



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF
SHOW CAUSE NOTICES NO. 18 & 19 OF/2010 ISSUED TO**

M/S ACE GROUP OF INDUSTRIES

(FILE NO. 3/REG/COMP/BMW/SEC.10/CCP/09)

&

(FILE NO. 4/REG/COMP/H.D/SEC.10/CCP/09)

Dates of hearing: June 07, 2010 &
June 17, 2010

Present: Ms. Rahat Kaunain Hassan
Chairperson

On behalf of
Ace Group of Industries: Chaudhary Tayyab Ali
Chaudhary Tahir Mansoor

The Complainants
BMW & Harley Davidson: Mr. Hassan Irfan Khan
Advocate Supreme Court
Ms. Habeeba Ahmad
Advocate
Ms. Amina Afzal
Advocate

ORDER

1. This order shall dispose of the proceedings pursuant to Show Cause Notices No. 18 & 19 of 2010 both dated May 19, 2010 (hereinafter jointly referred to as “SCN”) issued to M/s Ace Group of Industries (hereinafter referred to as “AGI”), for *prima facie* violation of Section 10 of the Competition Ordinance, 2010 (hereinafter referred to the ‘**Ordinance**’).

FACTUAL BACKGROUND

2. M/s *Bayerische Motoren Werke Aktiengesellschaft* and M/s H-D Michigan L.L.C. (hereinafter referred to as ‘**BMW**’ and ‘**HD**’, respectively; and collectively referred to as the ‘**Complainants**’) filed complaints under Section 10 of the Ordinance read with Regulation 17 of the Competition Commission (General Enforcement) Regulations, 2007 alleging that AGI is manufacturing, offering for sale, selling, exporting leather jackets and is fraudulently and without authorization using Complainants’ registered trademarks on its products. It was further alleged that such use of Complainants’ trade mark is fraudulent, *mala fide* and constitutes the acts of ‘Deceptive Marketing Practices’ and is prohibited in terms of Section 10 of the Ordinance. The contents of the complaints are summarized as follows:

BMW Complaint:

- *That BMW is a Company organized under and existing under the laws of Germany, having its registered office at Petuelring 130, BMW House, 80809 Munich, Germany.*
- *That BMW in the year 1917 developed the famous logo of BMW. The idea of this logo was primarily based on the **Circular Design of Aircraft propeller** as well as the **blue and white segments** were reflective of the Bavarian coat of arms. BMW’s logo has been modified but the main essence of the features remains the same. A representation of BMW’s logo is as depicted herein below:*



- *That the goods sold and business conducted using trademark, service mark, company name and trade name BMW and BMW Logo throughout the world by BMW have been widely advertised in international magazines, periodicals and news papers which also have circulation in Pakistan and/or most have been seen by the Pakistani public and BMW has spent huge amount of money for this purpose which has resulted in the tremendous awareness of the trademark, trade name, service mark and company name of BMW and BMW Logo which are recognized by the traders and the general public throughout the world including Pakistan as originating and/or having association with BMW or under its authority.*
- *That BMW has authorized M/s Dewan Farooq Motors Limited, a Pakistani Company as authorized Importers/Dealers/Distributors for its BMW cars in Pakistan.*
- *That BMW, over a period of time, expanded its range of goods to other allied or related goods as well as large variety of fashion and luxury merchandise, accessories, etc., and in order to distinguish its goods, business and services from those of others, BMW either itself or through its subsidiaries, licensees and/or affiliates uses amongst other BMW as Trademark logo. Businesses and services include; cars, car accessories, automobile parts, motorcycles, bikes, mountain bikes, cruise bikes, kids bikes, bags and various other products such as golf kits, golf balls, golf sticks, wallets, key chains, fountain pens, ball points, umbrellas, locks, clothing, jackets, leather jackets, leather bags, jeans, caps, sport shirts, T-Shirts, cigarette cases & lighters etc.*
- *That BMW in order to protect its interest in ‘BMW’ and ‘BMW Logo’, has obtained registration of trademarks BMW and BMW logo since year 1956 in Pakistan, the details of which are as follows:*

Sr. No.	Trademark	Application No.	Class	Date of Registration
01.	BMW	25352	12	26-03-1956
02.	BMW Logo	25459	12	11-04-1956
03.	-do-	190435	14	13-12-2003
04.	-do-	190433	16	13-12-2003
05.	-do-	190434	25	13-12-2003
06.	-do-	190439	28	13-12-2003
07.	-do-	197161	37	Pending
08.	BMW	197162	37	Pending

- *It has been alleged in the complaint that AGI is manufacturing, offering for sale, selling, exporting leather jackets and is putting the renowned trademark of BMW on its jackets and leather gears, without permission of BMW. It has been further alleged that, such unauthorized and fraudulent use of the registered trademarks of the BMW by AGI falls within the meaning of the 'Deceptive Marketing Practices' as defined under the Section 10 (2) (a), (b) & (d) of the Ordinance and is prohibited under Section 10(1) of the Ordinance.*

HD Complaint:

- *That HD is an American motorcycle manufacturer. Founded in Milwaukee, Wisconsin, during the first decade of the 20th century, it was one of two major American motorcycle manufacturers to survive the Great depression.*
- *That HD sustains a loyal brand community which keeps active through clubs, events, and a museum. Licensing of the HD logo accounts for almost 5% of HD's net revenue. A representation of HD's famous logo is depicted herein below:*



- *That HD also carries on, either itself or through its licensees, affiliates of associated companies, a wide range of manufacturing such as motorcycle, its parts and accessories and other wide range of products including but not limited to motorcycle clothing, motorcycle sports apparels including leather jackets, lifestyles accessories, which are marked using HD's trademarks.*
- *That HD in order to protect its interest in its trademarks has obtained registration of trademarks in Pakistan, the details of which are as follows:*

Sr. No.	Trademark	Application No.	Class	Date of Registration
01.	Trademark	169806	12	03-04-2001
02.	-do-	169813	18	03-04-2001
03.	-do-	169822	16	03-04-2001
04.	-do-	169818	25	03-04-2001
05.	-do-	169817	26	03-04-2001
06.	-do-	169812	12	03-04-2001
07.	-do-	169805	09	03-04-2001
08.	-do-	169803	26	03-04-2001
09.	-do-	169804	03	03-04-2001
10.	HARLEY DAVIDSON	169807	12	03-04-2001
11.	LOGO	169814	25	03-04-2001
12.	-do-	169808	18	03-04-2001
13.	HARLEY DAVIDSON	169809	25	03-04-2001
14.	HARLEY	169810	12	03-04-2001
15.	-do-	169811	25	03-04-2001
16.	TWIN-CAM 88	148291	12	03-06-1998
17.	-do-	148292	25	03-06-1998

- *There is no authorized dealer of HD in Pakistan and they have not authorized AGI to use their Trade Mark on its products.*
- *It has been alleged in the complaint that AGI is manufacturing, offering for sale, selling, exporting leather jackets and is fraudulently and without authorization using HD's registered trademarks on its products. It has been alleged that such use of HD's trade mark is fraudulent, mala fide and constitutes the acts of 'Deceptive Marketing Practices' in terms of Section 10 (2) (a), (b) & (c) of the Ordinance. HD has also appended the images from the website of AGI. (Annex-A & B to this Order)*

3. Upon receipt of the complaint, the Commission asked the Complainants' through its counsel, vide its letter dated 9-10-09 to attend a meeting at the offices of the Commission in Islamabad on 14-10-09 and to provide the following supporting documents/information within ten days of receipt of the letter :

- (i) *A copy of authorization to act on behalf of the Complainants',*
- (ii) *Certified copies of the Trade Mark Registration Certificates',*
- (iii) *Whether any proceedings regarding the captioned matter between the Complainants and AGI have already been decided by any court of law or the Trade Mark Registry or by any other statutory body? If yes, then to provide the Commission with all pleadings and Orders passed thereon;*
- (iv) *Whether the Complainants every authorized AGI to manufacture the leather jackets in the past for the Complainants? ;*
- (v) *Details relating to the legal status of AGI;*

- (vi) *When and how did it come to the Complainants' knowledge that AGI was allegedly using their trade mark? ;*
- (vii) *What other forms of advertisement is AGI using besides advertising the jackets online for sale? ;*
- (viii) *Whether the Complainants are aware of any sales made by AGI regarding the products advertised, bearing their trade mark? And to provide any sales receipts or purchase orders, if any, of those sales;*
- (ix) *Whether the Complainants are also manufacturing and selling similar products themselves?*

4. The counsel responded vide its letter dated October 16, 2009 attaching with it the requisite copy of the power of Attorney to act on behalf of the Complainants and certified copies of the trademark registration certificates. An identical response was sent on behalf of both Complainants which contained the following information:

- (i) *No proceedings of any nature have already been decided by or are pending before any court of law or the Trademark Registry or by any statutory body between the parties;*
- (ii) *The Complainants have never authorized AGI to act in any capacity whatsoever on their behalf;*
- (iii) *The Complainants are not aware of the legal status of AGI.*
- (iv) *In the month of September 2009, the Complainants became aware of the fact that AGI is fraudulently using their Trademarks and offering its counterfeit products for sale through internet websites.*
- (v) *The Complainants were not aware of any other form(s) of advertisement other than the online advertisements.*
- (vi) *The Complainants were not aware of any sales records, etc.*
- (vii) *The Complainants are also selling similar products to those being sold by AGI.*

5. Thereafter, pursuant to these Complaints the Competition Commission of Pakistan (hereinafter referred to the '**Commission**') appointed enquiry officers and initiated an enquiry under Section 37 of the Ordinance into the allegation of '*deceptive marketing practices*' specifically '*fraudulent use of a trade mark*' as alleged by the complainants and prohibited under Section 10 (2)(d) of the Ordinance.

6. AGI was sent copies of Complaints along with annexures vide letters dated 28-10-09 on the address provided by the Complainants, for soliciting its comments. However, both the letters were returned on account 'address not traceable'.
7. Since the address was provided by the Complainants therefore, verification of address was sought from the Complainants vide letters dated 18-11-09. The said letters were not responded by the Complainants therefore, reminders were issued to the Complainants on 02-12-09.
8. The Complainant's counsel vide its letter dated December 21, 2009, provided the Commission with the fax numbers of AGI and also requested that substituted mode of service may please be adopted for serving the complaints to AGI.
9. The Complaints were again sent through fax and through courier vide letter dated 22-12-09. This time the Complaints were received by the Respondent both through fax and through courier.
10. AGI vide its letters dated 06-01-2010 filed identical reply to both the Complaints, which reads as follows:

"That the Respondent is neither any incorporated concern nor a registered firm rather a small businessman under sole proprietorship. On initiation of business desirous to have some website and after having got prepared the same it was placed on web.

That the Respondent having no knowledge about such type of special laws innocently offered the garments from trade, with no intention to deceive any person in the universe in any manner whatsoever. However, if this hurt the Complainants, I am Sorry for the act and ready to amend the same and change the website accordingly rather has asked for it."

11. The enquiry officers after analyzing and examining the Complaints and the above correspondence concluded the enquiry by producing the Enquiry Report dated 17-05-10 (hereinafter referred to as the "**Enquiry Report**"). The Enquiry Report concluded as follows:

“Though the conduct and attitude of the Respondent may appear to be innocent and ignorant of special laws such as the Ordinance, however, we are inclined with the legal principle that ignorance of law can be of no excuse. Therefore, in view of the above facts, annexures appended herewith, images of the website of the Respondent, and clear admission of the Respondent that, prima facie, there is a violation of Section 10 (1) of the Ordinance and in particular clause (a), (d) of sub-section (2) of Section 10 of the Ordinance, on part of the Respondent.”

12. The Commission taking into account the recommendations of the Enquiry Report decided to initiate proceedings under Section 30 of the Ordinance against AGI. SCN were issued to AGI and they were required to reply to the SCN within fourteen days of the SCN and an opportunity of being heard was also provided to them on 3-06-10. SCN in its relevant parts is reproduced as under:

07. **WHEREAS**, in terms of the Part 3 of the Enquiry Report, the Undertaking has admitted that it is neither a subsidiary nor an affiliate of the Complainant, and has also admitted the unauthorized use of Complainant's registered trade marks on its products, which were advertised on its website;

08. **WHEREAS**, in terms of Part 5 of the Enquiry Report, the unauthorized use of registered trade marks of the Complainant on its products and subsequently advertising them on its website for advertisement purposes, appears to be misleading the consumer/customers that the products advertised are of the complainant, which is in fact false;

09. **WHEREAS**, it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior including deceptive marketing practices;

10. **WHEREAS**, in terms of Part 5 of the Enquiry Report, the unauthorized/fraudulent use of Complainant's registered trade marks by the Undertaking is likely to harm the business interests of the Complainant in terms of clause (a) sub-section (2) of Section 10 of the Ordinance read with sub-section (1) of Section 10 of the Ordinance;

11. **WHEREAS**, in term of Part 5 of the Enquiry Report, the Undertaking was using the registered trademark of the Complainant on its own products, and was advertising its products on its website without Complainant's authorization, which constitutes 'deceptive marketing practices' and is a violations in terms of clause (c) of sub-section (2) of

Section 10 of the Ordinance read with sub-section (1) of Section 10 of the Ordinance.

12. NOW THEREFORE, you, M/s. Ace Group of Industries, the Undertaking, in terms of the Enquiry Report and clear admission of the abovementioned violations albeit purportedly committed innocently, is called upon to show cause in writing within fourteen (14) days of this show cause notice and to appear and place before the Commission, facts and material in support of your contention and avail the opportunity of being heard through an authorized representative on June 03, 2010, at the Office of the Competition Commission of Pakistan, 4-C, Diplomatic Enclave, Sector G-5, Islamabad at 11.00 a.m. and explain as to why a penalty for the abovementioned violations be not imposed under Section 38 of the Ordinance. You are requested to provide the names of the authorized representative(s) appearing before the Commission along with their N.I.C. and vehicle registration nos., prior to the hearing date due to security reasons.

13. The Complainants through their counsel were informed vide letter dated 20-05-10 that the enquiry had been concluded and a hearing has been scheduled for 3-06-10 at the office of the Commission. It is worth mentioning that no written reply was filed for an on behalf of AGI to the SCN.
14. The Counsel responded vide its letter sent by fax dated 2-06-10 requested the Commission to adjourn the hearing till 7-06-10 as Mr. Hasan Irfan Khan, the Complainants' Counsel had been abroad and required time to prepare for the case. The Commission granted the Counsel's request for adjournment.
15. At the hearing on 07-06-10; Chaudhary Tayyab Ali apologized for the advertisements claiming that, being ignorant of existence of such law and unawareness he had violated the Ordinance by advertising items bearing the trademark/logo of the Complainants'. He submitted that he had never taken orders to sell any of the jackets/garments bearing the Complainants' trade marks, which were advertised on his website; even he never manufactured any product bearing the trademarks of the Complainant to date. He further submitted that he was not financially stable and the business of AGI was not flourishing. The Commission directed Mr. Tayyab Ali to submit relevant documents to support his claim. He

also volunteered to have an officer of the Commission to come and search the premises to verify his claim.

16. Consequently, thereof, the Commission vide its letter dated 07-06-10 requested AGI to provide the following documents within seven (7) days from the date of the letter:

- (i) *Bank Statements for last five years;*
- (ii) *Sales and export invoices for last five years;*
- (iii) *Details of registration with the Chambers of Commerce;*
- (iv) *Income tax assessment Orders and Return filed for the last five years;*
- (v) *Copies of the orders received from customers;*
- (vi) *Details of the persons to whom the products have been sold/supplied;*
- (vii) *Receipt/documents providing inception of the website,, from the date of its launching (at least one year); and*
- (viii) *Evidence of removal of the articles bearing BMW and HD trademark from the website, after receipt of notice from the Commission.*

17. The Commission vide separate letters dated 07-06-10 informed the Complainants' Counsel and AGI that another hearing in the matter had been scheduled for 17-06-10.

18. AGI vide its letter dated 15-06-10 submitted the above-mentioned required documents. These documents were forwarded by the Commission vide a letter of the same date to Mr. Hasan Irfan Khan, counsel for the Complainants for his comments.

19. At the hearing on 17-06-10, Mr. Hasan Irfan Khan submitted his analysis of the data provided by AGI and emphasized that the documents did not conform with the statements made at the previous hearing by the representatives of AGI. According to Mr. Khan AGI had a higher turnover than stated by Mr. Tayyab Ali at the first hearing. Mr. Tayyab Ali in response once again apologized and said that he has not lied to the Commission and has correctly stated the facts. He further added that in Sialkot several undertakings are engaged in such practices

and they need to be educated through their chamber of commerce that they are in violation of the Ordinance. He filed the undertaking before the Commission admitting the violation of the Ordinance and assuring future compliance of the Ordinance in letter and spirit.

20. Having gone through all the documents available on the record. The main issue which emerges in the matter is whether AGI has engaged itself into the deceptive marketing practices in violation of Section 10 of the Ordinance?
21. Since, AGI's admission, firstly at the enquiry stage vide its letter dated 06-01-10 and subsequently vide its undertaking before me on 17-06-10, leaves no doubt that they were using the trademarks of the Complainants on the images available on their website. During the hearing it was also admitted by AGI that, although they do not have the resources but advertising embellished details such as the capital, staff, tenure of the business always adds to the strength and popularity of the company amongst prospective customers and helps in fetching more orders from abroad. This admission in itself speaks volumes that, the proprietor of AGI although claims to be innocent and ignorant of law, is not that innocent at all. Further the allegations by the Complainant that their logos were used on the website by AGI knowingly that they are famous renowned logos owned by other companies, was never refuted by AGI and although not expressly admitted by the AGI but the statements made by them implies that the trademarks of Complainants' were used owing to their popularity amongst the public at large. The only justification which was afforded by the representatives of AGI was 'ignorance of law'.
22. During the course of hearing, I was informed by the representatives of AGI that as soon as AGI received letter from the Commission at the enquiry stage they removed all the images containing the registered logos of the complainant and have also amended their website. However, the counsel for the Complainant

opposed this and submitted that on the following link the AGI's page showing the image of BMW jacket is still available.

http://pk100462682.trustpass.alibaba.com/product/104711224-101231871/BMW_Leather_Racing_Jacket.html

Subsequent to the hearing, in order to verify the allegations of the Complainants' the link was checked and it transpires that the above link is not of AGI's website, instead the link is of an independent website www.alibaba.com; however, this page is no more available and has expired and/or removed.

23. In addition to the above, the counsel for the complainant has also referred to *Sikander Hayat vs. Haseena Sheikh, PLD 2010 SC 19, Mst Musarrat Bibi vs. Tariq Mahmood Tariq, 1999 SCMR 799 and Muhammad Ishaq vs. District and Sessions Judge, Jhang, 2000 SCMR 1274*, in support of his arguments that plea of innocence or ignorance of law are not acceptable and justified.

24. I find merit in the plea taken by the Counsel for the Complainants and in this regard, I am least impressed with the justification afforded by AGI for violation of Section 10 of the Ordinance that, they were not aware that '*they were in breach and/or in contravention of any law*'. It is pertinent to point out that 'ignorance of law is no excuse' is primarily based on the legal maxims *Ignorantia juris non excusat* which means ignorance of the law does not excuse or *Ignorantia legis neminem excusat* which means ignorance of the law excuses no one. The rationale behind these maxims is that if ignorance was an excuse, a person charged with criminal offence or a subject of a civil lawsuit would merely claim that he/she or it was unaware of the law in question to avoid liability, even though the person really does know what the law in question is. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently, especially to the laws which relates to the business which the person is involved in.

25. Furthermore, in the matter of Ahmad Bakhsh and 3 others vs. Managing Director, (Superintending Engineer) WAPDA Electric Supply Company, Multan, 1995 PLC 536, it was held as follows:

“Nobody, could plead ignorance of provisions of Constitution or any other codified law, because after such law was notified in official Gazette; presumption would be that everybody living in country would have knowledge thereof”

26. Keeping in view the above legal and factual position, I am inclined to hold that, plea of ignorance can not accepted as a valid justification or defense, at all. Moreover, the representative of AGI himself admitted that the information provided on the website regarding the establishment of AGI, its staff, its capital and ancillary details are only provided to build a good image and to fetch more orders from abroad, hence any plea of innocence does not seem tenable. In view of this clear intent and objective, it only makes the use of the subject trademarks as fraudulent on part of AGI.

27. With reference to the allegation that the unauthorized/fraudulent use of Complainant’s registered trade marks by AGI is capable of harming the business interests of the Complainant in terms of clause (a) sub-section (2) of Section 10 of the Ordinance read with sub-section (1) of Section 10 of the Ordinance.

28. The Complainants’ counsel has submitted documents and copies of the certificate making it clear that the trademarks used by AGI on its website are exclusively owned by the Complainant and the documents available on the record also establish that the logos are well recognized and holds goodwill to themselves and are not only well known in the public at large but are also well recognized.

29. The documents and evidence available on the record such as the website images and the catalogues submitted by the Complainants establishes that they are involved in the manufacturing and sale of the products, which AGI advertised on its website. There is no doubt that, the website of AGI is accessible from any where around the world and the products advertised and offered for sale on AGI’s

website are same as the ones manufactured and marketed by the Complainants, as well. In presence of the website images of AGI and their admission regarding unauthorized use of trade marks of the Complainant, there is not doubt in reaching to the conclusion that the information disseminated by AGI through its website is capable of harming the business interests of the Complainants with reference to the products advertised therein.

30. I would like to refer to my earlier decision in the matter of ZONG dated 29-09-09, wherein relying upon the judgments of *American Home Products Corporation, A Delaware Corporation, Petitioner, v. Federal Trade Commission, Respondent, 695 F.2d 681 (1982-83 Trade Cases 65,081) and Federal Trade Commission v. Direct Marketing Concepts, Inc., 569 F.Supp.2d 285 (2008)* it was held that,

“... [a]ctual deception need not be shown by complaint counsel to carry its burden of proof. It is necessary only that the advertisements have the tendency or capacity to deceive...”

31. Hence, keeping in view the above legal and factual position, I am of the considered view that, deceptive marketing in terms of Section 10 of the Ordinance has been carried out by AGI and the fraudulent use of the trademark by AGI was very much capable of harming the business interest of the complainants in violation of Section 10(1) read with Section 10 (2)(a) & (d) of the Ordinance.

32. Keeping in view all the facts and circumstance of the matter in hand, there is no doubt regarding violation of the provisions of the Ordinance, however, the approach of the representative of AGI needs to be appreciated as they cooperated throughout the proceedings and even amended their website immediately after receipt of letter from the Commission. In addition to the fact that he admitted the violation of the Ordinance not only at the enquiry stage but also during the course of hearing and cooperated by submitting all the record requisitioned by the Commission and apologizing and assuring future compliance of the Ordinance in letter and spirit. I am, therefore, inclined to impose a token penalty of Rs. 2,50,000/- (Two Hundred and Fifty Thousand Only). However, AGI is

reprimanded that in future, the Commission will take a very strict view of any or all non-compliances or contraventions under the Ordinance.

33. In terms of what has been stated above both the Show Cause Notices No. 18 & 19 of 2010 issued to AGI are hereby disposed.

(RAHAT KAUNAIN HASSAN)
CHAIRPERSON

ISLAMABAD THE AUGUST 16TH, 2010