



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO M/S A. RAHIM FOODS
(PRIVATE) LIMITED FOR DECEPTIVE MARKETING PRACTICES

(FILE No. 113/K&N/COMP/OFT/CCP/2012)

Dates of Hearing

03 June 2014
25 March 2015

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar
Member

Mr. Ikram Ul Haque Qureshi
Member

On behalf of M/s K&N's Foods (Private) Limited

Mr. Adil K. Sattar
Executive Director

Mr. Ali Kabir Shah
M/s Ali & Associates- Advocates & Legal
Consultants

On behalf of M/s A. Rahim Foods Limited

Mr. Mueen Qamar
Mr. S.M. Bilal Ahsan
M/s Irfan & Irfan- Attorneys At Law

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Competition Commission of Pakistan
Government of Pakistan
Islamabad.

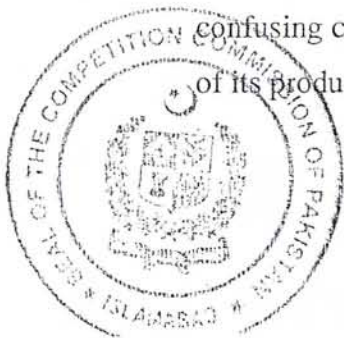


ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No.1/2014 dated 03April 2014 (the 'SCN'), issued to M/s A. Rahim Foods (Private) 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 K&N's Foods (Private) Limited (hereinafter the '**Complainant**').
2. The main issue under consideration in this matter is whether the Respondent has copied the Complainant's product labelling and packaging of frozen and/or processed meat products, for use on the packaging of its own frozen and/or processed meat products, and further whether the Respondent has used the term '*Combo Wings*' so as to have engaged in deceptive marketing practices in violation of Section 10 (1), read with Section 10 (2) (a) and 10 (2) (d) of the Act.

FACTUAL BACKGROUND

3. The Complainant is engaged in the poultry business, and also in the processing, marketing and sales of frozen and processed meat products. The Respondent is a part of the Dawn Foods group of companies, (the '**Dawn Group**'), and is engaged in the business of manufacturing, processing, marketing and sales of a large variety of food and frozen food products.
4. The Complainant alleged that the Respondent had copied its distinctive and instantly identifiable labelling and packaging which it developed for its frozen and/or processed meat products, thereby causing deception which has the effect of misleading and confusing consumers, while taking undue advantage of the market standing and goodwill of its products.

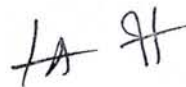


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5. With regard to the above, a formal enquiry in terms of Section 37 (2) of the Act was initiated, which was concluded vide an enquiry report dated 12 December 2013, (the 'Enquiry Report')¹. Based on the *prima facie* findings of the Enquiry Report, a 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. The relevant portions of the SCN are reproduced below:

12. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraph 4.23 in particular, it appears that:

(a) By using the exact language, font and color scheme of the Complainant's packaging material of frozen, processed, ready to cook and fully cooked chicken & meat products on its own frozen food product's packaging by the Undertaking is misleading and deceptive and is *prima facie* violation of the provisions of Section 10 of the Act, in particular Section 10(2)(d) of the Act;

(b) The use of mark 'COMBO WINGS' by the Undertaking without seeking authorization from the Complainant being a trademark owner, is misleading, deceptive and fraudulent and in *prima facie* violation of the provisions of Section 10 of the Act, in particular, Section 10(2)(d) of the Act;

(c) The use of exact language, font and color scheme of the Complainant's packaging material of frozen, processed, ready to cook and fully cooked chicken & meat products on its own frozen food product's packaging and the use of mark 'COMBO WINGS' by the Undertaking without any authorization is misleading and deceptive and appears to be capable of harming the business interest of the Complainant in *prima facie* violation of the



Available at: http://www.cc.gov.pk/images/Downloads/enquiry_reports/iv_enquiry_report%2004_04_2014.pdf

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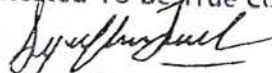
SUBMISSIONS

A. BY THE COMPLAINANT

6. The primary contentions submitted by the Complainant and its claimed grievances against the Respondent are summarized as follows:

- a. That it was one of the first companies to introduce frozen and/or processed meat products to the Pakistani market and has expended considerable resources to establish an identifiable brand identity and develop a reputation and goodwill for its frozen and/or processed meat products since their launch in 2003;
- b. That the trade dress and colour of its packaging consisted of a distinctive rectangular red box with the picture of the finished product on the front, storage and cooking instructions on the back, ingredients on one side and a smaller image of the finished product on the other side of the package (the '**K&N Packaging**');
- c. That the Respondent entered the market for frozen and/or processed meat products in 2008, with product labelling and packaging that was distinctly different and clearly distinguishable from that of the Complainant's. However, the Respondent was unable to make an impact in the market;
- d. That in 2012, the same products were re-launched by the Respondent with re-designed product labelling and packaging that now misleadingly resembled that of the Complainant's, including the overall layout and design, size and shape, colour scheme, font, exact language and sequence of information for the consumer;
- e. That the distinctive term '*Combo Wings*' has been accepted and approved by the Registrar of Trademarks for registration in favour of the Complainant and has been used without authorization by the Respondent;

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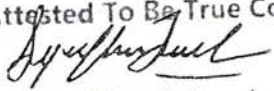


- f. That the Respondent's product labelling and packaging constitutes an instance of 'parasitic copying', and as such is prohibited under the 'Unfair Commercial Practices Directive' issued by the European Commission;
- g. That the Respondent's conduct has caused the Complainant to suffer irreparable damages, including business losses and harm to its goodwill, reputation and exclusivity.

B. BY THE RESPONDENT

7. The Respondent submitted a written reply to the Complaint, Enquiry Report and SCN. The Respondent further filed an application for rejection of the Enquiry Report wherein it was primarily contended that the officers conducting the enquiry, (the 'Enquiry Committee') treated certain mere presumptions as proven facts. Specifically, the Respondent contents that the Enquiry Committee has erroneously treated the Complainant's pending trademark applications as granted and registered rights, whereas the same have only been provisionally accepted for advertisement in the Trade Marks Journal for invitation of any opposition from third parties. It further asserts that the consumer survey conducted by the Enquiry Committee constitutes 'new evidence' which has been arranged and created without lawful authority.
8. The Respondent's submissions put forth in response to the substantive allegations made in the SCN, Enquiry Report and Complaint are summarized as follows:
- a. That the Respondent is a part of the Dawn Group, which has been active in the business of manufacturing food products since 1981;
- b. That the colour red has been used by Dawn Group for various purposes during the last thirty years, and presently, the Dawn Group is marketing many different food products under the trade name 'Dawn' with a predominantly red packaging scheme;
- c. That the Complainant does not have an exclusive registered right in the colour red, and further that an overwhelming majority of international food companies use the



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colour red in their packaging and designs as consumer psychology studies have found it to trigger the appetite;

- d. That the Complainant only has registered trademark rights in the logo 'K&N's' and no such rights, exclusive or otherwise, exist in either the packaging or the product labelling with a red colour scheme and design;
- e. That there is no similarity at all between the Respondent's packaging of various products and the packaging of the Complainant's products;
- f. That the results of the consumer survey undertaken by the Enquiry Committee are 'clearly defective, inconsistent, inherently flawed and the survey as a whole is completely invalid';
- g. That the term '*Combo Wings*' is a generic term used worldwide and is descriptive of a specific selection of chicken wings., It is not registered as a trademark in favour of the Complainant;
- h. That the Complaint was filed solely to harass the Respondent and to stifle legitimate, fair competition in the market by blocking the Respondent.

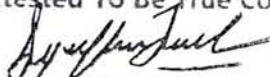
ISSUES

9. The issues identified by the Commission are therefore as follows:

- A. Whether the Respondent's product labelling and packaging is misleadingly similar to that of the Complainant's K&N Packaging and if so, whether such confusing resemblance is deceptive and amounts to the "fraudulent use of another's..... product labelling or packaging" within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;



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- B. Whether the use of the term/ mark 'Combo Wings' by the Respondent, in the absence of authorization from the Complainant, amounts to the "fraudulent use of another's trademark..." within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;
- C. Whether, the Respondent's product labelling and packaging and /or use of the mark 'Combo Wings' amount to the "distribution of false or misleading information that is capable of harming the business interests" of the Complainant within the meaning and scope of Section 10(2)(a) and hence a contravention of Section 10(1) of the Act.


ANALYSIS AND DECISION

10. 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 and 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.
11. Before proceeding with such analysis and a consequent determination as to any contravention of the Act, we find it necessary to point out that, with regards to the issues raised by the Respondent in their application for the rejection of the Enquiry Report, the survey as undertaken by the Enquiry Committee has not been taken into consideration by the Commission while adjudicating upon the issues framed in this matter.

ISSUE A

12. Section 10(2)(d) of the Act provides that 'fraudulent use of another's trademark, firm name, or product labelling or packaging' constitutes a deceptive marketing practice. In its Order in the Matter Of Complaint Filed By M/s. DHL Pakistan (Pvt.) Ltd (the 'DHL Order'), the Commission with regards to the interpretation of the term 'fraudulent' stated that 'while interpreting Section 10 of the Act; one needs to be conscious that the interpretation of fraudulent use of trade mark has to be in the context

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of deceptive marketing and would thus have a broader scope. Rather than making it too complex by focusing on subjective "intentions" of the Respondents, in our considered view, it is best if we adopt simplistic approach i.e. if it can be demonstrated that the Respondents by use of the trade mark, intended to deceive the customer/consumer to gain an advantage. Keeping in view the nature of contravention, it is not the subjective intent but the objective manifestation of that intent that will establish the fraudulent use'.

13. In light of the mandate of the Commission and the issue of consumer deception as envisaged by Section 10(2)(d) of the Act, we find it useful to consider the issue of 'parasitic copying' as raised by the Complainant and discussed in the Enquiry Report.
14. 'Parasitic Copying' is not a term defined under the Act, or a violation thereof per se. Keeping in mind however the element of deceit that it involves 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, it is necessary to consider when and how it may become relevant to a contravention under Section 10 of the Act.
15. According to the definition quoted in the Enquiry Report, '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). Copycat packaging is distinct from counterfeiting, since normally it does not infringe intellectual property rights. The risk posed by copycat packaging is consumer confusion, and consequently, distortion of their commercial behaviour.'²
16. In cases of both parasitic copying and a contravention of Section 10(1) in terms of Section 10(2)(d) of the Act, there exists an element of wilful deceitfulness along with free-riding and passing off. Therefore, the Commission is of the considered view that where there is evidence that an undertaking is culpable of parasitic copycat packaging, having the obvious foreseeable effect of misleading and causing deceitful confusion in the mind of the ordinary consumer, a violation in terms of Section 10(2)(d) will be made out.

Giuseppe Abbamonte. 'Copycat Packaging, Misleading Advertising and Unfair Competition'

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17. In order to set a benchmark for the Commission's consideration and consequent adjudication of cases, such as the instant one, of an alleged potential contravention of Section 10(1) in terms of Section 10(2)(d) of the Act, the Commission would like to make the following further observations relating to the now prevalent practice of "copycat packaging"/ "parasitic copying"/"slavish imitation", as well as its purpose and effect and more importantly its direct correlation to the "fraudulent use" of another's "product labeling or packaging":

- 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.
- c) 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 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



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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 colour 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) It may also be noted that the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and Council, provides in Article 6.2.a that "*A commercial practice shall also be regarded 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, trade marks, trade names or other distinguishing marks of a competitor*";". Further, Annex I to the said Directive provides at Item No. 13 that "*Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not*" is a misleading commercial practice. It may also be placed on record that national legislation in numerous member states of the EU for the implementation of the abovementioned Directive, makes slavish imitation and parasitic copying actionable with injunctive relief.



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g) 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.

18. In light of the above mentioned legal interpretation and observations as to the applicable law and principles, the Commission will now undertake a comprehensive analysis and in depth consideration of the facts in this matter.

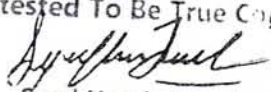
19. We begin with the most contentious issue of the identical "red" colour scheme used by the parties. The facts presented demonstrate that K&N Packaging, by virtue of having been introduced prior in time, acquired a reputation and distinctiveness in the relevant market for frozen and/or processed meat products. The Respondent's contentious red packaging was introduced after the Complainant's. The timing of the Respondent's actions suggests that there can be no doubt as to the awareness, knowledge and anticipation of the Respondent that its red coloured re-designed packaging would cause deceptive confusion in the mind of the consumer. On such basis, the Commission observes that the Respondent stands to gain an undue benefit and unfair advantage at the expense of the Complainant, which it would otherwise not have obtained. As such, the only rational conclusion which can be drawn is that the conduct of the Respondent has the purpose and effect of deceiving the consumer.

20. Notwithstanding the Commission's independent adjudicatory powers as permitted and within the scope of the Act, it may be pertinent to make reference to the recent Judgment of the High Court of Sindh in *Messrs Golden Thread Industries v. J & P Coats Limited Company*³, a case of "passing off" and deceptive measures pertaining to a trading specific commodity, wherein it was observed that "when all the three packets are kept side by

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side - for example in a showcase of the shopkeeper, an ordinary purchaser would not be able to distinguish between the three on account of the identical size of the packs in the backdrop of yellow colour with typical rectangular border running across the packing, they will tend to cause confusion in the mind of unwary purchaser. It is also to be noted that the goods of the opposing parties are to be offered in same and common outlets/sale points, therefore, if the packets are mixed with each other an unwary buyer may be deceived". It was further observed therein that where the prefixes are similar but the coloring of the packaging boxes are different, an ordinary person cannot be deceived. It was lastly concluded that "a particular colour scheme plays a vital part in the identification of a product...(and it is particularly so when such product is used mainly by illiterate persons)."

21. It is, however, emphasised that the above observations of the Commission do not in any way equate any registered trademark, exclusive or other design rights thus created in the colour red in favour of the Complainant. Such an issue is beyond the purview of the Commission and if at all, is a matter solely for the consideration of the Intellectual Property Organization.
22. Furthermore, the discussion of the same colour used by both parties is one part of a much wider analysis with regards to the overall packaging resemblance. Pertinent to mention here is also the fact that the other local competitors in the market are all using different colours which are distinct from the K&N Packaging. Also relevant to note is the fact that the Respondent is admittedly marketing the same products abroad with entirely different packaging including its colour scheme, layout and design.
23. The Respondent's argument regarding a correlation between the colour red and hunger is found to be one-dimensional and unconvincing. While a psychological connection between appetite and colours may or may not exist, the Commission considers that unless a specific colour was denoted as a standardized requirement to be followed by all food processing and packaging companies, or even inherently related to the properties or

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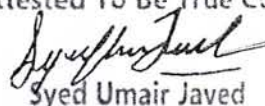
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functions of a product, its copying in the presence of a market leader already using it would require a more compelling justification.

24. While the fonts on the packaging of both the parties' products are not identical, the consideration of the examples given by the Complainant and defended by the Respondent, show that the language used for the product information including the list of ingredients, cooking and storage instructions on the Respondent's packaging are identical to that of the K&N Packaging. Therefore, notwithstanding our agreement with the Respondent's argument that in the case of same or similar products, it is not always possible to distinguish ingredients or cooking instructions. We are of the view that the syntax, punctuation and sequence of said instruction need not be exactly identical when seen in isolation to show deception. We find this practice not to be deceptive in itself but rather an apt demonstration of how the packaging as a whole has been copied to misleading effect by the Respondent.
25. In order to provide further factual clarity, it is the Commission's view that the only real and meaningful distinguishing factor between the K&N Packaging and that of the Respondent's, is the existence of the parties respective trademarked logos i.e. "K&N's" and "Dawn Foods" on the front side of the product packaging. If such logos were hypothetically to be hidden or removed, it would in fact be visually impossible to identify and distinguish the origin of the products as belonging to which of the two competitors.
26. The Commission's concern of mimicry and confusing similarity is further heightened by the fact that both parties' products, being of the same nature, are predominantly displayed for sale side by side, adjacent to each other in large common freezers located at retail stores, supermarkets and other points of sale across the country. 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 two products at the time of exercising a choice of purchase.



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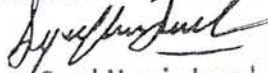
27. The extent of mimicry by the Respondent in terms of the overall layout, design, size, shape and colour scheme of the K&N Packaging leads the Commission to the reasoned conclusion that the Respondent is clearly culpable of and has resorted to parasitic copying. As such it has attempted to capitalize on the goodwill and reputation of the Complainant. It must not be forgotten as already observed by the Commission in its earlier orders, that part of any business's 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. 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 instant commodity, due to the strikingly similar packaging and labelling of the products.
28. 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 Section 10(2)(d) of the Act.

ISSUE B

29. This Issue also requires the indulgence of the Commission in determining whether the Respondent has acted in violation of Section 10(1) in terms of Section 10(2)(d) of the Act, with regard to the use of the term/ mark '*Combo Wings*' on its packaging. Accordingly, the Commission shall determine whether the Respondent has in fact made fraudulent use of the Complainant's claimed trademark in the said term.
30. It is observed that the Enquiry Report at paragraph 4.20 states that the term "*Combo Wings*" is generic, and part of common usage. The SCN however has erroneously referred to the term as the Complainant's distinctive trademark based on the averments by the Complainant in its Complaint. The Complainant did not, at the time of lodging its Complaint with the Commission, own any trademark rights in the said term. As per the documents on the record, while the Complainant had in fact filed an application for the registration of a trademark in the name and style of "*Combo Wings*" with the Trade



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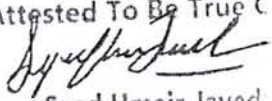
Marks Registry, Intellectual Property Organization, the process of advertisement and objections before acceptance of the same remained pending at the time of receipt of the Complaint by the Commission. The Complainant has incorrectly stated on record that the Registrar of Trademarks had "accepted and approved" the trademark in question.

31. Therefore, in this regard, the Commission concludes that, notwithstanding the Complainant's use of the mark "*Combo Wings*" on its K&N Packaging prior in time to the adoption of the same by Respondent, there has been no contravention by the Respondent of Section 10(1) in terms of Section 10(2)(d) of the Act pertaining to the specific issue of alleged fraudulent use of another's "trademark". The trademark claimed to have been used without authorization must be registered with the competent authority for the Commission to proceed under this provision of the Act.
32. However, the use of the term "*Combo Wings*" by the Respondent, when seen in conjunction with the overall layout and design of the copied and duplicated K&N Packaging, demonstrates the Respondent's intention to pass off its products as those of the Complainant. To such extent only, and as part of its overall scheme of deception, the use of the term in question falls within the scope of Section 10(2)(d) of the Act, as fraudulent use of another's product labelling. Such use is therefore part of the same violation as determined with regards to Issue A and is not being treated by the Commission as a second count of the same contravention under Issue B.

ISSUE C

33. With respect to this Issue, the Commission is required to determine whether the Respondent's packaging including the use of the term "*Combo Wings*" falls within the scope of the violation caught by Section 10(2)(a) of the Act.
34. Section 10(2)(a) 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.



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35. The legal interpretation of this sub-section has previously been elaborated upon in various orders by the Commission. Pertinently, the terms 'false' and 'misleading' have already been defined by the Commission in the Order In The Matter Of M/S China Mobile Pak Limited & M/S Pakistan Telecom Mobile Limited (the "Zong Order")⁴. An in-depth discussion of the term 'business interest' has also been provided in the Order In The Matter Of Show Cause Notice Issued To M/S Tara Crop Sciences (Private) Limited For Deceptive Marketing Practices (the "Tara Order")⁵. Therefore, for the purposes of reaching a determination pertaining to this Issue, the already interpreted meaning and scope of the terms "misleading" and "business interest" are being considered by the Commission.

36. The Zong Order also cites Regulation 5 of the 'Consumer Protection from Unfair Trading Regulations 2008'⁶. These Regulations were promulgated in the United Kingdom for the national implementation of the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and Council, which has already been referred to above. For reference, the relevant portion of the Regulations of 2008 are reproduced below:

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

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

37. In simplified terms, as per the EC Directive as well as the UK Regulations of 2008 cited above, a commercial practice is automatically considered as misleading if such marketing practice (including promoting and packaging of a product) causes confusion for the consumers in comparison to another product of a competitor and hence influences their

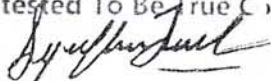
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⁴ Available at: <http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

⁵ Available at http://www.cc.gov.pk/images/Downloads/show_cause%20notice_issued_to_ms_tara_crop_order.pdf

⁶ Available at: <http://www.legislation.gov.uk/uksi/2008/1277/contents/made>



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Registrar
Competition Commission of Pakistan
Government of Pakistan
Islamabad.

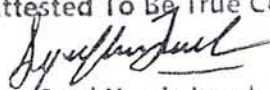
transactional choice. Similarly, in terms of the Act, in the event that there exists a contravention of Section 10(2)(d) by an undertaking, a concurrent violation of Section 10(2)(a) is also made out. Furthermore, parasitic copycat packaging, being a practice that falls within the ambit of Section 10(2)(d) and one which causes deceptive confusion for the consumer, in itself also amounts to the dissemination or distribution of misleading information to the public. The consequence of distribution of such information is such that it is capable of harming the business interests of and resulting in fatal consequences for the market leader or competitor whose product packaging and labelling designs have been copied. It may be noted however, that no strict proof of actual harm caused to an undertaking is required for a determination of a contravention of Section 10(2)(a) of the Act as long as it can be shown that such potential harm was capable or possible of being caused or foreseeable.

38. It is also pertinent to clarify here that the scope of Section 10(2)(a) is much wider and far reaching than Section 10(2)(d) of the Act. While there are innumerable instances of misleading information that an undertaking may distribute to the targeted potential consumer and hence be culpable under Section 10(2)(a), a contravention of Section 10(2)(d) will almost in every circumstance lead to a consequent contravention of Section 10(2)(a) of the Act, unless there exist exceptional circumstances in a particular case that warrant otherwise.

39. We are of the concurring opinion that the Respondent's practice of parasitic copying of the K&N Packaging, being misleading and deceptive by its very nature, is in fact capable of harming the business interests of the Complainant. We further believe that such conduct of the Respondent is likely to cause eventual dilution of the Complainant's brand identity and goodwill which it has built over the years in terms of the visual recognition and distinctiveness of the K&N Packaging. We are also wary of the harm capable of being caused to other undertakings and competitors in the relevant market in this regard. However, we shall not be extending the scope of this order beyond a determination of culpability of those acts of the Respondent as specifically complained of by the Complainant.



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Registrar

Competition Commission of Pakistan
Government of Pakistan
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40. The Commission further finds that the Respondent's use of the unregistered and non exclusive mark "*Combo Wings*" is an act which, when viewed in isolation, does not attract the provision of Section 10(2)(a) of the Act and hence does not amount to the distribution of misleading information capable of harming the business interests of the Complainant. However, the Commission concludes as it did with regards to Issue B, that such use of the said mark in conjunction with the copied packaging and product labelling as a whole, is in fact misleading and capable of causing harm to the Complainant.
41. Lastly, the Commission, before dealing with the penalties that are attracted in the instant matter, would like to make it abundantly clear that in reaching its decision as to the violations committed by the Respondent, it has in no way attempted to restrain or deny the Respondent its right to free trade in the relevant market. The Commission has reached its decision based solely on deceptive and misleading similarities in the products of the two parties concerned, which have arisen due to the indulgence by the Respondent in "deceptive marking practices" as prohibited by Section 10 of the Act.

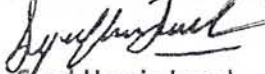
REMEDY AND PENALTY

42. In view of the Respondent's violations of Section 10 of the Act, the Commission hereby imposes on it a penalty of:

- i. Pakistani Rupees 10 Million (PKR 10,000,000) for the contravention of Section 10 (1) read with Section 10 (2) (a) of the Act;
- ii. Pakistani Rupees 10 Million (PKR 10,000,000) for the contravention of Section 10 (1) read with Section 10 (2) (d) of the Act;

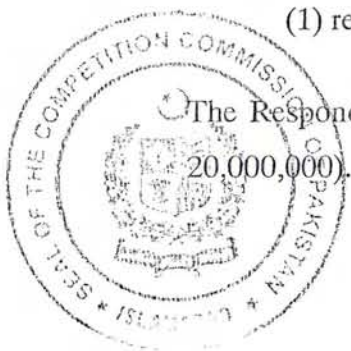
The Respondent is therefore liable to pay a sum of Pakistani Rupees 20 Million (PKR 20,000,000).

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43. The Commission further directs the Respondent to cease use of the contentious copycat packaging for its frozen and/or processed meat product within one month. 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 products.
44. The Respondent is also directed to file a compliance report with the Registrar of the Commission within a period of thirty (30) days from the date of issuance of this order.
45. In terms of the above, SCN No.1/2014 is hereby disposed of.
46. Ordered accordingly.

Vadiyya Khalil

Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar

Dr. Shahzad Ansar
Member

Ikram Ul Haque Qureshi

Ikram Ul Haque Qureshi
Member

Islamabad, the 8th February 2016

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Syed Umair Javed 8/2/16

Syed Umair Javed
Registrar
Competition Commission of Pakistan
Government of Pakistan
Islamabad.

