

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 HILAL FOODS (PRIVATE) LIMITED AGAINST
M/S S.M.FOOD MAKERS/VOLKA FOOD INTERNATIONAL
FOR DECEPTIVE MARKETING PRACTICES**

BY

Mohammad Salman Zafar, Marryum Pervaiz & Faiz ur Rehman

Dated: May 12, 2020

1. BACKGROUND:

- 1.1 M/s Hilal Foods (Private) Limited (hereinafter referred to as the ‘**Complainant**’), through M/s. JUS & REM, filed a complaint against M/s S.M. Food Makers / Volka Food International (hereinafter referred to as the ‘**Respondent**’), with the Competition Commission of Pakistan (the ‘**Commission**’) for alleged violation of Section 10 of the Competition Act, 2010 (the ‘**Act**’), pertaining to Deceptive Marketing Practices.
- 1.2 It was alleged in the complaint that the Complainant is engaged in the production of confectionary items, whereas the Respondent has been fraudulently involved in parasitic copying of the packaging of the Complainant’s various famous confectionary items in violation of section 10 of the Act.
- 1.3 Based on the preliminary fact finding, the Commission initiated an enquiry in accordance with sub section (2) of Section 37 of the Act by appointing Mr. Mohammad Salman Zafar, Director (OFT), Ms. Marrayum Pervaiz Joint Director (OFT) and Mr. Faiz ur Rehman, Deputy Director (OFT) , as enquiry officers (hereinafter collectively referred to as the ‘**Enquiry Committee**’). The Enquiry Committee was directed to conduct the enquiry on the issues raised in the complaint and to submit its Enquiry Report by giving findings and recommendations *inter alia* on the following:

Whether the allegations levelled in the complaint filed by the Complainant constitute a, prima facie, violation of Section 10 of the Act?

2. THE COMPLAINT:

- 2.1 This section summarizes the contentions raised in the complaint by the Complainant:
- 2.2 That the Complainant and Respondent herein are undertakings within the meaning of Section 2(1) (q) of the Act and the titled complaint has been filed on behalf of the complainant company by Barrister Naeem Shahid, Head of Legal, Hilal Foods (Pvt) Ltd. The term Complainant where the context so requires refers to the Hilal Foods and means and includes the Complainant, affiliated companies and successors-in-interest.
- 2.3 That the Complainant is a leading Pakistani company engaged in the business of manufacturer and merchant of a wide range of sweet, bakery, and confectionery products including but not limited to sweets, candies, toffees, chocolates, cakes and other allied products and have been marketing and selling quality products since 1957 throughout Pakistan. The Complainant has evolved and become Pakistan’s leading manufacturer and merchant of sweet, bakery and confectionery products with the mission to give, “Reasons to Smile” to its consumers with the best tasting, most delicious choices in a wide range of confectionery and beverages for all occasions.
- 2.4 The Complainant strongly believes in respect, integrity and being a socially responsible company. As part of this mission, the Complainant continues to invest in its people, their

talents and capabilities. The products come in an array of flavors, shapes and sizes and can be enjoyed by kids and adults alike.

- 2.5 That the Complainant has a wide range of confectionery and bakery items in the market that includes, sweets, candies and chocolates, biscuits, cakes, and other allied products While the Complainant regularly introduces new products under various brand names which includes, amongst others, Cup Kakes, Kakes, **Hajmola, Ding Dong, Tulsi, Fresh-up, Pan Pasand, Chorani Chatni, etc.** (hereinafter referred to as the “**Hilal Products**”), it has continued the exclusive and uninterrupted use of its products in order to signify its long-term commitment to the consumers and create consumer loyalty. The Complainant has been involved in the production and supply of high quality and hygienic confectionery products for over 48 years. The Complainant's unwavering adherence to quality standards has resulted in the Complainant obtaining the trust of consumers across the country as well as overseas, who without hesitation acquire Complainant's products.
- 2.6 The Complainant by dint of hard work and substantial investment in the shape of money, time and labour has become a symbol of quality and reliability. The Complainant has also worked tirelessly in building the reputation in Pakistani confectionery industry and played a key role in developing an international market for its products thereby earning substantially the foreign exchange thus contributing to the national economy.
- 2.7 The Complainant made substantial investments and expansion in processing facility that would adhere to the high standards and principles that have governed the Complainant's business for decades. The state of the art manufacturing plant was established at Hyderabad that has recently been shifted to Karachi. Through continuous research and the desire to strive for quality products, Complainant manufacture its products using the latest technology, and the most sophisticated tools available. State of the art testing labs, as well as highly competent employees ensure that quality is never compromised and Complainant's status of market leader in the confectionery industry is constantly maintained and built upon.
- 2.8 That the Complainant firmly believes in following strict quality assurance programs at all levels. The Complainant puts great emphasis towards customers' satisfaction while maintaining an optimal quality standard. Through methods of preventive management, Hilal Foods quality department tests out all possible scenarios that could result in a negative consumer response or recurrence of problems.
- 2.9 The skilled employees at the quality department ensure that the quality assurance program is implemented in the letter and spirit. The Complainant conducts inspections at three stages of production: incoming, online as well as final inspection to ensure the highest degree of the quality possible. A state of the art lab equipped with the latest technology in quality testing helps Complainant in maintaining this high standard of quality.
- 2.10 That the Complainant Hilal Foods also follows the following International standards:
- ISO 14001 (EMS)

- OHSAS 18001
 - BRC (B) for Baking
 - BRC for Confectionery.
 - HALAAL.
- 2.11 These standards and certifications provide the complainant with the license to compete with most companies in the International market and ultimately gain acceptance within foreign consumers.
- 2.12 That Complainant's research methodology relies on in-depth Local and International market surveys. Innovative ideas are tested for practicality by sampling products within the R&D lab and specific segments of consumers within the market. Product development is parallel to research conducted through various tests within the market resulting in a positive feedback at the time of product launching. Exhaustive laboratory tests ensure that the products are not only safe for consumption but also create customer appeal through unique blends of flavors, colors, and packing. Market surveys are conducted not only to see responses to sample products within the target market, but also to gain insight into new or changing market trends. The results of this ensure the Complainant that existing and new products will be a level above its competitors while a strict level of quality for customer satisfaction is maintained. Furthermore, all products sold by the Complainant are certified, and internationally recognized, as *Halal*.
- 2.13 That by virtue of long, extensive and exclusive quality production, the Complainant has acquired valuable reputation and goodwill and the products manufactured by the Complainant are demanded by purchasers of all classes and public and recognized as quality goods emanating from the Complainant's company and none else. The products manufactured/ marketed by the Complainant are made in accordance with international standards as such they are very much popular and in great demand through-out the country. In addition, the export and consumer patronage of Complainant's products in the foreign market establishes beyond any shadow of doubt that the envious goodwill and reputation of the Complainant is not restricted to the geographical boundaries of Pakistan.
- 2.14 That it is a matter of fact that due to the hard earned goodwill and reputation of the brand name/ trade name/ trade mark / house mark "***Hilal***", Complainant's products bearing new and distinctive trade dress always become instant hit in the market and within the introductory period stocks usually get sold. That due to the colossal publicity of the product sold or offered for sale by the Complainant as an innovator and creative trendsetter the Complainant is well aware of the importance and worth of its intellectual property rights and being a diligent corporate responsible entity the Complainant has taken all necessary measures to secure its said invaluable proprietary rights. In this regard the brand name/ trade name/ trade mark / housemark Hilal as well as Hajmola, Ding Dong, Tulsi, Fresh-up, Pan Pasand, Chorani Chatni, etc. and all the other brands are either duly registered with the Trade Marks Registry, Intellectual Property Offices, Government of Pakistan or application for such registration is pending with the authority.

- 2.15 That in addition to the above, the Complainant has also enhanced the protection of its Proprietary rights by securing registration of the artistic work in labels / trade dress for the aforesaid marks and its multitude of artistic labels are registered in accordance with Copyright Laws.
- 2.16 The Complainant has clearly established an extremely identifiable brand identity and Intellectual Property Value by using distinguishable brand/product names for the different set of product range and each product is marketed under combination of distinct Marks, Trade Dress/Colour Scheme, Protected Artistic Work for its packaging and logo(hereinafter referred to as the “Complainant’s IP”). That in light of the above registrations, the Complainant’s IP, as aforementioned are the duly protected intellectual property of the Complainant and as a consequence the Complainant holds the exclusive rights in respect of Complainant’s IP for manufacture, sale, distribute, trade and/or offer for sale products under Complainant’s IP. Therefore the use of the Complainant’s IP or any similar variation, in any manner whatsoever by any unauthorized person, entity or company is in express violation of the prevalent and governing laws and tantamount to the offence of Infringement, Passing off, Unfair competition and/or Misrepresentation.
- 2.17 The Complainant has expended great resources and energy in developing Hilal Products, researching various aspects of consumer behavior and the interplay between brand identity and consumer sensory experience. The Complainant is one of the few businesses in Pakistan to have focused and lays great emphasis on Intellectual Property Rights. The Complainant has made extensive use of the Complainant’s IP in its branding strategy, all its product packaging, advertisements, promotional materials, etc. The Hilal Products, in particular, are clearly identifiable through their colour schemes, placement of features and overall packaging design. The extensive use of the Complainant’s IP has created a deep-seated, distinct and inextricable link between the Complainant and the Complainant’s products in the minds of the general public.
- 2.18 That the Complainant primarily relies on the Complainant’s IP to differentiate its products as the Complainant, in order to survive in this era of rough competition has regularly been introducing unique brand names and the products to attract consumers such as Fresh Up, Cup Cake, Froot up, Bake Time, Chocolate Chip Kake, Jumbo Kake, Swiss-Roll, Khopra Candy, Pan Pasand, Amrod Chaat, Chorani Chatni, Choco4, Fantasy delights, Heart chocolate, Hilal Chocobite & Darbar etc. as depicted herein for convenience of the Commission.





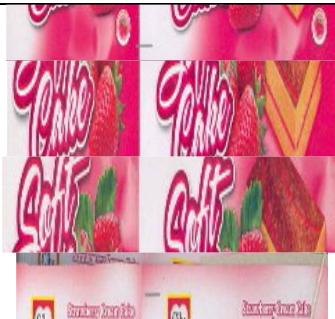
- 2.19 That in addition to the Complainant's IPRs for Hilal Products, the Complainant individually and painstakingly developed the text and other distinctive cum attractive features to be placed on the packaging for each product thus every product holds a unique trade-dress. The Complainant strived to ensure that Complainant's products would sufficiently provide enough information in strict compliance of the laws being a responsible corporate citizen of Pakistan.
- 2.20 That the Complainant has come a very long way since its inception and as a result of its focus on quality, continuous investment in research and development, and extensive and effective marketing strategy, the Complainant has been able to build a very strong brand identity and Intellectual Property Value, resultantly all the products under Complainant IPRs have become embedded in the national consciousness and become symbols of quality and reliability. The Complainant's role in the development of high quality sweet, bakery, and confectionery products in Pakistan have been lauded internationally.
- 2.21 The concept of brand protection and civil offense of deceptive marketing practices though dates back to centuries however, the recent enactment and the decisions taken by the Court and Tribunal have expanded the same immensely. With the advent of global village the reparation and goodwill of brands is no more confined to geographical boundaries and the notion of a single brand name, and an undertaking's identity is now indelibly linked with a range of "*sensory trademarks*," which include, labels, colour, sound and smell, and the protection of which is necessary to ensure fair competition. This is adequately reflected in the Act, which under s. 10(d) mandates that no undertaking shall resort to the fraudulent use of another's trademark, firm name, or product labeling or packaging.
- 2.22 The Complainant has developed distinctive trademark, an instantly identifiable immensely attractive product labeling and packaging that serves the primary purpose of identifying the Complainant as the source of the products. The Complainant's IPRs is also a symbol of quality and attracts consumers. The misuse of such brand or packaging inevitably causes the consumer to be deceived and/or misled regarding the origin of the product more particularly when end consumers are mostly small children. Moreover, the misuse of such brand or packaging inevitably results in diluting the goodwill and eroding the exclusivity of the brand and/or product packaging.
- 2.23 That during the course of its business the Complainant learnt from the market sources that Respondent herein had illegally imitated and copied the **Complainant's IP** in respect of Complainant's product "**Fresh up**" thereby infringing the vested exclusive rights of the

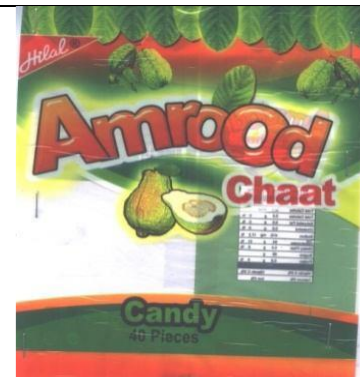
Complainant. Being aggrieved thereof the Complainant had filed a suit for the injunction and damages before the learned Intellectual Property Tribunal at Lahore against the Respondent herein and taking cognizance in the matter the learned Tribunal has granted an injunction order in favour of the Complainant. The Respondent has been served in the matter who contested the matter which is pending adjudication.

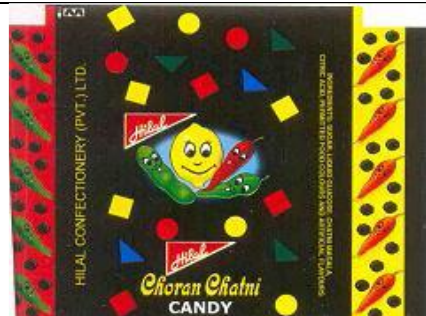
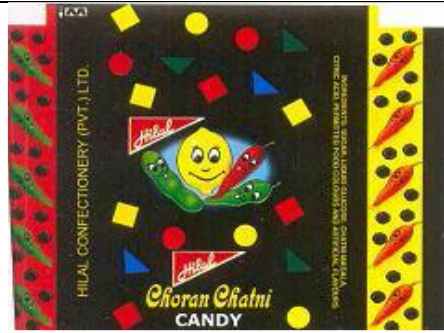
- 2.24 That during the course of its business the Complainant learnt from the market sources that Respondent herein had illegally imitated and copied the Complainant's IP in respect of Complainant's product "**Cup Kake Strawberry**" thereby infringing the vested exclusive rights of the Complainant. Being aggrieved thereof the Complainant had filed a suit for the injunction and damages before the learned Intellectual Property Tribunal at Lahore against the Respondent herein and taking cognizance in the matter the learned Tribunal has granted an injunction order in favour of the Complainant. The Respondent has been served in the matter who contested the matter which is pending adjudication.
- 2.25 That despite pendency of the subject suit and order of the Court the Respondent remained adamant to infringe the exclusive proprietary rights The Respondent named above has distorted healthy competition by entirely copying the Complainant's IP and used the recognition and goodwill associated with Complainant's Products Packaging for unjust personal gains. The Respondent has, to the best of Complainant's information has been carrying on his business for quite some time however, seeing the immense success, exceptional demand, instant market acceptability and envois reputation or recognition of Complainant's product under Complainant's IP the Respondent remained adamant to exploit the said recognition, reputation and immense demand of Complainant's product under the Complainant's IP.
- 2.26 That the Respondent continued the use of the intimated packaging as the said Respondent was unable to make an impact in the market when tried to sell its own products. It is abundantly evident that the Respondent has launched its product to directly compete with the Complainant by using deceptive marketing practices. The Respondent's launched the packaging / label designs that have been substantially copied from the Complainant's product labeling and packaging, in particular the Respondent has made identical use of the identical colour themes and get-up as depicted below that of **Complainant's IP**, which *prima facie*, establishes the bad faith on part of the Respondent. The dishonesty and fraudulent intent on part of the Respondent can safely be gauged from the fact that Respondent is not only copying **Complainant's IP** but at the same time Respondent is following and tracing the footsteps of the Complainant. The comparative chart of products of the both the parities, few of which are depicted herein;

RESPONDENT'S DECEPTIVE PRODUCTS	COMPLAINANT'S ORIGINAL PRODUCTS
	
	
	











2.27 That from the foregoing it is established beyond any shadow of doubt that the Respondent had before themselves the genuine and original products of the Complainant when it adopted trademarks and/or designed or redesigned its packaging therefore Respondent's actions are willful, deliberate and intentional. The Respondent has left no stone unturned to deceive the public at large through the aforesaid unauthorized adoption of the trademark

and other intellectual property of the Complainant to foster its ulterior motives as such Respondent is guilty of violating section.10 of the Act.

- 2.28 That, the Respondent could have created an independent brand identity for its products but has chosen to use packaging and label design so as to unjustly capitalize on the hard work put in by the Complainant. The Complainant is a market leader but competes fairly with a range of undertakings. The Respondent's actions are causing substantial deception and confusion and resulting in the unjust dilution of the Complainant's goodwill and exclusivity with regards to its trademarks, packaging and labeling.
- 2.29 The overall net impression of **Complainant's IP** is taken into account and interpreted, the Respondent's packaging of its product is *prima facie* disseminating false / misleading information to the consumers that belongs to that of the Claimant in violation of the Act. The infringement of **Complainant's IP** strongly possesses the tendency to mislead the consumers and induce them to make transactional decisions based upon the duplication of **Complainant's IP**.
- 2.30 The Respondent's actions constitute an instance of Unfair Competitive Practice that has been internationally termed as *Parasitic Copying*. The British Brands Group, a group of leading British Brands, recently revealed in a research paper that "*Parasitic (or copycat) packaging is used by competitors to boost sales by confusing and misleading consumers. Distinctive features of a familiar brand's packaging are hijacked in order to dupe shoppers into buying something they believe to be that brand, made by the brand manufacturer or sharing the reputation of that brand. The competitor gets a free ride on the back of the brand's reputation, investment and innovative efforts.*"
- 2.31 The European Commission (EC) has also shown its concern towards such practices which are considered to be in violation of Competition Laws, and in contravention of the EC's Unfair Commercial Practices Directive. In 2012, the EC specifically looked at the unfair commercial practice of Parasitic Copying through the commission a Europe wide study. The study recommended the strengthening of laws regarding Parasitic Copying and outlined the effects of such actions, which are detailed below:-

Effect 1 - *At least some of the consumers who purchase product B do so on the assumption that they are purchasing product A (even if they may realise after purchase that this is not the case);*

Effect 2 - *At least some of the consumers who purchase product B do so on the assumption that products A and B have the same commercial origin, or come from economically linked undertakings (even if they may realise after purchase that this is not the case);*

Effect 3 - *At least some of the consumers who purchase product B do so on the assumption that products A and B, having different commercial origins, are substitutes, being identical or highly similar in their specifications, nature and quality. As a result, the price becomes the sole or main criterion under which the choice between the two products is to be made.*

- 2.32 That, high-quality goods emanating from the Complainant are extremely popular. These products no longer cater to a niche market but are being demanded by a large proportion of the population representing a wide spectrum of society. In this context, the likelihood of deception and confusion, as well as brand erosion is substantially magnified. That the likelihood of deception and confusion as to trade origin or trade connection is more serious because the goods are of the same descriptions, the channels of trade are the same and the goods are used and purchased by the same class of consumers/purchasers.
- 2.33 The Respondent's deliberate, willful and intentional actions are contrary to fair and healthy competition in the industry and are actionable under Section 10(2)(d) of the Act . The Complainant has been and will continue to be irreparably harmed and damaged by the Respondent's conduct. The Complainant also has sustained damages as a direct and proximate result of the Respondent's infringement of the **Complainant's IP** and if the Respondent is allowed to carry on with its deceptive and unfair practices, the Complainant will suffer substantial business losses, and suffer irreparable harm to its goodwill, reputation and exclusivity.
- 2.34 Moreover, these deceptive marketing practices have a direct impact on the consumer and it is in the interest of the general public that the Respondent should be stopped from such deceitful actions.
- 2.35 It is therefore that action be taken against the Respondent to redress the injury and harm done to the Complainant's business and goodwill.
- 2.36 Finally, the Complainant sought the following prayers from the Commission
- a. Initiation of proceedings in accordance with the procedure of the Competition Act 2010 and as per s.30 of the Act
 - b. An order restraining the Respondents from engaging in Deceptive Marketing Practices, and specifically restraining the Respondents from copying / infringing the Complainant's packaging, product, brand names and/or other trademarks, or engaging in unfair business practices towards the Complainant.
 - c. An order directing the confiscation, forfeiture, destruction or market withdrawal of all deceptive, copied or infringing products or publicity materials.
 - d. An order directing the confiscation, forfeiture, destruction or market withdrawal of all of Respondent's products that carry deceptive, copied or infringing trademarks, packaging, label design and/or colour scheme.
 - e. An order directing the Respondent to remove from its website or domain all of Complainant's products that carry deceptive, copied or infringing trademarks, packaging, label design and/or colour scheme

- f. An order directing the Respondents to compensate the Complainant for losses suffered as a result of its deceptive marketing practices, which the Complainant estimates to be in the region of 50 Million Rupees.
- g. Any other relief deemed by the Honorable Commission.

3. SUBMISSIONS OF THE RESPONDENT:

- 3.1 The complaint was forwarded to the Respondent for comments/reply vide Commission's letter dated March 20, 2019. In response, the Respondents, requested for extension in time period to furnish the requisite comments/ reply.
- 3.2 The Respondent was accordingly granted the extension in time period to file their comments vide letter dated April 05, 2019. Thereafter, a reply was received from the Respondent containing its comments to the complaint, the particulars of which are summarized in the following paragraphs.
- 3.3 That the Respondent, established his business in the year 1990, is primarily engaged in manufacturing of Food products. Over the years, the firm has established itself as one of the largest biscuits & other confectionery products selling company in Pakistan. Reportedly S.M. Food Makers is the third largest biscuits selling company in Pakistan. The Respondent has a wide range of confectionery products being sold in all provinces of country and International markets as well.
- 3.4 The Respondent is also engaged in export of food items to USA, UK, Portugal, Saudi Arabia, Malaysia, Afghanistan, Tanzania, Yemen, Angola, and Bangladesh & to some African Countries. The Respondent has latest German and Italian production lines and the products produced in these lines are highly hygienic and safe to eat. The Respondent sells all his products under umbrella of house marks namely **Gibs, Soney, Donal, Giggly, Cookania, Kims**. Reportedly, more than 400 different products of above mentioned items are being manufactured by this group.
- 3.5 Our manufacturing units have the most modern facilities to produce the following quality food products:-

- | | |
|-------------------------------|-----------------------------------|
| 1) <i>BISCUITS</i> | 6) <i>DEPOSITED CANDIES</i> |
| 2) <i>TOFFEES</i> | 7) <i>CHOCOLATE BARS</i> |
| 3) <i>BUBBLE GUMS</i> | 8) <i>CHOCOLATE COATED WAFERS</i> |
| 4) <i>HARD BOILED CANDIES</i> | 9) <i>NIMKO</i> |
| 5) <i>JELLY</i> | 10) <i>CAKE</i> |

- 3.6 That the Respondent Company is 1st largest in Punjab and 2nd largest biscuits and other confectionery products manufacturer company in Pakistan. The Respondent holds rich experience of more than three decades in production and sales of food products. The Respondent is providing thousands of employment in Punjab and KPK. This group is paying good taxes and also selected as good tax payer and qualified for civil award. The Respondent has also been awarded from the Honorable Prime Minister of Pakistan as exporter of the year.
- 3.7 That the Respondent is a creative innovator and recognizes the importance and value of its intellectual property and being a responsible corporate citizen, the Respondent has taken all necessary measures to protect its rights. In this regard, the Respondent has registered and or/filed applications to protect their artistic work including its calligraphy, color scheme and peculiar style through registrations filed with the registrar of Trade Mark and Copyrights, Intellectual Property office.
- 3.8 That in view of the aforesaid submission, the registered and well know house mark **GIBS, SONEY, DONAL, GIGGLY, COOKANIA, KIMS**, are the exclusive Intellectual Property of the Respondent and the Respondent possess full legal authorization to use the said trademark for its goods and services, during the course of trade under law. It is submitted that the Respondent is a responsible and law abiding company and has never been in contravention of any intellectual property laws and its use of intellectual property rights is fully protected under the fair use provisions of the relevant laws.
- 3.9 That the Respondent's product under House mark **GIBS, SONEY, DONAL, GIGGLY, COOKANIA, KIMS**, are marketed, distributed and sold throughout Pakistan and its popularity extends beyond just major cities and into every corner of the country. The popularity of the product is heightened owing to the competitive pricing adopted by the Respondent, which is made possible through the Respondent well integrated sales and distribution network.
- 3.10 The Respondent dedication to growth through reinvestment can be evidenced by the unparalleled level of expenditure being borne by the Respondent in the promotion of its products to customers cross Pakistan.
- 3.11 That it is pertinent to mention that the Complainant's products are marketed and sold under their house mark "HILAL". In view of all above facts, there is no likelihood of deception or confusion between the trademarks and packaging of the Complainant and Respondent products.
- 3.12 That it is respectfully submitted, that there is absolutely no element of infringement, passing off or unfair competition on the part of the Respondent nor there any indication of deception on the part of Respondent. It is further submitted that the Complainant are trying to abuse the court's process to disrupt the business of the Respondent so that the Complainant can enjoy the market without any healthy competition. It is the actions of the Complainant that resort to unfair competition.

- 3.13 That it is reiterated here that the products of Respondent are easily recognizable as being products of the Respondent Company by any lay man and there is no question of any confusion or deception with the products of the Complainant. It was submitted that the Respondent Company is becoming gaining group and becoming popular by the day which is the only ill motive behind filing the instant Complaint.
- 3.14 That the Complainant has no, *prima facie*, case in his favour against the Respondent and the averments of the complaint from the bare perusal disclose imaginary situation without any reality, with no cause of action accrued in favour of the Complainant.
- 3.15 That the Complainant allegation are based upon a concocted story, which even otherwise do not even in the remotest sense corroborates with the documents attached with the Complaint and the trumped-up circumstances. These facts alone are apparent enough to prove that Complainant filed this Complaint with malafide intentions against the Respondent, complaint is absurd in nature and merits dismissal. The Complainant is wasting frivolous litigation, as the titled complaint has been moved with ulterior motives to this forum abundantly prove that the Complainant is trying to employ coercive methods on the Respondent by using fake and forged litigation.
- 3.16 That the acts of Complainant is tantamount to blackmail the Respondent by invoking this complaint, as they have no valid proofs for their concocted story. The Complainant is not only trying to black mails the Respondent by using these kinds of tactics but also wasting precious time of this forum and other concerned authorities. The same tactics was used by the other competitor against other competitors, but the superior courts refused to accept the version of Complainant company, and Divisional Bench of the Hon'ble Sindh High Court dismissed the appeal of the Complainant company in case titled as ;

**“ENGLISH BISCUITS MANUFACTURERS (PVT) LTD
VS
PAKISTANI DAIRY PRODUCTS (PVT) LTD
2016 CLD 847**

“where in Hon'able Court said that we do not see any reason that how a buyer of these two distinct products would get confused in buying the Respondent's products as that of the appellant. As discussed earlier, both, the appellant as well as Respondent, have a distinct what can more appropriately termed as, a house mark (**PEEK FREANS AND LOGO**) So to say, and their products are generally being sold by recognizing these Trademarks or house marks as their respective marks and not by individual Trade Marks, appeal was dismissed”.

- 3.17 That the Complainant has no, *prima facie*, case in his favour, as the Complainant has no legal justification whatsoever to file the title Complaint and is liable to be dismissed with compensatory costs under section 35-A CPC.
- 3.18 That the Respondent reserves its right to initiate proceedings (criminal as well as civil) against the Complainant, which become reason of filing such fake and frivolous case.

- 3.19 The Respondent also submitted preliminary objections para-wise comments to the complaint on following grounds:
- 3.20 That the Complainant has not come in the court with clean hands, they deliberately concealed true facts from this forum; hence they are not entitled to get any relief from this forum.
- 3.21 That the Complainant for his own mala fide reasons, is deliberately seeking to mislead and confuse this honorable Tribunal by selectively quoting facts regarding the case and withholding important and vital information from this Honourable forum to complaint his own purpose. In view of the same, the truth is being completely distorted for the benefit and assistance of this Honourable forum, therefore a correct narration of facts is provided herein below, which wholly substantiates the mala fides of the Complainant and also the fact that its misrepresenting the facts, concealing the same and willfully seeking to obstruct the course of justice.
- 3.22 That the Complainant/claim is false, frivolous and vexatious. It has been filed with malafide intention and ulterior motives just to harass and blackmail the Respondent, The purpose behind filling the instant complaint is to eliminate healthy Competition from the market. hence it is not maintainable and liable to be rejected and the Respondent is entitled for an appropriate compensation.
- 3.23 That the Complainant has no cause of action against the Respondent and the petition is liable to be dismissed.
- 3.24 That the Complainant has no locus standi to file the petition against the Respondent.
- 3.25 That no board resolution has been annexed with the plaint hence the Complaint is not properly instituted and is liable to be dismissed.
- 3.26 It was submitted that Respondent has honestly and bonafidely adopted the name “**FRESH IN**” with House mark and Logo “**GIBS**” for its product. It is pertinent to mention here that the Complainant used “**FRESH UP**” for its product with House mark and Logo “**HILAL**”, without prejudice to the foregoing, it is submitted that the use of word “**FRESH**” is a generic term and lacks distinctive, common word and so many other companies internationally and nationally use the word fresh for its products.
- 3.27 It was submitted that Respondent has honestly and bonafidely adopted the name “**CUP CAKE**” with House mark and Logo “**GIBS**” for its product. It is pertinent to mention here that the Complainant products are marketed and sold under their trademark/house mark “**HILAL**” as HILAL CUP KAKE STRAWBERRY. It is pertinent to mention here that the Complainant has never marketed its goods in any advertisement or promotion as exclusively CUP KAKE. It has always been marketed as a whole brand which is “**HILAL CUP CAKE STRAWBERRY**”. On the other hand Respondent has always used the complete mark which is “**GIBS CUP CAKE**”. The Respondent have always placed their

Household name “GIBS” on all their Products. Hence there is no chances of any confusion. It was further submitted that the use of word “CUP KAKE” is a generic term and lacks distinctive, common word and so many other companies internationally and nationally use the word for its products, Same does not qualify to be registered in terms of Section 14 of the Trademarks Ordinance 2001, nobody can claim exclusive right on it. The same was mentioned/Disclaimed **on page 34 of complaint at complainant CUP KAKE Trade Mark Certificate, Registration of this TRADE MARK shall give no right to the exclusive use of word and device of KAKE/CAKE.**

- 3.28 That it is submitted that it is totality of the both the Trademarks that needs to be seen as has been held by the Superior Courts to ascertain possibility of confusion or deception. Respondent has always used House mark “GIBS” for its Products. This is evidenced from all the advertisement of the defendants. There is no likelihood of any confusion or deception when both companies products are seen in totality and placed side by side as “GIBS” & “HILAL” Products. It is submitted that Complainant cannot pick and choose one particular generic part of the trademark to claim infringement and it has to be seen in totality, under the trade mark laws the exclusive rights of a common word, name or alphabets cannot be assigned to anybody, therefore the whole words in all the marks are common and all have different labels and designs which are not similar confusing with the mark of Respondent.
- 3.29 It was submitted that the products of the Respondent are easily recognizable as being products of the Respondent Company by any lay man and there is no question of any confusion or deception with the products of the Complainant.
- 3.30 Finally, the Respondent sought the following prayers from the Commission:
- 3.31 That in the light of above submissions, it was, therefore, most respectfully prayed that the instant complaint may kindly be dismissed with special costs, as the Complainant has no cause of action against Respondent, consequently the complaint is misconceived and not maintainable and cannot be entertained, considered or processed and merits dismissal as Complainant did not approach this forum with clean hands. The Complainant tried to mislead this Learned forum as there is no cause of action ever arose in favour of Complainant and against Respondent.
- 3.32 Any further relief which this learned tribunal deems appropriate, may also be granted.

4. REJOINDER BY THE COMPLAINANT

- 4.1. The comments/reply of the Respondent was forwarded to the Complainant for its comments/rejoinder vide letter dated May 20, 2019. The Complainant requested for extension in time for submission in time, which was granted to it through letter dated June 11, 2019.

- 4.2. The Complainant submitted its rejoinder vide letter dated June 17, 2019, the contents of which are reproduced below:
- 4.3. That the Respondent has miserably failed to specifically and categorically deny or disprove the element of infringement of Complainant's intellectual property rights in the registered trademark as well as copyright in label design, forming basis of the titled complaint as such on this count alone the prayer made by the Complainant company in the titled complaint merits to be granted to meet the ends of justice.
- 4.4. That the Respondent has made best efforts to hoodwink the true picture from the learned Commission by submitting large number of copies of registration certificates obtained by the said Respondent or the affiliated company under cover their counter statement / reply, however, such voluminous bunch is of no of no avail to the said Respondent primarily for the reason that under settled law no right is granted for any title of the work under the provisions of Copyright Ordinance 1962. Likewise, large number of trademark registration obtained by the Respondent is with conditions of disclaimer. Moreover, no iota of independent evidence is attached by the Respondent with the said reply to disprove the case of the complainant.
- 4.5. That the element of dishonest adoption and bad faith on part of the Respondent is *prima facie*, evident from the record of the case before the Commission and in the absence of any justification for the unwarranted and illegal adoption, copying and use of trademark/trade dress by Respondent that is exactly identical or deceptively similar to the trademark /trade dress of the Complainant the discretion vested with the learned Commission ought to be exercised in favour of the Complainant.
- 4.6. That dishonesty and malafide on part of the Respondent is apparent and *prime facie*, established from the record as Respondent is guilty of copying international brands as detailed herein;
- i. Trademark GIBS is internationally registered in the name of Khairul Azizi Bin Ramli, Malaysia.
 - ii. Trademark KIMS registered in the name of HAPIMI FOOD CO. Philippines.
 - iii. Trademark DONAL is Internationally registered in the name of M.Noer HA, Indonesia.
 - iv. Trademark KIMS registered in the name of ORKLA CONFECTIONERY & SNACKS, Denmark.
- 4.7. Thus, owing to the fact that Respondent is guilty of infringing not only Complainant's intellectual property rights but also the rights of other proprietors of trademarks carrying on businesses internationally, the Respondent is liable to be penalized accordingly.

- 4.8. It was submitted that no amount of use of any trademark or copyrighted work in breach of intellectual property rights of others can create any legitimate right or title over the imitated or pirated work. The Respondent having no case to defend or justify the illegal adoption and use of imitated trademark and trade-dress in utter breach of law has attempted to misguide the Commission.
- 4.9. It was reiterated that Respondent is guilty of infringing the intellectual property rights of others.
- 4.10. It was submitted that under law the Respondent cannot justify or otherwise be permitted to imitate or trade upon intellectual property of their competitors in any manner whatsoever.
- 4.11. It was humbly stated that mere filing of large number of trademark or copyright certificates, without disclosing the actual artistic work, is of no use to the Respondent who is, *prima facie*, guilty of copying or imitating international brands. Moreover, the Respondent, even otherwise, have miserably failed to convincingly refute or disprove the case of infringement as set up by the Complainant against them. The Respondent is thus liable to be penalized under the law.
- 4.12. It is correct that HILAL is the house mark of the Complainant and a registered trademark as well, however, it is not the case of the Complainant that Respondent are infringing said house mark of the Complainant. The grievance of the Complainant is with regard to the imitation, piracy and infringement of trademark FRESH-UP, and the trade dress thereof, to the extent of which the Respondent has failed to put up any defense thereby making an unqualified admission of the act of piracy and infringement of proprietary rights of the Complainant. That the Respondent commenced the use of the imitated packaging as the said Respondent was unable to make an impact in the market when tried to sell its own products.
- 4.13. It is abundantly evident that the Respondent has launched its product to directly compete with the Complainant by using deceptive marketing practices. The Respondent's launched the packaging/label designs that have been substantially copied from the Complainant's product labeling and packaging, in particular the Respondent has made identical use of the identical colour themes and get-up as depicted below that of **Complainant's IP**, which, *prima facie*, establishes the bad faith on part of the Respondent. The dishonesty and fraudulent intent on part of the Respondent can safely be gauged from the fact that Respondent is not only copying **Complainant's IP** but at the same time Respondent is following and tracing the footsteps of the Complainant.
- 4.14. It was humbly submitted that alleged case law referred by the Respondent neither pertains or related to the Complainant nor has any application on the facts of the case in hand more particularly owing to the fact that product of the contesting parties were dissimilar being biscuits and ice-creams. In addition thereto the mark of the plaintiff in that case was

registered with a condition or limitation. The Respondents has made best efforts to misguide the Commission to hoodwink the illegal act of piracy and imitation.

- 4.15. The Respondents have rather made an unqualified admission having failed to comment upon the use of imitated trade-dress that is exactly identical and deceptively similar to that of the registered trademark and trade-dress of the Complainant. Whatever stated in the memo of complaint is reiterated for the same of brevity. It is false to allege that trademark FRESH IN and FRESH UP, being used in respect of identical products under identical trade-dress are dissimilar. It is established from the record that Complainant holds exclusive rights in respect of the said trademark FRESH-UP and under the relevant provision of law being Section 40 of the Trade Marks Ordinance 2001 use of trademark as a whole or a part thereof without the consent of the registered proprietor is an act of infringement.
- 4.16. CUP CAKE of Respondent and CUP KAKE of Complainant are identical and similar trademarks that are being used in respect of identical products under deceptively similar trade dress. Thus, use of trademark CUP CAKE by Respondent amounts to infringement and in violation of Section 10 of the Act.
- 4.17. Needless to state that Respondent has not only miserably failed to establish any cogent, valid or substantiating defense but said Respondent through their willful act of omission or commission have admitted the case as put forth by the Complainant as such subject complaint merits to be accepted and relief be granted as prayed.
- 4.18. Unless the relief as prayed is granted the Complainant shall be seriously prejudiced and suffer irreparably.
- 4.19. It is pertinent to mention here that after submission of rejoinder, a letter dated June 17, 2019 was sent to the Complainant. Since after examination of the rejoinder, further clarifications were required, the Complainant's counsel was requested for a meeting on June 26, 2019 and also to provide documentary evidence in support of their allegations. The meeting fixed on June 26, 2019 could not be held due to non-availability of the Complainant's counsel. Therefore in order to provide another opportunity a letter dated July 29, 2019 was again issued for a meeting on August 01, 2019, but the Complainant's counsel did not avail the opportunity and he appeared at his own on September 17, 2019. In the earlier meeting held on September 17, 2019, the Complainant's counsel was advised in clear terms to submit all the relevant information, documents in support of the allegations, enabling the enquiry committee to conclude their enquiry report but waiting for considerable period, nothing was heard from their side. As the enquiry committee wanted to conclude its report at the earliest, it kept reminding the Complainant's counsel through telephonic calls/reminders but the requisite material was not submitted. Thus, in order to provide them a final opportunity, a detailed letter referring therein all the previous communications dated September 20, 2019 was issued and it was clearly mentioned that

all the required documents, material in support of their contention should be supplied latest by the October 04, 2019 failing which the enquiry committee shall be constrained to proceed further and conclude the pending enquiry on the basis of documents, material available on record. In spite of final reminder the Complainant's counsel failed to supply the requisite information, material.

5. ANALYSIS:

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

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

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

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

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

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

5.2 As mentioned in para 1.3 *ibid* the mandate of this enquiry report is to determine whether there is a *prima facie*, violation of section 10 in terms of the allegations and relief demanded in the complaint.

5.3 In the instant matter the Complainant filed a complaint with the Commission for grant of relief under section 10 in terms of section 10 2(d) of the Act specifically. For ease of reference section 10(2)(d) is elaborated below:

d) fraudulent use of another's trademark, firm name, or product labelling or packaging;

5.4 In order to determine the above stated, various matters pertinent to significance of trademarks and their association with section 10 of the Act would subsequently be discussed.

5.5 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 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 or and combination thereof;

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;

- 5.6 Additionally, the International Trademark Association defines trade dress as, “*Trade dress is the overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others. It may include the design or shape/configuration of a product; product labeling and packaging; and even the décor or environment in which services are provided. Trade dress can consist of such elements as size, shape, color and texture, to the extent that such elements are not functional. In many countries, trade dress is referred to as ‘get-up’ or ‘product design’.*”
- 5.7 For the purposes of this Enquiry Report, the trade dress shall be taken in the meanings of product labeling and packaging, in accordance with Section 10 of the Act.
- 5.8 Such uniquely developed trade or service marks and trade dress 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.
- 5.9 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.
- 5.10 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.

- 5.11 Furthermore, owing to its properties, significant efforts have been made across the country, to protect such proprietary rights. Whereas fraudulent use of these rights constitutes a clear violation of law including Section 10(2) (d) of the Act, which prohibits “*fraudulent use of another’s trademark, firm name, or product labeling or packaging*”.
- 5.12 Consequently, it can be concluded that the Commission also observes that trade/service mark infringement must be prevented to avoid consumer injury. Furthermore, their curtailment is necessary to safeguard the overall brand equity of an undertaking as trade/service marks not only affect the perception and good will of the product, but also have a significant impact on its sales. Therefore, in order to protect consumers from anti-competitive behavior and to make provisions to ensure free and fair competition in the market, intellectual property rights must be protected and Section 10 of the Act must be enforced, in this case particularly through the mandate outlined above.

- 5.13 The Copyrights Ordinance, 1962¹, defines a ‘Copyright’ as:

Copyright means inter alia the exclusive right

- *to reproduce the work*
- *to publish the work*
- *to perform or broadcast the work*
- *to make any translation or adaptation of the work” (for details see s. 3).*

- 5.14 **Before analyzing, it is pertinent to mention here that the Complainant had initially alleged that the Respondent has imitated and copied two of their products namely “Fresh Up” and “Cup Kake”. Apart from that, the Complainant also generally mentioned about their nineteen other products which were being produced by them. However, when asked to clarify as to whether it’s all products covered in the complaint are being imitated, no satisfactory reply was submitted. Under the situation, the Complainant was again requested through detailed letters to furnish the colored copies of updated trademark and copyright certificates along with their graphical representations and the packaging in respect of the products which are being copied by the Respondent. But in spite of reminders and various meetings held with the Complainant’s counsel, they only supplied the requisite supporting material of six products which were included in the complaint in general terms. Thus, the enquiry committee is constrained to keep their main focus on eight products i.e. Fresh Up. Cup Kake, Bake Time Marble Cake Slices, Bake Time Plain Cake Slices, Bake Time Fruit Cake Slices, Khopra, Pan Pasand, Chorani Chatni as highlighted in the complaint which were found duly registered with the IPO Pakistan and their packaging was also provided by the Complainant in support of their allegations .**

¹ http://www.wipo.int/wipolex/en/text.jsp?file_id=129350#LinkTarget_851

5.15 In view of the above, a comparative analysis of each of the eight products is made hereunder:-

I. Fresh Up vs. Fresh In

5.16 The Complainant submitted that one of its confectionary product is “Fresh Up”, which is illegally imitated and copied by the Respondent. (Copy of the Complainant’s Fresh up Trademark Certificate is attached as Annexure-A). The Following trademark of its product “Fresh Up” is registered in Pakistan:

Sr. No	TRADEMARK	Reg. NO	CLASS	STATUS	Date of Reg.
01	Fresh Up	145727	30	REGISTERED	27-Dec-1997

5.17 The Complainant’s proprietary rights in respect of the distinctive Label Design and Artistic Work associated with “Fresh Up” trademark are well protected under the respected Copyright laws. In this context, it is relevant to point out that there are six different flavors of Fresh up Gum i.e. Fresh up Ice mint, Fresh up Peppermint, Fresh up Strawberry, Fresh up spearmint, Fresh Up big Bite Spearmint, Fresh up Pan. However, the Complainant only submitted the copyright certificates of Fresh up Spearmint, Fresh Up big Bite Spearmint and Fresh up Pan., (Copy of the Complainant’s Fresh up Spearmint, Fresh up Big Bite and Fresh Up big Bite Spearmint Copyright Certificates are attached as Annexure-B), the particulars of which are as follows:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Fresh UP Spearmint	28182	Label Design	REGISTERED	29-Mar-2013
02	Fresh UP Pan	17811	Label Design	REGISTERED	3-June-2008
03	Fresh UP Big Bite Spearmint	22904	Label Design	REGISTERED	21-Feb-2011

5.18 When the Respondent was asked to submit trademark certification along with graphical representation of their trademark. They submitted the following information. (Copy of the Respondent’s Fresh In trademark pending application is attached as Annexure-C).

Sr. No	TRADEMARK	Application. NO	CLASS	STATUS	Filing Date
01	Fresh In	447640	30	PENDING	20/02/2017

5.19 The Respondent was also asked to submit documents pertaining to their proprietary rights in respect of the distinctive label design and artistic work associated with trademark “Fresh In” protected under the law of Copyright. (Copy of the Respondent’s Fresh In Spearmint Box and Wrapper Copyright Certificate is attached as Annexure-D). The detail of the Copyright Certification of the Respondent is given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Fresh In Spearmint (Wrapper)	24162-Copr	Label Design	REGISTERED	12-Oct-2011
02	Fresh In Spearmint (Box)	24160-Copr	Label Design	REGISTERED	12-Oct-2011

5.20 In view of the above, it is evident that the trademark “Fresh Up” of the Complainant was registered in the year 1997 prior to the application of the Respondent’s trademark “Fresh In “in the year 2017 which is still pending for registration with the Trademark Registry.

5.21 But at the same time, it is pertinent to mention here that the Complainant, under the trade mark no. 145727, has *no rights to the exclusive use of all descriptive matter appearing on the label*. Additionally as per the trademark certificate, it was initially registered on December 27, 1997 and subsequently, it was renewed for a period of 10 years w.e.f 27th December, 2004. When the Complainant was asked to submit the updated copy of the Trademark certificate, it failed to supply the same. Apart from that, as per the search report published on 03/07/2019 “Fresh” logo has already been registered under file No. 144548 in the year 22/10/1997 by M/s. Gujranwala Food Industries (Pvt) Ltd. Which means that the Complainant has no exclusive right on the word Fresh. The Complainant only has the right on the word “Fresh Up” as a whole and if someone uses Fresh In or Fresh on than there is no, *prima facie*, violation.

5.22 It is to be mentioned here that Complainant initially provided Copyright certificate of “Fresh up Spearmint” along with its graphical representation which is depicted below:



Complainant’s Graphical Representation of Product Box



Respondent’s Product Box

5.23 If we compare graphical representation of the Complainant and the Respondent they neither appear to be identical nor have close resemblance with each other. In the Complainant's box lime, emerald green and white color is used in the background while in the Respondent's box chartreuse green and white is used in the background. In the Complainant's box a bunch of mint leaves are present beneath the trade name which cover the central area of the box while in the Respondent's box only four leaves are present on the lower left corner of the box. In the Complainant's trade name there is a circular green colored circle present beneath the word 'up' while in the Respondent's name there is a floral circular red colored shape present beneath the word 'in'. 'Refreshing gum ' is written below the trade name on the Complainant's box while in the Respondent's box it's written above the trade name. On the Complainant's box an open dark green gum from which liquid green filling is oozing out is placed on the lower right corner while a light green colored gum is placed below the name on the Respondent's box. The Complainant's box is half the size of that of the Respondent's. The trade name is written in white color on the Complainant's box while it's yellow and white on the Respondent's box.

5.24 The product box packaging provided by the Complainant of both the Complainant and Respondent are given below:



Complainant's Product Box



Respondent's Product Box

5.25 Similarly, it may be observed that the packaging of both the products are different from each other. In the Complainant's box lime and emerald green is used in the background while in the Respondent's box chartreuse green and white is used in background. In the Complainant's box three mint leaves are placed along the open gum on the lower right corner of the box while in the Respondent's box four leaves are present on the lower left corner of the box. In the Complainant's trade name there is a circular green colored circle present beneath the word 'up' while in the Respondent's trade name there is a floral circular red colored shape present beneath the word 'in'. On the Complainant's box an open dark green gum from which liquid green filling is oozing out is placed on the lower right corner while a light green colored gum is placed below the name on the Respondent's box in the middle. The Complainant's box is half the size of that of the Respondent's. The trade name is written in white color on the Complainant's box while it's yellow and white on the Respondent's box.

5.26 Later on the Complainant provided two more Copyright certificates along with graphical representations which are as following.



Complainant's Graphical Representation of Product Box



Comp. Graphical Representation



Respondent's Product Box

5.27 From the above images, it can be established that there is no similarity between the products of both the Complainant and Respondent. Furthermore, the artistic work which includes expressions/style/getup of the work used by the Respondent is also different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be safely concluded that the allegations made against Respondent have not been proven and it is not found involved in use of the Complainant's registered trademark, product labeling, packaging and the overall trade dress.



Complainant's Product Wrapper



Respondent's Product Wrapper

5.28 Moreover, if we look at the wrapper of both the Complainant and the Respondent's product they have almost same shade of green. Additionally the house mark Hilal of Fresh up is in red back ground and present on the upper left corner of the gum whereas Fresh In instead of mentioning their house mark Gibbs on the upper left corner of the gum they have made a red color droplet so that the wrapper gives almost the same look

as Fresh up. It is important to point out that red color has nothing to do with the device as the device is of green color and the center filling is also of green color. Apart from that the placement of the trade name Fresh In is exactly the same as Fresh up i.e. slightly tilted and in the center. Besides, the Tag line used by Fresh up is “Centered filled refreshing gum and the tag line of Fresh In is liquid center filled refresher gum. The Respondent also uses the same distinct, bright, green color to market its product and has, like the Complainant, chosen to use almost the same shade for writing the text on the packaging.

- 5.29 It is to be noticed that the Copyright Certificate furnished by the Respondent of its product wrapper is different from the one that is currently available in the market and also supplied by the Complainant, which establishes the fact that the Respondent in the past and even currently have been using the wrapper which is deceptively similar to the Complainant’s wrapper. With this much similarities between both the product wrapper packaging the enquiry committee is unable to establish the fact that who is the prior user of the said product wrapper packaging. Moreover, it is pertinent to mention here that the Complainant has failed to provide any evidence regarding the usage of product wrapper packaging prior to that of Respondent, neither had it provided any type of registration regarding the said packaging.
- 5.30 In light of the above, it is concluded that the trademark and the artistic work (label design) used by the Respondent is different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be safely concluded that the allegations made against Respondent have not been proven and it is not found involved in use of the Complainant’s, trademark, product labeling, packaging and the overall trade dress.

II. Cup Kake vs. Kup Cake

- 5.31 The second product for which the Complainant alleged that the Respondent has copied its trademark and trade dress is Cup Kake. At the outset, it is to be pointed out that there are two products of the Complainant in question;
- I. Cup Kake Center filled with Strawberry Jam
 - II. Cup Kake Strawberry flavour
- 5.32 The Complainant only provided Copyright certificate of its product Cup Kake Center filled with Strawberry Jam and it has not provided Copyright certificate of its product Cup Kake Strawberry Flavour. Also the Complainant only provided the packaging of Responden’ts product Kup Cake Center filled with Strawberry Jam, so the analysis will be limited to Cup Kake Center filled with Strawberry Jam.

5.33 The Complainant submitted trademark and Copyright certification along with graphical representation of its trademark and copyrighted label design and artistic work. (Copy of the Complainant's Cup Kake Trademark Certificate is attached as Annexure-E). The detail of the trademark certification of the Complainant is given below:

Sr. No	TRADEMARK	Reg. NO	CLASS	STATUS	Date of Reg.
01	Cup Kake	338899	30	REGISTERED	28-Jan-2016

5.34 The Complainant's proprietary rights in respect of the distinctive Label Design and Artistic Work associated with "Cup Kake" Center filled with Strawberry Jam trademark is well protected under the respected Copyright laws. (Copy of the Complainant's Cup Kake Center filled with Strawberry Jam Copyright Certificate is attached as Annexure-F). The particulars of which are as follows:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Cup Kake Center filled with Strawberry Jam	33445	Label Design	REGISTERED	22-Mar-2016

5.35 The Respondent was asked to submit trademark and Copyright certification along with graphical representation of their trademark and copyrighted artistic work and label design. The Respondent submitted documents pertaining to their proprietary rights in respect of their trademark "Kup Cake". (Copy of the Respondent's Kup Cake trademark pending application is attached as Annexure-G). The detail of the trademark pending application of the Respondent is given below:

Sr. No	TRADEMARK	Application. NO	CLASS	STATUS	Filing Date
01	Kup Cake	367275	30	PENDING	24-July-2014

5.36 The Respondent also submitted documents pertaining to their proprietary rights in respect of the distinctive label design associated with trademark "Kup Cake" protected under the law of Copyright. (Copy of the Respondent's Cup Cake Strawberry Flavour Copyright Certificate is attached as Annexure-H). The detail of the copyright certification of the Respondent is given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Cup Cake Strawberry Flavour	36445-Copr	Label Design	REGISTERED	09-March-2018

5.37 In view of the above, it is evident that trademark “Cup Cake” of the Complainant was registered in the year 2016, whereas the Respondent applied for registration of its trademark “Kup Cake” in the year 2014, which is still pending for registration with the Trademark Registry. It is pertinent to mention here that the Complainant, under the trade mark no. 338899, has no rights to the exclusive use of the word and device of Kake/Cake. As per the disclaimer, the Complainant has no exclusive right on the word *Kake/Cake*. Complainant only has the right on the word Cup Kake as a whole, but at the same time the Respondent has modified the word Kup in a deceptive style, it has been using Kup with an alphabet “K” instead of “C” in a manner that an ordinary consumer specially a kid may be deceived with this slight modification.

5.38 If we compare Graphical representation of the Complainant’s and Respondent product, it is depicted below:



Complainant’s Graphical Representation of Product Box



Respondent’s Product Box

5.39 While comparing both, it is evident that the color combination of both are exactly same upper half is red and lower half is pink color. Both have used exactly same tag line .i.e. centered filled strawberry jam. The complainant has placed strawberry on the right side of the packaging whereas the Respondent has used the image of the strawberry in the lower middle part of the packaging. However, if we look at the overall packaging of both the products they are deceptively similar.

5.40 From the above paragraphs, it may be ascertained that both product packaging appear to share the same packaging color and are of the same material and feel. The Respondent has adopted a deceptively similar trademark, as that of the Complainant, on its product packaging. For an ordinary consumers of Cup Cake, most likely kids, the two packaging may appear similar and potentially deceptive.

5.41 In light of the paras above, it is concluded that the purpose of using the similar packaging color scheme and/or design/getup/expression of the product by the Respondent was to take benefit of the goodwill attached to the Complainant’s product and attract the consumers. Therefore, the act of using the similar trademark, color scheme, packaging as that of the Complainant by the Respondent is, *prima facie*, deceptive in nature. Therefore, the Respondent appears to be in violation of Section 10(1) of the Act in terms

of Section 10(2)(d) of the Act which prohibits *fraudulent use of another’s trademark, product labelling or packaging.*

5.42 As regards, the remaining six products, the third product which was alleged for infringement by the Complainant is “Bake Time Marble Cake Slices”.

III. Bake Time Marble Cake Slices vs. Cake Time Marble Cake Slices

5.43 Both the Complainant and the Respondent were asked to submit trademark and copyright certification along with graphical representation of their trademarks and copyrighted artistic work and label design and. **It is important to mention here that both the Complainant and the Respondent failed to provide their trademark certificates.** However, the Complainant provided the copyright certificate of its product wrapper, whereas the Respondent provided the pending application of its product box. (Copy of the Complainant’s Bake Time Marble Cake Slices Copyright Certificate and the Respondent’s Cake Time Marble Cake Slices Copyright pending application are attached as Annexure-I). The details of the Complainants and Respondents copyright certification and pending application are given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	BAKETIME MARBLE CAKE SLICES	37219	Label Design	REGISTERED	24-July-2018

Sr. No	Title	Application Type	STATUS	Filing Date
01	CAKE TIME MARBLE CAKE SLICES	Label Design	PENDING	29-SEP-2017

5.44 As regards the trademark, the Complainant does not have an exclusive right on the trade name, ‘Bake time’ and. the Respondent has been using its own trade name, ‘Cake Time’ on its marketing material which is different from the Complainant’s trade name. Since both the trade names of the Complainant and the Respondent are not registered neither they have provided any document which can prove that who is the prior user amongst them, hence it can be concluded that there is no *prima facie* trade mark infringement.

5.45 As regards the artistic work which includes expressions/style/getup of the work, it is to be pointed out that neither the packing was provided by the Complainant nor by the Respondent. So on the basis of the available information we will compare both the products. Graphical representation of both the Complainant’s product wrapper and Respondent’s product box packaging is given below:



**Complainant's Graphical
Respondent's Product wrapper**

**Respondent's Graphical
Representation of Product Box**

5.46 Upon comparison of the above images, we are of the view that the Complainant has used grey cutting board beneath the marble cake slices, whereas the Respondent has used red and white checkered napkin. Also the Complainant has used twisted chocolate rings on the lower left side of the packing while the Respondent has used dark chocolate cubes which are present on the lower right side of the packing. Placement of slices of cake pieces are different as well, Complaint has used single brown color in the background, whereas the Respondent has used two toned background. So on the whole the product wrapper of the Complainant is very much different from the product box of the Respondent.

5.47 The artwork used by the Respondent is different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be safely concluded that the allegations made against Respondent has not been proven and it is not found involved in use of the Complainant's, trademark, product labeling, packaging and the overall trade dress.

IV. Bake Time Plain Cake Slices vs. Cake Time Plain Cake Slices

5.48 The fourth product which we will discuss is Bake Time Plain Cake Slices of the Complainant. Both the Complainant and the Respondent were asked to submit trademark and copyright certification along with graphical representation of their trademarks and copyrighted 1 artistic work and label design. It is important to mention that both the Complainant and the Respondent failed to provide their trademark certificates. However, the Complainant has provided the copyright certificate of its product wrapper, whereas the Respondent has provided the pending application of its product box. Copy of the Complainant's Bake Time Plain Cake Slices Copyright Certificate and the Respondent's Cake Time Plain Cake Slices Copyright pending application are attached as Annexure J). The details of the Complainants and Respondents copyright certification and pending application are given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	BAKE TIME PLAIN CAKE SLICES	37221	Label Design	REGISTERED	24-July-2018

Sr. No	Title	Application Type	STATUS	Filing Date
01	CAKE TIME PLAIN CAKE SLICES	Label Design	PENDING	29-SEP-2017

5.49 As regards the trademark the Complainant does not have an exclusive right on the trade name, 'Bake time' and. Respondent has been using its own trade name, 'Cake Time' on its marketing material which is different from the Complainant's trade name. Since both the trade names of the Complainant and the Respondent are not registered neither they have provided any document which can prove that who is the prior user amongst them. Hence there is no, *prima facie*, infringement of trademark in this case.

5.50 As regards the artistic work which includes expressions/style/getup of the work, it is to be pointed out that the packing was provided by the Complainant and the Respondent. Images of both the Complainant's and Respondent's product box packaging are given below:



Complainant's Product Box



Respondent's Product Box

5.51 Upon comparison of the above images, we are of the view that the Complainant's product box is red colored while that of the Respondent has two colors red and skin in the background. On Complainant's box cake piece is placed on a grey platter while on the Respondent's box cake piece is placed on a red checkered napkin. Also on the Complainant's box a sunny side up fry egg is placed on the lower left side of the box while on the Respondent's box a half boil egg is shown that too on the lower right side of the box. Complainant's box has 6 packs in each packing while the Respondent's box has 12 packs each. In the Complainants box placement of sliced cake piece is vertical while in the Respondent's box cake piece slices are horizontal to the rest of the cake piece. The Complainant's house mark "Hilal" is placed on the upper left corner of the box while the Respondent's house mark "Gibs" is placed above the product name in the mid left side of the box.



Complainant's Product Wrapper



Respondent's Product Wrapper

5.52 As regards the wrappers, the Complainant's packing is almost double the size of that of Respondent. The Complainant's wrapper is of bright red while that of Respondent's is dark rose red which is used in the background and gives a total different look when seen together. The Complainant's product is double the price of that of the Respondent's. On the Complainant's wrapper a golden stamp is present on the lower right corner stating 'Baking experts' which is not on the Respondent's product wrapper. On the Respondent's wrapper 'Delicious, fresh and nutritious' is written on the lower right side. On the Complainant's wrapper an egg within the shell and a sunny side up egg is present of the left side while on the Respondent's wrapper a boil egg is present on the right side.

5.53 The artwork used by the Respondent is different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be safely concluded that the allegations made against Respondent have not been proven and it is not found involved in use of the Complainant's, trademark, product labeling, packaging and the overall trade dress.

V. Bake Time Fruit Cake Slices vs. Cake Time Fruit Cake Slices

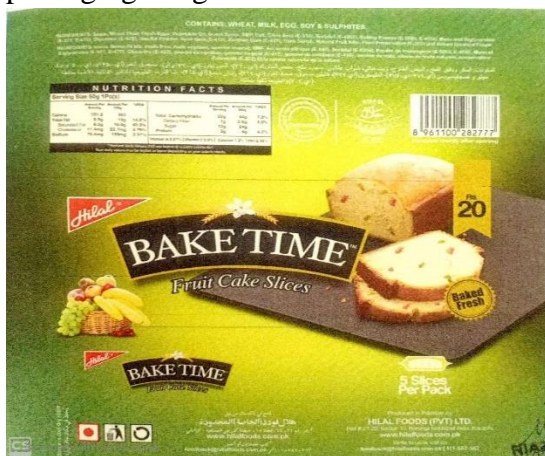
5.54 The fifth product which we are going to discuss is Bake Time Fruit Cake Slices. Both the Complainant and the Respondent were asked to submit trademark and copyright certification along with graphical representation of their trademarks and copyrighted label design and artistic work. It is important to mention that both the Complainant and the Respondent failed to provide the trademark certificates. However, the Complainant has provided the copyright certificate of its product wrapper, whereas the Respondent has provided the pending application of its product box. Copy of the Complainant's Bake Time Fruit Cake Slices Copyright Certificate and the Respondent's Cake Time Fruit Cake Slices Copyright pending application are attached as Annexure K). The details of the Complainants and Respondents copyright certification and pending application are given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	BAKE TIME FRUIT CAKE SLICES	37220	Label Design	REGISTERED	24-July-2018

Sr. No	Title	Application Type	STATUS	Filing Date
01	CAKE TIME FRUIT CAKE SLICES	Label Design	PENDING	29-SEP-2017

5.55 As regards the trademark the Complainant does not have an exclusive right on the trade name, 'Bake time' and the Respondent has been using its own trade name, 'Cake Time' on its marketing material which is different from the Complainant's trade name. Since both the trade names of the Complainant and the Respondent are not registered neither they have provided any document which can prove that who is the prior user amongst them. Hence there is no, *prima facie*. infringement of trademark in this case.

5.56 As regards the artistic work which includes expressions/style/getup of the work, it is to be pointed out that the packing was not provided by the Complainant but the Respondent provided its packaging. So on the basis of the available information we will compare both the products. Images of both the Complainant's and Respondent's product packaging are given below:



Complainant's Graphical Representation of Product Box



Respondent's Product Box

5.57 Upon comparison of the above images, we are of the view that the on the Complainant's box a bunch of fruits are placed on the lower left side in a bamboo basket while on the Respondent's box fruits are on the right side on the napkin along with cake piece. On the Complainant's box cherries are placed on the side of the fruit basket which is not present on Respondent's box. When we look at the Complainant's box's background color its light green from the center and spreading towards the ends it's dark green while that of the Respondent's box it is in two different colors the upper half is dark green and the lower half is light brown colored wooden cutting board panel. On the Complainant's box the placement of cake piece slices are in front of the uncut cake piece while on the Respondent's wrapper slices are on the right side of the rest of the cake piece.

5.58 So on the whole the box of the Complainant is very much different from the box of the Respondent. The artwork used by the Respondent is different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be

safely concluded that the allegations made against Respondent have not been proven and it is not found involved in use of the Complainant's, trademark, product labeling, packaging and the overall trade dress.

VI. Khopra Candy vs. SPECIAL KHOPRAA CANDY

5.59 The sixth product which we are going to discuss is the Khopra Candy. The Complainant was asked to submit trademark and copyright certification along with graphical representation of its trademarks and copyrighted artistic work and label design . The Complainant submitted that the following trademark of its product Khopra Candy is registered with the Trademark registry. (Copy of the Complainant's Khopra Candy Trademark is attached as Annexure-L).

Sr. No	TRADEMARK	Reg. NO	CLASS	STATUS	Date of Reg.
01	Khopra Candy	169427	30	REGISTERED	13-Mar-2001

5.60 The Complainant's proprietary rights in respect of the distinctive Label Design, Getup, and Artistic Work associated with "Khopra Candy" trademark is well protected under the respected Copyright laws. (Copy of the Complainant's Khopra Candy Copyright Certificate is attached as Annexure-M). The particulars of which are follows:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Khopra Candy	24401	Label Design	REGISTERED	30-Nov-2011

5.61 The Respondent was asked to submit trademark and copyright certification along with official representation of their trademarks and copyrighted label design and artistic work. The Respondent failed to provide its trademark registration.

5.62 The Respondent was also asked to submit documents pertaining to their proprietary rights in respect of the distinctive label design, get up and associated work associated with trademark "Special Khopraa Candy" protected under the law of Copyright. (Copy of the Respondent's Special Khopraa Candy Copyright Certificate is attached as Annexure-N).The detail of the copyright certification of the Respondent is given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	SPECIAL KHOPRAA CANDY	22862	Label Design	REGISTERED	31-JAN-2011

5.63 In view of the above, it is evident that trademark “Khopra Candy” of the Complainant was registered in the year 2001, whereas the Respondent has failed to submit any document to prove that its trademark is registered with the IPO. The Complainant though have not provided the updated trademark registration certificate still it can be concluded based on their prior registration and existence in the market that they are the right full owners of the trademark “Khopra Candy”. If we compare the trademarks of the complainant and the Respondent, it may be observed that the Respondent has added a word “Special” in a fraudulent manner to attract the consumers as it creates a deceitful distinction, also the Respondent has added a word “A” in Khopra just to give an impression that it is the same as Khopra candy of the Complainant.

5.64 As regards the artistic work which includes expressions/style/getup of the work, it has been observed the packaging provided by the Complainant is of the house mark “Soney” whereas the copyright certificate provided by the Respondent is of “Donel” house mark. Images of both the Complainant’s and Respondent’s product packaging are given below:



Complainant’s Product Box



Respondent’s Product Box

5.65 Upon comparison of the above images, it has been observed that the Complainant's Hilal house mark is on the upper left corner of the box while that of the Respondent's is in the center. The Complainant's box has blue palm trees while the Respondent's box has green palm tree which has green leaves and brown trunk. The Complainant's box has two blue palm trees on right side and one on left while the Respondent's box has two tilted green palm trees in the middle right center of the box above the open coconut. On the Complainant's box two coconuts are placed in the center one complete coconut with its husk and shell while the second one is open with its shell cut into two halves beneath it are the coconut tree leaves while on the Respondent's box two halves of a coconut are placed side by side. One half is bigger than the other and there are no leaves. On the Respondent's box an open candy is placed and coconut powder is oozing out from the center of it. Tag line is written in the center at the bottom of the box on Complainant's

box while it's written on the lower left side on the Respondent's box. Though the tag line used is the same but their writing styles are different. Also on the Complainant's box the tag line is written in capital letters while on Respondent's box only the word ' COCONUT' is written in capital when we look at the tag line. Respondent's box is bigger in size as compared to that of the Complainant's.

- 5.66 It is pertinent to mention here that the copyrighted box packaging is different from the one originally provided by the Complainant as discussed in the above para. Hence, it is concluded the copyrighted box packaging of the Complainant and the Respondent are different from each other. However the wrapper inside the box is deceptively similar.



Complainant's Product Wrapper



Respondent's Product Wrapper

- 5.67 Upon comparison of both the products wrappers, it has been observed that they look deceptively similar because the color combination is exactly the same. On the Complainant's wrapper Hilal house mark is on the top left corner while on the Respondent's wrapper house mark is missing instead a red colored droplet is placed on the top above the trade name to create confusion. In both the product's wrapper the word 'khopra' is written in white and 'candy' is written in red color and their writing styles are also quite similar. It is also highlighted that wrapper of candy inside the box is quite similar but it has not been copyrighted by either party also the both have failed to provide evidence of prior use of the said packaging. However the trademark used by the Respondent is deceptively similar to the Complainant since the Complainant is the rightful owner of the trademark Khopra candy from the year 2001, **hence it can be established that the Complainant is the prior user of the trademark Khopra candy and the Respondent have deceptively tried to copy its trademark on its wrapper packaging.**

- 5.68 In light of paras above, it is concluded that the purpose of using the similar/identical trademark "Khopra Candy" of the Complainant by the Respondent was to take benefit of the goodwill attached to the Complainant's product and attract the consumers. Therefore, the act of using the similar trademark, on the product wrapper by the Respondent is, *prima facie*, deceptive in nature. Therefore, the Respondent appears to be in violation of Section 10(1) of the Act in terms of Section 10(2)(d) of the Act which prohibits *fraudulent use of another's trademark, product labelling or packaging.*

VII. Pan Pasand vs. Pan Maza

5.69 The seventh product we are going to discuss is Pan Pasand. Both the Complainant and the Respondent were asked to submit trademark and copyright certification along with graphical representation of their trademarks and copyrighted artistic work and label design. It is important to mention here that both the Complainant and the Respondent failed to provide their trademark certificates. However, the Complainant has provided the copyright certificate of its product box, whereas the Respondent has provided the pending application of copyrights of its product box. Copy of the Complainant’s Pan Pasand Copyright Certificate and the Respondent’s Pan Maza Copyright pending application are attached as Annexure O). The detail of the Complainant’s Copyright Certificate and Respondent’s pending application are given below:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Pan Pasand	10745	Label Design	REGISTERED	13-Sep-2001

Sr. No	Title	Application Type	STATUS	Filing Date
01	Pan Maza	Label Design	PENDING	06-Feb-2013

5.70 As regards the artistic work which includes expressions/style/getup of the work, it is to be pointed out that the packing was provided by the Complainant and the Respondent. Images of both the Complainant’s and Respondent’s product packaging are given below:



Complainant’s Product Box



Respondent’s Product Box

5.71 Upon comparison of the above images, we are of the view that the Complainant's and the Respondent's box both have exactly the same color combination. In both the boxes house marks are placed on the upper left corner of the box. When we look at the boxes the size and dimensions are almost alike. A golden colored designed striped area is present at the bottom of both the boxes. Trade name on both the boxes are written in yellow color using almost the same writing styles. A big green betel leaf is present on both the boxes. Background consists of red and rust color on both the boxes.



Complainant's Product Wrapper



Respondent's Product Wrapper

5.72 Upon comparison of both the products wrappers, it was observed that both the wrappers look identical. Same design has been used, the candies have been wrapped in bright red colored foil. Both the wrappers start and end with a golden strips and the center is bright red color. Trade name of both the candies are written in yellow color. A single big flat betel leaf is present on both candy wrappers. On the Complainant's wrapper the golden area has brown colored betel leaf shapes and the Respondent's wrapper also has brown colored shapes though they are stars but they look quite similar because of the same color contrast being used.

5.73 In light of paras above, it is concluded that the purpose of using the similar packaging color scheme and/or design/getup/expression of the Complainant's box and wrapper by the Respondent was to take benefit of the goodwill attached to the Complainant's product and attract the consumers. Therefore, the act of using the color scheme, packaging as that of the Complainant by the Respondent is, *prima facie*, deceptive in nature. Therefore, the Respondent appears to be in *prima facie* violation of Section 10(1) of the Act in terms of Section 10(2)(d) of the Act which prohibits *fraudulent use of another's, product labelling or packaging*.

VIII. Choran Chatni vs. Choran Chaska

5.74 The eight product which we are going to discuss is “Choran Chatni”. The Complainant was asked to submit its trademark and copyright certification along with graphical representation of their trademarks and copyrighted label design and artistic work. The complainant submitted the following trademark of its product Choran Chatni which is registered with the Trademark registry. (Copy of the Complainant’s Choran Chatni Trademark is attached as Annexure-P).

Sr. No	TRADEMARK	Reg. NO	CLASS	STATUS	Date of Reg.
01	Choran Chatni	405887	30	REGISTERED	02-Mar-2018

5.75 The Complainant’s proprietary rights in respect of the distinctive Label Design, Getup, and Artistic Work associated with “Choran Chatni” trademark is well protected under the respected Copyright laws. (Copy of the Complainant’s Choran Chatni Copyright Certificate is attached as Annexure-Q) , the particulars of which are follows:

Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Choran Chatni	10746	Label Design	REGISTERED	13-Sep-2001

5.76 The Respondent was asked to submit its trademark and copyright certification along with official representation of their trademarks and copyrighted artistic work and label design. The Respondent failed to submit its documents pertaining to its proprietary rights in respect of its trademark “Choran Chaska candy”, however the Respondent has submitted the copyright application for label design of its product Choran Chaska. (Copy of the Respondent’s Choran Chaska Copyright certificate is attached as Annexure-R The detail of the copyright application of the Respondent is given below:

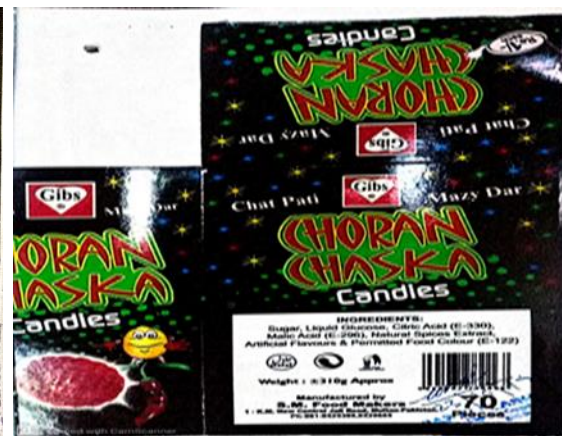
Sr. No	Title	Reg. No.	Application Type	STATUS	Date of Reg.
01	Churan Chaska	24797	Label Design	REGISTERED	18-Jan-2012

5.77 In view of the above, it is evident that trademark “Choran Chatni” of the Complainant was registered in the year 2018, however the Respondent has not submitted any document to prove that its trademark is registered with the IPO. It is pertinent to mention here that the trade name submitted by the Respondent in its Copyright certificate is “Churan Chaska”, whereas the product packing annexed with the Copyright certificate shows the trade name as “Choran Chaska”. If we compare, both the trademarks it has been observed that the first word of the trademark i.e. “Choran” is exactly the same, however in the

second word first three letters are similar, whereas the rest three alphabets are slightly different. The second word of the Complainant's trademark is "Chatni, while the Respondent is using the word "Chaska along with Chorán. So the Respondent has deceptively changed the last three letters of the second word very tactfully, like instead of "tni" they have used "ska" which is fraudulent practice on part of the Respondent. The Artistic work/label design of Chorán Chatni of the Complainant was also registered with the central Copyright office prior to application of the Respondent for registration of artistic work/label design. Therefore it can be safely concluded that the Complainant was the first and prior user of the trademark "Chorán Chatni".



Complainant's Graphical Representations of its Product Box



Respondent's Graphical Representation of its Product Box

- 5.78 From the above images, the enquiry committee is of the view that there is no similarity between the products of both the Complainant and Respondent. Furthermore, the artistic work which includes expressions/style/getup of the work used by the Respondent is also different from the Complainant and causes no confusion in the mind of an ordinary consumer. Based on these facts, it can be safely concluded that the allegations made against Respondent have not been proven and it is not found involved in use of the Complainant's product labeling, packaging and the overall trade dress.
- 5.79 In light of paras above, it is concluded that the purpose of using the similar/identical trademark "Choran Chatni" by the Respondent was to take benefit of the goodwill attached to the Complainant's product. Therefore, the act of using the similar trademark, as that of the Complainant by the Respondent is, *prima facie*, deceptive in nature. Thus, the Respondent appears to be in violation of Section 10(1) of the Act in terms of Section 10(2)(d) of the Act which prohibits *fraudulent use of another's trademark*.
- 5.80 From the above, analysis it can be concluded that the similarities found in the elements of the above mentioned packaging's 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.

5.81 In view of the facts, it is safe to infer that the Respondent has not only used the deceptively similar trademarks in several products but it has also been imitated the Complainant's packaging. Therefore, the conduct of the Respondent falls under the ambit of Parasitic Copying also, which means;

“Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, color combination and graphic arrangement) but usually there is just enough difference to avoid a clear cut trade mark infringement. Still they often generate deception or confusion among consumers²”

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

5.83 **Apart from the above products, the Complainant stated in general terms that the Respondent has launched few products copying from the Complainant's product labeling and packaging. But the Complainant's counsel did not submitted the complete evidence in support of its claims though they were requested time and again to provide a complete set of documents i.e. colored copies of updated trademark and copyright certificates along with their graphical representations and the packaging in respect of the products. It is obvious that in the absence of complete documents in support of their claims, it is difficult for the enquiry committee to analyze and to make up a case of deceptive marketing practices for those specific products. Thus the enquiry committee is not in a position to make specific recommendations for the products where required necessary evidence is missing.**

5.84 Considering the fact that the Respondent is fraudulently using the Complainant's trade mark and trade dress, it can be concluded that the Respondent is also engaged in “distribution of false [and] misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, method, place of production, properties and quality of products”. This conduct of Respondent falls under, *prima facie*, violation of Section 10(1), read with sub-section 2(b) of the Act.

5.85 The overall conduct of the Respondent, i.e., fraudulent use of another's trademark product labeling and packaging, in *prima facie* violation of Section 10(2)(d) of the Act, is also capable of harming the business interest of the Complainant by stealing its rightful customers, negatively affecting its sales and profits, and damaging its good will.

² Jorge Novais Goncalves, EC, DG Internal Market and Services “Similar Packaging: an IP, competition or a consumer protection matter?”

Resultantly, as the Respondent's conduct is capable of harming the business interest of the Complainant, the Respondent appears to be in, *prima facie*, violation of Section 10(2)(a) of the Act.

6. CONCLUSION & RECOMMENDATION

- 6.1 It has been observed that the Complainant in their complaint impleaded M/s.S.M Food Makers/Volka Food International as Respondent, whereas during the proceedings they did not provide any documentary proof against M/s. Volka Foods International. They being two different entities i.e. M/s. S.M Food Makers Limited and M/s. Volka Foods International Limited, neither the Complainant provided any material with respect to M/s.Volka Food International Limited nor did the Respondent cover M/s. Volka Food International Limited in its reply. Therefore, no action appears to be warranted against M/s. Volka Food International Limited.
- 6.2 This enquiry report was aimed at examining the allegations of the Complainant. In view of the position stated in the preceding paras, it appears that the Respondent is fraudulently using the deceptively similar trademark and trade dress of the Complainant. As a result, the Respondent has, *prima facie*, entered into deceptive marketing practices in terms of the provisions of Section 10 of the Act.
- 6.3 As distribution of false and misleading information and IP infringement attracts the consumers into purchasing goods they might otherwise have not opted for gives the fraudulent undertakings an unfair advantage over the fair competitors and also harms their business. Thus, in the interest of general public at large, and ordinary consumer in specific, the undertakings which are involved in misleading and unfair trade practices must be discouraged from selling their products in a deceptive manner and they should also be directed to adopt such practices which are transparent and provide the consumers/customers true and correct information about their products.
- 6.4 Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiation of proceedings against M/s. S.M Food Makers Limited, under Section 30 of the Act.

Mohammad Salman Zafar
Director
Enquiry Officer

Marryum Pervaiz
Joint Director
Enquiry Officer

Faiz ur Rehman
Deputy Director
Enquiry Officer