

# **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 DABUR PAKISTAN (PVT.)  
LIMITED AND M/S DABUR INDIA LIMITED AGAINST M/S HILAL FOOD (PVT.)  
LIMITED FOR ALLEGED DECEPTIVE MARKETING PRACTICES**

**BY**

**Mohammad Salman Zafar, Marryum Pervaiz & Amin Akbar**

**Dated: October 08, 2020**

## 1. BACKGROUND

- 1.1 M/s Dabur India Limited and M/s Dabur Pakistan (Pvt.) Limited Jointly (the ‘**Complainant**’) through The Tareen Chambers, filed a complaint against M/s Hilal Food (Pvt.) Limited (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 Sindh High Court (hereinafter referred to as “SHC”) had passed interim orders to permit both the Complainant and Respondent to use the trade mark “HAJMOLA”, But the Respondent in his recent letters to Pakistan Broadcasting Association (the ‘**PBA**’) and publications in National Newspaper (Dawn & Jang) has circulated misleading/false information regarding the association and use of trademark “HAJMOLA”, and by doing so has distorted healthy competition in the market.
- 1.3 Based on the preliminary fact finding, the Competent Authority initiated an enquiry in accordance with sub section (2) of Section 31 of the Act by appointing Mr. Mohammad Salman Zafar, Director (OFT), Ms. Marryum Pervaiz, Joint Director (OFT) and Mr. Amin Akbar, Management Executive (OFT) as enquiry officers (collectively the ‘**Enquiry Officers**’) to conclude the enquiry.
- 1.4 The aim of the enquiry was to determine whether, *prima facie*, by using similar trademark to Dabur India Limited’s trademark:
  - a) The Respondent’s conduct *is capable of harming the business interest* of the Complainant in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) of the Act; and/or
  - b) The Respondent’s conduct *pertains to the distribution of false or misleading information to consumers related to character, place of production, properties and quality of goods*, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (b) of the Act?

## 2. THE COMPLAINT:

- 2.1 This section summarizes the contentions raised in the complaint:
- 2.2 The Complainant is a well-known registered Company under relevant laws of India and Pakistan and carrying on International and country wide business under the trade name “HAJMOLA”. The Complainant was founded in 1884 at Kolkata India with the largest herbal and natural product portfolios in the world.
- 2.3 The flagship product of Complainant namely “Dabur Hajmola” is an Ayurvedic digestive tablet, having a vibrant presence in Pakistan and worldwide, including countries like India, United Kingdom, United States of America and United Arab Emirates. It is well known mark protected under the Paris Convention and material provisions of the trademark laws of Pakistan, *inter alia*, s. 86 of the Trade Marks Ordinance 2001. In order to protect intellectual property rights through all proper and legal means, the Complainant has obtained registration for trade mark in various countries like; on 02.08.1972 it obtained registration of trade mark “HAJMOLA” under Trade and Merchandise Act, 1958 of India, on 17.07.1987 it obtained registration for artistic work/cartoons forming part of “HAJMOLA” under Trade and Merchandise Act, 1958 of India and on 18.04.1980

with Trade Marks Act, 1938 of United Kingdom. (Copies of Trade Marks registration certificates are attached as **Annexure-A**)

- 2.4 Initially the operation of “Dabur Hajmola” in Pakistan was being run by Asian Consumer Care (the “**ACC**”) incorporated in 2006. On 23.11.2015 Dabur Pakistan (Pvt.) Limited entered into a license agreement with Dabur India Limited in order to Manufacture and sell products under the brand name “HAJMOLA”. The complainant further highlights that he is entitled for a “permitted use” in Pakistan in terms of ss. 2(iii) and (xxxi) of Trade Marks Ordinance 2001 and having more than 80% of market share, Highest advertisement expenditure & more than 100,000 retail outlets across Pakistan. (Copy of license agreement is attached as **Annexure-B**)
- 2.5 The Complainant alleged that he has been in litigation with the Respondent from several years in relation to the trade mark “HAJMOLA”, these matters are sub judice in the honorable courts of Pakistan. Till date no decree or judgment has been passed. The principle of natural justice and due process prevent any party from becoming a judge in its own cause by passing judgmental remarks, making misleading statements or interfering with the administration of justice, especially when the *litigation* is pending before the independent courts. The chronology of the pending litigations is as below:
- i. The suit No. 14 of 1995 titled “Dabur India v. Hilal Confectionary” (the “**First Dabur Suit**”), was filed before the Honorable Sindh High Court (hereinafter referred to as “**the Court**”), for passing-off along with interim injunction, to restrain the Respondent from passing-off and infringing Complainant’s Hajmola copyright in respect of its wrappers. The ad-interim injunction to restrain the Respondent was granted to the Complainant by the single judge of the court on 21.05.1999, which is reported in PLD 2000 Sindh 139. The Respondent preferred an appeal before the divisional bench of the court in 1999. The divisional bench through order dated 11.04.2000, on fulfilment of certain conditions by the Respondent, has pleased to permit both the parties to use the trade mark “HAJMOLA” on their respective labels as an interim arrangement thereby conferring a concurrent right in favour of both the parties (the “**Interim order in First Dabur Suit**”). No appeal was preferred against this order, the same is still in field; the First Dabur suit is also pending adjudication. (A copy of the order is attached as **Annexure-C**).
  - ii. Thereafter, the Complainant filed an application to cancel/remove the Respondents registration of the trade mark “HAJMOLA” through J. Misc. No. 58 of 1997, titled “Dabur India v. Hilal Confectionary” (the “**Second Dabur Suit**”), before the court on the basis that the Respondent’s registration of “HAJMOLA” only came to his knowledge after First Dabur Suit. An application for interim relief bearing C.M.A No. 1183 of 2010 was also filed by the Complainant to restrain the Registrar from passing any final order on the 9 applications pending before him in relation to the trade mark “HAJMOLA”. Through order dated 16.02.2016, the single bench of the court has pleased to restrain the registrar/respondent No.7 to maintain status quo till further orders (the “**Interim order in Second Dabur Suit**”). No appeal was preferred against this interim order, the same is still in field and the suit is also pending adjudication. (A copy of the order is attached as **Annexure-D**).
  - iii. In the year 2014, The Respondent filed a suit, bearing No. 1140 of 2014 (The “**Hilal’s v. Sindh Suit**”) against one licensee of the Complainant namely, Asian Consumer Care (the “**ACC**”) before the court for infringement, passing-off, unfair competition etc. along with an application for interim injunction, bearing C.M.A No. 9196 of 2014. The aforesaid suit

is pending adjudication. Through order dated 21.01.2015, the above application of the Respondent was allowed by the single bench of the court, restraining ACC from using the trade mark "Hajmola" on the sole basis that ACC could not prove through adequate documentation that it was a licensee of the Complainant authorized to manufacture and sell the products in Pakistan. The letter of authorization dated 08.08.2012, by the Complainant has been found insufficient to prove a valid authorization. The above order was challenged by the ACC through the court appeal No. 55 of 2015. On 12.12.2015, the divisional bench of the court had dismissed the appeal on the same above mentioned grounds and upheld the above order on same premise. The above order of the divisional bench of the court is reported as **Asian Consumer Care v. Hilal Foods**, 2016 CLD 804 [Sindh]. (A copy of the order is attached as **Annexure-E**).

- iv. In 2015, through civil suit No. 167 of 2015, the Respondent filed a suit for permanent injunction, infringements, passing-off, unfair competition, rendition of accounts and damages against Complainant before the Intellectual Property Tribunal, Lahore (hereinafter referred to as **IPTL**) (the "**Hilal's Lahore Suit**") in relation to trade mark "HAJMOLA". Through order dated 07.04.2015, ad-interim relief was granted to the Respondent till the next date of hearing. Through order dated 15.07.2015, it has been appraised and duly noted that the matter is already sub judice before the court in the titled suit, it was acknowledged that the interim order in the First Dabur Suit dated 11.04.2000 was still intact, hence, the injunctive order of the IPTL has no effect upon the order in the First Dabur Suit. Finally, through order dated 11.06.2016, the case was adjourned sine die till the proceedings were finalized by the court. (A copy of the order is attached as **Annexure-F**).
- v. Later in 2018, the Respondent filed another suit for infringement, passing-off and unfair competition etc. before the Honorable Intellectual Property Tribunal, Islamabad (hereinafter referred to as **IPTI**), bearing suit No. 34 of 2018, titled "Hilal Foods v. Dabur Pakistan (Pvt.) Limited" (the "**Hilal's Islamabad Suit**") against two licensees of the Complainant namely, Dabur Pakistan (Pvt.) Limited (Defendant No. 1); and ACC (Defendant No. 2). On 18.12.2018, the IPTI has awarded ad-interim relief to the Respondent with following operative part:-

*"Meanwhile, subject to notice, the defendants and their agents, affiliates, employees, and representatives are restrained from the trademark/service mark of the plaintiff namely "HAJMOLA MARKS" by using, manufacturing, distributing, marketing, selling, supplying and importing alone and/or in any other deceptively similar manner."*

Upon the Complainant's disclosure of the litigations and the order passed by the IPTI, Which were concealed by the Respondent, the above order dated 18.12.2018, (passed Ex parte) was modified by the IPTI, vide order dated 26.03.2019, by specifically mentioning that it will not have any effect on the order dated 11.04.2000, (Defined above as Interim Order in First Dabur Suit). The operative part was reproduced below:-

*"Accordingly, the order dated 18.12.2018 passed by this court is modified in the manner that the said order shall not in any manner affect the spirit of order dated 11.04.2000 and order dated 12.12.2015 in civil appeals No. 275/1999 and 55/2015 passed by the court."*

(A copy of the order is attached as **Annexure-G**).

2.6 The Complainant further alleged that, despite of the legal proceedings re “HAJMOLA” are sub judice in the court, the court has granted both the parties to use the trade mark “HAJMOLA” on their respective labels as an interim arrangement. Furthermore; the Respondent is constantly and deliberately issuing false and misleading statements causing harm to the Complainant.

- i. On 02.02.2019, the Respondent has written a scandalous letter to the Executive Director of the Pakistan Broadcasting Association (the “PBA”), with false, derogatory and misleading statements. The objectionable portion is identified below:-

*“...being the registered owner of the trademark, our client holds the exclusive rights of using, manufacturing, importing, selling, marketing, distributing, trading and dealing in any goods imprinted with the registered trade HAJMOLA in any manner whatsoever.”*

- ii. On 14.06.2019, the Respondent in continuation of the previous letter, has written a similar letter, the objectionable part is reproduced below:-

*“...in the presence of the restraining order passed by the Honorable High Court of Sindh, Learned Intellectual Property Tribunal, Islamabad and registration of trademark HAJMOLA in the name of our client [Hilal Foods], none other than our client is permitted to publish or otherwise use the trade mark HAJMOLA in any commercial advertisement or marketing campaign and no such commercial or advertisement can be allowed or permitted to be aired or otherwise published.”*

The Complainant accused the Respondent for providing misleading information via impugned letters thereby damaging the goodwill of the Complainant through deceptive marketing practices. (Copies of letters are attached as **Annexure-H**).

2.7 The Complainant alleged that, in continuation of Respondent’s anti-competitive agenda, recently on 17.06.2019, two highly offensive publications were being made by the Respondent against the Complainant in two leading newspapers of the country, Daily Dawn (English) and Daily Jung (Urdu). These publications were camouflaged as public notices, but in pith and substance, were nothing short of a charge sheet. The objectionable portion is reproduced below:-

*“...all rights over the said marks [HAJMOLA] are exclusive reserved in favour of our client as such trademark HAJMOLA can only be used by our client or with our client’s consent. The unauthorized adoption, use, advertisement or trade in any product bearing the said mark HAJMOLA or any variation thereof is an infringement of our client’s rights and constitutes violation of civil and criminal laws.”*

***Hilal Foods Private Limited** has always act vigilantly to protect its aforesaid trademark **HAJMOLA** against illegal and unauthorized use in the course of trade by imitators and in this pursuit our client has always taken prompt legal action for injunction, accounts of profit, damages and other ancillary reliefs against any such infringing use and has obtained restraining orders from the*

*high court as well as from the intellectual property tribunals established under the IPO Act 2012.”*

Moreover, through the above publications (the “**Impugned Publications**”) the Respondent has again attempted to destroy the trading character of the Complainants by presenting a highly insinuating, deceptive and misleading version in an unfair and scandalous manner by:

- a) Using the image of the Complainants trade mark, it’s branding and logo in the impugned publications, the respondent has clearly insinuated that the complainants were committing gross illegalities by using the mark “HAJMOLA” not only without authorization, lawful authority, but also in contempt of court.
- b) The impugned publications use the words and phrases like “any person or entity”, but when seen as a whole, are full of innuendos and inaccurate statements. They depict the Complainant as some sort of wrongdoers engaged in unlawful business activities.
- c) The threats and Respondent’s conclusive remarks regarding the contempt of the court are also directly hurled towards the Complainants, because in the trademark dispute cases the order of the court of law, including the injunctions are in personam not in rem. The interim order in First Dabur suit has allowed both the parties to use the trademark “HAJMOLA”.

(A copy of publication is attached as **Annexure-I**).

- 2.8 The Complainant further envisaged that by incorrect reporting of judicial proceedings, the Respondent has created an alarm and panic and loss of confidence amongst the large section of the people, including Actual and prospective consumers, with the purpose to injure the Complainant’s prestige and reputation.
- 2.9 The Complainant further highlights that the reporting of judicial proceedings which is false is actionable wrong, which falls under the ambit of deceptive marketing for harming the business interest of another undertakings S. 10 of the Act 2010. The way in which the Respondent has issued the statements regarding the use of trademark proves him guilty under the CCP Act 2010 and liable for penalty under S. 38(2) (a) of the Act 2010. The Complainant further says that everyone is innocent until proven guilty through due process of law, but the Respondent’s deceptive publications have been set out in a manner by which any reasonable reader is likely to think that the Complainant have actually committed the offence. This is contrary to the accepted norms and standards of reasonable and fair comment, and besides being deception it also constitutes interference in the process of administration of justice.
- 2.10 The Complainant further alleged that the Respondent has fallen very short of the requisite standards for responsible, fair and objective presentation of facts. The false and misleading statements were made by the Respondent to damage the business of the Complainant for ulterior motives, such as gaining advantage through illegal and anti-competitive means. Furthermore, the Complainant is involved in deceptive marketing practices by the presentation of concocted statements.
- 2.11 The Complainant prayed for the following penalties:
  1. Initiate enquiry under S. 37(2) of the act read with regulation 16 of the 2007 regulations;
  2. Declaring that the impugned letters and impugned publications are without lawful authority and are in contravention with S. 10(2) (a) of the Act 2010;

3. Imposing a maximum penalty of Rs. 75 million or 10% of the annual turnover, whichever is higher, under S. 38 (2) (a) of the Act 2010;
4. Passing necessary and appropriate orders under S. 31 (1) (c) of the Act 2010; and
5. Such other relief as may be deemed appropriate by the Honorable Commission may also be granted in the facts and circumstances of the case.

### 3. RESPONDENT'S COMMENTS:

- 3.1 The complaint was forwarded to the Respondent by the Enquiry Committee for comments on August 01, 2019. Later on, a reminder was issued for submission of comments on August 28, 2019. Upon receiving the complaint, Respondent had requested for an extension in time limit through letter dated September 04, 2019, which was granted wide letter dated September 05, 2019. The Respondent upon lapse of the initially granted extension demanded for a further extension in time limit through letter dated September 30, 2019, which was granted wide letter dated October 03, 2019. Further, on the expiry of the second extension a final letter dated October 17, 2019 was issued in which the Respondent had been intimated that if no reply/comments will be submitted by the Respondent till October 23, 2019, the Commission will be constrained to proceed further in light of the statutory provisions.
- 3.2 The Respondent has submitted reply via letter dated November 04, 2019 after many extensions granted as mentioned in para 3.1 above.
- 3.3 Initially, preliminary objections were raised by the Respondent.
- 3.4 The Respondent mentioned that the Competition Act, 2010 (the “**Act**”) was promulgated to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behavior. The Respondent further mentioned that the Complainant has initiated a frivolous complaint under section 10 of the above said Act, in order to seek assistance and support from all other enabling provision of law. It is imperatively stated by the Respondent that section 10 of the said Act is specific with very limited application. By virtue of section 59 of the said Act the Complainant cannot avail any other provision of law.
- 3.5 The Respondent said that the section 10 of the Act only bars deceptive marketing practices and by virtue of sub-section 2-A, the term “Deceptive Marketing Practices” has been narrowed down to **“distribution of false and misleading information”** only.
- 3.6 The Respondent claimed that it is a registered proprietor of the trademark “HAJMOLA” in Pakistan and hold exclusive proprietary rights by virtue of section 39 of the Trademarks Ordinance, 2001 (the “**Ordinance**”). The Ordinance was promulgated so as to amend and consolidate the law relating to the trademarks and unfair competition and to provide registration and better protection for the prevention of the use of fraudulent marks and other matters connected therewith.
- 3.7 The Respondent submitted that, it has not violated section 10 of the Act as alleged by the Complainant. The Respondent requested to consider the below mentioned undeniable facts which make the complaint baseless.
  - a. The Respondent is a registered proprietor of the Trademark “HAJMOLA” in Pakistan since 1982.

- b. The Ordinance gives Respondent the exclusive rights to use the same in course of trade.
  - c. Any use of such registered trademark by any other entity without the consent of the proprietor is deemed to be infringement under the said Ordinance.
  - d. The Respondent has already taken actions against the unauthorized use of the trademark “HAJMOLA” and cases are subjudice in the court.
  - e. The Respondent has already obtained restraining orders against the unauthorized use of the trademark “HAJMOLA” by the court.
  - f. The Respondent has not made any false and misleading statements as such *prima facie* the instant complaint, as framed and filed is nothing but a baseless blast, thus nothing short of abuse of due process of law, as such merits dismissal *in-limine*.
  - g. The same dispute is being litigated between the parties herein at different legal forums. As such, the instant complaint is liable to be dismissed.
- 3.8 The Respondent accused that the complaint is an outcome of ill-advice as term “Deceptive Marketing Practices” as envisaged under the aforesaid Act is not meant to thwart the judicial process and neither can it be used as a shield to cover-up or hoodwink the infringement activities. The Respondent further says that the alleged illegal act complained by the Complainant cannot be termed as Marketing, likewise the alleged offending or impugned publications are not deceptive for it contained nothing but the truth and is not false. The Complainant has failed to make any case against the Respondent and as such the instant complaint merits rejection out rightly on this count alone.
- 3.9 The Respondent said that the complainant is guilty of concealing material facts in the complaint since the Complainant has himself made a disparaging, defamatory, false and misleading publication on June 27, 2019 under the title “counter public notice”. The Respondent claims that it has issued a legal notice to the Complainant on this frivolous publication on July 01, 2019. Furthermore, the Complainant has replied negatively in response to the legal notice and the Respondent reserves the right to invoke jurisdiction of the competent court of law and this commission for redressal of grievances.
- 3.10 Secondly, true facts of the case have been discussed by the Respondent as below:
- 3.11 The Respondent, which term where ever the context so require shall mean and not includes its predecessor in business namely M/s Hilal Confectionery (Private) Limited, is a leading and reputed company and duly incorporated under Companies Ordinance 1984 in Pakistan. The Respondent has said that it has involved in the business of manufacturing and merchant of a wide range of sweet, bakery and confectionary products including but not limited to sweets, candies, toffees, chocolates, digestive tablets and other applied products since 1957 throughout Pakistan and also involved in exporting of the same products. (Copy of Certificate of Incorporation is attached as **Annexure-J**)
- 3.12 The Respondent claimed that it is a leading manufacturer and merchant of sweet, bakery and confectionary products with a mission to give “Reason to smile” to its customers and to provide the best tasting, most delicious choices in a wide range of products. The Respondent has always strived to upgrade its production capabilities in order to fulfil the ever growing demands of its high-quality products and take great pride in being the pioneers of center filled candies, chewing gums and



cupcakes in Pakistan. The competitive edge of the Respondent lies in the state of art manufacturing plant that produces high quality products. In order to meet tough competition in the market the Respondent has been introducing new products in the market every now and then.

- 3.13 The Respondent has mentioned that it strongly believes in doing business with utmost respect, integrity while maintaining its corporate social responsibility. As part of the Respondent’s mission, the Respondent is continuously investing in its human resource. The products come in array of flavors, shape and sizes and can be enjoyed by kids and adults. (Copy of company profile is attached as **Annexure-K**)
- 3.14 The Respondent says that in early 80’s it had launched unique candies that met tremendous success owing to the taste, different flavors and quality. The Respondent claims that it has been marketing and selling its flavored candies under the trademark “HAJMOLA” in conjunction with its house mark “HILAL”. The word mark “HAJMOLA” denotes an Urdu language words “HAZAM” and/or “HAJAM” and the word mark “HAJMOLA” is fusion word adopted by the Respondent in the year 1982 much prior to “Information Age”. The aforesaid trademark “HAJMOLA” soon became the leading brand of the Respondent and candies under the said trademark thus started appearing on different types of packaging. (Copies of Respondent packaging of HAJMOLA is attached as **Annexure-L**)
- 3.15 The Respondent mentioned that in order to expand its line of products it has introduced digestive tablets under the trademark “HAJMOLA” , and to secure its proprietary rights, the Respondent has obtained registration under No. 78160 dated 4.11.1982 in class 5 with the Registrar of trademarks, Trade marks registry, Government of Pakistan and Intellectual Property Organization (IPO) Pakistan. This registration is intact and valid for all intent and purposes. The Respondent is selling the candies in different flavors and distinctive packaging. In order to further strengthen its proprietary rights it has filed several applications to secure the trademark “HAJMOLA”, which are listed below: ( Copy of certified registration and cutting of Trademark journal pertaining to registration is attached as **Annexure-M & N respectively**)

Application Number	Trademark	Date of Registration	Classification of Goods
115625	HILAL HAJMOLA	19.05.1992	30
123270	HAJMOLA	29.12.1993	30
124079	HILAL HAJMOLA	21.02.1994	05
129489	HAJMOLA	03.04.1995	30
129672	HAJMOLA	11.04.1995	30
143738	HAJMOLA	13.11.1997	30

- 3.16 The Respondent has mentioned that in order to further strengthen its proprietary rights in respect of “HAJMOLA” it has secured registration for the artistic work in its label entitled “HAJMOLA” with the Registrar of Copyrights, Copyright Registry, Government of Pakistan, IPO Pakistan. (Copy of registration certificates are attached as **Annexure-O**)
- 3.17 The Respondent has been using the trademark “HAJMOLA” with different product recipes as well as flavor of digestive candies with several distinctive trademarks including: “Khatti Meethi Hajmola

Imli”, “Khatti Meethi Hajmola Adrak” and “Khatti Meethi Hajmola Aam” that gain immense popularity amongst consumers all over Pakistan. Accordingly, the Respondent has secured its right over the above said trademarks as detailed below: (Copies of the cuttings of the Trademarks Journal pertaining to the registration is attached as **Annexure-P**)

Application Number	Trademark	Date of Registration	Classification of Goods
170106	HILAL AAM	14.04.2001	30
170107	HAJMOLA IMLI	14.04.2001	30
170108	HAJMOLA ADRAK	14.04.2001	30

- 3.18 The Respondent claims that it is the original adopter and pioneer proprietor and exclusive user of the registered trademark “Hajmola” in Pakistan and due to the extensive use and sales of the products under the said trademark, it has acquired goodwill, proprietary rights and reputation for the high quality products signifying to the traders and purchasers that the said goods under the mark “HAJMOLA” originates from no one else but the Respondent. The trademark “HAJMOLA” is being used on a very large scale at national level and in other parts of the world.
- 3.19 The Respondent states that due to the extensive use of the said trademark and registration in its favour, any use of the said trademark in any manner by any other person/trader for any similar product or for other goods of same description shall lead to inevitable confusion and deception in the course of trade thus leads to infringement of Respondent’s exclusive rights for trademark “HAJMOLA”. The Respondent further mentioned that, due to exclusive use coupled with extensive publicity through media has acquired tremendous goodwill and reputation in the market.
- 3.20 The Respondent claims that due to extensive publicity and promotional activities since early 80’s on television, newspapers, magazines, hoardings, calendars, electronic media, web portals, digital & social media, the “HAJMOLA” marks with or without house mark “HILAL” exclusive connotes and denotes to the people in general, the consumers of the products of the Respondent in particular and all the persons in the business and trade as being the product of the Respondent and none else. Due to being the registered proprietor of the trademark “HAJMOLA” the Respondent has enjoyed the exclusive rights to use the same in the course of trade and said trademark by virtue of section 39 of the Ordinance is the personal property of the Respondent. Likewise, under section 40 of the said Ordinance any use of the trademark “HAJMOLA” either alone or in conjunction with any other word design or feature by any other person, firm or entity without the explicit permission of the Respondent herein shall be an infringement of Respondent’s property rights hence illegal and actionable *per se*.
- 3.21 The Respondent mentioned that the Complainant in active connivance and collusion with Asian Consumer Care (Pvt.) limited commenced marketing, distribution and sales under the trademark “HAJMOLA” thereby infringing the exclusive proprietary rights of the Respondent in its registered trademark “HAJMOLA”. Further, the Respondent has invoked the jurisdiction of the learned Intellectual Property Tribunal, Islamabad by filing a suit for permanent injunction and ancillary reliefs. The learned tribunal took due cognizance into the matter and passed a restraining order against the defendants in the said case barring the same from using the trademark “HAJMOLA”. That order remained in the field till 07-10-2019 when the learned tribunal returned the plaint. The

Respondent reserve its right to challenge the order dated 07.10.2019 before the competent forum. (Copy of the aforesaid order is attached as **Annexure-Q**)

- 3.22 Thirdly, the seriatim reply of the complaint has been phrased by the Respondent as below:
- 3.23 The Respondent has vehemently denied the acquisitions made by the Complainant that it has violated section 10 of the Act. Moreover, the term “Deceptive Marketing Practices” as enunciated under the said Act is neither attracted nor applicable to the facts of this case. The Respondent agrees with the content herein reproduced in paragraph 2.2 *ibid* as a matter of record. Moreover, the Respondent believes that the Complainant has deliberately withheld the copies of the documents allegedly empowering the executant of the complaint. It has a right to comment on the validity or veracity of the said documents i.e. the special power of attorney dated 23.05.2019 and the board of directors resolution filed by the Complainant on 21.06.2019. The Respondent agreed with the information given by the Complainant about the Respondent.
- 3.24 The Respondent denied the contents of paragraph 2.3 *ibid* being misleading. The Respondent claims that it is a registered owner of the trademark “HAJMOLA” since 1982 and said registration was acquired under the then applicable law being the Trademarks Act 1940 that was replaced by the Trade Marks Ordinance 2001. As per Respondent, the Complainant neither has any trademark registered in Pakistan. Registration of the trademark become conclusive as to the validity after lapse of five years by virtue of section 44 of the Ordinance and the registration of the Respondent is valid and intact for all intent and purposes till date.
- 3.25 The content of paragraph 2.4 *ibid* are specifically and vehemently denied by the Respondent on the basis that, the Complainant has no right to use trademark “HAJMOLA” in Pakistan. Owing to the registration of the said trademark, substantial unhindered continuous and exclusive use of rights in respect of the trademark “HAJMOLA” rest and vest only with the Respondent. The Complainant has made best effort to fabricate and twist the factual position to foster its ulterior motives. The Respondent believes that the content of paragraph 2.5 *ibid* contradicts with the ill-founded case of the Complainant who under the grab of the instant complaint is making best effort to thwart the due process of the court and the law.
- 3.26 The Respondent agrees with the matter of record phrased in paragraph 2.5 (i) *ibid*, but vehemently disagrees with the content that is contrary to the stance of the Respondent. The Respondent specifically denied that the Court has ever granted any rights to the Complainant to use the trademark “HAJMOLA”. The said rights are specifically conferred upon the Respondent by the Court in light of balance of convenience, element of irreparable loss and *prima facie* proprietary rights for the registered trademark in the name of Respondent. The Complainant has deliberately and wilfully withheld the information that the subject matter of suit 14 of 1995 filed by the Complainant against the Respondent in the Court pertains to the Complainant’s ownership in labels and not the trademark “HAJMOLA”.
- 3.27 The Respondent agrees with the matter of record phrased in paragraph 2.5 (ii) *ibid*. The Respondent however feels pertinent to mention that the Complainant was shy of proceedings with the alleged petition for cancellation of Respondent’s trademark upon realizing that it holds no ground to get the said trademark removed from the register and went forward to seek a restraining order against the relevant authority being the registrar of the trademarks, barring the said authority to make any order of refusal of Complainant’s trademark application.

- 3.28 The Respondent agrees with the content phrased in paragraph 2.5 (iii) *ibid*. The Respondent however, is pertinent to mention that injunction was passed against the alleged licensee namely, Asian Consumer Care by the Court owing to the trademark “HAJMOLA” in favour of Respondent. The Respondent states that the whole edifice of defense of the said Asian Consumer Care in suit no. 1140 of 2014 was of being a licensee of the Complainant which the said company failed to substantiate in any manner. It was however not the sole ground for the grant of injunction. The injunction was granted by the learned single judge of the Court and upheld by the Divisional bench of the Court owing to the established proprietary rights of the Respondent, factually and legally in respect of trademark “HAJMOLA”. Moreover, the Respondent agrees with the content of paragraph 2.5 (iv) *ibid* and Respondent is taking all necessary measures for restoration of the case to its original position.
- 3.29 The Content of paragraph 2.5 (v) *ibid* are denied by the Respondent to the extent that the content of the para under reply not only substantiate the case of the Respondent but establishes beyond any iota of doubt the malafide intentions on part of the Complainant as they upon the failure to trade upon the goodwill and reputation of the Respondent illegally in active connivance and collusion with Asian Consumer Care (Pvt.) Limited. Further in wake of the restraining order passed by the Court as aforesaid, clandestinely made yet another attempt by incorporating another entity in the name and style as Complainant, and to carry out its illegitimate business in violation of the statutory provisions. The Respondent further mentioned that, the content of the said para is misleading to the extent that it was Complainant who brought to the notice of the Court the factum of earlier pending litigations, as Respondent in has specifically mentioned the case wherein the injunction order was passed by the Court and upheld by the divisional bench of the Court. Furthermore, the amendment made in the restraining order date 18.12.2018 by the Intellectual Property Tribunal (IPT), Islamabad was made with the consent of the Respondent to the effect that the said order of the Tribunal shall not in any manner effect the spirit of the order passed by the Court. The facts of the instant case and the later developments fully substantiate that the Complainant has abused the due process of law by misusing, misconstruing and misinterpreting the said modification made by the learned IPT Islamabad.
- 3.30 The Respondent has vehemently denied the paragraph 2.6 *ibid* for being false and misleading it is reiterated that the Court has never permitted the Complainant to use the trademark “HAJMOLA” and no right was ever conferred upon the Complainant. The Respondent claims that it has never issued any false and misleading statement that could in any way cause any harm to the Complainant in any manner whatsoever. The Content of Para 2.6 (i) *ibid* are denied as alleged for being misleading. The Respondent submitted that it has in exercise of its legal rights, to safeguard its commercial interests, in the larger public interest and on account of continuous breach of injunction by the Complainant and its affiliates, sent an intimation letter to Pakistan Broadcasting Association (PBA) to bring on record the legal position so as to eliminate the chances of multiplicity of litigation. The Respondent has further mentioned that the content of said letters cannot be construed as scandalous or misleading in any manner, and the allegation to that effect is baseless and ill-founded.
- 3.31 The Respondent has aggressively denied the para 2.6 (ii) *ibid* by submitting that during the validity of the restraining order passed by the Court in its original as well as appellate jurisdiction and also during subsistence of the restraining order passed by the IPTI as aforesaid, the Respondent learned that defendant in the suit as well as in the complaint were promoting and advertising their product through electronic media under the offending/intimated trademark “HAJMOLA” in sheer disregard and utter breach of the injunction order. There upon the Respondent was constraint to notify the authorities about the legal rights it holds and the restriction imposed by the Court. The rights

exercised by the Respondent were bona fide cannot be construed as deceptive marketing practices as alleged, as such the subject complaint is baseless and ill-founded.

- 3.32 The Respondent vehemently denied the para 2.7 *ibid* by mentioning that the Respondent has not ever carried out any anti-competitive agenda or made any offensive publications. The Respondent has just safeguarded its interest. The Respondent mentioned that it has constrained to make publications through print media in sheer good faith, larger public interest and to avoid multiplicity of litigations. These publications did not involve any false or misleading information. All such publications are a matter of record. The Respondent established beyond any shadow of doubt that it is Complainant who has time and has attempted to usurp the proprietary rights of the Respondent and all such actions on part of Respondent is highly colored, insinuating, deceptive and misleading that can simply be gauged from the fact that Complainant under the grab of counter public notice has left no stone unturned to tarnish the image of the Respondent, to defame and malign the same and accordingly the Respondent has issued legal notice under the applicable law to the Complainant and Respondent reserve the rights to take appropriate actions accordingly.
- 3.33 The Respondent has specifically denied the paragraph 2.7 (a) (b) and (c) *ibid* on the basis that the Respondent is the exclusive proprietor of the trademark “HAJMOLA” in Pakistan and under law use of such trademark by any entity including the Complainant shall be an infringement of such exclusive right of the Respondent.
- 3.34 The Respondent has denied the para 2.8 *ibid* by stating that being an exclusive owner of the trademark “HAJMOLA” and owing to the restraining order passed by the Court, the Complainant has no right to accuse the Respondent for any act as alleged in the paras under reply. None of the statement made by the Respondent is incorrect, misleading and fallacious. The Respondent has never presented anything anywhere which could be termed as conflicting with the text and purposes of Competition Law. The Respondent strongly disagrees with the content of Para 2.9 *ibid* for not only being baseless and ill-founded but also for being an outcome of malafide on part of the Complainant. The Respondent has mentioned that the provision of section 10 of the Act only bars Deceptive Marketing Practices and by virtue of sub-section 2 (a) the term “Deceptive Marketing Practices” has been narrowed down to the **Distribution of false and misleading information** only. The Respondent hold exclusive rights by virtue of section 39 of the Ordinance with respect to trademark “HAJMOLA”. The Respondent believes that it is false to allege on part of the Complainant that the Respondent is liable to pay penalty under section 38 (2) (a) of the Act. The facts of the case establish beyond any doubt that instant complaint is nothing short of victimizing the Respondent for exercising its legal right in sheer bona fide and in larger public interest as such complaint merits to be rejected with exemplary costs.
- 3.35 The content of para 2.10 *ibid* is denied as alleged by the Respondent. The Complainant has made its best effort to harass and pressurize the Respondent to submit its unjustified claims. The Complainant has miserably failed to make out any case warranting grant of any relief as prayed and title complaint merits to be dismissed/rejected with exemplary costs.
- 3.36 The Respondent has humbly prayed that the subject complaint may kindly be dismissed. Cost of proceedings may also be granted to the Respondent.

#### **4. REJOINDER:**

- 4.1 The comments/reply of the Respondent were forwarded to the Complainant for its comments/rejoinder vide letter dated November 11, 2019.
- 4.2 The Complainant submitted its rejoinder vide letter dated November 26, 2019, the contents of which are reproduced below:
- 4.3 The Complainant has strongly denied the contentions raised by Respondent in paragraph 3.4, 3.5, 3.8, 3.30 and 3.34 *ibid* by stating that, it is a fallacy to argue that the scope of Section 10 (2) (a) of the Act is narrow and subject to a very limited application. The Respondent is using and ill-founded interpretation of the aforesaid provision, in negation of the well-recognized canons of statutory interpretation. The Complainant further states that;
- a) The Section 10 (2) (a) of the Act as a whole unequivocally extends to the distribution of false and mis-leading statements capable of causing harm to the business interest of another undertaking. The Respondent is attempting to attribute redundancy to the provision of a special law enacted to provide a level playing field and “...to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior”. This statutory interpretation adopted by the Respondent is not supported by law and legal principles. Reliance is placed on *Reading Law: The Interpretation of Legal texts by Antonin Scalia and Bryan A. Garner, 2012.*
  - b) The Respondent has nowhere stated that the Complainant do not fall within the definition of an “Undertaking” provided in Section (2) (q) of the Act, nor has made any sufficient contentions to prove that the impugned letters and impugned publications were not capable of harming the business interest of the Complainant. The silence of the Respondent in regards to its pleadings is tantamount to an admission that the statutory test of Section 10 (2) (a) of the Act is fulfilled.
  - c) The consistent jurisprudence developed by this Honorable Commission, endorsed by the Honorable Appellate Tribunal, also shows that Section 10 (2) (a) of the Act, being a special provision, is of broad statutory ambit, requiring a holistic construction. Reliance is placed on *In the matter of Dry and Acid-Lead Battery Manufactures, 2018 CLD 844 [CCP]; In the matter of Tara Corp Sciences, 2016 CLD 105 [CCP]; and Colgate Palmolive Pak v. CCP, 2019 CLD 254 [CAT].*
  - d) Even otherwise, the Section 59 of the Act is a non-obstante cl. giving overriding effect to the provisions of the Act over all other laws for the time being in force. Reliance is placed on *Syed Mushahid v. FIA, 2017 SCMR 1218; Syntax of Sales Tax on Services by Asfandiyar Khan Tareen, 2018 Chapter. 8 Section 4(1) at Page 364; and Banking Law and Jurisprudence by Asfandiyar Khan Tareen, 2019 Section 4 at Page 78.* It is also well settled that a law latter in time prevails over the former. Reliance is placed on *Commissioner Inland Revenue v. Golden Pearl Cosmetics; 2017 PTD 1485 [DB].*
- 4.4 The Complainant strongly believes that the entire case of the Respondent is built on evasive denial, irrelevant narration, fanciful assertions and weak superstructure. The issuance of false and misleading information is proven by Respondent’s own conduct and reply produced in para 3.7 and 3.26 *ibid*. The First Dabur Suit as well as the accompanying stay application bearing C.M.A No. 73 of 1995 were not merely confined to copyright infringement, but also include passing-off and trademark infringement. The text, scope and effect of the interim order in First Dabur suit is clear, the same conferred a right of concurrent use on both the parties to use the mark “HAJMOLA”

on their respective labels. In the presence of the aforesaid order, the constant deliberate attempt to make a false and misleading claim of exclusive right to use the mark “HAJMOLA” is otiose.

- 4.5 The Complainant has denied the contentions raised by the Respondent in para 3.4 – 3.8 *ibid* by stating that neither the scope of Section 10 of the Act is narrow, nor the Respondent has any real prospect of success in denying the distribution of false and misleading information. Thus the provisions of Section 10 of the Act squarely applies to the facts and circumstances of the complaint. It is well settled that distribution of false and misleading information is one which deceive the ordinary consumer into thinking contrary to the truth, which is capable of harming the business interest of the concerned. Reliance is placed on the order in the matter of Tara Crop Sciences, 2016 CLD 105 [CCP]. The Complainant has further accused the Respondent of presenting a false, concocted and biased version of the judicial proceedings through the impugned letters and impugned publications. By this act the Respondent has become the judge in its own cause in blatant breach of the principles of natural justice and fair play, when the litigation regarding the trademark, “HAJMOLA” is still pending before the Court.
- 4.6 The Complainant has strongly denied the contents of the para 3.9 *ibid*, Firstly, because the proceedings under the Competition Law are independent from the defamation proceedings, hence not material for the disposal of the instant complaint. Secondly, the concealment is vehemently denied on the basis that the Complainant has already submitted a paper book containing the documents of defamation proceedings along with the counter public notice and reply to the learned enquiry officers of the Honorable Commission.
- 4.7 The Complainant has denied the reply of the Respondent herein reproduced in para 3.11 to 3.20 *ibid* by mention that a part from being irrelevant and exaggerative, the same do not provide any support to the defense put forth by the Respondent, instead the contents of reply prove the admission of liability by the Respondent. The Respondent is adamant that the same is entitled to exclusive use of trademark “HAJMOLA” in sheer disregard of the order passed by the divisional bench of the Court, which is defined in the complaint as the interim order passed in First Dabur Suit. The Complainant has expressed that the Respondent has adopted a casual and whimsical approach towards the order passed by the Court to justify its illegal act of discriminating false and misleading information in order to provide business harm to the Complainant without any lawful excuse. The Complainant believes that the act of Respondent deliberately proves its intent to damage the goodwill of the Complainant.
- 4.8 The Complainant has denied the contentions raised by the Respondent about the infringement of trademark “HAJMOLA” reproduced in paragraph 3.21 *ibid*. The Complainant blames that the Respondent has obtained the Ad-interim relief by hiding the true facts of previous litigations from the Intellectual Property Tribunal, Islamabad. Once, the same was disclosed by the Complainant the tribunal has modified the restraining order on 26.03.2019, by stating that its order will not have any effect or bearing on the interim order in First Dabur Suit.
- 4.9 The Complainant has aggressively denied the response made by the Respondent in para 3.23 to 3.25 *ibid* by stating that the Complaint is the well-known owner of the mark “HAJMOLA”, protected under the Paris convention and the material provisions of the Trade Marks Ordinance 2001, who adopted the said trademark as early as in year 1972, evident from Trade Marks Registration Certificates. The Complainant mentioned that this material fact has not disputed by the Respondent in his comments, it is therefore, a delusional contention of the Respondent that the Complainant “*neither has any trademark registration nor it had any legitimate use in the local*

*market*". Specifically, the Respondent has failed to justify its act of making false and misleading statements at a time when the interim order in First Dabur Suit, conferring concurrent use on both the parties, is still in field.

- 4.10 The Complainant has denied the contents reproduced in para 3.26 to 3.29 *ibid* as the Respondent obtained the order of concurrent use dated 11.04.2000 in its own appeal, bearing H.C.A No. 275 of 1999, which is defined in the complaint as the interim order in First Dabur Suit. The justification that the same order did not confer any right on the Complainant to use the mark "HAJMOLA" on its label is beyond common sense and logic, and the legal principles of interpretation, thus an incapable ground for escaping the liability for contravention of Section 10 of the Act. The chronology of the pending litigation provided in the complaint proves the ulterior motives of the Respondent to cause damage to the goodwill of the Complainants through anti-competitive, illegal and unfair means.
- 4.11 The Complainant has specifically denied the response reproduced in para 3.30 to 3.34 *ibid* by stating that the Respondent has not been able to provide any lawful defense, excuse or justification for distribution of false and misleading information through the impugned letters and impugned publications. On the other hand, the Complainants have adequately discharged the standard and burden of proving the offences and contraventions committed by the Respondent. The false and baseless statements issued by the Respondent portray the Complainant as some sort of criminals in a highly scandalous and improper manner. The unlawful actions of the Respondent proves its anti-competitive agenda of deliberately destroying the trading character of "DABUR HAJMOLA". The Complainant states that the Respondent is liable to be punished and penalized under the Act for its defiant attitude towards the mandatory provisions of the law and its due process.
- 4.12 The Complainant humbly prayed that this Honorable Commission may be graciously pleased to allow the Complaint as prayed therein and such other relief as may be deemed appropriate by this Commission may also be granted in the facts and circumstances of the case.

## **5. ANALYSIS:**

- 5.1 As mentioned in para 1.4 above, the mandate of this enquiry is to determine whether, prima facie;
- a) The Respondent's conduct *is capable of harming the business interest* of the Complainant in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (a) of the Act; and/or
  - b) The Respondent's conduct pertains to *the distribution of false or misleading information to consumers related to character, place of production, properties and quality of goods*, in violation of Section 10 (1) of the Act, in terms of Section 10 (2) (b) of the Act?

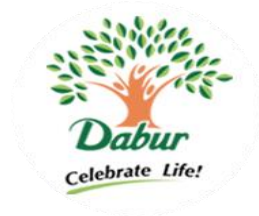
## **FACTS OF THE MATTER**

- 5.2 Prior to conducting the analysis of the findings of the enquiry, a brief summary of the factual background will be presented in this section.
- i. The Complainant is a company incorporated under relevant Company laws of Pakistan and India, which is engaged in manufacturing, marketing and sales of a range of herbal/Ayurvedic medicine since 1884 in India, and in Pakistan its dealership/marketing for sales started in 2006 by Asian Consumer Care as below:





- ii. The Complainant sells its product under brand name “HAJOMLA”, displayed below, which was registered under Trade and Merchandise Act, 1958 of India in the year 1972, Trade Marks Act, 1938 of United Kingdom in the year 1980 and protected by the parties to the Paris Convention. It is pertinent to mention here that Pakistan is a member of Paris Convention since 2004. The logos are as below:



- iii. The Respondent was one of the other company selling the same product “HAJMOLA” under its own logo depicted below;





- iv. The Complainant has alleged and submitted evidence exhibiting the Respondent using the name “HAJMOLA” and misleadingly disclosing its sole and exclusive affiliation with the trademark.
- v. The Respondent has written two scandalous letters to Pakistan Broadcasting Association (PBA) and published advertisements in two national newspapers, in which the Respondent has claimed clear affiliation with the trade name “HAJMOLA”.
- vi. The Honorable Sindh High Court in the year 2000, has allowed both the Complainant and the Respondent to use the trade name “HAJMOLA” until the final decision by the Honorable Court. And is still intact.
- vii. The complaint was sent to the Respondent and the comments of the Respondent was again sent to the Complainant for Rejoinder.

5.3 In the subsequent discussion, analysis will be carried out as per the mandate of this enquiry;

**Whether prima facie Respondent is involved in the distribution of false or misleading information to consumers related to character, place of production, properties and quality of goods.**

5.4 In order to proceed further, it is important to discuss what is marketing? Marketing is defined as:

*“(1) the act or process of promoting and selling, leasing or licensing products or services. (2) The part of a business concerned with meeting customers need. (3) The area of study concerned with the promotion and selling of products or services.”* (Reference page no 1115, Black’s Law Dictionary, Tenth Edition, by Bryan A. Garner).

5.5 Before moving forward, it is also necessary to establish the difference between false and misleading information. The Commission, in its order held against **M/s CMPak Limited<sup>1</sup>**, has

<sup>1</sup> <http://cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%202029-09-09%20.pdf>

defined “**False**” and “**Misleading**” information as deceptive marketing practices in the following manners:

**False Information:**

*‘False information’ can be said to include: oral or written statements or representations that are; (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence; (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation.*

**Misleading Information:**

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

5.6 The above reference suggests that any information distributed via marketing campaign can mislead consumers if it is vague in any way or has omitted certain information, even if such a conduct is not deliberate. Consequently, distribution of misleading information is capable of giving a wrong impression with respect to a good or service which could induce a consumer into distorted decision making, hence, causing consumer injury. Therefore, if the Respondent’s conduct is proven misleading, it would amount to deceptive marketing practices in terms of Section 10 (2) (b) of the Act.

5.7 The Respondent on 02.02.2019, has written a letter to the Executive Director of the PBA with false and misleading statements. The objectionable portion is identified below:-

*“...being the registered owner of the trademark, **our client holds the exclusive rights** of using, manufacturing, importing, selling, marketing, distributing, trading and dealing in any goods imprinted with the registered trade HAJMOLA in any manner whatsoever.”*

On 14.06.2019, the Respondent in continuation of the previous letter, has written a similar letter, the objectionable part is reproduced below:-

*“...in the presence of the restraining order passed by the Honorable High Court of Sindh, Learned Intellectual Property Tribunal, Islamabad and registration of trademark HAJMOLA in the name of our client [Hilal Foods], **none other than our client is permitted to publish or otherwise use the trade mark HAJMOLA in any commercial advertisement or marketing campaign and no such commercial or advertisement can be allowed or permitted to be aired or otherwise published.**”*

Furthermore, on 17.06.2019, in continuation of the PBA letters the Respondent has also published advertisements in two local newspaper, Dawn (English) and Daily Jung (Urdu) having nationwide circulation as below;

*“...all rights over the said marks [HAJMOLA] **are exclusive reserved in favour of our client** as such trademark HAJMOLA can only be used by our client or with our client’s consent. The unauthorized adoption, use, advertisement or trade in any product bearing the said mark HAJMOLA or any variation thereof is an infringement of our client’s rights and constitutes violation of civil and criminal laws.”*

***Hilal Foods Private Limited** has always act vigilantly to protect its aforesaid trademark HAJMOLA against illegal and unauthorized use in the course of trade by imitators and in this pursuit our client has always taken prompt legal action for injunction, accounts of profit, damages and other ancillary reliefs against any such infringing use and has obtained restraining orders from the high court as well as from the intellectual property tribunals established under the IPO Act 2012.”*

The Complainant has also published Counter Public Notices against the advertisement made by the Respondent. These publications are made in both Dawn and Jang News on June 27, 2019.



**PUBLIC NOTICE  
TRADEMARK CAUTIONARY NOTICE  
AGAINST THE UNAUTHORISED USE &  
INFRINGEMENT OF TRADEMARK**



**BE IT KNOWN TO ALL THAT** our client M/s. Hilal Foods (Pvt) Limited (formerly Hilal Confectionary (Private) Limited) is the sole proprietor of the trademark **HAJMOLA** in Pakistan and all rights over the said marks are exclusively reserved in favour of our client as such trademark **HAJMOLA** can only be used by our client or with our client's consent. The unauthorized adoption, use, advertisement or trade in any products bearing the said mark **HAJMOLA** or any variation thereof is an infringement of our client's rights and constitutes violation of civil and criminal laws.

**HILAL FOODS (PVT) LIMITED** has always acted vigilantly to protect its aforesaid trademark **HAJMOLA** against illegal and unauthorized use in the course of trade by imitators and in this pursuit our client has always taken prompt legal actions for injunction, accounts of profits, damages and other ancillary reliefs against any such infringing use and has obtained restraining orders from the High Court as well as from Intellectual Property Tribunals established under the IPO Act 2012.



**PLEASE NOTE** that our client is not prepared to permit any person or entity to trample on its hard-earned goodwill and shall take stern legal action under criminal and civil laws against anyone who violates our client's intellectual property rights by manufacturing, importing, supplying and/or trading in products under the trademark **HAJMOLA** unauthorizedly. Through this notice it is notified to all that, any use of trademark **HAJMOLA** as aforesaid without prior consent or approval of our client by any person or entity shall only be construed as an act of unfair Competition and infringement of our client's said exclusive proprietary rights making such person or entity liable for punitive and penal consequences under the applicable civil and criminal laws including Contempt of Court .

**KHURRAM GUL GHORY**  
Corporate Counsel & IPR Attorney



**JUS-n-REM - ZABAR**  
Counsel & Consulting



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**COUNTER PUBLIC NOTICE & REPLY  
IN RESPONSE TO PUBLIC NOTICE BY HILAL FOODS (PVT.) LIMITED  
DATED 17 JUNE 2019, PUBLISHED IN DAWN**

That we have been instructed by our client, Dabur India Limited ("Our Client") to publish this counter notice and reply in response to misleading, scandalous, contemptuous and defamatory statements made in the titled Public Notice (the "Notice under reply").

That Our Client, being one of the major consumer goods companies with the largest herbal and natural product portfolio in the world, was shocked to see the frivolous contents of the Notice under reply. Our Client is the lawful owner of a well-known mark protected under the Paris Convention and material provisions of the trademark laws of Pakistan.

That it is also clarified that there is presently no restraining order against Our Client preventing it from using the mark "Hajmola" in Pakistan. That Our Client is in trademark litigation with Hilal Foods (Pvt.) Limited from several years, since, the matter is *sub judice*, we do not deem it appropriate to comment on the merits case or give a detailed account here because we firmly believe in the due process of law and are responsible enough to understand the sanctity of judicial proceedings. Suffice to say that the Hon'ble High Court of Sindh through order dated 11-04-2000, passed in H.C.A. No. 275 of 1999, allowed both Our Client and Hilal Foods (Pvt.) Limited to concurrently use the mark "Hajmola" on their respective labels as an interim arrangement. Therefore, Our Client is legally entitled to market, distribute and sell its product in the name and style of "Dabur Hajmola" having below labels in Pakistan market:-



That in view of the foregoing, we strongly believe that the Notice under Reply by Hilal Foods (Pvt.) Limited, published in the newspaper dated 17 June 2019 is misleading, contemptuous and defamatory. Our Client is within its right to institute the proper legal proceedings against the aforesaid unlawful acts.

**TAREEN CHAMBERS**

408, Al-Hafeez Heights, 65 D/1, Gulberg III, Lahore.



ٹریڈ مارک ٹونس اصداتی حکم انتہائی  
مشہور و معروف ٹریڈ مارک (ہاجمولا) کے  
غیر قانونی استعمال کی خلاف برداری حکم انتہائی



عوام الناس مطلع ہوں کہ ہمارے موکلین ہلال فوڈز پر ایسٹ لیمٹڈ ٹریڈ مارک ہاجمولا کے قانونی اور کاپی رائٹ ہیں اور حقہ کرہ ہالا ٹریڈ مارک کے جملہ حقوق ہمارے موکلین کے نام محفوظ ہیں بزرع ٹونس ہذا ہم یہ بات واضح کر دیتا چاہتے ہیں کہ ہمارے موکلین کی اجازت کے بغیر کوئی شخص یا ادارہ ٹریڈ مارک "ہاجمولا" کو کسی بھی طور پر استعمال کرنے کا مجاز نہیں ہے واضح رہے کہ ہمارے موکلین کی اجازت کے بغیر ٹریڈ مارک ہاجمولا کا استعمال یا صرف غیر قانونی ہے بلکہ قابل دست انداز نہیں ہے۔



حال ہی میں ہمارے موکلین نے ٹریڈ مارک ہاجمولا کی بابت اپنے قانونی، ماکانا اور تہارتی حقوق کے تحفظ اور غیر قانونی بلا جواز استعمال کو روکنے کے لئے مجاز عدالت سے رجوع کرتے ہوئے حکم انتہائی حاصل کر لیا ہے جسکے تحت معزز عدالت نے ٹریڈ مارک ہاجمولا کے غیر قانونی استعمال اور خرید و فروخت پر پابندی عائد کر دی ہے۔

یاد رہے کہ اس سے قبل عدالت عالیہ سندھ نے ٹریڈ مارک ہاجمولا کی تحت درآمد شدہ مصنوعات کی فروخت اور ترسیل کے خلاف حکم انتہائی جاری کرتے ہوئے پابندی عائد کر رکھی ہے۔

لہذا ٹونس بڑی اشاعت کے بعد اگر کوئی ادارہ شخص یا کاروبار ہمارے موکلین کی اجازت کے بغیر ٹریڈ مارک ہاجمولا کے تحت مصنوعات کی فروخت اور ترسیل میں ملوث پایا گیا تو اس کے خلاف سخت تارہی کارروائی بشمول ہماری جرمانے کے دعویٰ، ضلعی مال اور فوجداری مقدمات کا قیام عمل میں لایا جائے گا۔ جسکی تمام تر ذمہ داری ایسے تاجر و کاروباری حضرات پر ہوگی۔

خرم گل خوری

ایڈووکیٹ پائی کورٹ



JUS-REM-ZABAR  
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ہلال فوڈز (پرائیویٹ) لمیٹڈ کی جانب سے مورچہ 17 جون 2019 کو  
ڈان اخبار میں شائع شدہ عوامی نوٹس کے جواب میں  
جواب الجواب عوامی نوٹس

ہر گاہ کہ ہمارے موکل ڈاٹا براڈ یا لمیٹڈ ("ہمارے کلائنٹ") نے ہدایت دی ہے کہ ہم ایک عوامی نوٹس ("نوٹس کے جواب") میں گمراہ کن، بدینتی پر مبنی اور ہماری سادھ کو نقصان پہنچانے والے بیانات کے جواب میں جواب الجواب عوامی نوٹس شائع کرائیں۔ ہر گاہ کہ ہمارا موکل، سب سے زیادہ تباہی اور قدرتی پروڈکشن کے پورٹ فولیو کے ساتھ دنیا کی بڑی کمپنیز میں سے ایک کمپنی کی حیثیت سے نوٹس کے جواب میں انتہائی خلیف یا غیر جمیدہ بیانات دیکھ کر دنگ رہ گیا۔ ہمارا موکل جیس کنونشن کے تحت محفوظ ایک معروف نشان اور پاکستان کے قوانین کے مطابق ٹریڈ مارک کا قانونی مالک ہے۔

ہر گاہ یہ بھی وضاحت کی جاتی ہے کہ اس وقت پاکستان میں ہمارے موکل کے خلاف "ہجومو" کا نشان استعمال کرنے کے خلاف کوئی حکم جاری نہیں کیا گیا ہے۔ یہ کہ ہمارے موکل کی ہلال فوڈز (پرائیویٹ) لمیٹڈ کے ساتھ گزشتہ کئی برسوں سے ٹریڈ مارک کے حوالے سے قانونی چارہ جوئی جاری ہے، جیسا کہ یہ معاملہ عدالت میں مذہر سماعت ہے، اس لیے ہم یہاں پر اس بارے میں اپنے تاثرات دینا یا اس کی تفصیلات سے آگاہ کرنا مناسب نہیں سمجھتے کیونکہ ہم عدلیہ کے احترام پر یقین رکھتے ہیں اور عدالتی کارروائی کو ڈس سے داری کے ساتھ بہتر طور پر سمجھتے ہیں۔ یہ کہنا کافی ہے کہ واچسب الاحترام ہائی کورٹ آف سندھ نے مورچہ 2000-04-11 کے حکم of 1999 H.C.A. No. 275 میں عبوری انتظام کے طور پر ہمارے موکل اور ہلال فوڈز (پرائیویٹ) لمیٹڈ دونوں کو ایک وقت اپنے اپنے لیبلز کے ساتھ "ہجومو" کا نشان استعمال کرنے کی اجازت دی تھی اس لیے، ہمارا موکل قانونی طور پر درج ذیل لیبلز کے ساتھ "ڈاٹر ہجومو" کے نام سے اپنی پروڈکشن کی پاکستان میں تھیں، تقسیم اور فروخت کا قانونی مجاز ہے:-



اس لیے مذکورہ بالا حقائق کی روشنی میں، ہم سمجھتے ہیں کہ ہلال فوڈز (پرائیویٹ) لمیٹڈ کی جانب سے جواب میں مورچہ 17 جون 2019 کو اخبار میں شائع شدہ نوٹس گمراہ کن، بدینتی پر مبنی اور ہماری سادھ کو نقصان پہنچانے کی کوشش ہے۔ ہمارا موکل مذکورہ غیر قانونی اقدامات کے خلاف مناسب قانونی کارروائی کا حق رکھتا ہے۔

ترین جیمبرہ

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5.8 It is clearly evident from the newspaper publications that the Respondent is providing false and misleading information to the general public regarding the trademark “HAJMOLA”. As per the decision of the Court, both the Complainant and the Respondent can use the trade name “HAJMOLA”, it is not exclusively affiliated with the Respondent nor the Complainant. Both are allowed to use the trade name “HAJMOLA” and claiming exclusive rights on the mark will lead to provoke misleading and false information among the general public. The directions of the Court are reproduced below:

*“.....the appellant would be entitled to sell the products under the brand name ‘Hajmola’ subject to furnishing a bank guarantee in the sum of Rs. 2.00 million with the Nazir of this court. This order however, shall not affect the respondent’s right to use the label ‘Hajmola’ on their products and the appellant will not use the same label.”*

The above decision of the court permits both the Complainant and the Respondent to use the brand name “HAJMOLA” for their products. However, The Respondent in its reply has repeatedly mentioned that it holds exclusive right over the trade name “HAJMOLA” as mentioned in para 3.6 *ibid*. Hence, in light of the ruling of the Hon’ble Sindh High Court, being the higher forum, the claim of exclusivity in its publications as well as reply to the Complaint is false and tantamount to deception.

5.9 The overall net impression created by the word “EXCLUSIVE”, which is used by the Respondent in its letters and publications is deceptive in nature and is likely to mislead the ordinary consumer. It is pertinent to mention that Federal Trade Commission (FTC) in its case **F.TC v. Cyberspace.Com LLC, 453 F.3d 1196, 1199-200 (9th Cir. 2006)** has established that

*“Deception may be found based on the "net impression" created by a representation, and a solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures”<sup>2</sup>.*

5.10 The publication of the letters and advertisement by the Respondent falls under misleading action which the Commission has defined in its **Zong & Ufone Order 20210 CLD 1478**, wherein the Commission has established that;

***“Misleading actions***

*(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).*

*(3) A commercial practice satisfies the conditions of this paragraph if— (a) it concerns any marketing of a product (**including comparative advertising**) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;<sup>3</sup>”*

5.11 In this case, it is apparent that the Respondent has properly disclosed its exclusivity with the brand name “HAJMOLA” despite of the interim order which is still intact. Not only has it intended to inflict damage in the form of loss of sales to the Complainant but also as a loss of brand identity and uniqueness of the Complainant’s products. In view of the facts above, it appears that the

<sup>2</sup> [https://www.ftc.gov/system/files/documents/cases/liberty\\_publishers\\_order\\_on\\_msj\\_6-20-19.pdf](https://www.ftc.gov/system/files/documents/cases/liberty_publishers_order_on_msj_6-20-19.pdf)

<sup>3</sup> <https://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

Respondent's conduct is not only capable of harming the business interest of the Complainant but also involved in distribution of false & misleading information to consumers related to the origin/manufacture of the product, in violation of Section 10(1) in terms of Section 10(2)(a) & (b) of the Act.

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

- 6.1 In light of the facts, it appears that the conduct of the Respondent, prima facie, amounts to disseminate false and misleading information regarding the exclusivity and affiliation of the brand name "HAJMOLA" despite of the interim order of the Court which is still intact, in violation of Section 10(1) in terms of Section 10 (2)(b) of the Act which prohibits the distribution of false or misleading information to consumers related to character, place of production, properties and quality of goods.
- 6.2 In view of the analysis, it can also be concluded that the conduct of the Respondent, prima facie, has the potential to inflict harm upon the goodwill and business interest of the Complainant and cause confusion among customers through dissemination of false and misleading information related to ownership of the disputed brand name of "HAJMOLA", in violation of Section 10(1) in terms of Section 10(2) (a) & (b) of the Act.
- 6.3 The dissemination of false and misleading information has a direct impact on the public at large. It is in the interest of the general public and to create fair competition in the market, the Respondent should be stopped to circulate the information in an unfair and misleading manner and be encouraged to resort to the marketing practices which are transparent and give consumers/customers true and correct information. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiation of proceedings against M/s Hilal Foods (Pvt.) Limited under Section 30 of the Act for the, prima facie, violation of Section 10 of the Act.

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