



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S SHAINAL AL-SYED FOODS FOR DECEPTIVE MARKETING PRACTICES

(FILE No. 205/OFT/SHAINAL/CCP/2015)

Dates of Hearing

28 November, 2016
27 April, 2017
20 February, 2018

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar
Member

Present:

M/s National Foods Limited

Hasan Irfan Khan, ASC
Syed Bilal Ahsan, Advocate
Talal Farrukh Irfan Khan, Advocate
Ms. Khadija Yasmin, Advocate
Saqib Asghar, Advocate
M/s Irfan & Irfan Attorneys at Law

Mr. Ahsan Javed, Advocate
Hafiz Talal Hassan, Business Consultant



M/s Shainal Al-Syed Foods Limited

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ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No.34/2016 dated 22 September 2016 (the 'SCN'), issued to M/s Shainal Al-Syed Foods Limited (hereinafter the '**Respondent**') for *prima facie* violations under Section 10 of the Competition Act, 2010 (the '**Act**'). The SCN was issued pursuant to a complaint filed with the Competition Commission of Pakistan (the '**Commission**') by M/s National Foods Limited (hereinafter the '**Complainant**') whereby it was alleged that the Respondent had engaged in deceptive marketing practices.
2. The main issue under consideration in this matter is whether the Respondent has engaged in deceptive marketing practices through the fraudulent use of the Complainant's product labelling and packaging for its own products, in violation of subsection (1) of Section 10, read with clause (d) of subsection (2) of Section 10 of the Act and if so whether such practice has also led to violations of subsection (1) of Section 10 in terms of clauses (a) & (b) of subsection (2) of Section 10 of the Act.

FACTUAL BACKGROUND

A. COMPLAINT, ENQUIRY AND SHOW CAUSE NOTICE:

3. The Complainant is a company incorporated under the Companies Ordinance, 1984 in Pakistan since 19 February 1970. It is engaged in the business of production, marketing and sale of a large variety (more than a hundred types) of food products at affordable prices, including but not limited to, dessert preparation mixtures, custards, jams, jellies, marmalades, pickles, ketchups, vinegars, sauces, recipe masalas, salts, snacks, spices and other ingredients (hereinafter the '**Complainant's Products**').
4. The Complainant submitted that it has been using the word '**National**' as a trademark, house mark and company name since 1970. Additionally it was stated that it has been using this registered trademark as a logo (copyright protected) which appears on all the Complainant's Products and related items in its modernized form.

The Complainant alleged that the Respondent started preparing, packing, marketing and selling imitated food products (hereinafter the "**Respondent's Products**") using a confusingly similar logo "**Shainal**" and packaging in terms of colour scheme, design and overall get up, to that of the Complainant's Products. Specifically, the Complainant alleged



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that the following of its food products along with its product labelling and packaging were being imitated by the Respondent:

- a. National Salan Masala
- b. National Qourma Masala Mix
- c. National Fish Masala Mix
- d. National Achar Gosht Masala Mix
- e. National Biryani Masala Mix
- f. National Haleem Masala Mix
- g. National Kasuri Methi
- h. National Strawberry Custard Powder

6. With regard to the above allegations, an enquiry in terms of Section 37(2) of the Act was initiated by the Commission, which was concluded vide an enquiry report dated 20 June, 2016 (the '**Enquiry Report**')¹. The Enquiry Report concluded as follows:

“6.1 In light of the facts, it appears that the conduct of the Respondent, prima facie, does amount to passing off its products as that of the Complainant’s through fraudulent use of Complainant’s logo, packaging, color scheme, design and get up of products, in violation of Section 10(1) of the Act, in terms of Section 10 (2) (d) which prohibits fraudulent use of another’s trademark, firm name, or product labelling or packaging.

6.2 In view of the analysis, it also appears 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 character, properties and quality of goods via similar/identical packaging, in violation of Section 10(1) of the Act, in terms of Section 10 (2) (a) & (b).

6.3 The deceptive marketing practices have a direct impact on the public at large. It is in the interest of the general public and fair competition in the market that the undertakings should be stopped to market their products in an unfair and misleading manner and be encouraged to resort to the marketing practices which are transparent and give consumers/customers



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

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true and correct information. Therefore, in light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against M/s Shainal Al-Syed Foods under Section 30 of the Act.”

7. Based upon the conclusions and recommendations of the Enquiry Report, the Commission approved the initiation of proceedings under Section 30 of the Act against the Respondent. In pursuance thereof SCN was issued to the Respondent, wherein it was required to respond in writing within fourteen (14) days as well as to appear before the Commission to avail its opportunity of hearing. The relevant portions of the SCN are reproduced below:

“6. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 5.1 to 5.14 in specific, it appears that the fraudulent use of Complainant’s logo, packaging, color scheme, design and getup of products by the Undertaking constitutes a prima facie violation of Section 10 (1) of the Act, in terms of Section 10 (2) (d) of the Act pertaining to the fraudulent use of another’s product labelling and packaging; and

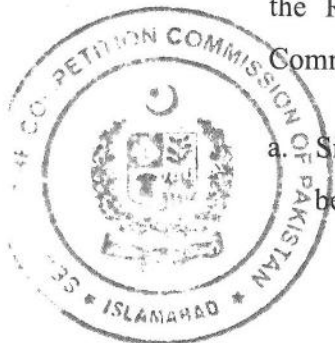
7. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 5.18 to 5.26 in specific, it appears that the Undertaking’s conduct is not only capable of harming the business interest of the Complainant but also amounts to the distribution of false or misleading information to consumers, which prima facie constitutes violation of Section 10 (1) read with Section 10 (2) (a) & (b) of the Act, respectively;”

B. SUBMISSIONS MADE BY THE PARTIES

(i) By the Complainant:

8. The primary allegations made by the Complainant and its consequent grievances against the Respondent as contained in its written and oral submissions made before the Commission, are summarized as follows:

a. Since the year 1970, the Complainant’s Products, which are of superior quality, have been prepared, marketed and sold throughout Pakistan. “National” is a household name



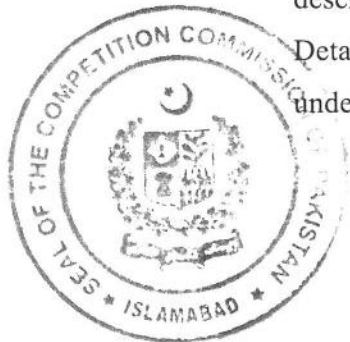
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in Pakistan for the product category which is being marketed by the Complainant in Pakistan;

- b. The Complainant's Products which are being actively marketed and sold, bear a unique and original labelling and packaging in terms of its logo, colour scheme, design and get up. The Complainant has one of the largest supply and distribution networks in Pakistan. The well-organized, equipped and efficient distribution network and supply chain ensures that the Complainant's products are supplied to retailers throughout the country in a manner that a reasonable stock of the Complainant's products are available for purchase by the end consumer at all times;
- c. By virtue of investment in advertisements through permitted means and production of superior quality food products, the Complainant has acquired substantial reputation and goodwill throughout Pakistan and has become very popular amongst the general public, which holds it in high esteem;
- d. The Complainant has been the first entity to design, introduce, develop and popularize its products in Pakistan with the said colour scheme, design and get up and no third party or entity has or is using the same or similar packaging legitimately within Pakistan, especially in relation to food products such as that of Complainant's. Any use of such, without prior permission, license or consent of the Complainant, is dishonest and only motivated to deceive or confuse the general public into believing that such entity is or is related to the Complainant in some manner or the other;
- e. The Complainant has a registered trademark in the brand name "National" and is also the holder of a registered copyright in the representation of the National Logo. It has secured various copyrights, in its genuine packaging colour scheme, design and get up, in the representation of the features of the label, writing and description etc., appearing on various products' packaging, which, being artistic works, were created and first published (and used) for and on behalf of Complainant under the provisions of the Copyright Ordinance, 1962. Therefore, unauthorized use of such features, writing and description by third parties would constitute infringement of the Complainant's rights.

Details of the Complainant's registered copyrights in relation to its products are as

under:



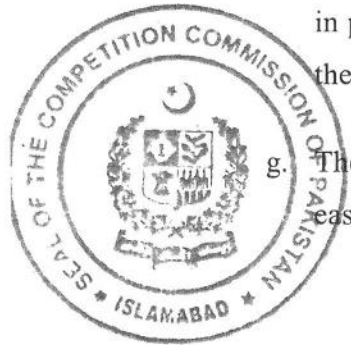
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Ser.	Title of Copyright	Registration No.	Registration Date
1.	National Logo	21926-Copr	16-08-2010
2.	National Foods Karahi Gosht Masala Mix	21930-Copr	16-08-2010
3.	National Foods Biryani Masala Mix	21929-Copr	16-08-2010
4.	National Foods Qourma Masala Mix	21934-Copr	16-08-2010
5.	National Foods Strawberry Custard	21952-Copr	16-08-2010
6.	National Foods Haleem Masala Mix	21933-Copr	16-08-2010
7.	National Foods Ginger Powder	21921-Copr	16-08-2010
8.	National Foods Black Pepper Powder	21925-Copr	16-08-2010
9.	National Foods Garlic Powder	21923-Copr	16-08-2010
10.	National Foods Turmeric Powder	21947-Copr	16-08-2010

f. The Respondent's Products bearing the imitated logo "Shainal" are packed and labelled in packaging with a colour scheme, design and get up which is confusingly similar to the Complainant's Products' genuine and original labelling and packaging.

g. The deception being caused can be gauged from the following images which draw an easy comparison of the Complainant's Products' labelling and packaging (hereinafter

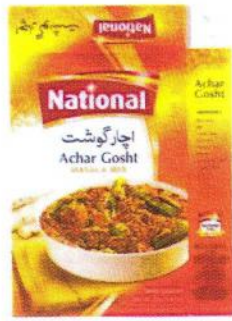


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the “Complainant’s Trade Dress”) and the Respondent’s Products’ labelling and packaging (hereinafter the “Respondent’s Trade Dress”):

Complainant’s National Products	Respondent’s Shainal Products
<p data-bbox="451 392 691 422">National Salan Masala</p>  <p>The image shows the packaging for National Salan Masala. It features a red and white color scheme with a bowl of food. The text includes 'National' in a large font, 'سالن مصالحه' in Arabic, and 'Salan Masala' in English. There is also a small 'Salan' logo on the side.</p>	<p data-bbox="820 392 1049 422">Shainal Salan Masala</p>  <p>The image shows the packaging for Shainal Salan Masala. It features a red and white color scheme with a bowl of food. The text includes 'Shainal' in a large font, 'سالن مصالحه' in Arabic, and 'Salan Masala' in English. There is also a small 'Shainal' logo on the side.</p>
<p data-bbox="415 817 727 847">National Quorma Masala Mix</p>  <p>The image shows the packaging for National Quorma Masala Mix. It features a red and white color scheme with a bowl of food. The text includes 'National' in a large font, 'قورمه' in Arabic, and 'Quorma' in English. There is also a small 'Quorma' logo on the side.</p>	<p data-bbox="781 817 1088 847">Shainal Quorma Masala Mix</p>  <p>The image shows the packaging for Shainal Quorma Masala Mix. It features a red and white color scheme with a bowl of food. The text includes 'Shainal' in a large font, 'قورمه' in Arabic, and 'Quorma' in English. There is also a small 'Quorma' logo on the side.</p>
<p data-bbox="435 1299 708 1329">National Fish Masala Mix</p>  <p>The image shows the packaging for National Fish Masala Mix. It features a red and white color scheme with a plate of fish. The text includes 'National' in a large font, 'مچھلی' in Arabic, and 'Fish' in English. There is also a small 'Fish' logo on the side.</p>	<p data-bbox="805 1299 1065 1329">Shainal Fish Masala Mix</p>  <p>The image shows the packaging for Shainal Fish Masala Mix. It features a red and white color scheme with a plate of fish. The text includes 'Shainal' in a large font, 'مچھلی' in Arabic, and 'Fish' in English. There is also a small 'Fish' logo on the side.</p>

National Achar Gosht Masala Mix **Shainal Achar Gosht Masala Mix**



National Biryani Masala Mix **Shainal Biryani Masala Mix**



National Kasuri Methi **Shainal Kasuri Methi**



National Strawberry Custard Powder **Shainal Strawberry Custard Powder**



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- h. The Respondent's aforesaid conduct of copying the Complainant's Trade Dress constitutes deceptive marketing practices in terms of Section 10(2)(d) of the Act, through the use of a deceptively similar logo, colour scheme, design and overall get up;
- i. The Respondent's aforesaid conduct also constitutes deceptive marketing practices in terms of Section 10(2)(a) of the Act as the copying of the Complainant's Trade Dress amounts to passing off on the Complainant's goodwill and brand identity, causing harm to its business interests;
- j. The Respondent's aforesaid conduct also amounts to the distribution of false and misleading information lacking a reasonable basis as it is packaging and selling its products to consumers under a false pretence and false association of the Respondent's Products to those of the Complainant's Products, violating Section 10(2)(b) of the Act.
- k. The Respondent has also sought trademark registration of the logo "Shainal" which is deceptively similar and closely resembles the Complainant's registered trademark "National". The Respondent's application remains pending before the Registrar of Trademarks, Intellectual Property Organization of Pakistan, which the Complainant has challenged by filing an opposition to protect its vested rights.

(ii) By the Respondent


- 9. The Respondent's written and oral submissions in response to the substantive allegations made against it are summarized below:
 - a. The Respondent's Trade Dress including style and layout are different from the Complainant's Trade Dress. The Respondent did not copy the product labelling and packaging of the Complainant's Products;
 - b. Even otherwise the Respondent has already submitted a new set of product packaging design to the Commission which does not bear similarities to the Complainant's Products in terms of the Complainant's Trade Dress;

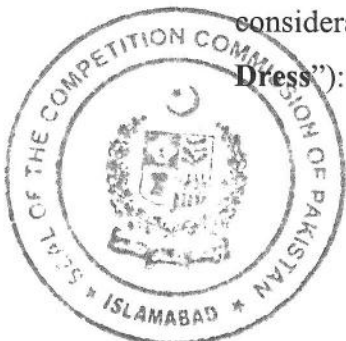
There exists no violation as alleged since the Respondent is not fraudulently using the Complainant's Trade Dress or that of any other competing business. The Respondent's Trade Dress consists of its own unique trade mark with its own colour scheme and design and is not disseminating any false or misleading information to consumers;



- d. The Respondent has no intention to harm the business interests of the Complainant, as it has its own distinct products and labelling and packaging, as well as its own distributors and consumers to whom it sells quality products at reasonable prices.
- e. The Respondent has not acted in violation of Section 10 of the Act.

C. HEARINGS BEFORE THE COMMISSION

- 10. During the course of the first hearing held on 28 November 2016, the Respondent's representative submitted before the Commission that the meanings and spellings of the Respondent's logo Shainal were completely different from the Complainant's National logo. Notwithstanding its submissions, the Commission was informed of the willingness to change the Respondent's Trade Dress to the satisfaction of the Commission and to remedy and address the concerns raised by it.
- 11. Vide letter dated 14 December 2016, the Respondent's representative submitted an undertaking to the extent that the Respondent's Trade Dress would no longer be used, on the basis of the objections of the Complainant and the observations of the Commission at the hearing held on 28 November 2016. Along with the said undertaking, the new packaging designs being used for the Respondent's Products were submitted for further scrutiny and review.
- 12. During the second hearing held on 27 April 2017, the Commission communicated to the Respondent's representative that the newly designed packaging of the Respondent's Products continued to appear deceptive similar to the Complainant's Trade Dress. The Commission, not being satisfied as to the extent of distinguishing alterations in design, directed the Respondent to submit yet another set of packaging designs after eliminating the existing misleading resemblances.
- 13. Thereafter, the Respondent vide its letter dated 25 September 2017, submitted the following samples of newly designed packaging options for the review and consideration of the Commission (hereinafter the "**Respondent's amended Trade Dress**"): 







14. At the last hearing held on 20 February, 2018, the counsel for the Respondent apprised the bench of the Commission as to Respondent's new Trade Dress as shown above. The Commission however still found the same to be deceptively similar to the Complainant's Trade Dress and therefore, directed the Respondent to submit further changes within a period of two weeks along with a commitment according to the procedure provided for in the Competition Commission (General Enforcement) Regulations 2007, with the office of the Registrar.
15. Subsequently, the Respondent's counsel communicated to the office of the Registrar that the Respondent would not be submitting or making any further changes other than the ones it had already provided in the form of the Respondent's new Trade Dress, which it believed was substantially different from that of the Complainant's Trade Dress.

ISSUES

16. The issues for determination identified by the Commission are as follows:
- A. Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(d) of the Act through the fraudulent use of the Complainant's Trade Dress, and hence a contravention of Section 10(1) of the Act;
 - B. Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(b) of the Act through the distribution of false or misleading information to consumers, including information which lacks a reasonable basis, and hence a contravention of Section 10(1) of the Act.
 - C. Whether, the Respondent has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(a) through the distribution of false or misleading information that is capable of harming the business interests of the Complainant, and hence a contravention of Section 10(1) of the Act.

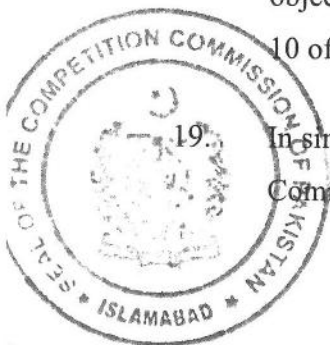
ANALYSIS AND DECISION

17. The factual and legal analysis herein below shall be structured according to the sequence and order of the three pertinent issues demarcated above as Issue A, B & C. To this extent, the Commission has taken into account and perused the entire record before it including submissions and supporting documents of both the parties.

ISSUE A: Whether the Respondent has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(d) of the Act through the fraudulent use of the Complainant's Trade Dress, and hence a contravention of Section 10(1) of the Act?

18. According to Section 10(2)(d) of the Act, the 'fraudulent use of another's trademark, firm name, or product labelling or packaging' constitutes a deceptive marketing practice. The Commission in its previous determinations has interpreted the term "fraudulent" objectively instead of determining a subjective intent, in line with the purpose of Section 10 of the Act and the mischief that it seeks to remedy.

19. In simple terms, the mischief that Section 10 seeks to remedy is consumer deception. The Commission has established time and again that the term "consumer" is to be construed as



the ordinary consumer for the purposes of Section 10 of the Act, reference in this regard is placed on '*in the matter of Show Cause Notice issued to Zong* reported as 2010 CLD 1478, wherein the Commission observed that '*restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints on 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*'.

20. In its Order dated 8 February 2016 *in the matter of show cause notice issued to M/s A Rahim Foods* and reported as 2016 CLD 1128, the Commission expounded upon the concept of "parasitic copying" being an inherent part of the fraudulent use of another's product labelling and packaging. Moreover, it was observed that the specific element of deceit that it entails, as well as its anti-competitive effects in the relevant market, coupled with potential problems it may pose for consumers with regards to making informed choices are crucial considerations for a violation under clause (d) of subsection (2) of Section 10 to be made out.
21. In simple layman terms, 'parasitic copying' or 'copycat packaging' "*is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader).*"² The copycat producer avoids investing in brand development and free rides at its competitor's expense who has already built a degree of visibility and goodwill with the consumer. The consumer may be misled by copycat packaging in terms of three aspects: "*the consumer might take the copycat product for the original, the consumer could be misled as to the quality or the consumer could be misled as to the origin of the product*"³.
22. More specifically, the following explanation of parasitic copying demonstrates aptly the crucial aspects of the practice:

"Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, color combination and graphic

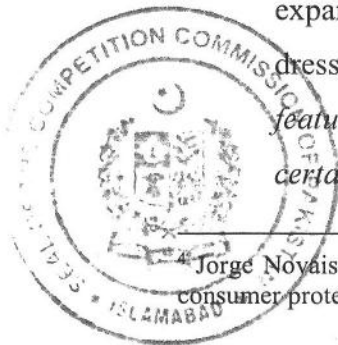


² Giuseppe Abbamonte. 'Copycat Packaging, Misleading Advertising and Unfair Competition' http://www.academia.edu/1367216/Misleading_packaging_practices_-_IMCO_-_European_Parliament

arrangement) but usually there is just enough difference to avoid a clear cut trade mark infringement. Still they often generate deception or confusion among consumers."⁴

23. Furthermore, the Commission is guided by the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and Council, which contains provisions designed to tackle copycat packaging that misleads or confuses consumers. Article (1)(b) of the directive bans, under certain conditions, commercial practices misleading consumers in relation to the main characteristics of the product, including its commercial origin. Article (2)(a), which is specifically dedicated to confusing marketing, prohibits any marketing of a product that creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. Article 6(2) defines a commercial practice as misleading if, "in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor". It may also be placed on record that Some Member States prohibit these acts of unfair competition as 'slavish imitation' of a competitor's product, regardless of whether they confuse the consumer or not.
24. In the case of Traffix devices, Inc. Marketing displays, Inc. 532 U.S. 23 (2001), the United States Supreme Court held that as per the general provision of the Lanham Act 1946, a cause of action accrues when a person uses "any word, term name, symbol, or device, or any combination thereof... which is likely to cause confusion... as to the origin, sponsorship, or approval of his or her goods". The traditional approach towards the trade dress was highlighted in Jeffry Milstein, Inc. vs. Greger, Lawler, Roth, Inc., 58 F.3d 27, 31 (2d Cir. 1992) as "the manner in which a product was 'dressed up' to go to market with a label, package display and similar package elements". However, the United States Supreme Court in Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, expanded the earlier tradition approach towards the trade dress in and defined the trade dress as 'a products' "total image" or "overall appearance" and "may include features such as size, shape, colour or colour combinations, texture, graphics or even certain sales techniques".

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

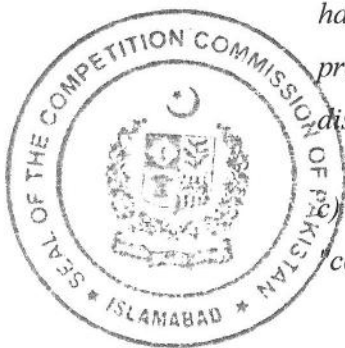


25. In a case of passing off in the UK, United Biscuits UK (Ltd) v ASDA Stores Ltd [1997], the High Court (Chancery Division) observed that “*My first impression of the Puffin packaging (in all four colors or varieties) is that it would cause a substantial number of members of public to suppose that there was a connection between the Puffin biscuit and the Penguin biscuit. Despite evidence of isolated mistakes, I do not consider that a substantial number would believe that the Asda Puffin is the McVities Penguin. But many would believe that the two must be made by the same manufacturer.*”
26. Moreover, the Commission has already set a benchmark in the 2016 CLD 1128 for the consideration and adjudication of cases involving copycat packaging as being violative of clause (d) of subsection (2) of Section 10 of the Act, to the effect that where the product labelling and packaging of another undertaking is mimicked, it carries with it the obvious foreseeable effect of misleading and causing deceitful confusion in the mind of the ordinary consumer.
27. The Commission shall proceed to analyze factually and legally the conduct of the Respondent in this matter, using the legal principles applicable to the interpretation of Section 10(2)(d) of the Act laid down in the case reported as 2016 CLD 1128, and as reproduced here in below:

“a) It is now an established principle under the majority of regulatory competition regimes around the world that mimicking the packaging designs of familiar established brands is a misleading and deceptive ploy with the end purpose of boosting sales.

b) Such purpose or object of parasitic copycat packaging is driven and derived from the viewpoint and perspective of the consumer. A potential purchaser is much more likely to mistake and perceive products which employ parasitic copying to be better quality than they in fact are or as equivalent to the aggrieved competitor or market leader (whose packaging has been copied). Hence, a consumer is more likely to purchase such a product, rather than if the packaging was clearly distinctive and distinguishable.

The end result of such a practice is that the consumer is misled by the “copycat” who is fraudulently attempting to pass off its product as



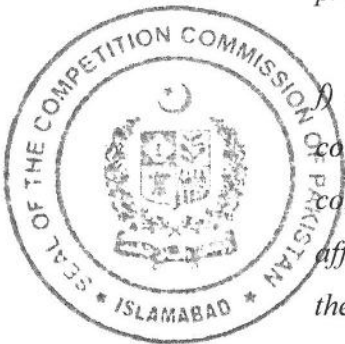
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something else. Furthermore, the copycat incurs minimal cost and in fact none of the cost of investment and innovation of design that the market leader has spent to build goodwill and reputation of its brand assets in the relevant market. Hence, where product differentiation is insufficient, such a practice on part of the copycat has fatal consequences for the business of the market leader.

d) In furtherance to the interpretation and applicability of the term "fraudulent use" of "product labeling and packaging" within the scope of Section 10(2)(d) of the Act, it may be noted 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. The Commission shall, therefore, be satisfied that the evidence adduced before it is conclusive, if the strikingly similar packaging and labeling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant.

e) The Commission considers it appropriate to examine the packaging and product labeling appearance of a finished product as a whole which may collectively include visually confusing resemblances in elements of color scheme, layout style, design, images, labels, font usage etc., instead of each individual similarity in isolation, to come to its determination as to a contravention under Section 10(2)(d) of the Act. It may also be noted that the Commission takes into account the surrounding circumstances which may be different in each particular case, as being peculiar to the parties, products, consumers and the relevant market; ...

f) Lastly, it may be noted that the worldwide consumer-survey based consensus is that when copycat packaging is deployed for a particular commodity, price becomes the main and sometimes only criterion which affects a consumer's choice of purchase. Furthermore, when price becomes the sole determining factor for the exercise of choice between two products,



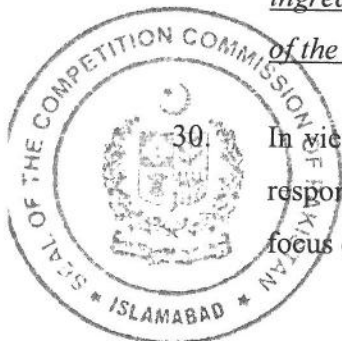
with no other meaningful distinguishing factor existing between such products, it is evidence of the presence of parasitic copying.”

28. Guided by the above general principles and adopting a holistic approach, the Commission’s observations, on a juxtaposition of the images of the Complainant’s Trade Dress and Respondent’s Trade Dress are as follows:

- i. There is no doubt that a pictorial comparison of the Complainant’s Products and Respondent’s Products leads to the obvious conclusion that there exist deceptively confusing similarities in the Complainant’s Trade Dress and the Respondent’s Trade Dress, almost to the extent of being identical but for the different brand names evident on the packaging.
- ii. This is specifically so in the context of visualizing the Complainant’s Products and Respondent’s Products being placed in close proximity to one another in display shelves at retail outlets, supermarkets and other points of sale across the country.
- iii. The ordinary consumer, specifically the illiterate, would not be able to distinguish between the products origin but for the brand names evident on the packaging. Even otherwise, the confusing similarities would mislead the consumer into believing that the source/ origin of the Respondent’s Products is in fact the Complainant.

29. In short, there is no doubt from the visual observation of pictorial illustrations placed on the record in this matter, that any ordinary consumer, would at first instance be deceived as to the origin of the products at the time of exercising a choice of purchase. In this regard we deem it appropriate to refer to the judgment of Delhi High Court reported as *Colgate Palmolive Co v Anchor Health and Beauty Care Pvt Ltd, 2003 (27) PTC 478 Del*, wherein Colgate sought an interim injunction against the Anchor Health’s use of the trade dress and colour combination of red and white in relation to identical products (tooth powder), even though the rival marks were completely different. The court held that: “If the first glance of the article... gives the impression as to deceptive or near similarities in respect of these ingredients, it is a case of confusion and amounts to passing off one’s own goods as those of the other with a view to encash upon the goodwill and reputation of the latter.”

In view of the foregoing, the Commission is fortified in its view that the Respondent is responsible for and has in fact resorted to parasitic copying. Marketers traditionally focus on designing advertising campaigns and other promotional strategies to promote a



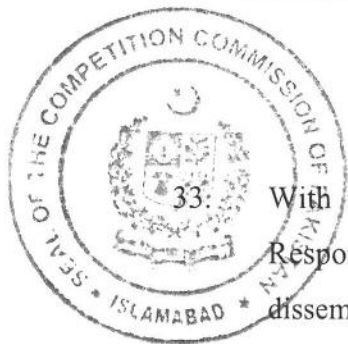
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brand name. However, with evolving consumer preferences and laws, presentation; trade dress have become just as essential for making products and services distinctive and for building brand recall. The cultural diversity of the Pakistan market makes a compelling case for the importance of product identification by packaging and visual impression. This has resulted in third parties creating lookalikes of popular products with similar packaging in order to grab consumers' attention and generate demand for their own products in the market. In the considered view of the Commission, the consumers are clearly susceptible and at a serious risk of falling prey to deceptive confusion pertaining to the origin and quality of the products, due to the striking similarity in the Complainant's Trade Dress and the Respondent's Trade Dress.

31. As regards the allegation pertaining to the use of the name "Shainal" by the Respondent, it is observed that the same is a derivative of the brand name of two of the oldest market players, the Complainant i.e. "National" and "Shan". The name "Shainal" is a homophone of the brand name "National" in general and a combination of the words 'Shan' and 'National' in specific. It is further observed that if we were to write "Shainal" in Urdu it appears as "شینل" which clearly shows the deception as it can be read in passing erroneously as "National". However, the Commission is of the considered view that this allegation in isolation holds no merit in terms of consumer deception. The Commission has, however, considered the logos, brand names and other labelling as an overall part of the Respondent's Trade Dress, in its determination of a violation of clause (d) of subsection (2) of Section 10 of the Act.
32. Therefore, in relation to Issue A and in view of the above legal and factual analysis, the Commission is fortified in its decision as to the existence of a contravention by the Respondent of Section 10(1) in terms of clause (d) of subsection (2) of Section 10 of the Act to the extent of the fraudulent use of the Complainant's Trade Dress.

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

33. With respect to this issue, the Commission is required to determine whether the Respondent's copycat packaging of the Complainant's Trade Dress, also amounts to the dissemination of misleading information to consumers within the scope of clause (b) of subsection (2) of Section 10 of the Act.



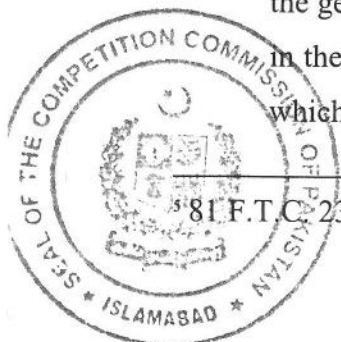
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34. Clause (b) of subsection (2) of Section 10 of the Act provides that '*the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;*' constitutes a deceptive marketing practice.
35. The terms "misleading" information has been interpreted by the Commission in the case reported as 2010 CLD 1478, as follows:

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

36. The Commission now considers the term '*reasonable basis*' in light of section 10 of the Act. The concept of having a reasonable basis is an established doctrine in USA which was first recognised in the case of Pfizer, Inc., 81 F.T.C. 23 (1972)⁵. In its seminal Pfizer decision, the Federal Trade Commission held that, even if an advertiser does not specify a level of support for its claims, i.e., it does not make an "establishment claim," it nevertheless must have a "reasonable basis" for making objective claims about product. The Commission further ruled that, when an advertisement does not make a specific level of substantiation of its claims, it is assumed that consumers expect that the advertiser had a 'reasonable basis' for making the claims.
37. As established by the Commission, the Respondents' Trade Dress and overall impression of the product labelling and packaging is deceptively similar to that of the Complainant's Trade Dress. An ordinary consumer who purchases the Respondent's Product off the shelf is highly likely to be deceived by the product packaging, logo and the get up of the product. The misleading information on the Respondent's Products is in the form of a deceptive impression disseminated by the Respondent's Trade Dress, which is likely to mislead the consumer as to the origin and quality of the same being

⁵81 F.T.C. 23 (1972)

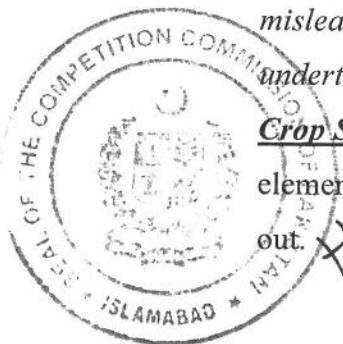


linked to that of the Complainant. The Respondent has failed to discharge the burden of providing any level of substantiation for the authenticity of its Trade Dress to the effect that it would not cause a misleading impression that Respondent's Products originate from the Complainant and hence match the quality of the Complainant's Products. This deceptive similarity in the Respondent's Trade Dress and the Complainant's Trade Dress has the potential to directly or indirectly affect the transactional decision of the consumers to buy the Respondent's Product on the misleading pretence as to origin/ place of production and quality of the product and hence is materially deceptive.

38. In view of the foregoing, the Commission is of the view that the aforementioned conduct of the Respondent has resulted in a violation of Section 10(1) read with Section 10(2) (b) of the Act, as the Respondent is disseminating misleading information to consumers lacking a reasonable basis, in the form of the confusing similarities of Respondent's Trade Dress to that of the Complainant's Trade Dress, thereby misleading the consumers as to the origin and place of production of the product.

ISSUE C: Whether, the Respondent has engaged in deceptive marketing practices within the meaning and scope of Section 10(2)(a) through the distribution of false or misleading information that is capable of harming the business interests of the Complainant, and hence a contravention of Section 10(1) of the Act.

39. With respect to this Issue, the Commission is required to determine whether the fraudulent use of the Complainant's Trade Dress by the Respondent amounts to a concurrent violation caught by clause (a) of subsection (2) of Section 10 of the Act.
40. Clause (a) of Section 10 of the Act provides that '*the distribution of false or misleading information that it is capable of harming the business interests of another undertaking*' shall be deemed to constitute a deceptive marketing practice.
41. This provision constitutes two main elements (i) *the dissemination of false or misleading information* (ii) *that is capable of harming the business interests of another undertaking*. As per the Order ***in the matter of Show Cause Notice issued to M/S Tara Crop Sciences (Private) Limited*** reported as ***2016 CLD 105***, in presence of both these elements, a violation of clause (a) of subsection (2) of Section 10 of the Act is made out.



42. With reference to proving the actual harm caused to a competitors business interest, the Commission in its Order *in the matter of Show Cause Notice issued to Jotun Pakistan (Pvt.) Limited* reported as *2015 CLD 1638*, stated that, actual harm to a competitors business interest need not be established to make out a violation in terms of clause (a) of subsection (2) of Section 10 of the Act, the very presence of a deceptive market practice that has the potential to cause harm to the competitor's business is in fact sufficient to hold the Respondent culpable.
43. The legal interpretation of the term '*misleading*' has already been elaborated upon at length in the issues above. Therefore, for the purposes of reaching a determination pertaining to this Issue, the already interpreted meaning and scope of the term "misleading" is being considered by the Commission.
44. With respect to the term "*business interest*" in clause (a) of subsection (2) of Section 10 of the Act, the Commission observed *in the matter of M/S. DHL Pakistan (Pvt.) Ltd* reported as *2013 CLD 1014* that, '*it is important to recognize that part of any business' identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value*'.
45. As per the ruling laid down by the Commission in the *2016 CLD 1128*, "*in the event that there exists a contravention of Section 10(2)(d) by an undertaking, a concurrent violation of Section 10(2)(a) is also made out*". Furthermore, as established above, copycat packaging, being a practice that falls within the ambit of clause (d) of subsection (2) of Section 10 of the Act, in itself also amounts to the dissemination of misleading information to the public as it amounts to an unfair and deceptive trading practice. The unavoidable consequence of the dissemination of such information is that it is capable of harming the business interest of and resulting in a serious injury to competitors whose product packaging and labelling has been copied in terms of the goodwill that the competitor has established in the market and reputation it has earned for the quality of its product. It is also placed on record that clause (a) of subsection (2) of Section 10 of the Act has a much broader scope than clauses (b) & (d) of subsection (2) of Section 10 of the Act and therefore, a contravention of clauses (b) & (d) of subsection (2) of Section 10 of the Act will almost in every circumstance lead to a



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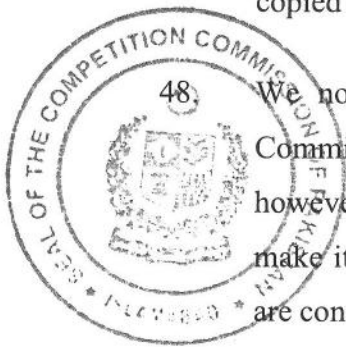
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consequent contravention of clause (a) of subsection (2) of Section 10 of the Act, unless there exist exceptional circumstances in a particular case that warrant otherwise.

46. Based on the above, the Commission is of the considered opinion that, Respondent's practice of parasitic copying of the Complainant's Trade Dress, which appreciably impairs the consumer's ability to make an informed decision due to confusing similarities between the Respondent's Products and the Complainant's Products, being inherently deceptive, is in fact capable of harming the business interest of the Complainant in contravention of clause (a) of subsection (2) of Section 10 of the Act.

REMEDY AND PENALTY

47. In order to impose any penalty in the instant matter and remedy the situation we deem it appropriate to highlight the importance of a 'Trade Dress', which in Pakistan are not taken into account and packaging and products are often created by borrowing successful features from competitors, in order to grab consumers' attention and generate demand for their own products in the market. We are conscious of the fact that with the dramatic development of digital communications and network technologies, and as global distribution channels enable businesses to market themselves to a worldwide audience, protecting and enforcing marks, trade dress, product designs and brand identities is of crucial importance. As these intangible assets embody valuable goodwill and serve as a distinct source identifier for the products and services of the business, in this environment, such assets continue to take on greater significance in developing and maintaining brand integrity, reputation and recognition for the business. This enables people with skill and enterprise to produce and market goods and services in fair conditions, thereby facilitating international trade. Hence, the practice of parasitic copying of the trade dress, which appreciably impairs the consumer's ability to make an informed decision due to confusing similarities between the original and copied one, is to be discouraged.



We note that during the enquiry as well as during the proceedings before the Commission the Respondent was given substantial time to amend/ revise its trade dress, however, no credible effort was made by the Respondent to change its trade dress and make it distinct from that of the Complainant. Hence, keeping in view the above, we are constrained to impose a penalty of PKR 5,000,000/- (Rupees Five Million Only) on

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the Respondent, which shall be deposited with the Registrar of the Commission within sixty (60) days from the date of this Order.

49. The Respondent is hereby reprimanded to ensure responsible behaviour in future with respect to the marketing of their business and are directed to cease and desist from the use of its Trade Dress (previous and revised submitted to the Commission) which is subject matter of this Order and similar to the Complainant's Trade Dress and Trade Mark, with immediate effect and not to use it in future. The Respondent is directed to ensure that the products are repackaged in a manner that is distinct in its overall layout, design, shape, size, language and colour scheme so as to be easily distinguishable from the Complainant's Trade Dress. The Respondent is also directed to file within sixty (60) days from the date of this Order, the compliance report with the Registrar of the Commission reporting compliance with this Order, to ensure future compliance and not to contravene any provision of the Act, in particular Section 10 of the Act with respect to the subject matter.
50. In case the violation of this Order continues, it is then warranted that the Respondent shall be made further liable under sub-section (3) of Section 38 of the Act to pay an additional penalty amounting to Rs. 100,000/- (Rupees One Hundred Thousand Only) per day from the date of such violation.
51. In terms of the above, SCN No. 34 /2016 is hereby disposed of.

Vadiya Khalil

Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar

Dr. Shahzad Ansar
Member

ISLAMABAD, 30th March, 2018

