



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICES ISSUED TO (1) M/S
SHAFIQUE & SONS, (2) PAK HERO INDUSTRIES (PVT) LTD. &
(3) M/S UNITED MOTORS COMPANY
FOR DECEPTIVE MARKETING PRACTICES


(FILE No. 24(10)/Comp-Atlas Honda/OFT/CCP/2013)

Dates of Hearing

13 January 2015
17 March 2015
04 June 2015

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar 
Member

Mr. Ikram Ul Haque Qureshi
Member

On behalf of M/s Atlas Honda Limited

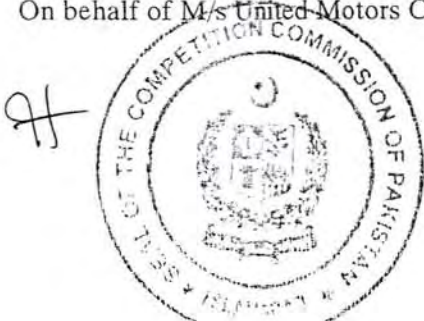
Mr. Umair Mukhtar, Company Secretary
Mr. Razi-ur-Rehman,
Director Corporate Affairs
Mr. Ali Kabir Shah, Advocate
Ms. Faridah Hemani, Advocate

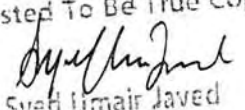
On behalf of M/s Shafique & Sons;
Pak Hero Industries (Pvt) Limited

Sardar Azeem Afrasiyab, Advocate

On behalf of M/s United Motors Company

Mr. Rasheed Ahmed Khan
Noman Amin Farooqi, Advocate



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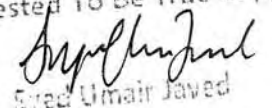
ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notices No. 70, 71 & 72 dated 11 December 2014 (hereinafter collectively referred to as 'SCNs') issued to the following undertakings (collectively referred to as the 'Respondents') for *prima facie* violations of Section 10 of the Competition Act, 2010 (the 'Act'):
 - (a) M/s Shafique & Sons (the 'First Respondent')
 - (b) M/s Pak Hero Industries (Pvt.) Limited (the 'Second Respondent')
 - (c) M/s United Motors Company (the 'Third Respondent')
2. The SCNs were issued to the Respondents pursuant to a Complaint filed with the Competition Commission of Pakistan (the 'Commission') by M/s Atlas Honda Limited (the 'Complainant').
3. The main issues under consideration in this matter are whether the Respondents have resorted to the unauthorized and fraudulent use of the Complainant's distinctive logo and registered trademark on their products so as to mislead the consumer as to the origin of the products and whether such conduct is capable of causing harm to the business interests and goodwill of the Complainant in violation of Section 10 (1), in terms of Section 10 (2) (a) and 10 (2) (d) of the Act.

FACTUAL BACKGROUND

4. The Complainant is a public listed company which emerged as a result of the joint venture and technical collaboration between the Atlas Group and Honda Motor Company Ltd. Japan (HMC). It is engaged in the business of manufacturing, marketing and distribution of motorcycles and allied goods in Pakistan under the brand name of "HONDA".
5. The Respondents are also engaged in the business of manufacturing, assembling and distribution of motorcycles in Pakistan. The First Respondent's motorcycles are marketed under the brand name/ trademark "JINAN". The Second Respondent



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markets under the brand name of "PAK HERO" and sells three-wheeler automobiles in addition to two-wheelers. The Third Respondent's markets and sells under the brand name of "UNITED SEVEN STAR" and "SHINE STAR".

6. The Complainant has alleged that the Respondents have copied its distinct and registered logo (the **Wing Device**) in a way that motorcycles manufactured by the Complainant and those manufactured by the Respondents are indistinguishable. The Complainant further alleged that the three Respondents, through the use of deceptively similar logos (the **Objected Logos**), are creating an impression in the minds of consumers, that their products are actually those of the Complainant's and they are passing off their goods to the consumers as goods manufactured by the Complainant. Therefore, it is alleged that such act of the Respondents' is in violation and breach of Section 10 the Act.

7. To assess the above allegations, a formal enquiry in terms of Section 37(2) of the Act was initiated (the '**Enquiry**') and conducted by the officers appointed for such purpose (the '**Enquiry Committee**'). The enquiry was concluded vide an enquiry report dated 10 August 2014 (the '**Enquiry Report**')¹. Based on the *prima facie* observations of the Enquiry Report and the recommendations contained therein, the Commission initiated proceedings under Section 30 of the Act against the Respondents. SCNs were issued to the Respondents, wherein they were required to respond in writing within fourteen (14) days and appear before the Commission to avail their opportunity of being heard. The relevant portions of the SCNs are reproduced as under:

4. *WHEREAS, in terms of the Enquiry Report, the Complainant is the Owner of the trademark, the representation of which is depicted below:*



Available at http://www.cc.gov.pk/images/Downloads/enquiry_reports/atlas_honda_october_30.pdf



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5. *WHEREAS, in terms of the Enquiry Report in general and in particular Part I read with Para 34, it has been asserted by the Complainant that the undertaking had not only adopted the Complainant's 'Wing Device' but was also using the Atlas Honda Trade Dress with the phrase "Safe Deposit 70" on its motorcycles in the exact same manner and calligraphy as used by Complainant in the style and form "Cash Deposit 70";*

6. *WHEREAS, in terms of the Enquiry Report in general and in particular Part I read with Para 35, it has been alleged by the Complainant that the Undertaking instead of creating a unique brand identity for its products adopted the 'Wing Device' and Atlas Honda Trade Dress with the sole intention to deceive and to lure the general public into buying their product under the expectancy of buying genuine high quality products as those of complainant;*

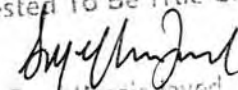
7. *WHEREAS, in terms of the Enquiry Report in general and in particular Part I read with Para 54, the Undertaking products under the imitated trademark in total disregard to the proprietary rights vested in the Complainant in respect of the Trade Dress and registered 'Wing Device' strongly possess the ability to mislead the consumers and induce them to make transactional/ financials decisions based upon the duplication of Complainants Trade Dress and 'Wing Device';*

8. *WHEREAS, the Undertaking by using the Trade Dress, 'Wing Device' of undertaking for advertisement/marketing purposes, fraudulently and without Complainant's authorization, constitutes 'deceptive marketing practices' in terms of subsection (1) of Section 10, in particular, clause (d) of subsection (2) of Section 10 of the Act;*

9. *WHEREAS, the Undertaking by using a registered trademark of the Complainant on its products is, prima facie, capable of harming the business interest of the Complainant in violation of Section 10, in particular, clause (a) of subsection (2) of Section 10 of the Act;*



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SUBMISSIONS

A. BY THE COMPLAINANT

8. The primary contentions and grievances of the Complainant against the Respondents are summarized as follows:

- a. That the Complainant is considered the leading manufacturer of motorcycles in Pakistan and has been selling a wide range of motorcycles under the globally renowned brand name HONDA and its corresponding distinctive logo, the Wing Device, which is both copyright protected and trademark registered. Since its operations began in 1962, it has established the position of an industrial giant in the country.
- b. That the Wing Device was designed and adopted by the founder of HMC. HMC is a world renowned company that manufactures motorcycles and motor vehicles under the brand name/trademark "HONDA". HMC is one of the world's largest motor cycle manufacturers. Being a large corporation, HMC actively pursues and heavily invests in research and development of the automotive industry.
- c. That a huge amount of resources have been spent on the evolution and development of the visual brand identity and image of the Wing Device since its first appearance in 1947. The version of the Wing Device as it stands today was launched in 1988. Since then it has served as the identity and distinctive recognition of Honda motorcycles, symbolizing that the products bearing the Wing Device originate from the Complainant and none else.
- d. That the products manufactured by the Complainant are made in accordance with international quality and safety standards. The Complainant is also known for its reliable customer care, after sale services and promotional activities. It is the provision of such high quality, durable and reliable products along with its proficient after sale services recognized by and associated with the brand name HONDA and associated Wing Device that has resulted in substantial goodwill and reputation of the Complainant amongst consumers of all classes. The Wing



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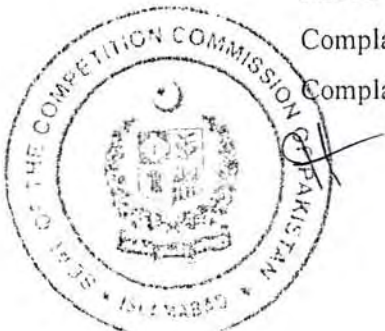
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Device is instantly identifiable as being associated with the Complainant and has remained a symbol of quality that attracts customers.

- e. That the brand name and associated Wing Device are part of the overall unique visual appearance of the Complainant's motorcycles which along with its bright red and black colour scheme, shape, size and design form the "Trade Dress" of the said motorcycles. The most popular model is HONDA CD-70 ("Cash Deposit 70") with its high fuel efficiency. The Complainant has registered the Trade Dress and design of its motorcycle models with the Patent Office, Government of Pakistan.
- f. That the imitation of the Complainant's trademarked Wing Device by the Respondents is a deceptive marketing practice within the meaning of Section 10(2)(d) and prohibited under Section 10(1) of the Act. The Respondents continue to distort healthy competition by adopting a deceptively similar trademark and trade dress as that of the Complainant and exploiting the recognition and goodwill associated with the Complainant's trademark for personal gains.
- g. That the individual grievance of the Complainant against each of the Respondents respectively is as follows:
 - i. The First Respondent's logo which accompanies its brand name JINAN is an imitation of the Complainant's Wing Device. The Trade Dress of the Complainant has also been copied by the adoption of the phrase "Safe Deposit 70" in the same manner and style of the Complainant's "Cash Deposit 70" on its motorcycles. The name JINAN is also an imitation of a Chinese company, which evidences the said Respondent's overall scheme to encash on the proprietary rights and good will of others.
 - ii. The Second Respondent's logo which accompanies its brand name PAK HERO is an infringement of the exclusive proprietary rights attached to the Complainant's Wing Device. The imitation is of an earlier version of the Complainant's logo which was being utilized prior to 1988. Additionally, the



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overall Trade Dress of the Complainant has also been copied by the said Respondent.

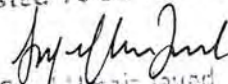
- iii. The Third Respondent's logo which accompanies its brand names UNITED SEVEN STAR and SHINE STAR is an exact imitation of the Complainant's Wing Device. Moreover, "Seven Stars" is a successful award winning brand of HMC.
- h. That the Complainant has always taken measures to prevent dilution of and protect its exclusive proprietary rights to the exclusion of others in respect of its brand name and associated Wing Device which is registered across the globe. The Complainant has been issuing legal notices and filing oppositions before the Trade Marks Registry against the unauthorized use of their registered logo by all undertakings within its knowledge. The Complainant has also published caution notices in newspapers warning the public about the illegal usage of its Wing Device.
- i. That the Respondents' conduct is likely to cause severe damage to the sales of the Complainant since the products, channels of trade, sale outlets and targeted customers of the Complainant and the Respondents are the same. The Complainant has already sustained damages as a direct and proximate result of the Respondents' infringement of the exclusive Trade Dress and the Wing Device. If the Respondents' continue this deception, the Complainant will undergo substantial losses and irredeemable harm to its goodwill and reputation.
- j. That the fraudulent and unauthorized use of the Complainant's Trade Dress and Wing Device without its permission, also runs the risk of generalizing the Wing Device for all kinds of motorcycles, be it high or low quality, thus diluting the distinctiveness of the Complainant's product. Furthermore, the Respondents' deceptive marketing practices are directly affecting the consumer as they are deceived into purchasing lower quality products.

That the Respondents' deliberate, wilful and intentional actions are contrary to fair competition in the industry. Reliance is placed on the Commission's previous



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findings of violation of Section 10 of the Act as to the fraudulent use of the famous BMW and Harley Davidson logos, as precedent in this matter.

9. In view of the above grievances, the Complainant prayed for the following relief to be granted: (i) restraining the Respondents from engaging in deceptive marketing practices; (ii) directing the confiscation, forfeiture, destruction or market withdrawal of all deceptive, copied or infringing products or publicity material; (iii) directing the Respondents to compensate the Complainant for cost of filing the Complaint with the Commission; and (iv) any other relief deemed fit in the circumstances.

B. BY THE RESPONDENTS

10. The Respondents submitted written replies to the Complaint and SCNs. Through their replies to the SCNs, the Respondents objected to various observations and findings as contained in the Enquiry Report. In summary, the Respondents denied any infringement or fraudulent use of the Wing Device of the Complainant and prayed for the SCNs to be withdrawn.
11. The Respondent's respective submissions put forth in response to the substantive allegations made by the Complainant are summarized below.

By the First Respondent and Second Respondent:

12. The First Respondent, a sole proprietorship and the Second Respondent, a private limited company filed individual replies to the Complaint and a joint reply to the SCNs and submitted as under:

- a. That the Enquiry Report, which appears to have been concluded based on a misreading and misconstruction of the pleadings of the Complainant, is ex parte and the said Respondents have been condemned unheard. Further, the record produced along with the Complaint was not authenticated by the Enquiry Committee in accordance with the Qanoon-e-Shahadat Order 1984.



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- b. That in addition to the existence of procedural irregularities in filing of the Complaint, the Complaint is an abuse of the process of the Commission and the Complainant has approached this forum with unclean hands.
- c. That the Complaint is an attempt to engage the Respondents in malicious and frivolous litigation for the sole intent of harming their reputation and growing state-of-the-art set ups. The instant proceedings are illegal and unlawful. The Respondents have a very small scale business with a small turnover as compared to the Complainant.
- d. That it is clear from an apparent view of the Objected Logos of the answering Respondents, that there is no relevance or similarity with the alleged distinctive Wing Device of the Complainant. The Respondents had no intention to infringe or copy the same to illegally benefit from the goodwill of others.
- e. That, with specific regard to the First Respondent's Objected Logo and brand name JINAN, the same was inspired by religious affiliations and a Saint whose shrine is situated in Karachi, contrary to the allegations of the Complainant. It is purely the intellectual property of the First Respondent. The said Respondent has been present in the motorcycle business since generations and has also worked with the Complainant as a dealer. However, the Complainant is trying to cause hindrances in the functioning of the Respondent's business, since the time it became aware of the said Respondent's intention to start its own business of assembling motorcycles.
- f. That with specific regard to the Second Respondent's Objected Logo and brand name PAK HERO, the same was designed by Oriental Group depicting the "Eagle's Wings" based on a devotional song sung in churches. The Second Respondent, faced with a financial crisis, entered into an agreement in 2009 with Oriental Group for investment purposes and the handing over of the administration and management of its business. The logo was also used by Oriental Group without prior permission of the said Respondent. However, the agreement with Oriental Group has since been terminated by the Second Respondent due to issues of fraud. The Second Respondent is already facing huge



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losses as a consequence of breach of contractual relations by Oriental Group. Furthermore, the Enquiry Report incorrectly states that the Second Respondent sells motorcycles under the name "Shine Star" and hence is representative of the non-application of vigilant minds by the Enquiry Committee.

- g. That the answering Respondents have acted strictly in accordance with law while executing their business strategies including advertisements, marketing and business development. However, the Complainant is trying to harm the remaining business of the Respondents which is already in turbulence due to unscheduled load shedding of electricity, gas and water supply as well as inflation and political instability.
 - h. That, in the present circumstances and to avoid a further setback or hurdle in the smooth running of their respective businesses, the First and Second Respondents, to show their bona fide intent, have stopped using the Objected Logos despite the fact that they were entirely different from the Wing Device of the Complainant.
13. The First and Second Respondents, in view of the adoption of new logos and their existing financial situation, have prayed for leniency from the Commission in terms of their commitments as detailed below.

Commitments of the First and Second Respondent

14. The First and Second Respondents, in their submissions and during the course of the hearings held in this matter, offered commitments to address the concerns of the Commission and the allegations levelled by the Complainant. The Respondents submitted that these commitments were being provided, without prejudice to the grounds and defences taken by them to reach an early resolution of the dispute. They placed reliance on the Commission's observations provided in its earlier order relating to the DHL trademark, stating that they were not in a position to contest any sort of frivolous litigation and jeopardize their remaining business operations.

15. The said Respondents submitted that they had changed their logos and all promotional materials had been redesigned incorporating their new logos. They further submitted



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that they had ceased to use and display the Objected Logos for the purposes of their business activities, that all previous printed material carrying the same had been destroyed, and their new logos have also been replaced on all existing stock present with their distributors. The said Respondents provided copies of the new logo designs and an assurance that the Objected Logos would not be used in the future.

16. The First and Second Respondents further submitted that they had applied for registration of their new logos with both the Copyright Office and Trade Marks Registry of the Intellectual Property Organization to avoid another future unruly situation due to the dominating position of the Complainant.

Complainant's response to the First & Second Respondents' Submissions

17. In response to the above submissions of the First and Second Respondents and commitments provided by them, the Complainant submitted a Rejoinder, received by the Commission on 25 February 2015, rejecting the denial of wrongdoing and reiterating their allegations against the Respondents. Notwithstanding the same, the Complainant acknowledged the said Respondents' willingness to settle the matter and comply with the law by amending the Objected Logos.
18. The Complainant asserted that there still existed some similarities between its Wing Device and the amended logo of the First Respondent resulting from the identical shape of the striped wing. However, the Complainant, while also communicating its desire to resolve the matter expediently, prayed for the Commission to pass an order compelling the First Respondent to use its new amended logo with its brand name JINAN as per the exact representation submitted before the Commission. With regard to its review of the Second Respondent's amended logo, the Complainant voiced its satisfaction as to the sufficient distinction in comparison to its Wing Device.
19. The Complainant further prayed for the Commission to pass an order directing the First and Second Respondents not to use the Objected Logos in any manner whatsoever and to remove all items including stocks, publicity and printed materials bearing the same in order to restore competition in the market.



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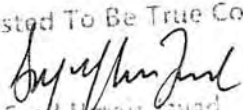
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By the Third Respondent:

20. The Third Respondent, a sole proprietorship filed its reply with the Commission and its submissions are summarized as under:

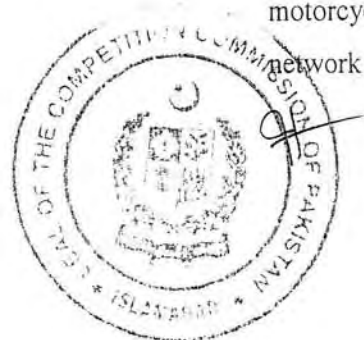
- a. That it has not engaged in any deceptive marketing practices as alleged by the Complainant and is conducting its business in a bona fide manner without violation of any law for the time being in force in Pakistan, under a distinct and self created trademarked logo. The answering Respondent has not copied the Wing Device of the Complainant. Even otherwise, neither does there exist any similarity between the two and nor is there any tendency to mislead on part of the said Respondent.
- b. That the Complainant's Wing Device is four layered with round upward curves. However, the answering Respondent's Objected Logo is three layered with a cutting edge arrow shape and a star in the centre. The distinctive brand names are also displayed at the bottom of each logo. Trademarks are to be viewed as a whole and not in bits and pieces in order to gather the impression. Both marks are visually distinctive and cannot be confused with each other. The trademarks are phonetically distinct too.
- c. That the Complaint itself is an attempt to oust the small manufacturers from the market who are competing with the Complainant in a fair and legitimate manner. It is also an attempt to encroach upon the mandate of the Intellectual Property Organization's Trade Marks Registrar under the Trade Mark Ordinance 2001 as the contents of the Complaint focus on infringement of trademark. A finding to this effect is not within the statutory mandate of the Commission.
- d. That the Enquiry Committee has erred in its investigative findings and conclusion and there is an absence of the application of mind and logic to the analysis. Hence, it is faulty and not well founded. The Enquiry Officers also disregarded the submissions of the answering Respondent that the use of the wing is common to this trade in terms of adoption of a variation of the wing by local motorcycle manufacturers. The common and distinctive features of each logo have to be



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analyzed in light of the exact trademarked logos of the existing manufacturers in the market.

- e. That the Complainant cannot blow hot and cold and make false statements in order to shut down the business of small enterprises through unfair tactics such as stating that its sales have been adversely affected. The annual report of the Complainant in fact shows that there has been an increase in its sales in the preceding year.
- f. That for Section 10(2)(d) of the Act to be triggered, the trademark must be used fraudulently and in the process of marketing or advertising. The Commission has already laid down the standard for analyzing advertisements, "viewing the advertisement as a whole" and not in isolation any part thereof (2010 CLD 1478). Reference is made to the Commission's earlier Orders in the matter of the Ace Group of Industries (2010 CLD 1840) and DHL (2013 CLD 1014), wherein the Respondents were using the exact trademark, along with the same colour scheme, font and style, and wherein any distinctive feature was missing. In the instant matter however, distinctive features exist between the Complainant's Wing Device and the Objected Logo of the Third Respondent, in the presence whereof there is no room for any deception or confusion on part of the consumer. The colour scheme and theme used by the Complainant in its advertising material is white and red which is unique in nature. The word HONDA is very conspicuously written on every billboard/ hoarding along with the Wing Device in a distinctive manner. On the other hand, the colour scheme and theme used by the Third Respondent is blue, yellow and golden and completely different from that of the Complainant. The said Respondent's brand name "Shine Star" also appears in both English and Urdu. This leaves no room for deception or confusion in the minds of the consumer.
- g. That in the trade of motorcycles, sales are made through exclusive authorized dealers. Therefore, the sales outlets for the different market players in the motorcycle market are not the same. The Complainant has the widest dealership network across Pakistan, whereas the Third Respondent sells its motorcycles



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through an authorized distributor and dealership channel consisting of approximately 18 dealers and sale points.

- h. That product in question does not pertain to a consumer good or shelved product which can be purchased by a passer-by. Rather, it is purchased only by a special segment of the public through special identifiable channels. Furthermore, motorcycle brands are very much within the knowledge of the consumer. It is the name of the brand and not the image which induces consumers to make a transactional decision. Therefore, the analysis of the advertisement is to be made from the point of view of the targeted audience / consumer which is not an ordinary consumer as defined by the Commission in its Order cited as 2010 CLD 1478, but a reasonable consumer. Through advertisements, the Complainant has made their tagline very famous "Mai Te Honda Hi Laisan!" which is identified by the targeted consumer when making a transactional decision. In the same way, the answering Respondent has its own distinct tagline being "Meri Pehli Khawhish".
- i. That it is trite law that "where advertising is aimed at a particularly susceptible audience, as in the instant case, its deceptiveness must be measured by the impact it will likely have on members of that group, and not to the general, unwary and gullible consumers to whom the advertisement is not targeted."

21. In view of its submissions above, the Third Respondent prayed for the Enquiry Report to the extent of the Third Respondent and the SCN issued to it, to be withdrawn by the Commission.

Complainant's response to the Third Respondent's Submissions

22. In response to the submissions of the Third Respondent, the Complainant rejected the denial of wrongdoing and submitted that the said Respondent is liable to be restrained and penalized as having engaged in deceptive marketing practices within the meaning of Section 10 of the Act. The Complainant further reiterated the following:



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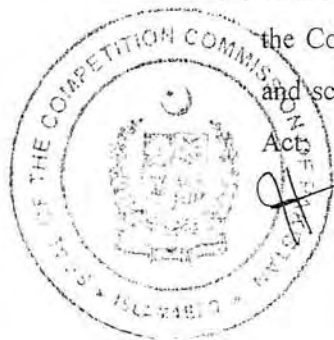
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- a. That its Wing Device has become famous and well known throughout the world as being exclusively associated with the Complainant. Therefore, the adoption of a closely similar and near identical logo by the Third Respondent is manifestly against the law and a violation of the Act.
- b. That it has already been established beyond reasonable doubt that the said Respondent has copied the Wing Device in order to free ride on the recognition and goodwill of the Complainant's world renowned trademarked logo. A trademark has a direct connection to the manufacturer of a product. The Complainant and the said Respondent are engaged in the same trade and channel of trade. The copied use of its trademark is a violation of fair trade practices and strictly prohibited under the Act, precedent of which has been set by the Commission in its Order in the matter of M/s Ace Group of Industries.
- c. That acceptance of a trademark application by the Trademark Registry does not in any way connote that the mark is not an imitation of another's trademark within the meaning of the Act. The Commission is the competent authority in dealing with cases of violation of Section 10 of the Act. The Trademark Ordinance 2001 also provides that "the provisions of this Ordinance shall be in addition to and not in derogation of any other law for the time being in force."
23. In view of the above rebuttal, the Complainant prayed for the Commission to issue an enforcement order against the Third Respondent with respect to the removal of all stock, publicity printed material and advertisements from the market that bears the existing Objected Logo in order to restore honest competition in the sector.

ISSUES

24. The issues identified by the Commission are as follows:

A. Whether the Respondents have resorted to the unauthorized and fraudulent use of the Complainant's distinctive and trademarked Wing Device within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act.



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- B. Whether the conduct of the Respondents amounts to the distribution of false or misleading information that is capable of harming the business interests of the Complainant within the meaning and scope of Section 10(2)(a) and hence a contravention of Section 10(1) of the Act.

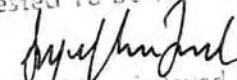
ANALYSIS AND DECISION

25. The factual and legal analysis herein below shall be structured according to the sequence and order of the two pertinent issues demarcated above, for each of the Respondents respectively. The Commission has taken into account and perused the entire record before it, including all submissions and supporting documents.
26. Before proceeding with such analysis and a consequent determination as to any contravention of the Act, the Commission finds it necessary to clarify the following, with regard to the objections levelled by the Respondents in their submissions pertaining to the Enquiry Report as under:
- a. The Enquiry Report does not amount to a determination of liability or guilt of the Respondents and has been considered by the Commission to the extent of the prima facie facts and recommendations contained therein, after which the Commission found it necessary in the public interest to initiate proceedings under Section 30 of the Act;
 - b. The actual liability or lack thereof of the Respondents will be considered analytically herein and a determination will follow in accordance with law based on the complete record before the Commission including the oral and written submissions of all the parties in the instant matter.
 - c. The Enquiry Report itself is a preliminary investigation and fact finding mission consisting of prima facie findings, which are subject to review by the Commission through its adjudication in proceedings such as these, pursuant to the issuance of a show cause notice under Section 30 of the Act.



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ISSUE A

27. The Commission finds it necessary, before a factual comparison and legal analysis of the Complainant's Wing Device and the Objected Logos used by the Respondents, to clarify the underlying legal principles and interpretation of the term "fraudulent use of another's trademark" in the context of deceptive marketing practices as envisaged by Section 10(2)(d) of the Act. This is necessitated by the sudden rise in complaints received by the Commission pertaining to allegations under Section 10 of the Act, as a result of the increasing public awareness of the protection provided by the Act with regard to prevalent anti competitive practices.

a. Section 10(2)(d) of the Act provides that 'fraudulent use of another's trademark, firm name, or product labelling or packaging' constitutes a deceptive marketing practice. The Commission has already issued determinations pertaining specifically to the fraudulent use of another's trademark through its Order in the Matter Of SCN issued to M/S ACE GROUP OF INDUSTRIES² (the 'Ace Order'), and Order in the Matter Of Complaint Filed By M/s. DHL Pakistan (Pvt.) Ltd³ (the 'DHL Order'). Moreover, the Commission observed in the DHL Order that *'...while interpreting Section 10 of the Act; one needs to be conscious that the interpretation of fraudulent use of trade mark has to be in the context of deceptive marketing and would thus have a broader scope. Rather than making it too complex by focusing on subjective "intentions" of the Respondents, in our considered view, it is best if we adopt simplistic approach i.e. if it can be demonstrated that the Respondents by use of the trade mark, intended to deceive the customer/consumer to gain an advantage. Keeping in view the nature of contravention, it is not the subjective intent but the objective manifestation of that intent that will establish the fraudulent use'*.



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- b. Furthermore, as the Commission observed in its Order in the Matter Of SCN issued to M/S A. RAHIM FOODS⁴ (the "K&Ns Order)", albeit a case pertaining to fraudulent use of another's product labelling and packaging, that "*...fraud itself consists of some deceitful practice or willful device to obtain an unjust advantage and which deprives another of a right or causes another injury. The Commission, entrusted with the task of adjudicating upon a potential contravention under this provision of the Act, remains mindful of the much wider context and purpose of the said prohibition.*"
- c. With specific regard to the fraudulent use of another's trademark, the Commission shall be satisfied that the evidence adduced before it is conclusive, if (1) there is a complete absence of distinctive features between the trademarked logos of the Complainant and the Respondent(s); or (2) the striking similarities that exist are misleading enough to cause confusion in the minds of the targeted consumer; and (3) the end result of which is unjust enrichment of the Respondent(s) at the expense of and to the detriment of the Complainant.
- d. It may also be noted that under the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and Council and the United Kingdom's Consumer Protection from Unfair Trading Regulations 2008, a commercial practice will be regarded as misleading if it involves any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor and, as a result, distorts the economic behaviour of the consumer.
- e. In relation to the definition of a consumer for the purposes of Section 10 of the Act, the Commission in its Order in the matter of M/s Pakistan Telecom Mobile Limited⁵ (the "Zong Order") observed that the term is to be "construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services". The ordinary consumer is the usual, common or foreseeable user or buyer of the product. It was further observed in the said Order

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that "...the scope of the term 'consumer' must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 ". However, it must be borne in mind that a different set of facts and circumstances may warrant a minor variation to the above definition, in terms of the targeted audience of consumers to whom the marketing practice may be directed. For instance, the ordinary consumer for a shelved product sold at supermarkets, being the general public, will not be the same as the ordinary consumer for a specialized product which is sold through a special channel and not demanded by the public as a whole but by a segment thereof. Factors such as the reasonableness of a presumption of being well informed and the consequent expected market behaviour and choice of a consumer may have to be taken into consideration. This issue will be discussed in more detail below in relation to the facts and circumstances in this matter.

- f. While correlating the function of a trademark to deceptive marketing practices, the Commission in the Ace Order, placed reliance on the judgments of Philips Electronics NV v Remington Consumer Products 2002⁶ Ltd and Arsenal Football Club v Mathew Reed 2003⁷, where in it was held by the Court of Justice of the European Union that the "*essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trademark to be able to fulfil its essential role in the system of undistorted competition, it must offer a guarantee that all the goods or services bearing it has been manufactured or supplied under the control of a single undertaking which is responsible for their quality*". This provides sufficient clarity as to the functioning of a trademark for the purposes of the applicability of Section 10(2)(d) of the Act.

⁶ Case No. C-299/99

⁷ Case No. C-206/01



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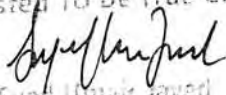
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- g. Furthermore, the Commission is wary of the fact that before any business undertaking is able to establish commercial relations with its targeted consumer base, it must create an identity for itself, its brand and its goods or services. Trademarks serve to individualize the products of a manufacturer from those of another manufacturer, with a dual purpose. They help manufacturers promote their products by stimulating brand loyalty while assisting consumers in their decision, prompting producers to maintain and improve the quality of the products sold under a particular brand.
- h. It follows from the above that a business's identity is primarily based on the good will it is able to establish with consumers, while a product's identity is the reputation it has earned for quality and value. From the economic perspective, free and undistorted competition is based on the ability of consumers to easily distinguish between products offered by competitors in a market for a particular product. Such competition is hindered when rival products become indistinguishable or are viewed as interchangeable by the consumer. For this reason, businesses make huge investments in designing and ensuring the uniqueness of their brand logos, amongst other things, as a symbol of their identity in the market and a distinguishing factor of their product from those of competitors.
- i. In terms of protecting their unique logos which they attach to their products and promotional material to signify authenticity and indicate source to the public, businesses make further investments to register the same with the Intellectual Property Organization Pakistan in accordance with the applicable trademark laws. However, from the viewpoint of competition, the mischief that Section 10(2)(d) of the Act seeks to remedy in this regard, is to deter competitors from using deceptively similar trade devices which cause confusion for the consumer due to their lack of distinguishing properties and hence a distortion of competition in the marketplace. It is this very aspect of unfair competition which impairs the identification and differentiation ability of the consumer due to the use of resembling trademarks by businesses, an aspect that the Commission remains



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wary of and that has a special significance from the marketing perspective within the meaning and scope of Section 10 of the Act.

- j. It may also be clarified here that in a case of unfair competition caused by a deceptive marketing practice, as contrasted to a technical trademark infringement case, fraud is the essence of the wrong. However, "fraud" required for such a finding, is not equivalent to technical deceit. With its objective interpretation, it means a conscious use of an identical or confusingly similar mark. This distinction between a technical trademark infringement case and that of unfair competition has to be seen in light of the much broader sense of indicators of product origin that competition law seeks to protect, as against the physical aspect of the mark itself. The Commission is more focused on the nature of the conduct of the party complained off and its effects on competition in the market, as against the recognition of property rights attached to the complainant vis-à-vis its trademark. Therefore, the term "fraudulent use" in Section 10(2)(d) of the Act, refers to fraudulent marketing by an undertaking, where the circumstances are such that the targeted consumers are likely to rely on the marketing scheme of the undertaking, to the commercial detriment of another.
- k. Furthermore, a strong likelihood of confusion on part of the targeted consumers as well as free riding on the goodwill attached to another's trademark is central to a determination as to the existence of a deceptive marketing practice through the fraudulent use of another's trademark. Such likelihood of confusion is presumed in the case of the use of an identical trademarked sign or logo. However, this presumption is not attracted where there is a combination of material similarities and distinctive features, in which situation a comparison and analysis is required of intrinsic and external factors to determine how likely it is that consumer confusion shall result objectively. Such factors may include among others, the extent of similarity in the overall trade dress of competing products, distribution channels for sales and whether the products are related or are sold in different geographic markets.

Notwithstanding the independent jurisdictions of the Trademark Registrar and the Commission established under the respective trademark and competition laws,



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there may be a case of unfair competition even if the competing mark of the respondent is registered with the Trademark Registry. However, such registration may in certain instances show prima facie good faith to negate the finding of imitation of another's mark. In other words, while it is true that registration of a competing mark will not negate the likelihood of unfair competition where the products are passed off as those of the complainant, the mark's registration, coupled with stark differences between the competing marks, may be seen as negating an actual intent to deceive the public. This is particularly true where the competing goods are expensive and the buyer is more cautious and discerning, preferring to deliberate over the purchase consciously, thereby making confusion and deception less likely.

m. In continuation to the above, there is no doubt that the behaviour of the consumer or purchaser, which is a central factor to be considered under Section 10 of the Act, is in fact determined to a great extent by the cost of the product in question. Additional external factors that are relevant in this context of unfair competition include the nature and presentation of the product, whether it is bought for immediate consumption or is a durable long lasting investment, the conditions under which it is so purchased and the corresponding understanding of the targeted consumers in relation to the product. There is no hard and fast rule or exhaustive set of factors to be considered for the application of Section 10 and specially Section 10(2)(d) of the Act. The law itself is an evolving creature and the existence of unfair competition will remain a question of fact in light of the peculiar circumstances of each case. The only certain question of universal application is whether the public is likely to be deceived in view of a overall impression of a certain mark being associated with the products originating from the complainant as against its similar or identical competing use by the respondent. Thus, an inference of fraudulent marketing is measured against the likely influence it may have on the consumer based on the similarity and general appearance of the products in question. It may be clarified that the probability or likelihood of deception, being the test of fraudulent use, is to be tested at the point of sale and not after wards, as it is this point that the purchaser mulls upon the product and is likely to buy the same under the belief that he is buying another. It is at the point of the transactional decision taken that a purchaser would not

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otherwise have taken, but for the fraudulent marketing, that is relevant for a determination of a violation of Section 10(2)(d) of the Act.

28. In light of the above legal observations in relation to Section 10(2)(d) of the Act, the Commission's application of the same to the facts at hand and its conclusion as to each of the three Respondents' conduct are as follows.

29. At the outset, the Commission finds it appropriate in view of the facts of the instant case to clarify that it is indeed a targeted segment of the public to whom the marketing practices of the parties are directed in terms of competing with each other as manufacturers of motorcycles in Pakistan. The Commission in its analysis below will seek to evaluate objectively the effect that the marketing of the Respondents has had on the consumer susceptible to such advertising, and not the general public. It is further observed that members in this group are understood to be wary and well informed of the choices they have before concluding the purchase of a motorcycle. Relevant to this is also the fact that the purchase of motorcycles is a costly investment and would reasonably always involve the active application of mind before a transactional decision is taken. It also follows, that since the product in question itself is not a shelved product, being sold instead through a distribution channel of exclusive and non exclusive dealers, deceit itself cannot be easily inferred, as would otherwise be the case with an off the shelf product.

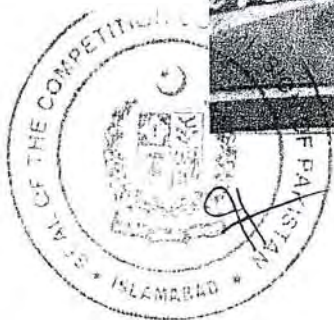
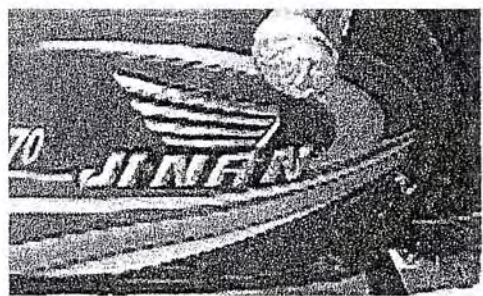
First Respondent

30. The Commission finds it necessary to compare the Wing Device of the Complainant and the Objected Logo of the First Respondent along with their respective brand names, both of which are reproduced below for the purposes of image comparison:

Complainant's Wing Device



First Respondent's Logo



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31. On the basis of a pictorial comparison of the two logos above, the Commission does not hesitate to rule out the existence of an identical usage or exact replica of the mark of the Complainant by the said Respondent, in contrast to the factual findings in the DHL Order and Ace Order.
32. The Commission observes that if the logos are viewed in isolation without any attention given to other external factors of the overall marketing strategies, certain striking similarities do exist at first sight in terms of the overall shape and design of the two wings. However, when further attention is paid and specifically in view of the adjoining respective brand names of the parties being affixed to the logs at the base, the logo and brand name seen as a whole confirm the existence of distinctive features. Furthermore, when extraneous factors such as the overall layout of their respective marketing practices are seen in juxtaposition with each other, the similarities are blurred even further.
33. In view of the foregoing, from the objective viewpoint of the targeted consumers purchasing motorcycles through specialized distribution channels, the Commission concludes that there is no significant likelihood of deception. The First Respondent cannot be held to have resorted to the unauthorized and fraudulent use of the Complainant's Wing Device within the meaning of Section 10(2)(d) of the Act.
34. Even otherwise, the First Respondent has provided its commitment of refraining from using the Objected Logo in the future, which it has replaced with a new logo, as reproduced below. The Commission finds the new logo of the said Respondent to be satisfactory in terms adequately removing the existence of the earlier similarities between the Complainant's Wing Device and the original Objected Logo of the Respondent. The Commission accepts this commitment of the First Respondent on the condition that its brand name will accompany its new logo on all its products and promotional material at all times to avoid any future likelihood of deception.



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Second Respondent

35. The images below as reproduced for the purposes of comparison are that of the Complainant's former logo that it used prior to 1988 and Objected Logo of the Second Respondent:

Complainant's logo prior to 1988



Second Respondent's Logo



36. On the basis of a pictorial comparison of the two logos above, it is observed that while the two images are not identical per se, the Commission does find striking similarities between the two, when viewed in isolation and without the respective adjoining brand names of Complainant and the Second Respondent. However, it must be kept in perspective that the Complainant's allegations against the said Respondent relate to a logo which the Complainant no longer employs in its marketing practices in Pakistan as of 1988. Therefore, from the perspective of unfair competition or a potential distortion of competition in the relevant market of motorcycles, there can be no positive conclusive finding against the Second Respondent.

37. The Commission concludes that the use of the objected logo by the Second Respondent being similar to a much earlier version of the Complainant's Wing does not have the potential to impair the identification and differentiation ability of the targeted consumer from a deceptive marketing perspective within the scope of Section 10(2)(d) of the Act. Therefore, the Commission does not deem it necessary to indulge in further analysis of extrinsic factors in its determination.

38. The Complainant may well have a case under trademark laws for infringement of its trademarked logo as it appeared prior to 1988. However, unfair competition laws and the enforcement provisions there under are aimed at restoring competition in the



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market, which is not absent in the case of the Second Respondent having copied an older version of a logo which is no longer being used in the course of trade and marketing, thereby not affecting consumer decision. The Second Respondent cannot be held to have resorted to the unauthorized and fraudulent use of the Complainant's logo within the meaning of Section 10(2)(d) of the Act.

39. Even otherwise, the Second Respondent has provided its commitment of refraining from using the Objected Logo in the future, which it has replaced with a new logo, as reproduced below. The Commission finds the new logo of the said Respondent to be satisfactory as it bears no resemblance whatsoever to the Complainant's earlier logo or existing Wing Device. The Commission accepts this commitment of the First Respondent on the condition that its brand name will accompany its new logo on all its products and promotional material at all times to avoid any future likelihood of deception.



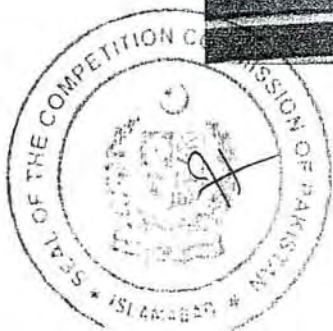
Third Respondent

40. The images of the Wing Device of the Complainant and the Objected Logo of the Third Respondent are reproduced as under:

Complainant's Wing Device



Third Respondent's Logo



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41. On the basis of a pictorial comparison of the two logos above, it is observed that there has been no identical use of the Complainant's existing Wing Device by the Third Respondent. However, the overall appearance may be seen as similar, if the logos are seen in isolation of all other components including the circled star emblem located at the centre of the said Respondent's logo. However, when the two logos are compared in the presence of the distinctive features and the adjoining brand names of the parties, the Commission finds no conclusive deceptive behaviour on part of the Third Respondent. This view is further strengthened by the existence of other important factors to be considered from a competition viewpoint, such as the completely distinct colour scheme, overall layout and tag lines of the respective marketing campaigns of the two parties.

42. Furthermore, an exclusive chain of authorized distributors and dealers exist for the sale of the Third Respondent's motorcycles, based on which the likelihood of confusion is negated on part of the targeted consumers. Therefore the Third Respondent cannot be held to have resorted to the fraudulent use of the Complainant's Wing Device within the meaning of Section 10(2)(d) of the Act. However, as a measure of caution, the Third Respondent is strongly recommended to use its brand name along with its existing logo on all its products and promotional material in order to avoid any future likelihood of deception.



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ISSUE B

43. In furtherance to the observations and conclusions reached above in terms of Section 10(2)(d) of the Act, the Commission further finds that the conduct of the Respondents and their use of the Objected Logos, does not amount to the distribution of false or misleading information, which is capable of harming the business interest of the Complainant under Section 10(2)(a) of the Act.
44. Had the Commission reached a different factual and legal conclusion in relation to ISSUE A above, the analysis under Section 10(2)(a) of the Act would have been quite different. However, in view of the only conduct of the Respondents' complained of being the use of the Objected Logos, coupled with the absence of any other allegations of deceptive marketing practices against the Respondents, the Commission is fortified in its negative determination under ISSUE B.
45. The Commission does not find the First, Second or Third Respondent to have engaged in the distribution of any information that has a false or misleading character. Consequently, the subsequent question of any potential capability of harm being caused to the business interests of the Complainant is not relevant to this adjudication for the time being.

COMMITMENTS/ CONDITIONS AND RECOMMENDATION

46. In view of the above factual and legal analysis, the Commission finds none of the three Respondents to have engaged in deceptive marketing practices in contravention of Section 10 of the Act.
47. Moreover, the Commission accepts the commitments of the First and Second Respondents on the condition that their respective brand name JINAN and PAK HERO will accompany their new logos on all their products and promotional material at all times to avoid any future likelihood of deception.

48. The Commission further strongly recommends that the Third Respondent uses its brand names SHINE STAR and UNITED SEVEN STAR along with its existing logo



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on all its products and promotional material in order to avoid any future likelihood of deception.

49. In terms of the above, SCN Nos.70, 71 and 72/2014 are hereby disposed of.

50. Ordered accordingly.

Vadiyya Khalil

Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar

Dr. Shahzad Ansar
Member

Ikram Ul Haque Qureshi

Ikram Ul Haque Qureshi
Member

Islamabad, the 30th June, 2016



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