



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF**

**COMPLAINT FILED BY RECKITT BENCKISER PAKISTAN LTD.
AGAINST M/S S.C. JOHNSON & SON PAKISTAN LIMITED FOR
DECEPTIVE MARKETING PRACTICES
(FILE NO. 77/REG/RECKITT/OFT/2011)**

Date of Hearing: 03-11-2011

Present: Ms. Rahat Kaunain Hassan
Chairperson

Ms. Shehzad Ansar
Member

On behalf of

M/s Reckitt Benckiser Pakistan Ltd. Mr. Mehmood Mandviwalla & Ms. Sana
Iftikhar, Advocates of Mandviwalla & Zafar

M/s S.C. Johnson & Son Pakistan Ltd. Mr. Waseem Majid Malik, Advocate Supreme
Court & Mr. Wasif Majeed, Advocate High
Court

ORDER

1. This Order will dispose of the proceedings arising out of the show cause notice no. 46/2011 issued to M/s S.C. Johnson & Son Pakistan Limited (the '**Respondent**') for *prima facie* violation of Section 10 of the Competition Act, 2010 (the '**Act**').

2. The Show Cause Notice was issued pursuant to a complaint filed by M/s Reckitt Benckiser Pakistan Limited (the '**Complainant**') with the Competition Commission of Pakistan (the '**Commission**') against the Respondent alleging that the Respondent is making a claim in their Marketing Campaign and advertisements to be 'No. 1 in Pakistan' with respect to all of its products under the brand 'Baygon'. It was submitted that on the basis of the Audit Retail Survey of A.C. Neilson Company, the market share of the Complainant's product is 39.7% while the market share of the Respondents products under the brand 'Baygon' is 5.7%. Therefore, it was alleged that the said claim in Respondent's Marketing Campaign lacks a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act and the said Marketing Campaign is capable of harming the business interest of the Complainant.

3. A formal enquiry in terms of Section 37(2) of the Act was initiated which was concluded vide Enquiry Report dated 26-10-2011. Based on the *prima facie* findings of the enquiry report a show cause notice was issued to the Respondent

on 27-10-2011. It was required to respond to the show cause notice in writing within fourteen (14) days from the date of show cause notice and to appear before the Commission and avail the opportunity of hearing on 14-11-2011. The show cause notice in its relevant part alleged as follows:

5. **AND WHEREAS**, in terms of the Enquiry Report in general and in particular Para 5.2.1 to Para 5.2.8 of the Enquiry Report, prima facie, the overall impression of the advertisement of the Respondent is that Baygon has been awarded the Brand of the Year 2010 Award for the entire range of its products and on the basis of this award Baygon is No. 1 in Pakistan for the entire range of its products and is best to fight dengue;

6. **AND WHEREAS**, in terms of the Enquiry Report in general and in particular Para 5.4 to 5.4.9. of the Enquiry Report, when the overall net impression of the advertisement is taken into account and interpreted with the Award Certificate of the Brand of the Year 2010 provided by the Respondent, it appears that the advertisement pertains to all the products of the Respondent under their brand 'Baygon', whereas the Award Certificate only grants recognition/Award to the Aerosol products;

7. **AND WHEREAS**, in terms of the Enquiry Report in general and in particular Para 5.5 to 5.5.6 of the Enquiry Report, when the dengue is on the rise and dengue fever is increasingly becoming an epidemic in Pakistan, the Marketing Campaign/Advertisement of the Respondent has the tendency to mislead the consumers;

8. **AND WHEREAS**, in terms of the Enquiry Report in general and in particular Part 5 & 6 of the Enquiry Report, the Respondent is, prima facie disseminating false/misleading information to the consumers regarding its products under the brand 'Baygon' that is lacking a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act;

9. *AND WHEREAS, in terms of the Enquiry Report in general and in particular Part 5 & 6 of the Enquiry Report, prima facie, the conduct of the Respondent i.e. making the claim of being the 'No. 1 in Pakistan' in its advertisement with reference to all of its products is capable of harming the business interest of the Complainant in violation of Section 10(2)(a) of the Act;*

4. The Complainant has filed an 'Application for Interim Relief under Section 32 of the Act' (the '**Application**'). It has been stated therein that with the cases of dengue and malaria on rise, the marketing campaign is a deliberate, conscious and *mala fide* attempt on part of the Respondent to mislead and exploit the consumers to believe that 'Baygon' being No. 1 in Pakistan is best for protection from these diseases. It was stated that since, claim of the Respondent lacks reasonable basis and is capable of harming the business interest of the Complainant, therefore, the Respondent be restrained from using the claim 'No. 1 in Pakistan' till final disposal of the matter. Accordingly, hearing was scheduled on the Application for 03-11-2011 and the Respondent was informed through hearing notice dated 28-10-2011 through courier/fax. A copy of the Application was also forwarded to the Respondent and was required to file their written reply and attend the hearing on the said date.
5. On 03-11-2011, Mr. Mehmood Mandviwalla & Ms. Sana Iftikhar, Advocates of Mandviwalla & Zafar for and on behalf of the Complainant and Mr. Waseem Majid Malik, Advocate Supreme Court and Mr. Wasir Majeed, Advocate High Court for and on behalf of the Respondent appeared before us. The Counsel

appearing on behalf of the Respondent did not file any written reply and only made oral submissions before us.

6. The counsel for the Complainant during the hearing argued that the Commission has the power under Section 32 of the Act to issue interim Orders where it would, otherwise, cause irreparable damage. The Complainant is not seeking relief in the garb of complete disposal, however, requested for interim relief regarding further printing and publicizing of the campaign. The counsel submitted that advertisement of the Respondent bears a claim 'No. 1 in Pakistan' followed by the Brand of the Year Logo. The ad conveys that Respondents' entire range of products is No. 1 in Pakistan. The counsel submitted the picture of the advertisement, which is as follows:



7. It was further argued by the counsel for the Complainant that although the Respondent has been awarded the Brand of the Year 2010 award, however, the same is only for 'Aerosol Products' and not for the entire range of products. He

relied on the advertisement of K&N and submitted that the Brand of the Year 2010 should have been advertised or claimed perhaps in similar manner.

8. He submitted that the retail Audit Survey of the AC Neilson Company is self explanatory that the Complainant is No. 1 in the market. The details of the value and volume share of the products of the Complainant as compared to that of Baygon are as follows:

	Volume Share %		Value Share %	
Mortein	33.1%	33.0%	38.8%	39.7%
Baygon	4.7%	4.7%	5.7%	5.7%

9. The counsel added that the Respondent has not submitted any document to rebut the AC Neilson Report and also has not provided any details supporting the claim of No. 1 in Pakistan. He further relied upon *Order of the Commission in the matter of Proctor & Gamble Pakistan reported as 2010 CLD 1695* and submitted that any undertaking making a claim must have a reasonable basis for making such claim. It was inquired whether the advertisement affected the sales of the Complainant, and the response in this regard was that this advertisement campaign is conducted when the fight against dengue is going on and the claim of being 'No. 1 in Pakistan' would generally or is likely to get the Respondent a competitive edge enhancing the market share and the Complainant would be denied of the market share, which share may otherwise, could have been gained by the Complainant. It was, therefore urged that the Respondent be restrained to

further advertise the claim through any medium till disposal of the Show Cause Notice.

10. The counsel for the Respondent argued that in terms of Section 32 of the Act, the Commission has to form an opinion that the final Order is likely to take time and the matter is of public importance. However, plain reading of the hearing notice finds no mention regarding forming of such opinion. He further argued that the AC Neilson Report was published in June 2011 and the advertisement campaign was carried out in September 2011 only in Karachi through billboards. Therefore, how can that be relied upon? He further argued that they have not committed any violation of law and in fact at best; the claim is puffery which is not prohibited and is not a violation of the Act.

11. The counsel argued that if the claim made by the Respondent i.e. ‘No.1 in Pakistan’ is deceptive then claims such as ‘Best in Town’ ‘Best of the Best’ are also deceptive. In this regard he placed reliance on *American Italian Pasta Company vs. New World Pasta Company 371 F3d 387*; wherein the phrase ‘America’s Favourite Pasta’ was under question and *Deborah A. Fraker vs. K.F.C Corporation; Yum! Brands, INC., 2007 U.S. Dist. LEXIS 32041*, wherein the claim ‘the Best Food’ was under question. However, it was held that the exaggerated claims made in the advertisement are puffery and cannot be held misleading claims.

12. Notwithstanding the above submissions, the counsel for the Respondent also submitted that even before the enquiry committee they have submitted that they are willing to modify/amend their claim and advertisement in light of the direction of the Commission. The counsel for Respondent Mr. Waseem Majid Malik also gave the following statement:

“He has instructions from his client i.e. M/s S.C. Johnson & Son Pakistan Limited that on a high moral ground the marketing campaign in question in the present proceeding/SCN will be withdrawn no later than ten (10) days, starting from today i.e. 03-11-2011.”

13. In response to the statement made above, the counsel for Complainant submitted that “he has no objection if the complaint is disposed off by the Commission in terms of the commitment made by the Respondent’s counsel.”

14. Subsequent to the hearing, through letter dated 04-11-2011 the Respondent was required to file the commitment as undertaken by its Counsel. Accordingly, the Respondent through Mr. Kamran Khan, its country manager, filed an undertaking stating that,

“...S.C. Johnson & Sons (Pvt.) Limited do hereby, on high moral grounds, undertake to withdraw marketing campaign subject matter of the titled complaint within ten (10) days of the Order dated 04-11-2011.”

15. In view of the above, the conciliatory and compliance oriented approach of the counsels appearing before us in the matter needs to be appreciated. Although, the

Respondent had already filed an undertaking regarding withdrawal of the marketing campaign, we deem it appropriate and important to address following issues that have emerged from these proceedings for the purpose of clarity:

- (i). Whether the claims ‘No.1 in Pakistan’ and ‘Brand of the Year 2010’ is in violation of Section 10 or is merely puffery?
- (ii). Whether the requirements for issuance of interim Order under Section 32 of the Act have been complied with?

16. With reference to the first issue, the counsel for the Respondent has argued at length that the claim is puffery which is allowed and is not a violation of the Act. He also added that if ‘No.1 in Pakistan’ is deceptive than ‘*Best in Town*’ or ‘*Best of the Best*’ are also deceptive. He placed reliance on *American Italian Pasta Company vs. New World Pasta Company 371 F3d 387*; wherein the phrase ‘America’s Favourite Pasta’ was under question and *Deborah A. Fraker vs. K.F.C Corporation; Yum! Brands, INC., 2007 U.S. Dist. LEXIS 32041*, wherein ‘the Best Food’ was under question. In both the above referred judgments the claims under review were declared puffery.

17. We have reviewed the cases cited above, and deem it important to clarify the concept of a ‘puffery’ statement. The term ‘puffery’ also termed as ‘puffing’ is defined in *Black’s Law Dictionary 8th Edn.*, as “*the expression of an exaggerated opinion – as opposed to a factual misrepresentation – with the intent to sell a good or service.*” The Federal Trade Commission (the ‘FTC’) as early as in 1957 in the matter of *Better Living, Inc., et al., 54 F.T.C. 648 (1957)* defined ‘puffery’ as a “*term frequently used to denote the exaggerations reasonably to be expected*

of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." This definition was affirmed by the United States Court of Appeals third circuit in *259 F.2d 271 (1958)*. The United States Court of Appeals in the matter of *Newcal Industries v. Ikon Office Solution 513 F.3d 1038 (2008)* held that:

"A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. Id. at 246. "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." Id. Thus, a statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery. Id."

18. Keeping in view the above, we are of the considered view that generally ‘puffery’ is intended to base on an expression of opinion not made as a representation of fact. ‘Puffing’ statements are, while factually inaccurate; so grossly exaggerated that no ordinary consumer would rely on them. Hence ‘puffing’ is generally vague and unquantifiable.

19. We note that the claim ‘No.1 in Pakistan’ is not a general assertion. The examples quoted by the Respondent further strengthens our view as the statement ‘**Best in Town**’ or ‘**Best of the Best**’ are more general in nature and cannot be quantified. However, the statement ‘**No. 1 in Pakistan**’ is a quantifiable and specific statement, which describes specific characteristic. We cannot accept that either

‘No. 1’ or ‘Pakistan’ in any manner conveys a general impression towards the consumers.

20. Moreover, with respect to the claim ‘No. 1 in Pakistan’ it would be helpful to refer to case of *Nestle USA (Nescafe Frothe cappuccino), Report #4263, NAD Case Reports (Jan. 2005)*; wherein the claim *“Nescafe delivers brand credibility as the world’s #1 coffee brand”* was under review. It was held that the claim used in the advertisement by Nescafe was quantifiable; as it could be measured and defined. The statement was termed as a claim and not ‘puffery’.

21. The Complainant has argued that the Respondent has made a claim in their marketing campaign in question i.e. ‘No. 1 in Pakistan’, for which the Respondent does not have any ‘reasonable basis’. He further argued that based on the AC Neilson Audit Survey ‘Mortein’ is ‘No. 1 in the Pakistani markets’ in terms of volume and value share. It was also argued that the ‘Brand of the Year 2010’ award does not entitle the Respondent to claim ‘No. 1 in Pakistan’ as the said award has only been conferred for the ‘Aerosol Products’ and not the entire range of products under the brand i.e. ‘Baygon’. On the other hand the counsel appearing on behalf of the Respondent has argued that they have not committed any violation of law and in fact if at all; the claim is puffery which is allowed and is not a violation of the Act. It is pertinent to mention here that the Respondent was also required to file the written reply to the application for early hearing sent

through letter dated 28-10-2011; however, no written reply was filed. The Respondent preferred verbally arguing the matter before us.

22. We have gone through the material available on the record and the submissions made by the parties in this regard. In one of earlier Orders of the Commission ***In the matter of Procter and Gamble reported as 2010 CLD 1695***, the concept of ‘reasonable basis’ has been recognized in following terms:

“The concept of having a reasonable basis is an established concept in USA and was introduced after much deliberations and public comments through Policy Statement Regarding Advertising Substantiation. It provides that, the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement.”

23. In our considered view, when the logo of ‘brand of the year’ is placed with the claim ***No. 1 in Pakistan*** every ordinary consumer would *prima facie* believe on the statement and is likely to be misled by such marketing particularly, when dengue is becoming an epidemic, and the consumers are looking for the best protection against mosquito.

24. We are cognizant of the fact that the Brand of the Year Award 2010 was awarded to the Respondent for their ‘Aerosol products’, whereas, as is evident from the picture of the advertisement, the claim of being ***No. 1 in Pakistan*** is used with reference to all of the products of the Respondent, even otherwise, just by

winning the Award of the Year in any particular category from the Brands Foundation, would not entitle any undertaking to make any such absolute claim. In this regard reference has to be made to the *Commission's Order dated 13-01-2012 in the matter of show cause notice issued to Paint Manufacturers* wherein the Commission relied on *International Harvester Co., 104 F.T.C. 949 at pg. 1058* (1984) agreeing with the observation that “[i]t can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative”.

25. Therefore, in view of the *prima facie* findings of the enquiry report, which even before us have not been rebutted either orally or by production of any documents/evidence, we are of the view that the claim ‘*No.1 in Pakistan*’ lacks ‘reasonable basis’ and was in violation of Section 10 of the Act. In light of the prevailing situation when fight against dengue fever was going on rigorously, there is a merit in the claim that ‘it is capable of harming the business interest of the competing undertakings’, including the Complainant.

26. With respect to the second issue, it would be relevant to reproduce Section 32 of the Act, which is as follows:

32. Power to issue interim orders.- (1) *Where, during the course of any proceedings under section 30, the Commission is of opinion that the issue of a final order in the proceedings is likely to take time and that, in the situation that exists or is likely to emerge,*

serious or irreparable damage may occur and an interim order is necessary in the public interest, it may, after giving the undertaking concerned an opportunity of being heard, by order, direct such undertaking to do or refrain from doing or continuing to do any act or thing specified in the order.

27. As per the settled principle of interpretation of statutes plain and ordinary meaning of the words and expression shall be adhered to and no other meaning shall be deduced there from which was not available from such reading. Accordingly, the plain reading of the above provision suggests that for issuance of Interim Order under Section 32 of the Act, following conditions must be fulfilled:

- (i). proceedings under Section 30 are pending;
- (ii). Commission is of the opinion that:
 - (a). a final order is likely to take time;
 - (b). in the situation that exists, or is likely to emerge, serious or irreparable damage may occur; and
 - (c). an interim order is in the 'public interest';
- (iii). An opportunity of hearing is provided to the undertakings concerned.

Subject to the above, the Commission may direct such undertaking to do or refrain from doing or continuing to do any act or thing specified in the Interim Order.

28. With respect to the requirements under Section 32, Respondent's only argument was that if any "opinion" is formed by the Commission regarding issuance of the interim order under Section 32 of the Act, the same has not been communicated.

We are of the considered view that the requirements above stated are for issuance of an Order under Section 32 and not for issuing a hearing notice.

29. There is no denying to the fact that the proceedings were pending as show cause notice under Section 30 of the Act pursuant to the complaint had already been issued. In the present case, dengue was on the rise, and basic contention of the Complainant was that the marketing campaign of the Respondent wherein 'No. 1 in Pakistan' has been claimed will seriously harm the sales of mosquito repellants and other related products of the Complainant. We are of the opinion that *prima facie* the contention of the Complainant is correct as the consumers would want to take the best product for protection against mosquito and in the presence of marketing campaign of the Respondent under review, there existed a likelihood which could cause irreparable harm to the Complainant, in addition we are in agreement with the recommendation of the enquiry report, that "*presently dengue is on the rise and dengue fever is increasingly becoming an epidemic in Pakistan. The disease easily spreads in rural areas of Pakistan. Five (5) persons per day are being killed by dengue. More than 10,000 people have been infected. The severity of the disease is felt in Lahore, the provincial metropolis of Punjab. More than 170 people have died and several hundreds are admitted as new cases are confirmed. In such circumstances the consumers are going an extra mile to accord themselves protection from such lethal disease; the Marketing campaign/Advertisement of the Respondent is more likely to mislead the*

consumers in the said manner”. In view of the above, the final Order could have taken time. Besides the subsequent development and statements made by the parties during the hearing, such a situation could have warranted issuance of an interim Order under Section 32 of the Act.

30. However, the Respondent as per its commitment has stopped its marketing campaign under review and has also withdrawn all the materials regarding the marketing campaign under review from the public domain. The Respondent is reprimanded not to indulge in deceptive marketing practices in future as it shall entail penal consequences and it shall continue to refrain from making the subject claims in the present form in their advertisements or marketing campaigns.

31. In terms of the commitment made by the Respondent’s counsel and the statement made by counsel for the Complainant during the hearing, we, therefore, deem it appropriate to dispose of the show cause notice no. 46/2011 issued to the Respondent.

(Ms. RAHAT KAUNAIN HASSAN)
CHAIRPERSON

(SHEHZAD ANSAR)
MEMBER

ISLAMABAD THE JANUARY 20, 2012