full Bench judgement, it is submitted that fair play and equity demand that the decision of the Honorable Supreme Court of Pakistan may be awaited, otherwise the rights and interests of the Respondent will be seriously prejudiced.
- 3.5.3 The reply of the Respondent was sent to the Legal Department of the Commission for an opinion on the issues cited by the Respondent. The Legal department quoted a relevant excerpt from the Honorable Full Bench judgement, which is reproduced hereunder for reference;

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“1.9 ... For the notices already issued, and are under challenge, the proceedings shall continue, however, the issue of jurisdiction shall be decided at first instance.”

- 3.6 Based on the excerpt, the Legal Department gave its opinion that the injunctive order had been vacated and the Enquiry Officers could proceed further with the enquiry as per the provisions of the Competition Act, 2010. In light of the above, a final reminder was written to the Respondent vide letter dated 24th of February, 2021, asking to furnish comments to the subject complaint, failing which the Enquiry Officers will proceed further with the enquiry.
- 3.7 A reply was received from legal counsel of the Respondent on 1st of March, 2021, requesting for extension in time period to file their reply/comments to the complaint. An extension was granted the same day via letter until 5th of March, 2021. The reply/ comments of the Respondent were received on 5th of March, 2021, a summary of which is given hereunder;
- 3.7.1 The Respondent submitted that both the Commission and the Respondent are praying suspension of the Honorable Full Bench judgment and therefore prays the Commission suspends the proceedings under this particular complaint. That the Respondent had, on account of its own commercial market strategy, had already stopped production of the 500 ml bottle of its drink STORM since 2nd of August, 2018. Therefore, the complaint had already become infructuous, making the subject complaint a *non-starter*.
- 3.7.2 That the Respondent is a private limited company incorporated under applicable laws and engaged in the manufacturing and selling of various food products under the distinct brand name 'Mezan'. The Respondent is engaged in the manufacturing and sale of Mezan Oil, Banaspati, Olive Oil, Mezan Tea and aerated waters (Cola Next, Storm Energy Drink, Dare Next).
- 3.7.3 That the subject matter of the complaint relates to infringement of trademark and the Complainant had falsely and unfairly accused the Respondent for deceptive marketing of STORM in 500ml packaging in comparison to the Complainant's STING. They submitted that at the time of the complaint, the Respondent was offering its energy drink in two sizes i.e., 500 ml bottle and 345ml bottle. The titled complaint only relates to the prior 500ml bottle design.
- 3.7.4 That the Respondent has, despite pending adjudication, filed an instant reply upon inquiry from the Commission, under protest and without surrendering to the jurisdiction of the Commission to merely remain within legal parameters and establish it's bona fide.

Para-wise Reply on Merits:

- 3.7.5 That the Complainant has no *locus standi* to file the titles complaint and the contravention of Section 10 of the Act is also misconceived denied. Moreover, the purported claims of the

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Complainant and nature of reliefs prayed fall within the ambit Trade Marks Ordinance, 2001. However, *STORM* is a recognized and duly registered trademark of the Respondent under the applicable laws. The Complainant has not challenged or opposed the registration of *STORM* trademark which establishes that the filed complaint is mala fide and frivolous.

- 3.7.6 The complaint falsely accused the Respondent of deceptive marketing of *STING* by *STORM* on the premise of deceptive similarity between the two products in terms of their trade dress, packaging, getup, logos, formatting, placements, color schemes, shape and design of the bottles. The Respondent also submitted images of the two products highlighting the differences between both, which are reproduced hereunder:



- 3.7.7 That the Respondent had already discontinued the production and sale of its products' 500ml bottle even before entertaining the title complaint, therefore no cause of action is left to be adjudicated upon by the Hon'ble Commission. The Respondent has introduced another original self-curated pet bottle of 345 ml. Moreover, the old and new packaging both bear no similarities with the Complainant's product *STING*.

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- 3.7.8 That the Respondent's STORM is highly distinct from the Complainant's STING and that many energy drinks in the market have similar and generalized /universal features. That the described features in the complaint do not make a product unique or distinctive and that the placement and formatting of stylized prominent text on a specific part of a label with color red in combination with black and white are common to most energy drinks globally.
- 3.7.9 The facts and figures as to advertising expenditures, revenues and other amounts depicted within the complaint are denied being irrelevant to the matter. The facts and figures of a local business may have a bearing in the competitive market within Pakistan.
- 3.7.10 That the attributes of STING indicated in the complaint are generic in nature and cannot make it unique for consumers to solely associate them with the Complainant's energy drink. By claiming exclusivity over these features the Complainant is maliciously trying to create a monopoly over red colored energy drinks.
- 3.7.11 The Respondent reiterated that the nature of allegations levied are related to infringement of trademark as the Complainant has built its case on trade dress, packaging, look/feel/getup of products, confusing or deceptive similarity, shape of bottle, label, design, color combination, color scheme, logo design, lettering, color of drink, aesthetic design elements, look alike, passing off, dilution, pattern, marks, resemblance and copyrights etc. Hence, the subject matter is germane to the Trademarks Ordinance 2001 and the jurisdiction of the Commission cannot be invoked in the given matter.
- 3.7.12 That the identifying features of both the logos, i.e., STING and STORM are substantially different and even an unwary customer can mark the distinction between two products. The font, size, spellings, phonetics, meaning, look and design of both logos are completely different and alleging infringement merely on colors is untenable.
- 3.7.13 That the Complainant has made reference to the clauses (a) and (d) of Section 10 of the Act, and from bare perusal it is established that none of the criteria is satisfied by the contents of the complaint. Therefore, the complaint is liable to be rejected being wholly misconceived.
- 3.7.14 That the trademarks registries provided by the Complainant do not include features over which the Complainant is claiming exclusivity. The registries specifically cover the logos and the name of the Complainant's drink and the Respondent's logo and name does not have any overlapping with the Complainant's. Moreover, the Respondent's logo STORM is also duly registered trademark and if in case the Complainant is aggrieved by it, it should file an opposition under the Trademarks Ordinance, 2001.
- 3.7.15 That the shape of the Complainant's bottle being protected by this complaint is different from the shapes registered, where the former has a longer neck as opposed to shorter neck and stouter bottle registered. Additionally, none of the bottle designs have been registered in Pakistan.

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- 3.7.16 That the registrations of the Complainant display a disclaimer reading '*bottle container is not protected*' while the remaining registrations are either incomplete or absent translations, making the impression that the generic features have been granted registrations through other platforms. That the registrations of the Complainant do not show any registration of the trade dress in its entirety.
- 3.7.17 That it has not been established that the Respondent has imitated the Complainant's logo design. That the Respondent's company logo is a well-known brand in itself and enjoys its own exclusive customer base. That the Respondent's energy drink's peculiar taste, exclusive experience, competitive price and customer satisfaction that it has attracted a large number of loyal customers.
- 3.7.18 That in July 2018, the Complainant purchased STORM from Imtiaz Store in Karachi. At the time, the Respondent was selling its product in two differently sized bottles, i.e., 500 ml and 345 ml, respectively. The one year overlap between the sales of STORM 500ml to STORM 345ml was a transition period rightly sought by the Respondent to gauge the market response to the change.
- 3.7.19 That aforesaid both products of the Respondent and the product of the Complainant are very different, having distinctive logos that highlight their source of origin (brand) through the respective brand names in bold letters, making it possible for any consumer to differentiate he said product. Two different names with different meanings as well as their varying phonetics highlight the difference between the two products.
- 3.7.20 That the brand name STORM ends in "*orm*" while STING ends in "*ing*" creating distinctive aural impressions on consumers that enable them to differentiate between two, proving the Complaint under reply is baseless.
- 3.7.21 STORM/complained product displays a label across the bottle in a dark shade of red with a logo and two lightening/thunder symbols in black and white, and a unique drawing showing a stylized circle extending into a curl and spikes on either side. The word STORM appearing in an ascending font size in the color white, outlined with red. On the contrary, the label on the STING bottle appears in a lighter shade of red displaying a completely different design showing: a stylized scorpion-like image visible from the sides of the word "STING" that is outlined in black and appears in a consistent font size. Such distinctive labels easily enable consumers to differentiate between the two products.
- 3.7.22 Moreover, the logo designs of the both products are themselves symbolic of their respective names. The lightening symbols and unique designs on the STORM/complained product the lightning symbol as well as the electric current pattern on new packaging of STORM are features of thunder or a storm, the scorpion-like drawing on STING is symbolic of a scorpion's sting. Such representations create different impressions on consumers because

they give these products individual distinctive characters, thus enabling consumers to tell the product of the Complainant from that of the Respondent.

- 3.7.23 Furthermore, the objection raised by the Complainant on the shape of container of STORM/complained product is baseless as the packaging of 500ml bottle of both brands is in a generic and functional shape. A bottle typically punted at the bottom and elongated at the top serves the purpose of making the bottle stable and easy to hold, respectively. Many other drinks are sold in bottles with these two functional features. For instance, Murree Brewery, Shezan and Coke products, Fruit 2go, Share water, Ribena, Sprit Aqua and Devon Water bottle have elongated necks and/or punted bottle.
- 3.7.24 Likewise, the color red is also generic to most energy drinks in the market and are not protected under the law (as opposed to the artistic features) added for the sole purpose of making a product aesthetically appealing. The Complainant is misconstruing such utilitarian functional features to illegally and unfairly assets exclusivity over them.
- 3.7.25 The Respondent further pointed out that since November 11, 2017 STORM has also been marketed and sold in STORM new packaging which is altogether different in size and shape etc., from both STORM 500ml and STING. This further establishes that there was no ill motive of the Respondent and that the title complaint has been filed with *mala fide*.
- 3.7.26 The STORM new packaging is a narrow, longitudinal bottle with a punted bottom, a label measuring two inches that runs across the breadth of the bottle displaying a black lightning symbol in the background and the word STORM outlined in red; the phrases "Stimulant Drink" and "White Ginseno" above and below it, respectively and in the foreground; a bundle of electricity currents appearing on the left. All such features are altogether different from the product /STING of the Complainant. Additionally, the front style, size and pattern used on both labels are poles apart: the word STORM appears in an overall larger and ascending font size while the font size of STING is smaller and remains consistent; the word STORM is outlined in red while STING is outlined in black and on the whole the STORM label is smaller, more congested and busier as compared to the STING label.
- 3.7.27 That STORM new packaging is of 345ml, that is narrow at the center, tapering into a punted bottom and an-inch-wide on top whereas, STING is contained in a bigger 500ml bottle of consistent width covering 6 inches of the container's length, at which point it changes into a narrow cylindrical shape with a diameter of approximately one inch extending all the way to the opening of the bottle, and a punted base at the bottom. Such variations in the size of two products do not only make one stand out from the other but impact their retail prices, further enabling consumers to differentiate one from the other.
- 3.7.28 Additionally, the surface of both the containers in terms of look and feel are poles apart; the bottle of STING appears to be smooth while STORM has a patterned surface with an imprint of the Respondent's brand name i.e. "NEXT" and horizontal lines on the lower half of the

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bottle. Moreover, the cap of STORM new packaging also differentiate between the two products as the print on the cap “A quality product of Cola Next” clearly highlights the origin of the product. Such dissimilarities are enough to strike out all accusations of deceptive or parasitic marketing or taking unfair advantage of the Complainant’s goodwill in addition to the concocted risk of confusion between the two products.

- 3.7.29 It has further been submitted that energy drink known as Red Bull has the name of color “red” as part of its logo, its trademark, its text and the figure of the bull on the can is also in red, thus confirming the close link between energy drinks and the common use of the color red. Apart from STING, STORM and Red Bull, Energy Shot, Tab Energy, Lucozade, Cocaine, Beaver Buzz, Emerge Stimulation drink etc. are all energy drinks that shares the color red in their packaging and labelling. Having explained the symbolic nature of the color red and establishing its generic nature it is asserted that the Respondent has a legitimate right to market and publicize its stimulant/energy drink using the color red and the Complainant has no right to allege anti-competitive practices.
- 3.7.30 The color red alone or in combination with other simpler colors (for instance black or white) represent someone/something ‘...assertive, daring, determined, energetic, powerful, enthusiastic, impulsive, exciting, and aggressive. Red represents physical energy, lust, passion, and desire. It symbolizes action, confidence, and courage....’ hence it is illogical for the Complainant to try and monopolize the use of color red for its product/STING. The Respondent submitted that it has been established that both products/logos are different in so many aspects and the accusation of deceptive marketing by the Complainant is flawed, hence the complaint must be chucked out.
- 3.7.31 The Respondent has further submitted that other features used by most of beverage manufacturer like the techniques of placement of these logos and punted bottoms serve the functional purpose of attracting the attention of consumers and adding stability to the product, respectively. As a result, they cannot be exclusively reserved for Complainant as part of its “traditional” design. Likewise, it is only illogical and unlawful for Complainant to claim monopoly over red color of the beverage/energy drinks. As an instance, it may be noted that almost all “cola” drinks are black in color and are not monopolized are attributed by any particular manufacturer. The color combination used by the Complainant to allege deceptive marketing practices are also infact generic features, common in the marketing styles used for energy drinks, and discussed above.
- 3.7.32 With regards to the allegation of trademark infringement (characterized by impression, look, feel, color combination, getup and offending design), the Respondent submitted that the contents of Para 3.7.11 to 3.7.17 above as well as the Preliminary Objections above are reiterated here to reinforce the submissions as to lack of jurisdiction of this Honorable Commission to take cognizance upon the title complaint, which is liable to be dismissed.

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- 3.8 The Respondent has denied the allegation as being illegal, incorrect and bald. The Respondent submitted that Complainant is making hollow, impractical and harsh allegations against the Respondent. It has further submitted that the Respondent is well reputed brand with extensive business in Pakistan, and it does not need to take unfair or parasitic advantage of any other brand to create a consumer base for itself. Apart from the brand STORM, the Respondent has a huge presence in the market as it is currently associated with products including but not limited to aerated drinks, drinking water, different kinds of teas and cooking oils. The Respondent is the only Pakistani brand creating all these brands locally, encouraging innovation and boosting Pakistan's economy.
- 3.9 The Complainant, being an international brand is abusing its international standing in an attempt to intimidate the Respondent with the aim to disrupt the Respondent's business, so as to unfairly curtail the business prospects of the Respondent and eventually create a monopoly over the energy drinks market in Pakistan. In such view of the matter, it is important to underscore that indeed the Complainant is maliciously attempting to disrupt the competition in the market by misusing the jurisdiction of the Regulator.
- 3.10 The allegation of copycat packaging and/or parasitic copying are not only ill-founded but also unsubstantiated and jurisdictionally defective. The Respondent has not copied/adopted any features of the trademark of the Complainant. The Complainant has failed to show the so-called ill intentions of the Respondent or the fact that any unwary consumer is confused between the two products.
- 3.11 In additions to the above, the Respondent highlighted that the wording of Section 10 of the Act does not contain words like "similar", "overlap" etc. but used the phrase "another's mark" which is interpreted to mean identical copying of another's mark. Additionally, the said Section of law, may be invoked, when a complaint concerns "identical usage or exact replica" of the trademark and trade dress of the Complainant. In the instant matter the Respondent's mark is not only distinctive but also contains unique features in both STORM 500ml and STORM 345ml new packaging.
- 3.12 The Respondent once again, reiterated the contents of Para 3.7.11 to 3.7.17 above as well as the preliminary objections here to reinforce the submissions as to lack of jurisdiction of the Commission to take cognizance upon the title complaint, which related to trademark infringement (characterized by impression, look, feel, color combination, getup and offending design etc.) The appropriate remedy, if any, for Complainant lies under the mandate of Trade Mark Ordinance, 2001, hence the complaint under reply warrants to be dismissed.
- 3.13 The Respondent submitted that it had not copied or adopted any exclusive features of STING for manufacturing that STORM, therefore entire allegation premised on copycat copying or parasitic copying is misconceived, exaggerated and blown out of proportion. For the same reason, any observations of the Commission, in this regard, are inapplicable to the instant case.

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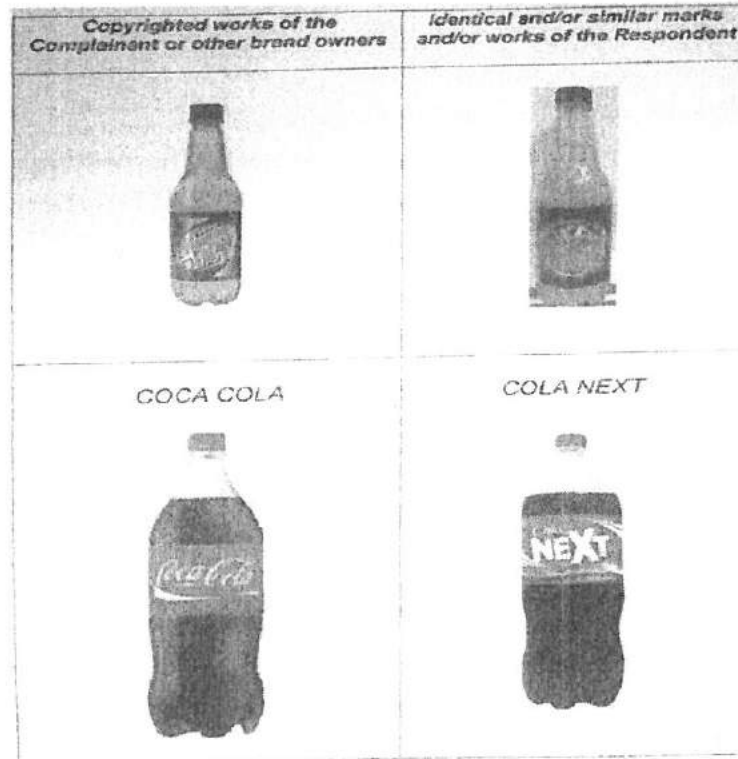
Therefore, the allegation of deceptive marketing practices in terms of Section 10 of the Act is only national and wishful.

- 3.14 Furthermore, the allegation of parasitic copying and copycat packaging have been based on the viewpoint and perspective of the target consumers. However, with respect to STORM and STING such viewpoints and perspectives of consumers cannot be confused as consumers of such products are more often than not “informed” consumers. It is matter of public knowledge that majority consumers of energy drinks are urbanized teenagers, who are not only unwary or illiterate. Instead, they are very particular about the kind of product they want to purchase, thus can easily differentiate between STING and STORM. Additionally, based on affordability of the STORM products it is asserted that targeted consumers will be learned enough to differentiate one drink from another. Price differences between two products (STING and STORM) and their distinctive logos enable even unwary consumers to tell one drink from the other, thus overshadowing the impact of any functional, generic features that both product have in common.
- 3.15 In addition, other brands like Coke also sell products that are of a similar/generic features like color and of the drink and color of the bottle. Likewise, for instance, Sprite and 7-up have common/generic features; Coca Cola and Pepsi have common/generic features as well. The Complainant does not have the audacity to bring action against a competitor as big as Coke. In stores all such drinks are shelved side by side despite having the same color combinations Sprite, 7-Up, and Team, Coke and Pepsi, Fanta and Mirinda or other orange flavored and/or colored drinks, similarly STING, STORM and other drinks like cranberry juice despite having the same color are all stacked in the same aisle. The positioning and point of sale cannot be seen as reason to confuse these products with each other. Intimidation, abuse of position and groundless assumptions by the Complainant are beyond malicious. Hence, the frivolously filed titled complaint is liable to be dismissed.
- 3.16 The Respondent submitted that the Complainant tends to wishfully imply that STORM is a poor quality product and penitential confusion between it and STING will damage the reputation of the Complainant’s product, causing brand dilution. The Respondent’s subject matter brand STORM is duly registered with Punjab Food Authority who continuously monitor the criteria of standardization and strict conformity with the applicable provisions of food Laws. By drawing illegally, senseless comparison between its products and those of the Respondent, the Complainant has maligned the goodwill of Respondent and is liable to be sued for defamation.
- 3.17 As submitted above, the Respondent has invested millions of rupees and put a years of hard work, efforts and dedication to create its product/brand, and made a name and goodwill for itself. Such demeaning remarks about the Respondent have undermined the worth and credibility of Respondent and misleading of this Commission. The Complainant has approached the Commission with unclean hands, demanding loss of profits to in fact unfairly damage the business of Respondent being a competitor and market challenger.

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3.18 The allegation that Respondent is engaged in a pattern of such conduct and has adopted a number of marks is too general, evasive, bald, notional and non-specific. It is visible with the plain optical analysis of the pictures depicted below, with naked eye that there is no resemblance or dilution between the brand of Respondent and other brands in the market.



II. REJOINDER BY THE COMPLAINANT:

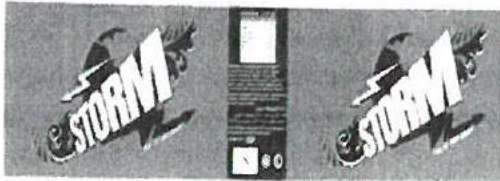
3.19 The Complainant stated that all of the averments, denials and allegations contained and suggestions made in, and inferences drawn or sought to be drawn from, the Respondent's reply which are inconsistent with what is stated in the subject complaint and this present rejoinder, are hereby expressly denied. It is respectfully further stated that, except for making false and misleading statements and distorting facts in its reply, the Respondent has failed to present any valid or cogent argument in defence and, as such, the Respondent's reply ought to be rejected in the circumstances and on the basis of the incontrovertible facts, legal grounds and evidences submitted in the Complainant's complaint and further explained in this rejoinder. Additionally, it is specifically stated as follows:

3.20 The Complainant submitted that, it has been expressly denied that the present proceedings or the subject matter thereof is a non-starter or has become infructuous. It is submitted that the complaint has been duly and validly made in accordance with law and the Respondent has failed to provide any plausible reason(s) for its purported claims and objections which in any event are false, and irrelevant. It is expressly further denied that the Respondent has since 2 August 2018 stopped production of the product being the subject matter of the complaint filed on 30

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July 2018 as the Respondent's said claim is false, irrelevant and misleading, and does not excuse or absolve the Respondent for its violation of section 10 of the Competition Act 2010 (hereinafter also referred to as the "Act"). Furthermore, clearly, the Respondent is trying to mislead this Honorable Commission as the subject matter of complaint is the unauthorized and illegal adoption and marketing by Respondent of the STORM stimulant/energy drink bearing the trade mark/logo/label design/trade dress/packaging (and/or the elements thereof) and the overall impression/look and feel thereof being confusingly and/or parasitically similar to that of the Complainant's STING energy drink (hereinafter collectively and individually referred to as the "STORM Label Design") and not only the 500ml bottle of Respondent as falsely alleged in its reply.

- 3.21 Further, and without prejudice to the aforesaid, it is most humbly stated that the Respondent has throughout the relevant period been engaged, and continues to engage, in the unauthorized and illegal use and/or advertising of the STORM Label Design. In this regard, the attention of this Honorable Commission is invited to the following:
- 3.22 The Central Copyright Office Journal published on 25 March 2021 (available on the website of Intellectual Property Office, Pakistan, at this web link: https://ipo.gov.pk/system/files/210315_0.pdf) contains the following advertisement of copyright application bearing number 2021/1018 filed on 8 March 2021 for the registration of alleged artistic work titled "STORM FUEL UP YOUR ENERGY" in the name of Respondent. The said alleged work is the same as and/or substantially similar to STORM Label Design and shows the Respondent's continued use and publication of the STORM Label Design.

	
Title Of Work :	STORM FUEL UP YOUR ENERGY
Name Of Applicant :	MEZAN BEVERAGE (PVT.) LTD. ,
Address Of Applicant :	817-RAVI BLOCK, ALLAMA IQBAL TOWN, MULRAN ROAD , LAHORE .
Application No. :	2021/1018
Date Of Application :	08-Mar-2021

- 3.23 As also evident from Annex-B to the Respondent's reply, the Respondent has on 25 February 2021 submitted to the Trade Marks Registry, Pakistan, the requisite application (on prescribed Form TM-11) together with payment of prescribed fees for issuance of registration of following mark/label design (being the offending STORM Label Design) under trade mark application number 397388 in class 32 in respect of the goods, namely "Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for

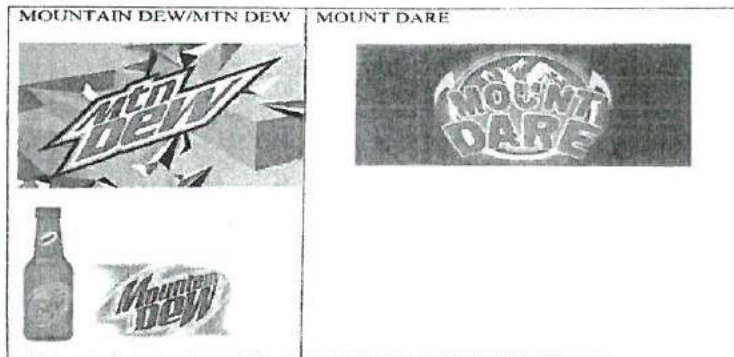
making beverages". Such step indicates that the Respondent is actively pursuing the said trade mark with the intention of using it.



3.24 This Honorable Commission will further appreciate that the Respondent is actually in the habit of copying the Complainant's trade marks (which include the distinctive get-up and label designs for the Complainant's well known products sold in Pakistan) and the few examples of such imitation marks applied for registration by the Respondent before Trade Marks Registry and/or Copyright Office in Pakistan are shown below.

Complainant's trade marks/ label designs	Imitations and copycat versions of trade marks/label designs adopted by the Respondent
<p>STING</p> 	<p>STORM</p> 
<p>7UP</p> 	<p>SUP LEMON UP</p> 

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3.25 In light of the above, and as already explained in more detail in the complaint, the Respondent's conduct amounts to deceptive marketing practice(s) in violation of section 10 of the Act. Further, in this regard, it is respectfully stated that the Complainant has and reserves the right to object to the registration and use of the imitation marks adopted by Respondent.

3.26 The Complainant fervently denies all of the alleged "Questions of Jurisdiction" and the alleged "Questions of Law and Preliminary Objections" insofar as they concern the subject complaint and proceedings. The reasons being that, the Respondent has failed to show any valid reason and its objections and also allegations are based on mere inferences, conjectures and surmises, against the facts and material on record and the Respondent is put to strict proof thereof. It is specifically further stated as follows:

3.27 At the outset, we would like to state that section 6 of the Trade Marks Ordinance 2001 clearly lays down that the "provisions of this Ordinance shall be in addition to, and not in derogation of any other law for the time being in force". It is humbly stated that, the aforesaid section 6 manifests legislative intention to read the provisions of the Trade Marks Ordinance 2001 in addition, and not in derogation with, any law for the time being in force. Section 10 of the Competition Act 2010 is one such "law for the time being in force" in the present case, that has to be read in addition, and not excluded by, the Respondent. Therefore, a civil court as well as the Competition Commission are both available for redress, and a party can choose either of the two fora.

3.28 Furthermore, section 10 of the Competition Act 2010 has to be read to accomplish the goal that was contemplated to be achieved by the legislature while ushering in a full-fledged competition regime in Pakistan. Reliance is also placed on section 59 of the Competition Act 2010, which states as follows:

59. Act to override other laws.- The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

3.29 It is submitted that the absence of an overriding provision in the Trade Marks Ordinance 2001, further reinforces the intention of the legislature that its provisions (of the Trade Marks

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Ordinance) are to be read in addition, and not in derogation with any law for the time being in force.

- 3.30 It is humbly stated that, this Honorable Commission is a specific forum available to test the trade practice of a party on the touchstone if it is an unfair, deceptive, or anti-competitive trade practice. As long as the allegations relate to a prohibited trade practice including a deceptive marketing practice strictly prohibited under section 10 of the Act, as complained in the subject complaint, the Competition Act 2010 can be invoked without hesitation and this Honorable Commission has complete and undiluted jurisdiction to entertain such complaints and deal with them according to the said statute. It is respectfully stated that the subject complaint is therefore fully covered under section 10 of the Act and is not barred by the provisions of Trade Marks Ordinance 2001 as falsely alleged by the Respondent, or any other law for the time being in force in Pakistan.
- 3.31 It is respectfully further stated that the aim object and purpose of the Act is to ensure healthy competition between companies to enhance economic efficiency and to protect the consumers from anti-competitive behavior. Accordingly, the legislature in its wisdom, in order to achieve the said goal have in terms of the Act provided the forum of Competition Commission, which is an independent, quasi-judicial forum/ body to hear and determine the issues summarily in accordance with the prescribed rules and procedures.
- 3.32 The Respondent has therefore falsely alleged that the complaint is jurisdictionally misconceived, legally defective and incompetently filed and that the contents of the complaint are skewed or concocted and not substantiated. The Respondent is put to strict proof of all the allegations.
- 3.33 It is categorically further denied that the subject complaint or the *lis* before this Honorable Commission is *non est* in law or liable to be rejected whether for reasons falsely alleged by Respondent or for any other reason whatsoever. It is submitted that the complaint has been duly and validly filed on behalf of the Complainant by its authorized attorneys and the requisite Letter of Authorization has been duly signed by the Complainant's designated executive and signatory, Mr. Paul A. Lee, an Assistant Secretary of PepsiCo, Inc. Attached hereto is a copy of an Assistant Secretary's Certificate and two attachments thereto: Exhibit A which is a true and correct copy of certain resolutions that Board of Directors of the Corporation (PepsiCo, Inc.) has adopted, and Exhibit B which is a true and correct copy of the Delegation of Authority, adopted by the Corporation naming Paul A. Lee as Assistant Secretary of PepsiCo, Inc.
- 3.34 The alleged "Preliminary Submissions" in the Respondent's reply are denied for want of knowledge or information sufficient to form a belief as to their truth. Furthermore, the contents of paragraphs 2 and 3 above are reiterated here. The true position being that stated in the complaint and further explained in the earlier paragraphs of this rejoinder.

- 3.35 The contents of succeeding paragraphs in the Respondent's reply being allegedly "Para-wise Reply on Merits" are nothing short of misleading, mala fide, erroneous and illogical for the reasons detailed above. The Respondent has failed to show any plausible reason for its averments and allegations in these paragraphs or otherwise in the reply in totality which ought to be rejected in light of the incontrovertible facts and evidences provided in the complaint. The contents of earlier paragraphs of this rejoinder are reiterated here. It is categorically further denied that the Complainant's STING logos/label design and the features thereof including colour-scheme are not distinctive and are common to trade or generic.
- 3.36 The Respondent is put to strict proof of the said contention. The Respondent has also falsely alleged that the STORM Label Design carries any identifying features vis-à-vis the Complainant's STING product and label design or trade dress thereof or that STORM is a well-known and distinctive brand of Respondent enjoying its own exclusive customer base. The Respondent has failed to provide any justification for its adoption of the STORM Label Design. Further, contrary to the Respondent's false, misleading and erroneous conjectures, it is humbly stated that, clause (d) of subsection 2 of section 10 of the Act applies to both registered and unregistered trade mark, product labeling and/or packaging, or in other words, the Act does not necessitate that the Complainant's STING energy drink bearing the label design/packaging/trade dress thereof (which is a well-known product and has for many years been extensively sold and marketed throughout Pakistan) should be registered under the Trade Marks Ordinance 2001.
- 3.37 Additionally, and without prejudice to the aforesaid, we also once again rely on annexures to the complaint, which provide details along with documentary proof of Complainant's worldwide and Pakistani registrations for a variety of STING marks and logos or label designs. It is respectfully further stated that the Complainant has and reserves the right to take appropriate action(s) in accordance with law, against the trade mark registration of STORM Label Design (bearing number 397388 in class 32) which has unauthorisedly and illegally been obtained by the Respondent. *Copy of annexures D, E & F is attached as Annexure-C.*
- 3.38 Furthermore, it is categorically denied that the alleged new packaging of STORM energy/stimulant drink has no identical or similar features to the Complainant's product or has relevance to the subject matter of the complaint. The Respondent has also tried to falsely justify the adoption of offending STORM Label Design by alleging that the price of the respective product is different, and that there are other cola drinks or fruit flavored drinks available in the market having similar or common/generic features, and that the Complainant is trying to intimidate the Respondent and to create a monopoly over the energy drinks market in Pakistan, all of which are utterly false and misleading claims having no relevance to the subject matter of the complaint. The contents of paragraph 10 of the complaint are reiterated here. Clearly, for these and other reasons set forth in the earlier paragraphs of this rejoinder and the complaint, the Respondent is in no position to insinuate against the Complainant such serious accusations and allegations without the strongest evidence to support the same. It is further stated that the subject complaint is based on a correct understanding of facts and law and it is the Respondent

which is continuing to defend its wrongdoings based on whimsical assertions, without any substantiated bases.

- 3.39 In response to the alleged prayer of the Respondent in its reply, it is humbly stated that the Respondent is not entitled to any of the reliefs therein prayed or otherwise and that this Honorable Commission should not assist the Respondent whose reply is based on such unethical, false, and invalid grounds. It is humbly further stated that in the circumstances of the present case and for the reasons stated hereinabove and in the subject complaint, the discretion vested in this Honorable Commission under the provisions of the Competition Act 2010 ought to be exercised in the Complainant's favor by granting the reliefs as prayed in the complaint. The Complainant furthermore requests this Honorable Commission to reject from consideration the Respondent's assertions and allegations in its reply as the same are based on false, invalid, and vexatious grounds.
- 40 Any claim, statement or averment made or to be made contrary to what is stated in this rejoinder or the subject complaint is hereby expressly denied. The Complainant reserves the right to reply to any case set up by the Respondent.

4. ANALYSIS:

- 4.1 As mentioned in Para 1.3. *ibid*, the mandate of this enquiry is to determine whether the allegations leveled in the complaint amount to, *prima facie*, violation of Section 10(1) of the Act in general; and
- i. *Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(d) of the Act through the fraudulent use of the Complainant's trade dress, and hence a contravention of Section 10(1) of the Act?; and*
 - ii. *Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(b) of the Act through the distribution of false or misleading information to consumers, including information which lacks a reasonable basis, and hence a contravention of Section 10(1) of the Act?; and*
 - iii. *Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(a) of the Act through the distribution of false or misleading information that is capable of harming the business interests of the Complainant, and a contravention of Section 10(1) of the Act?;*
- 4.2 In order to determine the above, various matters pertinent to significance of trademarks and their association with Section 10 of the Act would subsequently be discussed.
- 4.3 A word, phrase, symbol, and/or design which is used to classify and distinguish goods and services in general and from those of its competitors is known as a trade or service (Page 14

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of 35 mark). The term, “mark” has been defined in Section 2(xxiv) of the Trade Marks Ordinance, 2001 (the ‘Ordinance’)¹ as:

(xxiv) *"mark" includes, in particular, a device, brand, heading, label, ticket, name including person name, signature, word, letter, numeral, figurative elements, colour, sound and/or combination thereof;*

4.4 In addition, Section 2(xlvii) of the Ordinance defines the term “trade mark” as:

(xlvii) *"trade mark" means any mark capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings;*

4.5 Such uniquely developed trade or service marks are created and adopted by undertakings to assist consumers in quick identification of their brands of varied products. One of the major purposes of these trade/service marks is also to separate them from those of its competitors. These creative works then represent a certain perception about the respective products in terms of the status, price, unique characteristics, method or place of production/origin of service providers, properties, quality, etc., of the relevant goods and services. Consequently, they also become one of the most important aspects of the undertaking’s goodwill.

4.6 Therefore, in order to form their unique identity, firms invest significantly in creating and promoting their brands through the medium of trademarks. These creative works, hence, become a prominent aspect of the brand image and goodwill of their owners, as they not only represent the producers/providers of these products, but also symbolize the unique features and quality of the said products.

4.7 These creative works are also termed as intellectual property of their owners. However, in order to gain exclusive rights for their use, they have to be registered with the relevant authorities, such as the Intellectual Property Organization (IPO) of Pakistan. By registering intellectual property such as trade/service mark, intellectual property rights extend monopolistic use of the registered trade/service mark to its owners.

4.8 Furthermore, owing to its properties, significant efforts have been made across the world, including Pakistan, to protect such property rights. Whereas fraudulent use of these rights constitutes a clear violation of law including Section 10 of the Act, which prohibits “fraudulent use of another’s trademark, firm name, or product labelling or packaging.”

4.9 Protection of such property rights, therefore, have twofold benefits. Firstly, they prevent consumer injury caused as a result of trademark infringement. Reason being that trademark infringement may induce a consumer into buying a product which they may otherwise have

¹ http://www.ipo.gov.pk/uploads/CMS/Trade_Mark_Ordinance_2001.pdf Page 14 of 35

not bought. Such a situation may arise as a consequence of confusing one product with some other similar product containing the identical or similar trademark and/or packaging. Secondly, these laws also ensure protection of property rights of the owners of these trademarks who invest significantly into their creation and promotion in order to establish a certain brand image and goodwill. Through such actions, fair competition is also protected and promoted.

Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(d) of the Act through the fraudulent use of the Complainant's trade dress, and hence a contravention of Section 10(1) of the Act?;

- 4.10 According to Section 10(2) (d) of the Act, the '*fraudulent use of another's trademark, firm name, or product labelling or packaging*' constitutes deceptive marketing practices. The Commission in its previous determinations has interpreted the term "*fraudulent*" objectively instead of determining a subjective intent, in line with the purpose of Section 10 of the Act and the mischief that it seeks to remedy. In simple terms, the mischief that Section 10 seeks to remedy is consumer deception by way of anticompetitive practices. The Commission has established time and again that the term "consumer" is to be construed as the ordinary consumer for the purpose of Section 10 of the Act, reference in this regard is placed on '*in the matter of Show Cause Notice issued to Zong* reported as 2010 CLD 1478'.
- 4.11 Additionally, the International Trademark Association defines "trade dress"² as,
- "Trade dress is the overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others. It may include the design or shape/configuration of a product; product labeling and packaging; and even the décor or environment in which services are provided. Trade dress can consist of such elements as size, shape, color and texture, to the extent that such elements are not functional. In many countries, trade dress is referred to as 'get-up' or 'product design'."*
- 4.12 The traditional approach towards the trade dress was highlighted in Jeffry Milstein, Inc. vs. Greger, Lawler, Roth, Inc., 58 F.3d 27, 31 (2d Cir. 1992) as "*the manner in which a product was 'dressed up' to go to market with a label, package elements*". However, the United State Supreme Court in 'Two pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763' expanded the earlier tradition approach towards the trade dress in and defined the trade dress as '*a products*' "*total image*" or "*overall appearance*" and "*may include features such as size, shape, color or color combinations, texture, graphics or even certain sales techniques*"
- 4.13 Moreover, the Commission has already set a benchmark in the 2016 CLD 1128 for the consideration and adjudication of cases involving copycat packaging as being violative of

² <https://www.inta.org/?searchType=posts&query=trade%20dress&page=1>

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clause (d) of subsection (2) of Section 10 of the Act, to the effect that where the product labelling and packaging of another undertaking is mimicked, it carries with the obvious foreseeable effect of misleading and causing deceitful confusion in the mind of the ordinary consumer.

- 4.14 In addition to this, the Commission, *in the matter of Show Cause Notice issued to M/s A. Rahim Foods Private Limited*, has made the observation relating to the now prevalent practices of “*copycat packaging*”/”*parasitic copying*”/”*slavish imitation*”, as well as its purpose and effect and more importantly its direct correlation to the “*fraudulent use*” of another’s “*product labelling or packaging*”.
- 4.15 The Enquiry Committee will proceed to analyze factually the conduct of the Respondent in this matter, using the principles applicable to the interpretation of Section 10(2) (d) of the Act laid down in the case reported above as *2016 CLD 1128*.
- 4.16 The Respondent claims to have obtained registration for its trademarks in its reply and seems to have attached the registration certificates as annexures. However, the annexures submitted by the Respondent do not include any trademark registration certificates and only a copy of demand notice issued by the Trade Mark Registry, IPO. The demand notice was issued to the Respondent since after publication of trademark in Trademark Journal and no opposition had filed against trademark, to which the Respondent has referred to as a registration certificate in the reply. (*Copy of Demand Notice issued by Trade Mark Registry is attached as Annexure-D*)
- 4.17 Therefore, the claim of Respondent to have had its trademark registered is not true. Moreover, even if the Respondent had obtained any registration after the filing of the complaint does not justify the act of the Respondent, since at the time of violation, the Respondent had no such registration or right to use the mark.
- 4.18 It is important to emphasize here that the Respondent had submitted that at the time of filing of the complaint it had already discontinued the use of its prior packaging and that it had no intention of using it in the future. However, the recent reply submitted by the legal counsel of the Respondent and the annexures attached therewith include copy of demand notice and copy of payment slip to the IPO, dated March 02, 2021, which includes the previous 500ml bottle packaging design. This shows a contradiction between the submission of the Respondent and its intentions. The Respondent has moved forward, subsequent to the complaint, to get a registration for its prior packaging that it had claimed to have discontinued, that too absent any evidence.
- 4.19 This proves that the Respondent had only been using delaying tactics via stay orders from Honorable Courts to further its agenda of obtaining a registration for its infringing trademark before the enquiry could be proceeded further and that it still had intention to use the infringing trademark in the future.

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- 4.20 The Respondent submitted that in July, 2018 before launch of complaint, both 500ml and 345ml variants were available in the market. Since the evidence in form of stock sheet, submitted by the Respondent, is available which reflects the existence of stock of 345ml bottle, it is safe to conclude that the Respondent had launched the bottle before the current complaint had been filed.
- 4.21 The Respondent submitted that this 345ml bottle was an introductory product to replace the 500ml bottle. In support of the same, the Respondent submitted the trademark along with device of STORM 345ml bottle which is significantly different from the STORM 500ml bottle. However, it is noted that the recent move by pursuing the pending application for registration of trademark STORM shows that the Respondent did not launch 345ml bottle as an introductory product to replace the 500ml bottle, rather only to obtain stay orders so that it can pursue registration of the infringing bottle in the meanwhile.
- 4.22 The Complainant has reiterated multiple times in the complaint filed that it has a right over the complete trade mark and trade dress of the product. However, it is to emphasize that the annexures attached by the Complainant show that it only has trademark registrations for its label design, duly registered within Pakistan. The Complainant has no copyrights to its bottle design for which it has so forcefully pleaded within the complaint. As long as the punted bottle design has not been registered by the Complainant within Pakistan, the Enquiry Committee will not discuss the matter further.
- 4.23 Therefore, the enquiry report will only discuss the trademark, color scheme, fonts and label design with some consideration to the color of the drink and bottle design as well. The Complainant does not have a right to the color red, however, the color red in combination with the design elements does hold certain rights and elements of deception for counterparts.
- 4.24 The Complainant had attached a variety of trademark and copyrights registration from across the globe from regions where it distributes its product to enforce the complaint. However, only the registrations from within Pakistan will be entertained for the purposes of this enquiry report to avoid unnecessary debate. It is pertinent to mention that the Complainant is conducting the sales and marketing operations of its product STING through its franchisee, namely M/s. Pakistan Beverage Limited³.
- 4.25 However, the Respondent is right to claim that the color red is not only associated with the Complainant's drink and the use of bright colors for energy drinks is global practice. Similarly, punted bottles have also been used by various energy drinks throughout the globe and therefore, cannot only be attributed to the Complainant alone.
- 4.26 Before moving forward, it is important to discuss various elements of similarity between the two packaging. The Complainant alleged that the Respondent has copied the registered labeling and packaging of one of its product 'STING'.

³ <http://pakbev.com/index.html>

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- 4.27 As per the packaging submitted by the Complainant, it is very clearly identifiable that the Respondent identically copied the Complainant's logo design, product labeling, creative design element including placement of various details and language used by the Complainant. The Respondent has copied the Complainant's distinctive trademark (logo design) used for its product 'STORM'. The logo design was first adopted by the Complainant and has been approved by the Registrar of Trademarks for registration. The unauthorized used logo design constitutes a violation of Section 10(2) (d) of the Act.



- 4.28 The Complainant's products is available in punted bottle in transparent color. The brand name STING appearing in a white color with black outline on the two sides of the bottle. The brand name has the alphabets 'TM' at its end displaying that the name has been registered and protected under the relevant laws. The brand name on the packaging is preceded by an image of Scorpion with black and white shades. The text 'energy' and 'Berry Blast' appears under the brand name in white color. The back of the packaging lists nutrition information, ingredients, precaution and daily use recommendation accompanied by the logo of the Complainant along with its principle name. Front and back of the Complainant's product packaging is reproduced hereunder for reference:

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(Front)

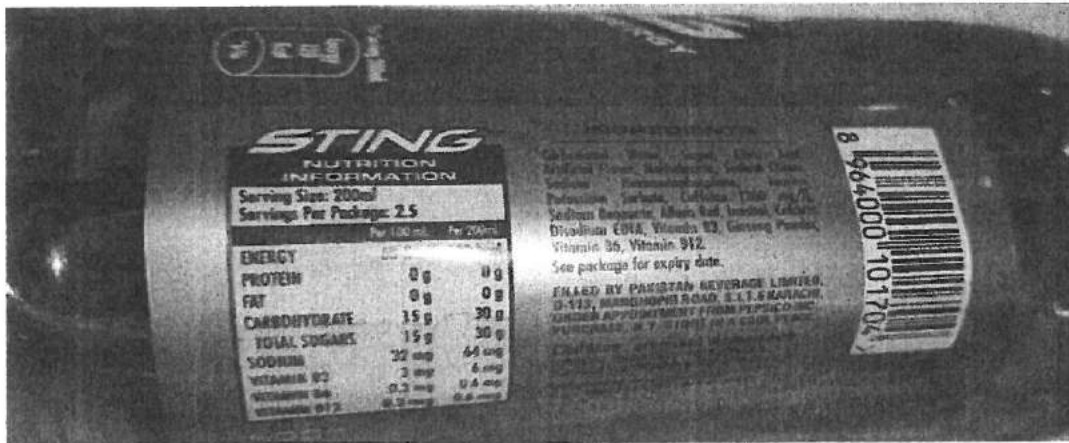


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- 4.32 The brand name on the Respondent's products is followed by the text 'energy drink' and 'fuel up your energy' in white color respectively. The Complainant has also used the word 'energy' and 'berry blast' in white color on the face of its product 'STING'. (Reference Para 4.28&4.30)
- 4.33 The list of ingredients appearing on the Respondent's packaging is also identical and appears in identical sequence. The Respondent has also used the same silver background color to list the product ingredients. The Respondent's actions raised serious questions regarding the authenticity of the language appearing on the Respondent's packaging and the veracity of the claimed list of ingredients. The list of ingredients of both the Complainant and Respondent is reproduced below for reference:

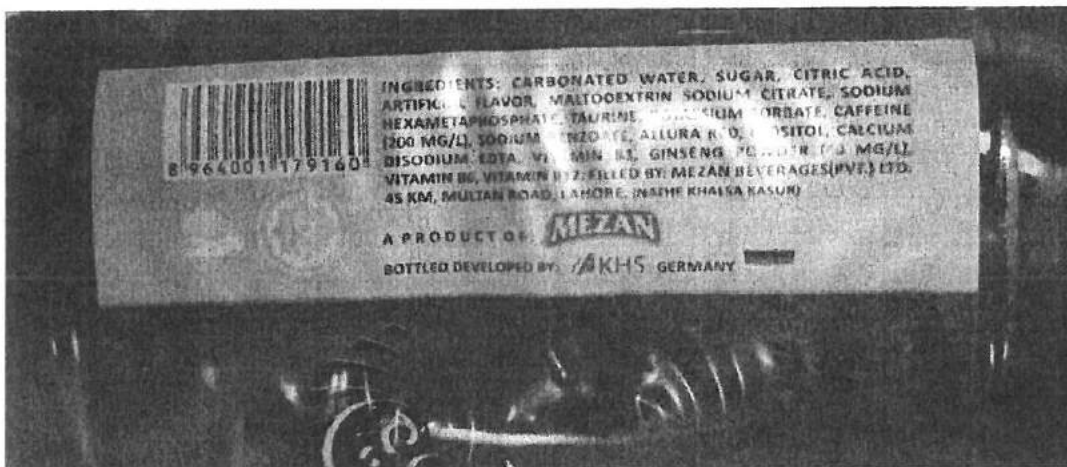
Complainant's Product Ingredients:

Carbonated Water, Sugar, Citric Acid, Artificial Flavor, Maltodextrin, Sodium Citrate, Sodium Hexometaphosphate, Tourine, Potassium Sorbate, Caffeine (200mg/l), Sodium Benzoate, Allura Red, Inositol, Calcium Disodium ETDA, Vitamin B3, Ginseng Powder, Vitamin B6, Vitamin B12.



Respondent's Product Ingredients:

Carbonated Water, Sugar, Citric Acid, Artificial Flavor, Maltodextrin Sodium Citrate, Sodium Hexometaphosphate, Tourine, Potassium Sorbate, Caffeine (200mg/l), Sodium Benzoate, Allura Red, Inositol, Calcium Disodium ETDA, Vitamin B3, Ginseng Powder (40mg/l), Vitamin B6, Vitamin B12.



- 4.34 The Complainant has mentioned the nutritional information of its product, i.e., STING, whereas the Respondent has not displayed the list of nutrients present in the product.
- 4.35 The text 'energy' beneath with the brand name 'STING' has been displayed on the cap of the bottle of the Complainant's product. The Respondent has also displayed its own brand name 'STORM' in an identical manner on the top of bottle cap. The only difference is that the text 'energy' has been displayed above the brand name 'STORM' by the Respondent. The Respondent has also used the similar color scheme, white with black lining, to display its brand name on top of the bottle.

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- 4.36 The Respondent submitted that two different names, i.e. STING & STORM have different meanings as well as varying phonetics highlights the difference between the two products. STORM ends in “orm’ while STING ends in “ing”, creating distinctive aural impressions on customers that enable them to differentiate between the two. However, the Respondent has intentionally omitted to mention that two products name starts with the similar words, i.e. “ST” creating similar aural impression on consumers to cause confusion between two.
- 4.37 The Respondent submitted that there was no ill motive of it as it has already launched STORM new packaging of 345ml which is altogether different in size, shape, etc., from old bottle design of STORM 500ml and STING. However, it is important to note that the Respondent had already initiated process to obtained trademark and label design of its old STORM 500ml variant and not initiated process of registration of 345ml bottle. This clearly highlights the intention of the Respondent to continue the use of alleged logo design.
- 4.38 As it has already been mentioned in Para 4.22, above that the Complainant has not exclusive right over punted bottle design and color red, however, in order to determine instance of deception in any marketing material, the main focus of the Enquiry Committee, as per the general practices, is to evaluate its “net general impression” The Canadian Competition Commission, according to its Competition Act, states: “*To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meaning.*”³
- 4.39 The Respondent submitted that it had discontinued the production and sale of its STORM 500ml bottle even before entertaining the titled complaint therefore, no cause of action left to be adjudicated upon by this Commission. It has also submitted that new 345ml packaging has different label design as compared to the old one. Although, the Respondent has changed its bottle design which is narrow at center, into a punted bottom and an inch wide opening on top, the word STORM is outlined in red, however, it has been observed that the new 345ml packaging of STORM with the old label design (500ml STORM) has been marketed through its website (<https://colanext.com/cnws/storm/>). The relevant screen shot was taken on May 27, 2021 from the abovementioned website and reproduced hereunder:

³ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>

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4.40 The Respondent further submitted that energy drink known as Red Bull has the name of color “red” as part of its logo, its trademark, its text and the figure of the bull on the can is also red, which confirming the close link between energy drinks and the common use of the color red.

4.41 In furtherance of the comparison of elements, it is important to shed light upon the packaging of various other prominent energy drinks highlighted by the Respondent. The prominent competitors in beverage category (energy drinks only) are Red Bull, Energy Shot, Tab Energy, Lucozade, Cocaine, Beaver Buzz and Emerge stimulation drink. For the sake of brevity and fair comparison, product “energy drink” is being used as an example from all abovementioned competitors product alongside the Complainant’s and Respondent’s packaging as under:



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4.42 It is visible in the images above that shades of Red color are dominant features of most of energy drinks but not specific to the product category 'energy drinks' only. However, it is important to note that most of the competitors' products have completely distinctive trademarks, logos, design, color scheme and trade dress for the same product. Therefore, it is safe to say that every brand in the given example, other than the Respondent, has tried to capture the market with their distinct logo, packaging design and color scheme. However, the packaging of the Respondent is uncannily similar to/ identical to that of the Complainant with very slight and easily overlooked differences.

4.43 It is important here 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."⁴

4.44 Therefore, in view of the comparison drawn under Para 4.10 to 4.42, the similarities found in the elements of the packaging of Complainant and Respondent are enhanced because of the use of similar colors by the Respondent, thereby passing off its product as that of the Complainant. Although all other competitors products referred to under para no. 4.41 are using shades of red, yet due to stark differences in their design elements, the packaging do not appear similar or identical to each other and each has its own distinct appearance.

4.45 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 Act⁵.

4.46 In light of the above pictorial comparison of the Complainant's product and Respondent's product, it is safe to conclude that there exists deceptively confusing similarities in the Complainant's trade dress and the Respondent's trade dress, almost to the extent of being identical but for the different brand name evident on the packaging. Moreover, the brand names of both create phonetic similarity to the extent of starting two words "st" which are common in both the brand names. This is so specifically in the context of visualizing the Complainant's product and Respondent's product being placed in close proximity to one another in display shelves at retail outlets, supermarkets and other points of sale across the country.

⁴ <http://openjurist.org/542/f2d/611/beneficial-corporation-v-federal-trade-commission#fn6>

⁵ 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'

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- 4.47 The ordinary consumer would not be able to distinguish between the products origin but for the brand names evident on the packaging. Even otherwise, the confusing similarities could mislead the consumer into believing that the source/origin of the Respondent's product is in fact the Complainant.
- 4.48 The Respondent has distorted healthy competition by entirely copying 'STING' packaging and used the recognition and goodwill associated with STING for unjust personal gains. The misuse of such packaging causes the consumer to be deceived and/or misled regarding the origin of the product. A discerning consumer may also be subconsciously attracted towards a product that appears to be a replica thus diluting the goodwill and exclusivity of the packaging or product labeling.
- 4.49 In light of the analysis above, the Respondent 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 its conduct appears to be fraudulent use of the Complainant's trade dress.

Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(b) of the Act through the distribution of false or misleading information to consumers, including information which lacks a reasonable basis, and hence a contravention of Section 10(1) of the Act?;

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

*"Copycat packaging is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting, since normally it does not infringe intellectual property rights. The risk posed by copycat packaging is consumer confusion, and consequently distortion of their commercial behavior"*⁶.

- 4.51 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.*"⁷

⁶ Giuseppe Abbamonte, "Copycat Packaging, Misleading Advertising and Unfair Competition"

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> , No 13 of Annex I

- 4.52 With respect to this issue, the Enquiry Committee is required to determine whether the Respondent's copycat packaging of the Complainant's trade dress, also amounts to the dissemination of false/misleading information to the consumers within the scope of clause (b) of subsection (2) of section 10 of the Act.
- 4.53 Clause (b) of subsection (2) of Section 10 of the Act provides that "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; constitutes a deceptive marketing practices."
- 4.54 The term misleading information has been interpreted by the Commission in the case reported as 2010 CLD 1478, as follows:

Misleading information: "may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent." [Emphasis Added]

- 4.55 It is evident from the information provided from both undertakings that the product of Complainant had an existence prior to the establishment of the Respondent in the energy product category. In order to establish whether parasitic copying/copycat packaging of trade dress may have occurred, it is important to compare elements of the Complainant's and Respondent's packaging to assess similarities.
- 4.56 As per the packaging submitted by the Complainant (reference is made to para no. 4.28 to 4.32 in the enquiry report), it is very clearly identifiable that the Respondent identically copied the Complainant's logo, product labeling, creative design element including placement of various details and language used by the Complainant.
- 4.57 The brand name 'STORM' has deliberately been placed by the Respondent in the same style/manner, with similar color scheme on the packaging as that of the Complainant's. Although, both the brand names are visually different however, the auditory pronunciation have capability to cause confusion in the mind of unwary consumer especially, when two product have similar trade dress and packaging.
- 4.58 The list of ingredients appearing on the Respondent's packaging is also identical and appears in identical sequence. The Respondent has also used the same silver background color to list the product ingredients. The Respondent's actions raised serious questions regarding the authenticity of the language appearing on the Respondent's packaging and the veracity of the claimed list of ingredients.

- 4.59 The shape of the bottle of Respondent's STORM is identical and/or closely similar to that of the Complainant's STING energy drink, that is, both bottles have punted bottoms and transparent color. It is important to highlight that although the Complainant does not have exclusive rights over punted bottle design, however, the act of the Respondent to use similar bottle design for STORM showed its intention. Moreover, the label/packaging of STORM energy drink has been designed in such a manner so as to convey the over-all impression/look/feel of label packaging of the Complainant's STING energy drink.
- 4.60 The logo appearing on front panel of the Respondent's STORM product indicates a design in the color combination of black and white, which design in terms of its overall look/feel/get-up and color scheme is closely, deceptively and parasitically similar to the Complainant's STING logo design/label design. In addition to this the brand name STORM appears in bold white lettering in the middle of the design, that is, exactly in the same place and manner as the trade mark STING appears on the STING label design.
- 4.61 In order to determine instance of deception in any marketing material, the main focus of the Enquiry Committee, as per the general practice, is to evaluate its "net general impression". The Canadian Competition Commission, according to its Competition Act, states: "*To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meaning.*"⁸
- 4.62 As established by the Enquiry Committee, the Respondent's trade dress and overall impression of the product labelling and packaging is deceptively similar to that of the Complainant's trade dress. An ordinary consumer who purchases the Respondent's product off the shelf is highly likely to be deceived by the product packaging, logo and get up of the product. The misleading information on the Respondent's product is in the form of a deceptive impression by the Respondent's trade dress, which is likely to mislead the consumers as to the origin and quality of the same being linked to that of the Complainant.
- 4.63 The deceptive similarity in the Respondent's trade dress has the potential to directly or indirectly affect the decision of the consumers to buy the Respondent's product on the misleading invention as to origin/place of production and quality of the product and hence is deceptive.
- 4.64 In view of the foregoing, we the undersigned, Enquiry Committee, is of the view that the conduct of the Respondent has resulted in a violation of Section 10(1) read with Section 10(2) (b) of the Act, as the Respondent is disseminating misleading information to consumers lacking reasonable basis, in form of confusing similarities of Respondent's trade dress to that of the Complainant's trade dress, thereby misleading the consumers as to the origin and place of production of the product.

Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of section 10(2)(a) of the Act through the distribution of false or misleading

⁸ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>

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information that is capable of harming the business interest of the complainant and hence a contravention of Section 10(1) of the Act?

- 4.65 Clause (a) of Section 10 of the Act provides that *'the distribution of false or misleading information that is capable of harming the business interests of another undertaking'* shall be deemed to constitute a deceptive marketing practices.
- 4.66 The Commission in its **Order In The Matter Of Complaint Filed By M/S DHL Pakistan (Pvt.) Ltd, (DHL Order)** it was stated that *'it is important to recognized that part of any business' identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value'*. In its **Order In The Matter Of Show Cause Notice Issued To M.S Jotun Pakistan (Pvt) Limited For Deceptive Marketing Practices**, the Commission held that *'To prove conduct under Section 10(2) (a) of the Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practices that has the potential to harm the business interests of the competitors'*.
- 4.67 The Complainant spends a considerable amount of money on advertisements to promote the STING energy drinks. Such advertising and promotion includes television commercials, newspapers and magazine advertisements, outdoor signs, and point of purchase displays. The amount spent on such advertising and marketing in Pakistan has been reproduced in Para 2.8 above. Through such advertisement of STING energy drink in Pakistan, the Complainant had created close association between the characteristic trade dress and packaging of STING product and created a distinctive representations of energy drinks in Pakistan. Since the Complainant had spent such heavy budgets on the marketing and promotion of the aforementioned packaging and design over a span of years, it had gained exclusive right to use the said trade dress or packaging and/or its elements, particularly in respect of energy drinks. The registration of trademark and label design of STING product has authorized the Complainant to use it without any let and hindrance. The unauthorized use of similar trademark and/or label design by any undertaking constitutes, prima facie, violation of Section 10 of the Act.
- 4.68 The Commission in its Order dated February 08, 2021 **in the Matter of Show Cause Notice issued to M/s A. Rahim Foods (Pvt.) Limited** held that *"Such purpose or object of "parasitic copying" and "copycat packaging" is driven from viewpoint and perspective of the target consumer"*. The trade dress and packaging of Respondent's STORM energy drink is a look alike and mimicry of the trade dress and packaging of the Complainant's STING energy drink. Consumers mostly base their purchasing actions on their first impressions of the product's trade dress and packaging and do not engage in detailed and considered examination of the product itself or of the concerned trade dress and packaging.
- 4.69 Therefore, it can be established that the unwary consumer of Complainant's STING energy drink is more prone to look at the over-all impression of the trade dress and packaging of STORM energy drink, which is deceptively similar to STING energy drink, could be duped

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into making transactional decision of purchasing the Respondent's STORM energy drink under false or misleading pretense instead of the Complainant's STING energy drink.

- 4.70 A use of deceptively similar trade dress and packaging has been indicated of Respondent's intent to pass off their STORM energy drink to cause confusion; to cause mistake or deceive unwary consumers as to the origin of Respondent's STORM energy drink; and to dupe the unwary consumer to believe that the Respondent's STORM energy drink is related to or connected with Complainant and share same or similar qualities, which have a potential to cause harm and damage the Complainant's businesses, reputation and goodwill.
- 4.71 The Commission in the *Matter of M/S. DHL Pakistan (Pvt.) Ltd* reported as **2013 CLD 1014** has held that, '*it is important to recognize that part of any business' identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value.*'
- 4.72 The Respondent's use of similar trade dress and packaging would result in dilution of the Complainant's brand value which has accrued in favor of the Complainant in respect of trade dress and packaging of its energy drink STING and, as such, capable of harming the business interest of the Complainant.
- 4.73 Based on the above, it can be established that, Respondent's practice of parasitic copying of Complainant's trade dress, which appreciably impairs the consumer's ability to make an informed decision due to confusing similarities between the Complainant's product and the Respondent's product, being inherently deceptive, is in fact capable of harming the business interest of the Complainant in contravention of clause (a) of subsection (2) of Section 10 of the Act.
- 4.74 It has been observed that the product 'STORM' has been marketed and sold throughout Pakistan and there is no doubt that the impact of its marketing takes place throughout Pakistan and cannot be termed being restricted to any specific territorial boundaries within Pakistan,

5. CONCLUSION AND RECOMMENDATION:

- 5.1 The businesses spend a substantial amount of resources to build their brand identity, distinguish their products from competitors and build a reputation in the market. The four principle devices undertakings use to distinguish themselves are trade names, trademarks, service marks and trade dress. Broadly speaking, a trade mark can be anything that individualizes that good and services of a given enterprise and distinguishes them from the goods and services of others. These elements serve as trademarks, provided that they perform the function of uniquely identifying the commercial origin of products and/or distinguishing the product. Trade dress or packaging is also a principle component undertakings use to distinguish themselves and it refers to a product's physical appearance- size, shape, texture and design, the way a product is presented or wrapped.
- 5.2 The Respondent's marketing of its product in very similar packaging to the Complainant certainly would not only affect the consumer's capacity to make an informed choice and cause

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deception but would also hinder competition as it would be no longer based on honesty and fairness. One of the main aims of the Act is to ensure that competition is fair and not distorted. Tests have shown that where products are packed in a similar way, consumers get confused and sales of the imitated product are reduced in a way that is not the case when the packaging is clearly different from the brand⁹.

- 5.3 In view of the above, the Respondent appears to be in violation of Section 10 of the Competition Act 2010, in particular, Section 10 (2) (d) which prohibits *fraudulent use of another's trademark, firm name, or product labeling or packaging*; Section 10(2)(b) which prohibits *false or misleading information including information which lacks a reasonable basis related to price, characteristic, properties, suitability of use and place of production (origin) of the product*; and its conduct also appears to be *capable of harming the business interest of the Complainant* in terms of Section 10 (2)(a) of the Act.
- 5.4 It is, therefore, proposed that these, *prima facie*, violations under the Act, warrant initiation of proceedings against M/s Meezan Beverages (Pvt) Limited under Section 30 of the Act.



M. Salman Zafar
Director
(Enquiry Officer)



Riaz Hussain
Assistant Director
(Enquiry Officer)

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