BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO

M/s Hi-Tech Lubricants Ltd
Hi-Tech Blending (Pvt.) Limited

On Compliant Filed By
M/s Chevron Pakistan Lubricants (Pvt.) Limited

(F. NO: 315/HITECH/OFT/CCP/18)

Date(s) of hearing:	26-09-2019, 25-10-2019 28-11-2019, 04-02-2020 27-02-2020, 13-05-2020
Commission:	Ms. Shaista Bano **Member**
	Ms. Bushra Naz Malik **Member**
On behalf of: **M/s Chevron Pakistan Lubricants (Pvt.) Limited**	Mr. Shahbakht Pirzada, Advocate *RIAA Barker Gillette*
	Mr. Usman A. Bilgrami, *Technical Support Manager*
	Mr. Mamoon Bashir *Territory Manager*
M/s Hi-Tech Lubricants **M/s. Hi-Tech Blending (Pvt.) Limited**	Mr. Umar Akram Ch, Advocate *Raja Muhammad Akram & Co*
	Mr. Faraz Akhtar Zaidi, *Director*
	Mr. Mohammad Javed Iqbal *Advisor Business Operations*

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ORDER

1. This order disposes of proceeding arising out of Show Cause Notices (**SCN's**) No.16/2019 & 17/2019 dated August 20, 2019 issued to M/s Hi-Tech Lubricants Limited (the "**Respondent No.1**") and M/s. Hi-Tech Blending (Pvt) Limited (the '**Respondent No.2**') respectively (both collectively called "the **Respondents**") for *prima facie* violation of Section 10 of the Competition Act 2010, (the '**Act**').

2. In the instant matter, M/s Chevron Pakistan Lubricants (Pvt) Limited (the '**Complainant**') alleged that product superiority claims made by the Respondents through advertisements and TV commercials are false, misleading, unsubstantiated and deceptive in nature, capable of harming consumers, as well as, business interests of competing undertakings.

A. FACTUAL BACKGROUND

COMPLAINT, ENQUIRY REPORT AND SCN'S

3. The Competition Commission of Pakistan (the '**Commission**') received a complaint against the Respondents. The Complainant claimed to be involved in manufacturing and supplying lubricating oil for automobiles and off-highway engines. Whereas, the Respondents were stated to have been operating in the same market and selling their lubricants under the brand name "**ZIC**". The complaint also identified the Respondent No.1 as an agent and exclusive distributer of imported lubricants, greases, speciality oil etc. manufactured by its parent company called *SK Lubricants Company Limited (**SKL**)*. Whereas, the compliant identified the Respondent No.2 as a wholly owned subsidiary of Respondent No.1 which has been engaged in blending and bottling lubricants imported in bulk from SKL.

4. The complaint alleged that the Respondents have made outrageous claims with respect to quality, efficacy and fitness of ZIC lubricants through their televised commercial campaign. The complainant also alleged the Respondents to have made various statements in their advertisements which created unsubstantiated impression of comparison between ZIC and the competing products including ZIC outperforming all other lubricants in the market. The claims alleged in the complaint were in the following words;

i. *"Engine oil bnta hai 80% base oil se, lekin her engine oil ZIC nahi hota". (Translation: Engine oil is made of 80% base oil but not every engine oil is ZIC.)*

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ii. *"ZIC bnta hai dunya ke behtreen base oil Yubase se, jiski VHVI technology ghatae friction aur de lajawab performance" (Translation: ZIC is made of world's best base oil Yubase, whose VHVI technology reduces friction and provides unmatchable performance.)*

iii. *"Yubase ki low volatility our pure saturates rakhe oil ko shafaf, barhaey mileage our dale gari me jaan". (Translation: Low volatility and pure saturates of Yubase keeps the oil pure, increases mileage and adds power and strength to the vehicle.)*

iv. *"Is liye har engine oil ZIC nahi hota aur ZIC se behter koi engine oil nahi". (Translation: That is why not every engine oil is ZIC oil and no engine oil is better than ZIC oil.)*

5. In addition to above mentioned statements, the Respondents were also alleged to have prepared marketing material such as brochures by the name of "*Shaandaar Gift Scheme*", wherein, following questionable claims regarding the Respondent's product were made;

i. *"Cleaner Engine with ZIC, tested for best performance, friction reducer, greater performance, better mileage and cleaner engine with ZIC"*

ii. *"Fuel Efficient", "Protects Engine", "the Ultimate Vitamin for Your Engine", "More In Every Drop", "Ultimate Engine Protection", and "Advance Fuel Saving".*

6. The Respondents were also alleged to have made unsubstantiated claims on social media in the following words;

i. *"Don't settle for just an engine oil, because no other engine oil is ZIC."*

ii. *"Get double protection & Extra care with ZIC engine oil."*

iii. *"Switch to ZIC and feel difference of day and night".*

iv. *"Use only ZIC motor oil".*

Along with the complaint, the Commission received attached copies of alleged advertisements, brochures and statements on social media which are reproduced herein below for ready reference;

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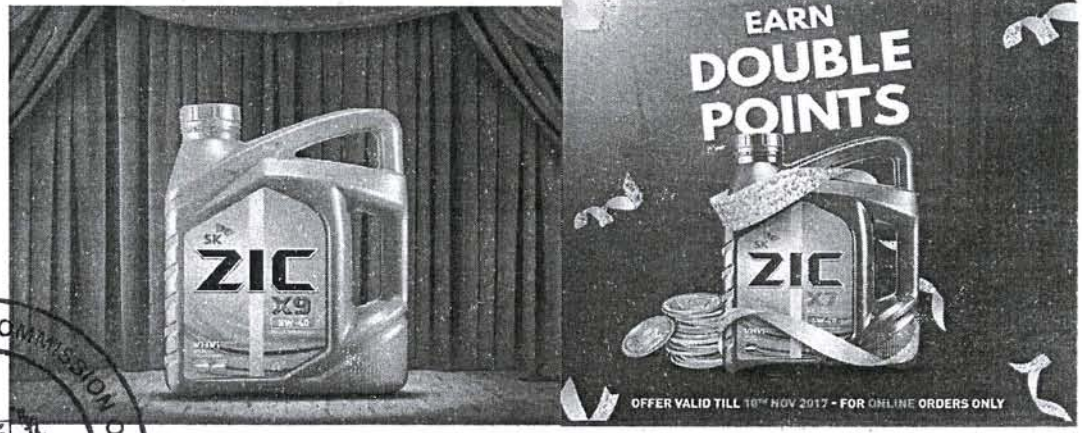
ZIC Lubricants
2 May

Using the right oil for your car, means less fuel consumption as the engine will run smoothly & efficiently and it will be protected at all times. Use only ZIC Motor OIL!
Buy Online @ http://zicoil.pk
Earn Loyalty Points • Free Delivery • Cash on Delivery

ZIC Lubricants
22 October 2017

Get double the protection & extra care with ZIC engine OIL.
Plus earn double the points with every online purchase!
Buy Online @ http://zicoil.pk
Offer Valid till 10th Nov 2017



7. The Complainant alleged that the Respondents were making claims without any reasonable basis and valid substantiation. It is also alleged that the use of particular words such as "***Behtareen***" and "***Ultimate***" in general statements such as mentioned above, amounted to distribution of false and misleading information, having the effect of harming not only consumers but also business interests of the Complainant. The Complainant also stated that a claim must necessarily be based on objective justifications which could reliably be measured or used to test veracity of the claim. However, a claim such as in the instant case was not based on objective reasons, therefore, lacked substantiation and hence, was capable of causing confusion to consumers and competitor's harm.

8. Pursuant to this complaint, the Commission initiated an enquiry in term of Section 37 (2) of the Act which was finally concluded vide Enquiry Report dated February 7th, 2019. Briefly, the conclusions of the enquiry report are as follows:

> *6.1. In light of the discussion made in the preceding paras, the Enquiry Committee is of the considered view that Respondents' claim of "ZIC say behtar koi engine oil nahi ", "ZIC bana hai duniya ke behtareen base oil Yubase se", and "Get double protection and extra care with ZIC engine Oil "without any reasonable basis is prima facie in violation of Section 10(1) of the Act, within the meaning and scope of Section 10(2)(a), 10(2)(b), and 10(2)(c) of the Act.*
>
> *6.2. In order to protect consumers and to ensure that they are not deceived while taking decision on the basis of false and misleading information, the interest of the general public demands that deceptive marketing practices must be discouraged at all levels and a fair competition in the market is promoted.*

9. The Commission, after considering the *prima facie* findings of the Enquiry Report, deemed it appropriate to initiate proceedings under Section 30 of the Act against the Respondents while providing them the opportunity of hearing. The SCN in its relevant parts is reproduced herein below:

> ***4.*** ***WHEREAS****, in terms of the Enquiry Report in general and paragraphs 2.2 to 2.13, it has been alleged by the Complainant that the Undertaking in order to promote the brand "ZIC" launched a marketing campaign with several high sounding claims. Furthermore, false and unsubstantiated superiority claims in comparison to competing products have also been made, and thus prima facie constitutes violation of Section 10(1) of the Act; and*
>
> ***5.*** ***WHEREAS,*** *in terms of the Enquiry Report in general and paragraph 5.4 to 5.18 in particular, it appears that the marketing campaign of the Undertaking appears to be prima facie deceptive in terms of Section 10(1) of the*

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Act in general, read with sub-Section 10(2)(b) of the Act which prohibits distribution of false and misleading information to consumers without reasonable basis; and

6. ***WHEREAS,*** *in terms of the Enquiry Report in general and paragraph 5.19 to 5.21 in particular, it appears that the Undertaking tried to mislead the public by unsubstantiated comparisons of "ZIC" with competing products which appears to be prima facie, in violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(c) of the Act; and;*

7. ***WHEREAS,*** *in terms of the Enquiry Report in general and paragraph 5.22 in particular, it appears that the Undertaking's marketing campaign is also capable of harming the business interest of competing undertakings including the Complainant is, prima facie, in violation of Section 10(1) of the Act in general, read with sub-Section 10(2)(a) of the Act; and;*

9. Vide SCN's, the Respondents were required to file written replies within fourteen (14) days and to appear before the Commission to avail opportunity of hearing. Parties submitted their written replies and arguments and put forward following justifications;

B. WRITTEN REPLIES AND HEARING CONDUCTED

10. The Respondents claimed themselves to have been widely acknowledged around the globe (in more than fifty countries) for their production of high quality lube base-oil called "*Yubase*", which is claimed to be made of hydrocarbon mineral oil and serves as base-oil in preparation of ZIC lubricants. The Respondents also claimed themselves as subsidiary companies of *SK Lubricants* (a Korean company) which holds trademark rights and patents for "*Yubase*" due to its "*Very High Viscosity Index* (**VHVI**)". Copies of patent and trademark certificates have been produced as supporting evidence. For further substantiation in this regard, the Respondents relied upon an international quality standard called ***"American Petroleum Institute (API) Standard"***, which has enlisted *Yubase* in Group III of its categorical classification. The Respondent identified the Group III as a group known for best mineral based-oils. In addition to that, the Respondents also claimed to have been conferred with various awards by Pakistani agencies, such as *Consumer Association of Pakistan* and *PakWheels* in category of best automobile lubricant producing companies. Besides, the Respondents also produced a study report titled ***"SK Innovation Sustainability Report 2017 (Published in June 2018)*** (hereinafter referred to as *SK Report 2017*), which acknowledges international recognition of the Respondent's profile and *Yubase* as a good quality base-oil. The said report is also claimed to have been reviewed and evaluated by *DNV GL Business Assurance Korea Ltd*, which is an independent third party assurance provider.

11. With regard to legal submissions, the Respondents claimed the alleged statement/advertisements as 'statements of equivalence', unlike 'claims of superiority over competitors' as alleged by the Complainant. Furthermore, the Counsel for the Respondents placed his reliance on defence of "**puffery**" and contended Enquiry Committee's reliance on "**Comparative Advertisement**" and "**Nit-Picking**". He claimed the alleged statements eventually to have fallen within the ambit of non-actionable claims.

C. HEARINGS

COMPLAINANT'S ARGUMENTS

12. The hearings into the matter took place on 26-09-2019, 25-10-2019, 28-11-2019, 04-02-2020, 27-02-2020 and 13-05-2020.

13. The Counsel for the Complainant argued at length and called the matter in the instant case simply relating to false advertisement. He challenged truthfulness of the Respondent's claims i.e. "*ZIC is made of world's best base oil i.e. Yubase*" or "*No other engine oil is better than ZIC*" for being claims of superiority, eventually capable of creating an unwarranted and undeserved competitive edge for ZIC lubricants. Though the Counsel recognized *Yubase* as a good quality base-oil, however, he urged the Commission not to accept it as world's best base-oil since there exist other base-oils in the market which can be put equal to or better than *Yubase* in terms of quality. According to the Counsel, acceptance of *Yubase* as world's best base-oil is an approach which is either incorrect at the first place or, at least, subject to proof. Further, if approach of the Respondents is accepted for sake of argument, even then a lubricant made with world's best base-oil cannot not be accepted as a world's best lubricant. Until proven otherwise, lubricant's superiority claim would be insufficient and misleading if it is based on the fact that it is made of the world's best base-oil. The Counsel put forward following technical reason in support of this argument.

14. Counsel argued that quality of a lubricant cannot not be determined only on the basis of quality of the base-oil used in it. Instead, it depends on four factors; base-oil, additives combination, formulation expertise and blending process. Since these factors can never be similar for two specific lubricants, therefore, such lubricants can never be claimed similar to each other. A slight variation in any of these four factors may effect quality of the lubricant. Consequent to this reason, the Counsel argued that a perfect comparison can never be made

between two lubricants manufactured by two different manufacturers. The only possible or appropriate way of making a comparative assessment is conducting ***'Engine Tests"*** or ***"Bench Test'*** for two competing lubricants having same viscosity, grade, identical performance level and same industry specifications. The Counsel further illustrated the term '*Engine Test*'; a test which is conducted by keeping two similar engines in a controlled environment with dissimilar lubricants, and their performance is calculated then. He argued that since no such comparative testing data is placed on record by the Respondents, therefore, it can be concluded that the Respondents have not conducted any such tests before making alleged claims. In consequence thereof, the alleged claims are believed by the Complainant to have lacked substantiation.

15. In addition to the foregoing, the Counsel also highlighted the falseness of the alleged claims evident from a comparison between two different advertisements of the same Respondents. In one advertisement, the Respondents have claimed best quality of their lubricant which is made with mineral base-oil. However in another advertisement, which is not assailed before this Commission, they have claimed best quality of their lubricant called "*ZIC TOP*" and claimed it to be the world's most technologically advanced lubricant. Not to mention, '*ZIC TOP*' is made with different synthetic base-oil comprising synthetic hydrocarbons such as Polyalphaolephin (**PAO**). Such a contrast in the Respondent's own claims that puts a lubricant made with synthetic base-oil more advanced than a lubricant made of mineral base-oil, has itself drastically challenged the veracity of the subject claims assailed in the instant proceedings. Being contradictory to each other, the Counsel asserted that two claims of the same Respondents are capable of putting a consumer into confusion with respect to which of the two products is best. Either the one made with '*Yubase*' or the one called '*ZIC TOP*'!

16. Such confusion, *inter se* the Respondent's claims, is not only capable of harming consumers but also capable of altering their transactional decisions by making them believe in the Respondent's superiority claim over their competitors. Such a situation is tantamount to harming business interest of the Complainant. Hence, there exists violation of Section 10 of the Act.

RESPONDENT'S ARGUMENTS

17. Before initiating his arguments, the Counsel for the Respondent claimed the Respondent No. 2 not to have been involved in distribution or sale of the lubricants. Instead, he claimed the Respondent No.1 to have taken all the liability for the alleged statements and requested the Bench to withdraw SCN to the extent of the Respondent No. 2. He produced

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financial statements of the Respondents in support of this version showing marketing expenses as evidence. Subsequently, he contended the matter at length and completed his arguments in two parts; legal submissions and technical submissions.

18. Counsel for the Respondent primarily resorted to defence of puffery and subsequently challenged the Enquiry Committee's reliance on the methodology of nit-picking. He also contested the Enquiry Report on holding the Respondents accountable for comparative advertisement. He submitted case law in support of his arguments which is detailed ahead while discussing puffery. He also made arguments in alternative if the Commission views the defence of puffery as not applicable in the instant case. Although he believed the alleged claims to have fallen in the category of non-actionable puffery, however, he urged the Commission to be considerate of the following factual substantiation.

19. Counsel called the context or inference drawn by the Enquiry Committee from language of the alleged advertisements incorrect and expressly denied any claim of superiority. He explained the Respondent's position who have never intended to claim their products best in the market. Through the alleged statement *"ZIC se behter koi engine oil nahi (Translation: No Engine Oil is better than ZIC)"* the Respondents intended to claim their products second to none, instead of *"ZIC sub se behter hai (Translation: ZIC is best in the market)"*. He urged the Commission to regard it as statement of equivalence instead of superiority claim. For substantiation in this regard, the Counsel explained structural/chemical formulation of ZIC lubricants. He claimed it to have been made of base-oil called "*Yubase*" which is prepared from mineral oil with the help of a technology called "*Very High Viscosity Index (**VHVI**)*". Due to high saturation and low volatility, "*Yubase*" is categorized in Group III of ***American Petroleum Institute (API)*** classification. The Counsel also also claimed the Respondent to have been aware of other base-oils in the same group, which may have chemical properties equivalent to "*Yubase*". That is the reason the Respondent has not claimed its lubricants best in the market, instead, claimed equivalence to all those competing lubricants which could possibly be made of any base-oil categorized in Group III. The Respondents intended to claim their product amongst best engine oils, if not the best all alone, available in the market. Since the Respondents believed themselves second to none, therefore, the Counsel requested the Bench to consider this context as a prism to evaluate the alleged statement "*ZIC se behter koi Engine Oil nahi*". He also relied upon a comparison conducted by the Respondents between its product namely ZIC and the Complainant's products, which he believed to have given the Respondents reasonable basis

to conclude their product second to none. This comparison is based on API grading, base-oil types, viscosity grading, flash points and pour points.

20. Counsel for the Respondents also explained API classification, how it is done and how many number of groups are present. He asserted that base-oils are usually classified into five groups in total. First three group i.e. Group I, Group II and Group III, consist of base-oils made from crude mineral oil after getting it through distillation and refinery processes. Whereas, Group IV and Group V consist of base-oils made from synthetic oil, which are recognized as premium and distinct in characteristics/properties. Hence, later two groups are not comparable with first three groups. As far as comparison among first three groups is concerned, the Counsel explained that base-oils in Group III are known for their high saturation, high viscosity index and low volatility as compared to base-oils in Group I-II. Hence, Groups III is considered better than Group I-II. Since "*Yubase*" is categorized in Group III, therefore its superiority over other base-oils in Group I-II has been acknowledged worldwide.

21. Counsel for the respondent also put emphasis on the proportion in which a base-oil and additives are mixed together to form a lubricant. He claimed that a lubricant is usually made of 80% base-oil, and 20% additives. He put reliance on US Patent Certificate and other academic literature in order to explain composition of a lubricant and the role a base-oil essentially plays in performance of a lubricant. He argued that a base-oil itself determines major lubrication properties because of its structural regularity and molecular weight etc. Therefore, the better the base-oil, the better the lubricant. However, to some extent, a lubricating oil may have few alterations in the lubricating properties depending on the intended application of the lubricant. When a base-oil does not meet certain standards of lubrication properties then additives are added to supplement any insufficient lubrication property. Since base-oil makes large part of a lubricating oil, therefore, it can be concluded that a right choice of the base-oil yields significant impact on performance and functions of an engine oil. Since "*Yubase*" is made with patented *VHVI* technology, which is held by none other than the Respondent, therefore, a lubricant consisting of "*Yubase*" comprises special properties and qualities which other competing products cannot have. "*Yubase*" is known worldwide as best for its low volatility and high saturation, hence, the Respondents are well justified in claiming their product unique and better in the market. In furtherance to this argument, the Counsel relied and produced copies of various academic articles such as "*Investigation of Producing Modern Base Oil*" by Gy. Pokzmann, "*Performance of High VI Basestock Produced From a Fuel Hydrocrackers Unconverted Oil Stream*" by Woo-Sik Moon, "*Base Oil Groups: Manufacture, Properties and*

Performance" by Dr. John Rosenbaum. The Counsel relied on these academic articles for establishing base-oil as an important component of a lubricant, for stating properties of base-oil, for explaining differences in chemical properties of base-oils belonging to different API groups and for establishing direct impact of a base-oil on the lubricant. Although, the Counsel admitted incremental improvements which additives add up to the base-oil, however, he overwhelmingly attributed quality of the lubricant to chemical properties/structure of the base-oil.

22. Based on high quality and proven track-record, the Respondents also claimed to have obtained ***Original Equipment Manufacturer (OEM)*** approvals from leading automobile manufacturers such as BMW, Volvo, General Motors, Porsche etc. In furtherance to that, the Counsel relied on various awards conferred on the Respondent, such as "*Consumer Choice Awards for Best Lubricant ZIC Motor Oil*" and "*PakWheels People's Choice Award Most Popular Car & Bike Engine Oil*". It is argued that these awards are capable of substantiating the Respondent's success in the business, customer's confidence on them and high product quality. In order to establish veracity of the award, the Counsel shed light on the methodology adopted by *PakWheels* to conduct surveys before conferring any award. He stated that the *PakWheels* methodology is based on surveying three thousand persons in the year 2018 and collection of their experiences with ZIC products. The survey report finally found ZIC to be the most popular car engine oil.

23. The Counsel for the Respondents further relied on a list of shareholders in the Respondent's company and disclosed the fact that the Complainant is also a shareholder in the Respondent's company. He argued that if the Respondents were not popular then the Complainant would not have invested in the Respondent's company. Holding shares in the Respondent's company is itself evident of the Respondent's success. Finally, he counter alleged the Complainant for being intimidated with the Respondent's overwhelming market share and for its motive to settle business rivalry through instant proceedings before the Commission. He relied in this regard on ***Timothy White v Gustav Mellin [1985] AC 154***, wherein the court discouraged the parties to resort to regulatory actions for settlement of their commercial rivalries. The Counsel for the Respondent also alleged the Complainant with mala fide, for spreading false information in the market with regard to the instant proceeding against the Respondents and maligning its good-will even before final decision of the instant proceedings. However, the Respondent did not submit any proof.

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24. Finally, he argued that the Act does not require a party to produce absolute basis for the alleged claims, instead, it demands reasonable basis for substantiation. He asserted that the Commission in its earlier decisions had also accepted reasonable substantiation without pressing the parties for absolute substantiation which would usually need laboratory tests. Therefore, based on all of the above grounds, the Counsel assured the Commission to have provided reasonable basis for alleged claims, therefore, requested it to drop SCN against the Respondent.

COMPLAINANT'S REBUTTAL

25. The Counsel for the Complainant denied allegations with regard to mala fide and spreading of fake news against the Respondents in the market. He asserted that initiation of enquiry against the Respondents has been in public knowledge and dissemination of this news has absolutely nothing to do with the Complainant. Subsequently, the Counsel put forward his rebutting arguments in three stages; puffery, Alleged Claims and then Ancillary Statements made by the Respondent during arguments.

26. He further responded to the Respondent's contentions towards nit-picking and called it an untenable and misleading argument which is capable of causing the Commission to believe that focusing on specific words in the advertisements may lead to a practice beyond the jurisdiction of the Commission known as nit-picking. Since the Commission is supposed to look at the net general effect of the alleged claims on consumers, therefore, the Counsel urged the Commission not to rely on this defence. He also alleged that objectionable words in the advertisement are in fact shown by the Respondents as slogans. Not only that, putting repeated emphasis on the same is an attempt on the part of the Respondents to induce a superiority impression into the minds of consumers. He considered the Enquiry Committee rightful in picking up such words that are central to the alleged advertisement and capable of conveying objectives/sentiments of the Respondents. He argued that assessment of the Enquiry Committee and its evaluation of overall net effect of the alleged claims on the consumers cannot be equated to nit-picking. Instead, it is essential to examine overall impression of the alleged advertisement.

27. Before moving to factual rebuttal, Counsel for the Complainant contended alternate pleas taken by the Respondent's Counsel. He asserted that "puffery" and "An attempt to factually verify alleged claim" are two distinct and self-destructive pleas which cannot stand alongside each other. Either the Respondent could have resorted to puffery on the basis of

incapability of the alleged claims to be verified, or alternatively, he could have taken plea of factual verification of his claims. Once plea of factual verification is taken, the plea of puffery automatically becomes redundant and *vice versa*.

28. With reference to *Consumer's Attitude Study*, Counsel for the Complainant contended that the said study report only suggests consumers behaviour in the following words;

> *"Consumers in the market of automobile maintenance are known to be relatively aware of and educated about the quality of products and are not easily influenced by achievements".*

29. The Counsel argued that the study report does not deserve too much credit since it is only based on the data comprising small sample of 120 diesel engine owners. Such a small number of participants cannot allow a person to make a credible statement about all consumers in Pakistan. The Respondent's claim that the report finds Pakistani consumers relatively aware and educated, is even not supported by this very report since no such claim is expressly made therein. Hence, the Respondent's claims are left unsubstantiated. It is further argued that, by putting reliance on consumer's insensitivity towards advertisements, the Respondents have astonishingly expected the Commission to believe in little to no role which marketing plays in consumer attitude. Despite this version, the Respondents have already spent over 200 million rupees in 2017-2018 on sales promotion and advertisement, the expenditure which itself negates the Respondent's claim of no substantial influence of advertisement on consumers in the relevant market. Even otherwise, Counsel for the Complainant asserted that the question of whether advertisement alters consumer's transactional decisions or not, would not serve as a valid ground for technical substantiation of alleged superiority claims.

30. The Counsel also vehemently contended the Respondent's reliance on quality assessment standards developed by ***API*** and ***International Lubricants Standardization and Approval Committee (ILSAC)***. He also objected to the Respondent's justification that *Yubase* is acknowledged as higher in performance level than base-oils in Group I-II only because it is placed in Group III of *API* Classification. He requested the Bench not to give any credit to this justification because API classifications/performance levels cannot be the benchmark to judge superior quality of a lubricant. However, he asserted that *API* performance levels are created originally to indicate if an engine oil is successfully tested against a certain set of parameters/specifications established by the *API*. This is so done in order to develop a benchmark for consumers, so that they may be able to get the idea if their chosen lubricant is

actually compatible with their engine type. Elaborating further with an example, the Counsel stated that several automobile lubricants can be designated after tests a level of 'API SN-Plus' (currently one of the highest category), however, these can still be different from each other depending upon their additive chemistry or ***OEM*** levels. Not to mention, new *API* performance levels usually immerged with the development of engine technology in order to make consumers capable of ascertaining lubricant's compatibility with newer engines.

31. He also contended the Respondent's reliance on *OEM* engine approvals and regarded it as an unacceptable justification. Because *OEM* approvals are developed by engine manufacturers with the objective to only indicate if a particular engine oil is compatible with a particular engine type manufactured by that particular manufacturer. Therefore, the two assessment standards relied by the Respondents are incorrect standards/justifications for judgment/substantiation of the alleged superiority claims.

32. As a counter argument, Counsel for the Complainant also proposed 'Engine Test' or 'Bench Test' which he believed to be an appropriate way of comparing two competing lubricants having same viscosity grade, identical performance level, same industry specifications and *OEM* approvals. He also contended the Respondent's reliance on product comparison data based on viscosity grades. He argued that different lubricants are designed to be used in different engines under different ambient conditions such as climate, therefore, a comparison between products based on viscosity grades, specifications and performance levels would not be appropriate. If this was the case, then the Respondents could have provided comparative testing data for all commercially available engine oils manufactured by other competitors. Since the Respondents have not provided such data on the basis of which they could justifiably claim "ZIC engine oils are the best" or "no other engine oil is better than ZIC", therefore, the alleged claims are left unsubstantiated.

33. Down the course of his arguments, the Counsel also contested the Respondent's reliance on the Commission's earlier decision in *S.C Johnson*. He asserted that reliance is misplaced because the said case was based on the respondent's inability to substantiate his claim "*No.1 in Pakistan*" which was otherwise verifiable. The said case was not decided on the basis of puffery. He urged the Commission to deal with the instant matter with the same reasons as it dealt with in *SC Johnson case* i.e. whether the alleged advertised statement "ZIC se behtar koi engine oil nahi" and "Yubase" is "behtereen" are verifiable?. Being scientifically verifiable through 'Engine Test' or 'Bench Test', he requested the Bench to call upon the Respondents

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to conduct tests and provide reasonable basis for their claims. He also asserted that inability to prove a claim would not automatically render a claim as 'Puff'. In fact, 'Puff' is a concept which originally applies to unverifiable exaggeration, hence, not applicable in the instant case.

34. Counsel also contested the Respondent's reliance on various achievement awards conferred by private organisations or websites such as *Consumer Association of Pakistan* and *www.pakwheels.com*. He iterated that such awards are not conferred on the basis of objectively/scientifically verifiable results, instead, conferred on the basis of personal and uninformed preferences of a small group of persons specifically considered for the purposes of conferring these awards. Hence, he urged the Commission not to give too much credit to these awards. He supported this argument by referring to the Commission's earlier decision in *SC Johnson Case* wherein it has already been held that winning of awards would not substantiate an undertaking's claim.

35. Counsel for the Complainant also categorically objected to documentary evidence relied by the Respondents and attributed a status of general information to it which speaks about the technology used in lubricant formulation. He asserted that the relied documents only pertain to the acknowledgment of *Yubase*, its belonging to Group III of *API* classification and its good quality. However, these do not show any comparative analysis of all the base-oils belonging to same Group III. Whereas, it is an admitted fact that there also exist other base-oils in Group III which are of good quality too. This is the fact that requires the Respondents to produce comparative testing data just as stated in the previous paragraph. The Counsel pressed upon insufficiency of relied documents to substantiate superiority of *Yubase* over other base-oils in the same Group III. Further, the Respondents themselves admitted quality of base-oils in Group IV better than Group III. This implies that even if *Yubase* is presumed best in Group III, base-oils in Group IV would still be better than *Yubase*. The Counsel for the Complainant called it an admission on the part of the Respondents which itself negates their superiority claims. He found it astonishing how the Respondents could claim their *Yubase* best in the market when they already knew about existence of other better base-oils. Therefore, he called the Respondent's arguments absolutely misleading and without substantiation.

36. In addition to that, base-oils of Group III make a very small portion of relevant product market and, on top of that, not all products of the Respondent are made with *Yubase*. There are few other products of the Respondents which are technically impossible to be made with *Yubase*. Therefore, the Respondent's overall general claim that "*ZIC bna hai dunya k behtareen*

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oil Yubase se" is capable of giving the impression that perhaps all ZIC products are made with *Yubase* which is incorrect in fact. Hence, the alleged claims are false and untenable.

37. He further argued that although superiority is not judged on the touchstone of *API* classification, but even if it is done for the sake of arguments, then one product of the Complainant still surpasses all products of the Respondents in terms of quality. In support of this assertion, Counsel for the Complainant presented a document which compares the products of the Complainant with those of the Respondent's and claimed his product *Delo 400 MGX* to have been conferred with API CJ-4/SM classification. He claimed that no product of the Respondents is equal to this classification, therefore, the Respondents cannot claim themselves better than the Complainant. Eventually, the alleged claims such as "ZIC se behter koi nahi (Translation: No one is better than ZIC)" are proven false, misleading and lacking substantiation.

38. Counsel for the Complainant also responded to the Respondents' contention towards 'Engine Test' or 'Bench Test', and his refusal to accept it as an appropriate way to judge a lubricant's superiority. He asserted that *API* classification, which the Respondents have heavily relied upon, is itself based on bench tests. He supported his argument by placing reliance on an *API* document called *"Engine Oil Licensing and Certification System" (API 1509 Eighteenth Edition, June 2019, amended in July 10, 2019),* which provides a methodology/procedure for *API* classifications. He explained that in order to place a particular base-oil in any of the given Groups, a base-oil has to go through certain tests before it is conferred with particular classification. However, such bench tests are not conducted for comparative assessments, rather, only to place a particular base-oil in a particular Group. If two base-oils are in the same API group, this does not mean that a lubricant made with either of these two is also similar. He reiterated that alleged claims of superiority can only be proved by getting two competing lubricants through bench tests. Therefore, the argument of the Respondents that bench test is not the appropriate way to make comparative analysis is not tenable.

39. He concluded his arguments by contending the Respondents' reliance on surveys conducted by *PakWheels* and disregarded it as being an unauthentic evidence. He contended so because it is based on mere opinions of the consumers; what consumer think or believe, instead of technically authentic proves. Therefore, he requested the Commission not give so much credit to survey reports.

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D. ISSUES AND ANALYSIS

40. Though there are a number of statement assailed by the Complainant before the Commission, but after perusing the Enquiry Report, the Commission finds it appropriate to confine itself only to the extent of following three claims. First; "*ZIC se behtar koi engine oil nahi*". Second; "*ZIC bna hai dunya ke behtareen base oil Yubase se*". Third; "*Get Double Protection and extra care with ZIC engine oil*". The Respondents were expected to substantiate only these claims.

ISSUES

41. Out of divergent arguments of the parties and perusal of the Enquiry Report, the Commission regards it important to deliberate on following issues.

a. Whether puffery is an acceptable defence under jurisprudence of Pakistan?
b. Whether the alleged claims actually fall in the category of puffery or not?
c. If claims are puffery, whether there arise question of reasonable basis related to product character, properties or suitability for use?

ANALYSIS

a. Whether puffery is an acceptable defense under jurisprudence of Pakistan?

42. The Respondent has primarily resorted to the defense of puffery and called alleged as mere exaggeration in course of business. However, the Complainant has vehemently objected to the doctrine of puffery for not being acceptable or applicable under Competition Laws of Pakistan for two basic reasons. First; he argued that the language of Section 10 of the Act does not provide any room for puffery at all. Therefore, a statement which is false or misleading and capable of harming business interest of another undertaking is actionable under the law, irrespective of the fact that it is a mere puff. Secondly; the doctrine of puffery finds its origins in common law as a defence to torts, in particular slander of goods, malicious falsehood, injurious falsehood, trade libel, disparagement etc. In order to explain why the said doctrine is not applicable in cases related to Section 10 of the Act, he urged the Commission to take a look at its history first. He referred in this regard to ***Colgate-Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited, (Case (2008) 7 MLJ 1119)***, wherein, the history of the doctrine is described in detail.

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43. It is argued that, unlike modern competition law which protects interests of consumers, defence of puffery was originally sought to provide remedies to a seller against disparagement of his goods committed by his competitors. In fact, puffery was designed to provide protection to a market player against his competitor. The reason behind availability of such protection was a favourable approach on the part of English Courts towards free trade and commerce while keeping in view various broader objectives such as expansionary economic policies in Britain, level of education/awareness of British consumers, the impact of damages awarded by English court against English manufacturers and Caveat Emptor (Buyer Beware, a principle of contract law). However, English Courts were always disposed to distinguishing between actionable lies from non-actionable lies. Although, non-actionable lies were characterized as 'expected exaggeration' and termed as 'puffery', nonetheless, the trend has been shifted in the last few decades from seller's protection to consumer's protection. Due to increased focus on consumer rights in the light of harmful corporate practices, jurisdictions across the world have introduced competition and consumer protection legislations which are getting less and less tolerant towards 'puffery'. Therefore, he requested the Commission to limit its application to protection of consumer's interest.

44. In relation to the Act, Counsel for the Complainant argued that the entire law related to deceptive/unfair market practices is encapsulated in Section 10 of the Act. Whereas, subsection 2(a) of Section 10 provides no relaxation or room for 'Puffs'. Besides, there are no judgments of apex court are in place related to consumer protection law which would recognise a competitor's entitlement to defence of puffery. Therefore, it is correct to call doctrine of 'puffery' as a foreign doctrine which finds no roots in Competition Laws of Pakistan. Further, it is incompatible with circumstances prevalent in Pakistan and capable of undermining consumer interest which is the core objective of competition laws. He also urged the Commission not to get swayed by the Respondent's assertions that courts in developed jurisdiction have found "Best" as a non-actionable claim. However, he requested the Commission to confine itself to its objectives i.e. to protect the consumers instead of pushing or favouring advertisements by competitors. The Counsel further urged the Commission to keep under consideration consequential implications of the doctrine while deciding its fate. For example; whether the foreign cases, recognizing doctrine of 'puffery', were decided under a legal framework presently similar to Pakistan; Whether it would be appropriate to expound defence of 'puffery' especially in context of a developing country like Pakistan where consumers have limited awareness and inequality in their rationale; Whether the interest of consumer would still be protected and not undermined even if the said doctrine is recognized.

45. With regard to the question whether the Commission can adopt a doctrine enunciated within foreign jurisdictions such as EU or US where economies are much more developed as compared to Pakistan, the Commission has already answered affirmatively in its previous decision ***Institute of Chartered Accountants of Pakistan (ICAP Final Order), 2009,*** in following words;

> *"71. Regarding the concern whether EU or US competition jurisprudence is an appropriate model for Pakistan. It needs to be appreciated that Competition Law pertains to behavioral aspects. Whether we are in EU, US, UK or Pakistan, individual motivations or incentives vis-à-vis anticompetitive practices inherently remain the same. No case has been made out by the Appellant as to why EU or US competition jurisprudence which are the recognized worldwide as the front-runners in the area of competition, do not serve as appropriate guideposts for Pakistan. ..... 72. We must, however, emphasize that there is no blind following of the precedents from these jurisdictions by the Commission – there is no adjudication without due consideration and appreciation of law and facts. Moreover, while such precedents have a persuasive value, it must be recognized that the Commission is fully empowered to adopt, evolve or indigenize these principles keeping in view the exigencies of the situation at hand."*

46. Pertinent to mention here that the Commission has already recognized doctrine of puffery earlier ***In the matter of the Complaint filed by Reckitt Benckiser Pakistan Ltd against Messrs S.C. Johnson and Son Pakistan Limited for Deceptive Marketing Practices, 2012 CLD 783, para 19SC*** *(hereinafter referred to as SC Jonson Case).* However, the, Supreme Court of Pakistan has held in ***Shifa International Hospital, Islamabad v Commissioner of Income Tax/Wealth Tax, Islamabad (2017 PTD 1158 SC)***, that judgments from foreign jurisdiction may be relevant in understanding and resolving the issue before court but do not have binding effect upon them. Such acknowledgment of relevancy opens doors for the Commission to resort to foreign judgments in case of insufficient development in domestic jurisprudence. Therefore if the circumstances of the case allow, we are of the view that the doctrine of puffery as enunciated in foreign jurisdictions can be adopted or resorted to for correct application of Section 10.

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b. Whether the alleged claims actually fall in the category of puffery or not?

47. Having decided that puffery is acceptable under competition laws of Pakistan, next is the core issue pertaining to the nature of the alleged claims in the instant case. While referring tothe nature of alleged claims in relation to puffery, Counsel for the Respondents contended the Enquiry Report for translating the words "*Behtar*" or "*Behtareen*" as "Best". He urged the Commission not to take such words to task as the Respondents only intended to make generalized superiority claims which are neither quantifiable nor actionable. Eventually, alleged claims fall in the category of puffery.

48. With regard to the alleged statement "*ZIC bna hai dunya ke behtareen base oil Yubase se (Translation: ZIC is made of world's best base oil Yubase)"* the Counsel called the translation adopted by the Enquiry Committee incorrect. He objected the Enquiry Report for incorrectly translating the word "*Behtareen*" into "*Best*". He argued that "best" is an absolute term in the English language which represents a superlative degree, however, the term "*Behtareen*" is not an absolute term in Urdu language. Therefore, the term "*Behtareen*" cannot be translated into "*Best*". He relied on ***Mathura Prasad Mishra's Trilingual Dictionary (1865)*** wherein the word "best" is translated in superlative meanings such as "*Acha se Acha*" and "*Sub se Acha*", "*Sub Se Behtareen*", "*Behtareen* Se *Behtareen*" or "*Behtareen Se Behtar*". Existence of various other translations of the term "*Behtareen*" such as "*A'ala*", "*Umdah*" or "*Mumtaaz*" indicates that the term "*Behtareen*" is general and vague, eventually incapable of translation in absolute manner. Moreover, the term "*Behtareen*" in Urdu exhibits flexibility, generality and vagueness which the word "*Best*" in English simply does not. It is only a vague and general manner in which the term "*behtareen*" is claimed to have been used by the Respondents in the alleged advertisements. He vehemently objected the Enquiry Committee to have erred while translating this term in a unitary, absolute and non-literary manner, eventually depriving the Urdu term of its flexibility and diversity to the exclusion of all other dictionary meanings. Therefore, he requested the Commission not to translate or put the Respondent's claim into the meanings that "*Yubase*" is the best oil in the world.

49. In support of his argument he relied not only on the Commission's earlier decisions, but also, on judgments from various other jurisdictions such as UK, USA, EU, India and Australia. He attempted to establish how the principle of puffery is accepted across the world and, in consequence thereof, words such as "*Best*" are generally considered as puff and non-actionable.

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50. Starting with the Commission's earlier decision *in SC Johnson,* supra (at par 19), wherein the Commission had already acknowledged the words "*best in town*" or "*best of the best*" as claims general in nature, unquantifiable and non-actionable. While referring to ***American Italian Pasta Company v New World Pasta Company 371 F3d 387*** (hereinafter referred to as ***Italian Pasta Case***), he reminded the Commission of its acknowledgment of American approach with regard to the claim "*America's Favourite Pasta*" as puffery.

51. On similar line of arguments, he also referred to the English case titled ***De Beers Abrasive Products Ltd. v. International General Electric Co. of New York Ltd [1975] 1 WLR 972, page.6*** (hereinafter referred to as ***De Beers Abrasive Case***), wherein the court drew a line between actionable and non-actionable statements. It held the claim "*best in the world*" as non-actionable. Moving on to the Indian jurisdiction, he relied on ***Dabur India Limited v Emami Limited (2019 Ind Law DEL 1345)*** (hereinafter referred to as ***Dabur Case***) and ***Marico Limited v Adani Wilmar Limited 199 2013 DLT 663, Para 16(a)*** (hereinafter referred to as ***Marico Case***). In both of these cases the court allowed, in following words, a competitor to declare his goods as best ;

> *"A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue."*

52. Quoting from the Australian jurisdiction, he relied on ***Australia Competition and Consumer Commission v We Buy Houses Pty Ltd [2017] FCA 915, para 66*** (hereinafter referred to as *WBH Case*), wherein the court held that the use of the terms "*greatest*", "*best*", "*leading*" etc. as puffery. Furthermore, in ***Deborah A. Fraker v K.F.C. Corporation; Yum! Brands, INC., 2007 U.S Dist LEXIS 32041*** (hereinafter referred to as *Deborah Case*), wherein the court judged the term "the Best Food" as puffery. He also relied on ***Oestreicher v Alienware Corp. 544 F. Supp. 2d 964, Pg.10*** (hereinafter referred to as *Oestreicher Case*), wherein the American court held general claims non-actionable in the following words;

> *"Thus, the generalized and vague statements of product superiority such as "superb, uncompromising quality" and "faster, more powerful, and more innovative than competing machines" are non-actionable puffery. See Brother, 2006 WL 3093685, at *4-*5 (rejecting "high performance" and "top of the line" as mere puffery); Long, 2007 WL 2994812, at *7 (Ware, J.) (rejecting "reliable mobile computing solution" and "do more on the move" as puffery). The court has not been able to glean any false statement of fact from plaintiff's complaint.*

Indeed, "higher performance", "long battery life", "richer multimedia experience", "faster access to data" are all non-actionable puffery."

53. In addition to recognition of puffery worldwide, Counsel for the Respondent also emphasized on the standard of "*Reasonable Man*" i.e. how a reasonable man will look at the advertisement. He urged the Commission to adopt this standard while dealing with puffery cases and consider consumers in Pakistan equivalent to a Reasonable Man. He claimed that consumers in Pakistan's automobile-maintenance-market are relatively aware of and educated with respect to quality of products. He also attributed them their incapability of getting easily influenced by advertisements, and therefore, urged the Commission to look at the alleged advertisement in the perspective of a reasonable consumer rather than an ordinary consumer. He supported his argument by placing reliance on a study report titled ***"Consumer's Attitude Towards Automobile Lubricants: A Case Study of PSO Lubricant"***, *prepared by Salman Zakir, Corporate Communication Executive at Pak-Arab Refinery Ltd* (hereinafter referred to as *Consumer Attitude Study*), which regards consumers in the market reasonable and well-informed. He also relied on the European ***"Guidance on the Implementation/Application of Directive 2005/29/EC on the Unfair Commercial Practices" (Section 2.5, Pg.39),*** which adopts standard of "Reasonable Consumer" in following words;

"...in order to determine whether a particular description, trade mark, or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect."

54. Similar standard is also stated by the Counsel to have been accepted by the American and Australian jurisdictions. He relied on ***Anunziato v eMachines, Inc. 402 F. Supp. 2d 1133*** (hereinafter referred to as *Anunziato Case*), wherein the American court adopted "*reasonable consumer test*" and held general claims as puffery in following words;

"Generalized, vague and unspecified assertions constitute "mere puffery" upon which a reasonable consumer could not rely and hence are not actionable."

55. Lastly, Counsel for the Respondent relied on ***REA Group Ltd v Fairfax Media Ltd [2017] FCA 91, para 85-86*** (hereinafter referred to as *REA Case*), wherein Australian court held the claim "the best" as puffery in following words;

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"I accept that it is a question upon which reasonable minds may differ, but in my view the broad claim that Domain has the number one property app in Australia, understand as a district or separate claim, is just puffery. Obviously, it makes a claim of superiority but that claim has little content. In my view it merely invites the question "No.1 in what way?

.....

The ordinary reasonable reader would be accustomed to puffing claims in advertising, and would know that claims to be "No.1", "the best" or "the greatest" are commonly made in trade. The question as to what makes one property app better than another, or "No.1", depends on so many variables subjective or objective factors that it does not carry a definite meaning."

56. The Respondent's reliance on puffery is strongly contested by Counsel for the Complainant when he stated puffery to be recognized worldwide analogous to exaggeration. Since exaggerations do not find any place in Section 10(2)(a) of the Act, therefore he argued that, any exaggeration which is capable of harming business interests of another undertaking in any way must be prohibited under the Act at the first instance. Primarily, he requested the Commission to discredit the Respondent's arguments with regard to difference between actionable and non-actionable exaggeration. However, if the Commission finds it needful acceptance of puffery under the said Section 10, then he requested the Commission to draw at least a precise distinguishing line between an actionable and non-actionable exaggeration. He urged the Commission to decide the matter in light of if its earlier decision; ***In Complaint filed by Reckitt Benckiser Pakistan Ltd against Messrs S.C. Johnson and Son Pakistan Ltd for Deceptive Marketing Practices (2012 CLD 783, Para 17)***, wherein puffery is defined in following terms;

"the expression of an exaggerated opinion - as opposed to a factual misrepresentation - with intent to sell goods or services".

He also referred to puffery as;

"term frequently used to denote the exaggeration reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined"

57. Apart from above, the Counsel also responded to the Respondent's defence that *"Behtareen"* is not a superlative degree. He referred to ***Feroz-ul-Lughat*** (Urdu Dictionary)

which defined the word "*Behtareen*" as "Sub *Se* Acha (Translation; Better than all)". He argued that an authentic Urdu dictionary has put the word in superlative degree as opposed to normal adjective which the Respondents have asserted. In addition to that, the Counsel also contended the Respondent's defence with respect to applicability of the alleged advertisement only to the extent of petrol engines. He argued that this oral version of the Respondents contradicts their previous version in written submissions, wherein the Respondents relied on a comparative analysis between their products and other diesel engine lubricants. This contradiction shows the Respondent's intention to target all consumers, instead of just diesel engine consumers.

58. Keeping in view what the Commission has already held, Counsel for the Complainant has inferred an exaggerated opinion to be a non-actionable puffery if it is based on subjective opinion and truthfulness/falsity of it cannot be precisely determined. As oppose to that, he inferred if a claim is of such a nature that its falsity can be determined precisely or it is based on objective quantification/verification then it would be called actionable factual representation. It is further contended by Counsel for the Complainant that difference between actionable puffery and non-actionable factual misrepresentation is overwhelmingly visible in judgments relied by the Respondent himself. For example, ***Colgate Palmolive Company and another v Hindustan Unilever Limited 2014 (1) CLT 21, para 27-29*** (hereinafter referred to as *Hindustan Unilever Case*), which distinguishes puffery from Factual Misrepresentation at para 29 in the following words;

> *"Thus, as long as claims made in an advertisement are considered only as puffery, no interference with the same by the courts would be warranted. This is for a simple reason that puffing involves expressing opinions and are not considered as statements of facts which can be taken seriously. As puffery is neither intended to make a representation as to facts nor is considered as such by the target audience. The advertisement involving puffery, thus, cannot be stated to be misrepresenting facts"*

59. Counsel for the Complainant claimed to have rested his entire case on the argument that the alleged statements are not mere expression of opinion or puffs, instead, factual representation which are capable of substantiation scientifically through comparative engine or bench tests. Since the Respondents have not opted for any credible mode of substantiation, therefore, the alleged claims are left unsubstantiated, unverified and without reasonable basis, hence actionable under section 10 of the Act.

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60. In addition to above, the Counsel for the Complainant further contended puffery to be unacceptable in Pakistan for the reason that it is heavily dependent on the concept of a "Reasonable Man" i.e. whether a reasonable man would take an advertisement seriously. He argued that, through years, courts across the world have imparted such characteristics to this 'Reasonable Man' that he no longer resembles a realistic person. However, what may be considered to be the characteristics of a 'Reasonable Man' in developed jurisdictions like USA and UK must necessarily be very different from characteristics of a 'Reasonable Man' in Pakistan. Reason being education/awareness in Pakistan is not at the same level as in developed countries. Therefore, in case the Commission still finds it imperative to adopt the doctrine, the Counsel urged the Commission not to embrace the underlying concept of the same 'Reasonable Man' as adopted by the developed jurisdictions. Instead, he recommended to view the alleged advertisements from the perspective of an 'Ordinary Man' in Pakistan. He relied in this regard on the Commission's earlier decision ***In The Matter Of M/S China Mobile Pak Limited & M/S Pakistan Telecom Mobile Limited (2010 CLD 1478)*** (hereinafter referred to as *Zong Case*), wherein the Commission construed the term "Consumer" under Section 10 of the Act as an "Ordinary Consumer".

61. We are also aware of the fact that the question of an ordinary consumer has already been dealt with in earlier ***Zong Case***, supra, whereby standard of an "ordinary consumer" was adopted in the following words;

> *"32. Taking the above into account, I am of the considered view, that if in Pakistan, we want to encourage a compliance oriented approach viz-a-viz Section 10 of the Ordinance we must place a higher onus on the Undertakings in relation to the marketing practices. Therefore, from OFT's perspective, the consumer to whom such information is disseminated has to be the 'ordinary consumer' who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. Here it may be relevant to point out that the 'ordinary consumer' is not the same as the 'ordinary prudent man' concept evolved under contract law. Unlike the 'ordinary prudent man' the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer.*

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Therefore, in order to implement the law in its true letter and spirit, the scope of the term 'consumer' must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services"

The same approach has also been acknowledged in ***P&G Order*** (at para 29).

62. However, we would like to elaborate a little further how the term 'Consumer' should be construed. The precedents set by the Commission by no means close the doors to taking a varied approach on how consumers should be perceived when considering Section 10 violations. The consumers' perception of products and the marketing around it can vary significantly from one market to another. Therefore, the Commission must always keep an open mind when it comes to the standard being applied in determining the consumer type for thepurposes of Section 10.

63. We are also considerate of our decision in ***The Matter of Show Cause Notices Issued to (1) M/s Shafique & Sons, (2) Pak Hero Industries (Pvt) Ltd. & (3) M/s United Motors Company for Deceptive Marketing Practices (hereinafter referred to as Pak Hero Case)*** wherein the Commission had also adopted on reasonable consumer approach in following words;

27(e). In relation to the definition of a consumer for the purposes of Section 10 of the Act, the Commission in its Order in the matter of M/s Pakistan Telecom Mobile Limited[1] (the "Zong Order") observed that the term is to be "construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services". The ordinary consumer is the usual, common or foreseeable user or buyer of the product. It was further observed in the said Order that "....the scope of the term 'consumer' must be construed most liberally

[1] http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf

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

64. Keeping in view the circumstances of the case at hand, we are convinced with the test adopted in ***Pak Hero Case*** referred above, whereby advertisement is analysed in terms of the targeted audience. The target audience in question are millions of consumers across the country in a form of vehicle owners and drivers who purchase engine oils. The widespread nature of marketing affirms this as do vehicles sales numbers. Invariably this means that a wide spectrum of consumers are present in the market, some more informed than the others. It is reasonable and safe, however, to assume that car owners or drivers either have a basic sense of maintenance themselves or have access to mechanics who do and, therefore, would have at least sufficient information aboutthe products they are purchasing or using on the advice of someone to make an informed choice. It follows that the consumers in the market we are considering are therefore reasonable consumers.

65. Subsequent to the determination of a consumer, we would like to determine what exactly constitutes puffery and whether alleged claims fall in this category. The Respondent attempted to rely on reasons enunciated in ***SC Johnson Case*** and to convince the Commission to hold the alleged claim puffery for being an unquantifiable expression of opinion. It is pertinent to mention here that this Commission has already defined the term puffery after

detailed deliberation and distinguished it from actionable deceptive claims in the following words;

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

66. With the above observation, the Commission identified one type of claim i.e. "No.1 in Pakistan", a test which is developed to analyse this type of exaggeration is quantification. If the claim is quantifiable by virtue of data or evidence, then it no longer remains a subjective exaggeration, rather, it becomes factual representation and actionable. This is what happened in SC Johnson Case, supra, when "No.1 in Pakistan" was declared an actionable claim. Nonetheless, we would like to further clarify here that there are other types of claim such as "best of the best" or "best in the world" or "best in town" which are also subjective exaggerations. The test developed to analyse such claims is also given in ***SC Johnson Case*** whereby this Commission has already relied on test of 'generality or specificity' while referring to ***Newcal Industries v Ikon Office Solution 513 F.3d 1038 (2008)***. We consider it imperative to reproduce the relevant part once again;

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

67. Keeping this test of specificity in view, the Commission is of the view that if a claim, which is otherwise subjective exaggeration, is attached with another claim of specific character then it does not remain puffery any longer. This implies that "World's best call" may be a puffery claim, however, "world's cheapest call" cannot be puffery since it is attached to the low price characteristic of the call. This is what happened in *Zong Case*, supra, when "World's

Cheapest Call" was held to be an actionable claim. The Counsel for the Complainant relied on the Commission's earlier decision ***In The Matter Of Show Cause Notice Issued To M/s University Of Management Technology For Deceptive Marketing Practices (2019 CLD 615)***, wherein the claim "Best" was found verifiable , hence held misleading and in violation of Section 10 of the Act. However, we would like to differentiate the referred decision from the matter at hand because the referred decision involved the expression "Best Accredited", not only "Best", and the Commission held the expression verifiable. Hence, it was not recognised as puffery. Whereas, the matter at hand involves only "Best".

68. Keeping in view the above mentioned test, we will now proceed to our main analysis ofwhether alleged claims in the instant case are puffery or not. Primarily we have three statements alleged under consideration before us.

Claim No.1

"ZIC bnta hai dunya ke behtreen base oil Yubase se, jiski VHVI technology ghatae friction aur de lajawab performance" (Translation: ZIC is made of world's best base oil Yubase, whose VHVI technology reduces friction and provides unmatchable performance.

69. The test developed to identify a puffery claim is in fact its ability to be quantified, not the apparent analysis of particular words used to express that claim. It is a developed jurisprudence in deceptive marketing cases that the effect of particular words used in the advertisement are to be looked at in conjunction with overall impression of the advertisement in question. We are guided here with the Commission' earlier decision in ***Zong Case***, supra, which lays down method for evaluation of advertisements in the following words;

"35. It was observed in the case of standard oil of Calif 84 F.T.C 1401(1974) at pg. 1471 by the Federal Trade Commission of USA (FTC) that:- "[I]n evaluating advertising representations, we are required to at complete advertisement and formulate our opinions on them on the bases of the net general impression conveyed by them and on isolated excerpt" ...."

70. To our understanding, this implies that doctrine of puffery is dynamic to some extent instead of statically dependent on a few particular words. This also means that a particular word which is unquantifiable in one case can be quantifiable in another case keeping in view the overall impression of the advertisement it is used in. Now if we keep in view impression of the

alleged claim, we observe that the claim is general in nature and a subjective opinion. The word "Best" is general in nature that varies from an individual to individual. What is best for one person cannot be best for another person. As an example, the best oil for one segment of the consumers might be the economical one, for others perhaps the one that has the longest change cycle, and for yet another the fact that it is attached to a known brand name. Being the 'best' in and of itself without reference to a particular trait is nothing more than meaningless boasting. For purposes of clarity, if the claim had been more specific or linked to a particular trait of the product, the meaning behind it would have been completely different.

71. In addition to above, we also consider it imperative to address the Respondent's argument with regard to wrongful implantation of words into the Commission's mouth by the Complainant. The Respondent argued that they have never claimed themselves the best, instead, the alleged statement i.e. *"ZIC se behter koi engine oil nahi"* should be taken as a statement of equivalence rather than superiority claim. They alleged that the Enquiry Committee has put the claim in a wrong context, whereas, it was originally open ended and squarely fell within the bounds of puffery. The Respondents also tried to present different dictionary meanings of the word "*Best*" and tried to establish that the Enquiry Committee has not correctly translated the word "*Behtereen*". They also suggested that "*Best*" is superlative degree, instead, "*Better*" could be the suitable translation for "*Behtereen*".

72. We are of the view that whether or not the Respondents meant superlative degree of expression from alleged words "Behtareen" or "Behter" does not make any material difference here. It is the overall impression of the advertisement that is important and to be looked at for the application of Section 10 of the Act, instead of subjective intentions of the party. This is the principle that has already been established by the Commission in its previous decision ***In the Matter of Show Cause Notice Issued to M/S. Al-Hilal Industries (Pvt.) Limited (2012)***, in the following words;

> *"19. It is well established in the Commission's ZONG Order dated September 29, 2009 and Paints Order dated January 13, 2012 that it is not a must to establish intent and information pertaining to the product in question "may or may not be deliberate or conscious in order for it to qualify as misleading". Accordingly, the onus is on the undertakings to ensure that no deception occurs through their marketing 10 practices. Therefore the undertaking's justification that it has never*

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been its intention to lead customers into believing that the juice is without any additives whatsoever is not relevant."

This implies that subjective intention of the Respondents, that they meant statement of equivalence instead of superiority, is not important. What is important is the overall net general impression which the advertisement is likely to cast on the minds of consumers. We are of the opinion that alleged claim falls under the category of puffery for the reason that these are nothing more than mere boasted or exaggerated claim which undertaking are usually expected to make in market.

73. We would also like to respond to foreign judgment relied by the Respondents in order to establish their claims within the bounds of puffery. First in line is **WBH Case, supra**. We have gone through the judgment and we consider it important to state brief facts of the case. ***Australian Competition and Consumer Commission (ACCA) held We Buy Houses (WHB)*** liable for making false and misleading claims during their advertisement strategy called "Wealth Creation System". Alleged claims involved, among others, following three claims. *1) Buy a house for $1. 2) Buy a house without needing a deposit, bank loan or real estate experience. 3) Buy a house using little or none of the consumer's own money, including by buying at a discount.* ACCA held these claims misleading and false. However, at appeal stage WBH argued these claims to be puffery but the court of appeal did not accept this argument despite taking into consideration a previous decision by the name of ***Jainran Pty v Boyana [2008]*** wherein the court held claims like *"the best car in its class on the market today", "Greatest Show on Earth", "leading a New Wave of Talent"* as examples of puffery. The court of appeal acknowledged the concept of puffery, nonetheless, it also held that the context would be the important factor in which a claim should be judged. On this reason, alleged claims in WBH case were held not to be puffery, but misleading. Perhaps Hi-Tech Lubricants has been unable to appreciate this aspect. Additionally, the court of appeal also noted that cases involving puffery defence should be dealt with two-step analysis. In first step it should be analysed whether the advertisement conveys the alleged meanings for which it is complained of. Second, whether the meanings so conveyed are misleading or deceptive or likely to mislead or deceive. Therefore, we are of the view that WHB case is not relevant with the case at hand.

74. In another *REA Case*, supra, ***Fairfax Media Ltd*** published an advertisement which promoted a mobile telephone application (app) operated by its wholly owned subsidiary Domain Group. REA alleged that this publication constituted misleading or deceptive conduct

which was likely to mislead or deceive. There were total four claim in question. 1) *#1 property app in Australia.* 2) *The most property listing in Sydney.* 3) *The best property listing in Melbourne.* 4) *Australia's highest rated property app.* The court held it deceptive and misleading when *"#1 property app in Australia"* was read with *"the most property listing in Sydney"*. For analysis, the court adopted the same methodology which it had adopted in WBH case i.e. first determining whether claims convey the same impression as had been alleged by the complainant, secondly, whether the impression so produced was misleading/deceptive in nature. The court observed that combination of two claims produced an impression of owning more property listings than competitors. Whereas, as a matter of fact, evidence revealed quite opposite. Therefore it was held misleading. However, when the claim *"#1 property app in Australia"* was read in connection with *"the best property listing in Melbourne"*, it was held puffery. The court applied the "Reasonable Consumer" test here and held that reasonable or ordinary consumer would view these claims of superiority as puffery. Claims such as *"#1" or "the best"* would not be so unusual to gain the reader's attention. Since the court believed that law was not intended to protect people who fail to take reasonable care to protect their own interest, therefore, ordinary or reasonable consumer would be expected to possess a degree of robustness in relation to claims made in advertisement and would expected to be accustomed to puffing of products advertised. The court held that a statement would not be in the ambit of puffery if it had conveyed definite meanings capable of causing the ordinary or reasonable consumer to believe or rely upon. In order to judge whether puffery coveys a definite meaning or not, the court adopted methodology of analysing the context or setting in which a claim would be made and specificity of impression that it would convey.

75. In another ***Deborah Case***, supra, Deborah A. Fraker brought the consumer class action against KFC under Class Action Fairness Act, 2005, and alleged the defendant for making deceptive health claims with regard to its food product. Fraker alleged that the claim "Best Food", among others, is deceptive in context that the food that KFC offers is not healthy at all and medical studies provides evidence which counters this claims. However, trial court dismissed the suit and held that alleged claims are non-actionable because no reasonable consumer would rely upon the statements as specific representation as to health, quality or safety.

76. In ***Italian Pasta Case,*** supra, American Italian Pasta sued New World Pasta and sought declaratory judgment that the use of phrase "America's Favourite Pasta" did not constitute false or misleading advertising under section 43(a) of Lanham Act. New World Pasta

counterclaimed that America's use of phrase "America's Favourite Pasta" violated Lanham Act and many state's unfair competition laws. On summary, district court concluded that America's use of "America's Favourite Pasta" did not violate Lanham Act and dismissed New World's counter claim. New World filed an appeal before circuit court which held that the alleged phrase is puffery because it was vague, subjective, unverifiable, unquantifiable and subject to individual's fancy. The court of appeal also classified statements into two general categories under Lanham Act. Actionable claims, also identified as statements of fact, which would be either literally false hence called as false claims, or literally true but ambiguous enough to implicitly convey false impression, hence called misleading. Second category was defined as non-actionable claims called puffery which included either exaggerated statements of bluster/boast upon which no reasonable consumer would rely or vague but highly subjective claims of superiority. However, the court also noted that puffery would not include false description of specific or absolute characteristics of a product and specific, measurable claims of product superiority. The court of appeal also distinguished puffery from statement of fact in a sense that if a statement is a specific, measureable claim or can be reasonably interpreted as being a factual claim, i.e. one capable of verification, the statement would be one of fact. Conversely, if a statement is not specific or measureable and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement would constitute puffery. Additionally, the court of appeal also noted that consumer surveys cannot be used as benchmark by which a claim is measured. This Commission believes that alleged claim under consideration i.e. "Best" sounds also similar to 'Favourite' which cannot be quantified.

77. Keeping in view all that has been said above, we are of the considered view that the defence of puffery is applicable in the instant case and alleged claims do fall in the category of puffery instead of factual representation. We are also of the view that the mere use of the word 'Best' in an advertised statement is not sufficient to claim it a deceptive advertisement since it is based on subjective reasons, unverifiable or incapable of substantiation.

Claim No.2

> *"Is liye har engine oil ZIC nahi hota aur ZIC se behter koi engine oil nahi".*
> *(Translation: That is why not every engine oil is ZIC oil and no engine oil is better than ZIC oil.)*

78. Moving on to the second statement which is under consideration, the questionable part of the statement, "*ZIC se behter koi engine oil nahi*", which the Enquiry Committee has

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regarded as comparative advertisement. Counsel for the Respondents have vehemently contended this observation of the Enquiry Committee and argued that the alleged statement would have been comparative advertisement only if the Respondents had derogated or discredited any competitor expressly by mentioning their name or product. Since, nothing like such has happened, therefore, it cannot be called comparative advertisement. He relied in this regard on ***De Landtsheer Emmanuel SA v Comite Interprofessional du Vin de Champagne (Case C-381/05) [2007] 2 C.M.L.R. 43, para 51***(hereinafter referred to as ***De Landtsheer Case***), wherein European Court of Justice defined comparative advertisement in the following words;

> *"for an advertisement to be considered to be comparative advertising, and accordingly to fall within the scope of the directive, it is essential that the advertisement identifies a competitor of the advertiser or goods or service which the competitor offers."*

79. He further relied on ***Colgate Palmolive Company and another v Hindustan Unilever Limited 2014 (1) CLT 21, para 27-29*** (hereinafter referred to as *Hindustan Unilever Case*), wherein Indian court laid down a certain test for holding a comparative advertisement actionable:

> *"... It is open to exaggerate the claims relating to his goods and indulge in puffery, it is not open for a person to denigrate or disparage the goods of another person. In case of comparative advertisement, a certain amount of disparagement is implicit. If a person compares its goods and claims that the same are better than that of its competitors, it is implicit that the goods of his competitor are inferior in comparison. To this limit extent, puffery in the context of comparative advertisement does involve showing the competitor's goods in bad light. However, as long as the advertisement is limited only to puffing, there can be no actionable claim against the same."*

80. It is also argued that the question of comparative advertisement arises if an advertiser puffs his claim while comparing his goods with his competitor's goods, not when the Enquiry Committee considers it comparative on its whims without making reference to any law. Further, it is actionable only when comparison is made in such a way that denigrates the competitor or his goods. The Counsel iterated that the Respondents have not made any specific comparison, neither named any of his competitors nor mentioned any of their goods. Instead,

it has only made broad, general and vague statements about its own products. Therefore, the alleged claims cannot be called comparative advertisement. However, if it is assumed for a moment that the Respondent has done comparative advertisement, then he urged the Commission to take into consideration the Indian jurisprudence developed in ***Marico Case at para 13-14,*** supra, which holds comparative advertisement non-actionable if it does not denigrate competitor's products. It says;

> *"Thus comparative advertisement is permissible as long as while comparing own with rival/competitors product, the latter's product is not derogated, discredited, disgraced, though while comparing some amount of "showing down" is implicit; however the same should be within the confines of De Beers Abrasive supra and should not be of a slighting or "rubbishing" nature"*

81. Given the principals enumerated in the case law, it is sufficiently clear that the claim is that of equivalence at best. The plain and simple reading, as would be apparent to any reasonable consumer (or for that matter even an ordinary one) would clearly mean that the product in question is as good as any other or at the at least is not worse off than any other product in competition.

Claim No.3

"Get Double Protection"

82. Having clearly laid out the case law on puffery earlier, we find no reason to reiterate it at this point. The third claim is vaguer than the first one. There is absolutely no indication in the claim itself as to what protection is being referred to. Does it mean that the oil will protect the engine parts and double the engine life? Or does it mean that emissions will be halved, increasing the protection for the environment? One can't be sure which makes the claim unquantifiable. In such an instance, 'Get double the protection' has no real meaning. A reasonable consumer would very quickly understand that it is nothing more than a marketing gimmick designed to attract the attention of the consumer.

c. If claims are puffery, do questions of reasonable basis arise related to product character, properties or suitability for use?

83. It is necessary to clarify that we are considerate of the Complainant's arguments and rebuttal from the Respondents' side with regard to reasonable basis for alleged claims. However, we believe that the question of reasonable basis would have arisen if alleged

claims were not declared puffery. Since we have held in previous issue that alleged claims are puffery, therefore, we do not deem it necessary to further dive into judging reasonability of basis provided by the Respondents. Accordingly, our answer to the third issue is negative.

E. CONCLUSION

Keeping in view the discussion above, we are of the view that the case against the Respondents is not made out as per Section 10 of the Act and alleged claims fall in the category of puffery. Therefore, the findings of the Enquiry Report are set aside and the Show Cause Notices 16/2019 & 17/2019 dated 20 August 2019 are hereby disposed of.

(Ms. Shaista Bano)
Member

(Ms. Bushra Naz Malik)
Member

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ISLAMABAD THE 15th DAY OF SEPTEMBER, 2020