



BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF  
SHOW CAUSE NOTICE ISSUED TO

M/S IRSHAD TRADING CORPORATION  
*On Complaint Filed By*  
M/S POLYCON PAKISTAN PRIVATE LIMITED

(File No. 335/Plycon/Comp/OFT/CCP/2019)

Date(s) of Hearings:

26-11-2019, 19-12-2019

Commission:

Dr. Muhammad Saleem  
**Member**

Dr. Shahzad Ansar  
**Member**

Ms. Bushra Naz Malik  
**Member**

**Present:**

Mr. Noman A. Farooqi

*Assisted by:*  
Mr. Arsal Ikram  
**Assistant Director (Legal)**

M/s. Polycon Pakistan (Pvt.) Limited  
(Complainant)

Mr. Aijaz M. Khan  
*Chief Executive Officer*

Mr. Ibrahim Jamal Khan  
*Authorized Representative*

M/s. Irshad Trading Corporation  
(Respondent)

Mr. Husnain Irshad  
*Son & Authorized Representative*

Dr. Abdul Qayyum  
*Authorized Representative*



## ORDER

1. This order shall dispose of proceedings arising out of Show Cause Notice No. 34 of 2019 dated 30 September 2019 (hereinafter the 'SCN') issued to M/s Irshad Trading Corporation (hereinafter the 'Respondent') for *prima facie* violation of Section 10 of the Competition Act, 2010 (hereinafter the 'Act').
2. In the instant matter, M/s Polycon Pakistan (Private) Limited (hereinafter the 'Complainant'), alleged that words 'Super Power Tuff' and 'Polygon', used by the Respondent which are the trademark and brand name of the Complainant, respectively, to produce and market water storage tanks, amounts to fraudulent use of Complainant's trademarks and brand name in violation of Section 10 of the Act. It was also alleged that the distribution of false and misleading information by the Respondent with reference to the trademark and brand name of the Complainant and the quality amounts to harming the business interests of the Complainant within the meanings of section 10 of the Act.

### FACTUAL BACKGROUND

#### A. COMPLAINT, ENQUIRY AND SHOW CAUSE NOTICES:

3. The Competition Commission of Pakistan (hereinafter the 'Commission') received a complaint against the Respondent on 17 December 2018, wherein, the Complainant asserted that it has been involved in businesses since 1986, *inter alia*, of manufacturing food graded polyethylene water tanks through rotation moulding. This product line has been traded and marketed under registered trademark 'Super Tuff', whereas due to their novel shapes and designs, water tanks are also duly patent protected under Patent and Designs Act, 1911. As evidence, Trademark and Patent Certificates were attached with the complaint. It was also claimed therein that 'Super Tuff' branded product line is also ISO-9001-2000 certified and, due to decade's long effort of cultivating its goodwill, the brand has become a household name in Pakistan for its high standards and superior quality. The basic allegations in the complaint can be further segmented into the

following:



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- (a). The Respondent had been passing himself off as a joint venture partner of the Complainant. The Respondent had sold its products including water tanks and other items, of sub-standard and inferior quality, through advertisement on fake brochures, by claiming to be the Joint Venture Partner of the Complainant. This act of Respondent had given the consumers an impression that the Respondent was partner of the Complainant and is selling Complainant's products. Such conduct of Respondent, the Complainant alleged, amounted to false and misleading information having tendency to seriously harm not only consumers, but also, business interests of the Complainant.
- (b). The Respondent had fraudulently designed a trademark called '**Super Power Tuff**' which was not registered and gives deceptive impression; phonetically, textually and graphically being identical to the Complainant's trademark. The Complainant also alleged that such free riding and parasitic copying is a clear depiction of Respondent's fraudulent intent to pass itself off as Complainant and its products as that of the Complainant. Not to mention, the Complainant's brand name '**Polycon**' was also fraudulently copied by the Respondent as '**Polygon**', which was an attempt on part of the Respondent to deceptively put on the minds of consumers a reflection of original brand and to pose his products as Complainant's products.
- (c). The Respondent has disseminated inaccurate, false and misleading claims on his advertisement brochures with regard to quality, durability, capacity and food grade material of his product. The Complainant alleged that the tag lines produced by Respondent on its fake brochures, such as, '**since 1989**', '**beware of copiers**', '**made from food grade material**', '**capacity as embossed**' were false statements and parasitic copy of Complainant advertisements. As believed by the Complainant, the Respondent certainly would not have reasonable substantiation for such claims, therefore, it amounted to distribution of false and misleading information. It was also alleged that low quality counterfeit water tanks manufactured by Respondent could have exposed public to hazardous chemicals and, eventually, might have led to health risks.



4. Based on such allegations, the Commission considered it appropriate to conduct an enquiry under Section 37(2) of the Act. The enquiry in the matter was concluded vide enquiry report dated 10 July 2019 (hereinafter the '**Enquiry Report**'). The conclusions of the Enquiry Report in succinct are as follows:

*“6.27. In view of the above, it is stated that by creating negligible variances in the brand name, packaging/trade dress, brochures, etc., and by copying the exact text of the Complainant’s brochures, the Respondent has engaged in, inter alia, Parasitic Copying/Copycat Packaging as well as fraudulent use of the Complainant’s trademark, firm name, product labelling and packaging and thus, it appears to be involved in prima facie violation of Section 10(2)(d) of the Act.*

**B. Whether, prima facie, the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis related to character, method/origin of production, properties and suitability for use and quality of products**

6.28. *The Respondent, on its marketing material, has engaged in complete replication of the claims made on the Complainant’s marketing material, however, without any reasonable basis. No evidence of use of high quality raw material or certification as per the brochures was submitted to the Enquiry Committee.*

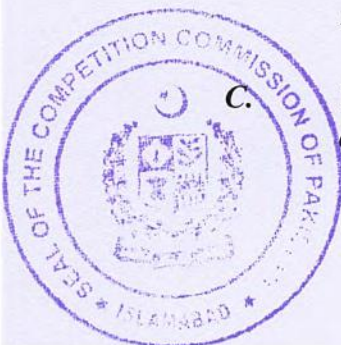
6.29. **Joint Venture of ITC and Super Tuff** – *the Respondent had placed the statement, “joint venture of ITC and Super Tuff” without a reasonable basis. The Complainant out rightly denied existence of such a venture, whereas the Respondent had no proof in support of its claims. Therefore, by making such a statement is capable of deceiving the consumers as they would buy products from the Respondent thinking it to have some kind of a relationship with the Complainant. Resultantly, it can be concluded that by making such statements on its marketing material, the Respondent has entered into deceptive marketing practices for distributing false and misleading information to consumers in prima facie violation of Section 10(2)(b) of the Act.*



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- 6.30. **The Only Food Grade Tank in Pakistan** – the Respondent has copied this statement from the Complainant’s brochure. The Complainant is obviously also making its water tanks with food graded material. Hence, the Respondent’s claim that it is the “only” undertaking in the market manufacturing tanks out of this material appears to be false and thus, in violation of Section 10(2)(b) of the Act. Moreover, no cogent evidence has been submitted by the Respondent that it in fact uses Food Grade Material to produce the said water tanks and as a result, the Respondent’s conduct constitutes to be distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks, in prima facie violation of Section 10(2)(b) of the Act.
- 6.31. **Quality Stamps/Marks** – the Respondent has also placed quality marks of various standard setting entities on its marketing material, including, inter alia, PSQCA, UKAS MANAGEMENT SYSTEMS – 063, CERTIFICATION INTERNATIONAL of ISO 9001: 2008, CI/15577, etc., without providing any proof in this regard. Therefore, it appears that the Respondent does not have any cogent evidence to support its conduct and therefore, it appears to be involved in distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks in prima facie violation of Section 10(2)(b) of the Act.
- 6.32. **Since 1986** – the Respondent has printed the date of the Complainant’s incorporation, whereas no evidence has been submitted proving that the former has also been involved in this business since 1986. Moreover, by placing the “since 1986” stamp along with indulging in Copycat Packaging, the Respondent is clearly trying to pass off as the Complainant. Therefore, the Respondent’s actions amount to distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks in prima facie violation of Section 10(2)(b) of the Act.

**Whether, prima facie, the conduct of the Respondent is capable of harming the business interest of the Complainant**



6.33. *Finally, the overall conduct of the Respondent, i.e., distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability for use of its Water Tanks in prima facie violation of Section 10(2)(b) of the Act and fraudulent use of another's trademark, firm name, or product labelling or packaging in prima facie violation of Section 10(2)(b) of the Act, is capable of harming the business interest of the Complainant by stealing its rightful customers, negatively affecting its sales and profits, and damaging its good will. Resultantly, as the Respondent's conduct is capable of harming the business interest of the Complainant, the Respondent appears to be in prima facie violation of Section 10(2)(a) of the Act."*

5. The Commission, after considering the conclusions, findings and recommendations in the Enquiry Report, in line with its role under Section 37(4) of the Act, deemed it appropriate to initiate proceedings under Section 30 of the Act in the public interest, by issuing the SCN and providing the Respondent with an opportunity of hearing. The SCN in its relevant parts is reproduced hereunder;

**4. WHEREAS**, *in terms of the Enquiry Report in general and paragraphs 2.1 to 2.30, it has been alleged by the Complainant that Undertaking passing off as Complainant's Company joint venture partner, as use of "Super Tuff" brand and false representations about the quality of water tanks and business, prima facie constitutes violation of Section 10(1) of the Act; and*

**5. WHEREAS**, *in terms of the Enquiry Report in general and paragraph 6.8 to 6.27 in particular, it appears that the Undertaking by creating negligible variance in the brand name, packaging/trade dress, brochures, etc. and by copying exact text of the Complainant's brochures, has engaged in parasitic copying as well as fraudulent use of Complainant's trade mark, firm name, product labeling and packaging, without any consent or authorization, which, in prima facie, violation of Section 10 (1), in terms of Section 10(2)(d) of the Act; and*

**6. WHEREAS**, *in terms of the Enquiry Report in general and paragraph 6.28 to 6.32 in particular, it appears that the Undertaking's conduct amount to distribution of information lacking a reasonable basis related to character, method of production, properties, quality and suitability of use of its Water Tanks, in prima*



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*facie, violation of Section 10(1) in terms of Section 10(2)(b) of the Act; and*

7. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 6.33 in particular, it appears that the Undertaking's conduct of distribution of information lacking reasonable basis related to character, method of product, properties, quality and fraudulent use of Complainant's trademark, firm name etc. is capable of harming business interest of the Complainant, in prima facie, violation of Section 10(1) in terms of Section 10(2)(a) of the Act; and"

## **B. HEARINGS AND WRITTEN REPLY TO THE SCN:**

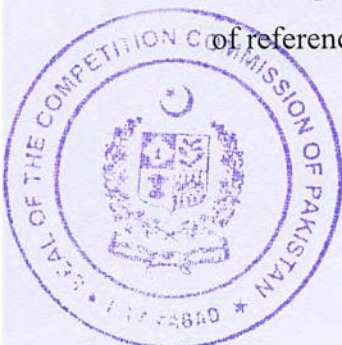
6. The Respondent, vide SCN, was called upon to respond in writing within fourteen (14) days of the show cause notice and to avail the opportunity of hearing on 16 October 2019. The hearing so scheduled was adjourned on the request of Respondent and an extension in time to file the written reply was given to the Respondent. Nonetheless, the Respondent failed to file written reply to the SCN. Second date of hearing was scheduled for 26 November 2019, wherein, the Complainant, appeared through its Chief Executive Officer and authorized representative. The authorized representative of the Complainant reasserted facts which previously had been asserted in the complaint. In furtherance to that, the authorized representative reiterated the recognition of its well-established trademark '**Super Tuff**', its brand name '**Polycon**' and explained the goodwill attached thereto. The Complainant strongly condemned the actions of the Respondent and called it strictly against business interests of the Complainant and harmful to consumer. In this regard, he relied upon Commission's earlier decision cited as **In the matter of Tara Crop Sciences Limited [2016 CLD 105]**, whereby the Commission has acknowledged the importance of brand name, the perception of goods and services attached to such names in the minds of consumers and their sensitivity to market factors.
7. The Complainant also asserted that copying Complainant's trademark '**Super Tuff**' and using it with slight variation such as '**Super Power Tuff**' is an issue already called by the Commission as 'Parasitic Copying' or 'Copy Cat'. He placed his reliance on the case cited as **In the matter of Messers Shainal Al-Syed Foods [2018 CLD 1115]**. Such copying, the Complainant argued, has potential to inflict harms to its business interests



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and capable of spoiling its goodwill. In this regard, further reliance was placed upon Commission's earlier decision cited as **In the matter of Jotun Pakistan (Pvt) Limited for Deceptive Marketing Practices [2015 CLD 1638]**, wherein the Commission settled that a Complainant need not to establish actual harm to the business, instead, the very presence of a deceptive marketing practice having the potential to cause harm is sufficient to hold a party culpable. He vehemently expressed his concern that if the Respondent gets away with his violations then it would set precedent for others in the market to copy each other's trademarks which, eventually, cause not only confusion to consumers but also harm to business interests of rightful owners of trademarks. Not to mention, Complainant claimed that his brand name is still being copied in various parts of KPK province.

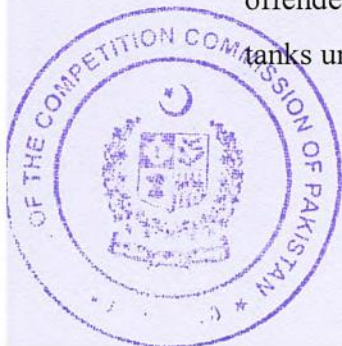
8. With respect to false claims regarding food grade material and punch lines such as “**since 1989**”, “**Long life, Reasonable price**” and “**capacity as embossed**”, the Complainant argued that such claims lack substantiation and reasonable bases. He place his reliance in this regard on **In the matter of Proctor & Gamble [2010 CLD 1695]**, wherein the Commission held that an entity must have reasonable bases and recognizable substantiation for the claims it makes about its products and services in advertisements. Otherwise, it would amount to deceptive marketing practice within the meaning of Section 10(2)(b) of the Act.
9. Subsequent to Complainant's arguments, an opportunity of hearing was afforded to Respondent, but, the authorized representative in attendance on behalf of the Respondent requested for an adjournment given the bad health of the Proprietor of Respondent. In the interest of justice, we deemed it appropriate to provide another opportunity to the Respondent to file written reply to the SCN latest by 5<sup>th</sup> December 2019 and also to avail opportunity of hearing on 19<sup>th</sup> December 2019.
10. The written reply to the SCN was filed on 4<sup>th</sup> December 2019. In the written reply, astonishingly, the contents of the Enquiry Report and the SCN were not denied. However, three explanations were given, that too without any supporting evidence, which for ease of reference are reproduced herein below:





- (a). The joint venture was made with the consent of the Complainant, however, evidence as to this fact would be produced before the Commission on the date of hearing.
- (b). Being a distributing agent of the Complainant, the Respondent put efforts into building a strong customer network and, for such services, the Respondent was also given an award by the Complainant. The Respondent also committed to produce copies of award as an evidence at the date of hearing.
- (c). Through instant complaint, the Complainant has tried to attain monopoly and kick out Respondent from the market.

11. Final hearing in the matter was held on 19<sup>th</sup> December 2019. The authorized representatives of the Respondent stated that the he had acted as distributor of Complainant's product for almost 30 years. Moreover, keeping his previous record in view and for the further business growth, the Complainant himself approached the Respondent and offered him to join the Complainant as a Joint Venture Partner, which was accepted by the Respondent. Subsequently, the Respondent worked with Complainant as a JV Partner at the premises of the Complainant for over six (6) months. The Respondent was required to produce a copy of the JV Agreement, however, in response no agreement was produce by the Respondent. The authorized representative of the Respondent submitted that after the termination of agreement with the Complainant, it left the office of the Complainant and started producing its own product, *inter alia*, water tanks. He also asserted that the production was carried out for a short period of time and the word '**Super Power Tuff**' was opted as a trademark because the Respondent was given an impression of name-availability by the Trademark Registry. Subsequently, the trademark application was withdrawn given the Complainant's opposition to the same. Currently, the production plant of Respondent is closed given the economic conditions of Pakistan as a whole. The Respondent also stated that he was not a very literate person and, due to lack of knowledge about trademark rights, he produced water tank with offended trademark for short period of time. He further stated that he had produced water tanks until February, 2019.



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12. The Complainant in rebuttal stated that the last sale which the Respondent conducted as a distributor of Complainant was in September, 2018. Thereafter, the Respondent started manufacturing its own water tank and giving consumer two price quotations; one for Complainant's water tanks and other for his own manufactured tanks which was obviously cheaper and low quality. This was an attempt on the part of Respondent to give consumer an impression that either the Complainant might have started manufacturing of cheaper product line or the Respondent is working with Complainant as Joint Venture Partner. Going along the time line, the Complainant further stated that the Respondent continued manufacturing its products until February 2019, exactly the time when the enquiry committee of the Commission approached the Respondent. Soon after that, Respondent stopped its production. The Complainant further stated that, though he is aware of the nature of proceeding before this Commission, but it would still be important to highlight another fact that the Respondent had failed to clear outstanding payments for the materials obtained as a distributor of the Complainant. For this reason, FIR under Section 406 of Pakistan Penal Code, 1860 was also lodged against the Respondent and he was held guilty by police enquiry report and his bail application was rejected by the August Supreme Court of Pakistan.
13. The Director General (Legal) in attendance, in order to assist us, referred to an age old principle of administration of justice i.e. '*humans can lie but the documents do not*'; and asserted that the Respondent has not produced a single document in their favour, and is dodging the accountability by either seeking adjournments or ignorance. He further said that it is also a settled principle of law that '*ignorance of law is of no excuse*' and that nowhere in the written reply to the SCN filed by the Respondent has he denied anything. He submitted that from the facts narrated by the Complainant it is evident that the Respondent is avoiding his personal attendance before this Forum in the fear of getting arrested as his bail was rejected by the August Court. In short, the Respondent has admitted using of the trademark and brand name of the Complainant. He further submitted that in now a days, the situation which emerge from the instant case is that any distributor or authorized agent, subsequent to termination of agency or distribution contract may indulge itself into fraudulently using the trademarks of the manufacturers and would free



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ride on the goodwill earned by the original manufacturer. This practice and conduct should be discouraged. Moreover, given the absence of cogent reason, if the Respondent is allowed to get away with his violations then the entire industry may suffer harm. He relied upon the cases cited as **In the matter of Show Cause Notice issued to Ace Group of Companies, 2010 CLD 1840, In the matter of Show Cause Notice issued to Proctor & Gamble, 2010 CLD 1695, In the Matter of Show Cause Notices issued for violation of trademark of DHL, 2013 CLD 1014, In the matter of Show Cause Notice issued to M/s Jotun Pakistan (Pvt.) Ltd., 2015 CLD 1638, In the matter of Show Cause Notice issued to M/s Tara Crop Sciences (Private) Limited, 2016 CLD 105, In the matter of Show Cause Notice issued to M/s A Rahim Foods, 2016 CLD 1128 and In the matter of Show Cause Notice issued to M/s Shainal Al-Syed Foods, 2018 CLD 1115.**

### **ANALYSIS & DECISION**

14. Based on allegations levelled in the Complaint, findings of the Enquiry Report and SCN issued to the Respondent along with the submissions made before us, following issues emerge which require determination:

- a. *Whether the word “Super Tuff” is a trademark of the Complainant?*
- b. *Whether the Respondent has violated provisions of Section 10 of the Act?*

15. In the subsequent paragraphs, we will now proceed to analyze the aforesaid issues in terms of the evidence available on record along with the submissions made before us.

#### **ISSUE NO. (a): Whether the word ‘Super Tuff’ is a trademark of the Complainant?**

16. The importance of trademark has been elaborated in one of our earlier decisions, **In the matter of violation of trademarks of DHL, 2013 CLD 1014**, wherein it was held as under:

“48. We also would like to refer to the judgments of **Hoffmann-La Roche [1978] E.C.R. 1139, para.7, and Philips Electronics NV v**



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*Remington Consumer Products Ltd [2002] ECR 1-0000*; wherein it was held that “the essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality”.

17. In addition to the above, in one of our earlier Order i.e. **Order dated 23<sup>rd</sup> December 2019, in the matter of Show Causes Notice issued to M/s NIMKO Corner and M/s Karachi NIMCO for Deceptive Marketing Practices**, much stress has been laid on the trademark and its value, in the following words:

51. *Before moving on to consider imposing penalty for the violations as determined in the preceding paragraphs of our Order, we would like to stress that the law governing the trademark jealously protects the registered trademark for the growth of healthy competition in trade, commerce, industry and those who have invested their money, labour and skills for earning a remarkable reputation should not be allowed to be exploited by rivals who venture to take benefit of the earned reputation by a registered trademark. The objects/ intention of the Legislature, while enacting the trademark, has been primarily focused towards investment and innovation leading to elimination of chances of confusion and deception.*

18. Being mindful of the above, we deem it appropriate to first deliberate on the ownership of the intellectual property rights vis-à-vis the trademark and the trade name as has been claimed in the complaint. In the complaint and during the hearing, the Complainant has claimed to have been involved in business of manufacturing water tanks since 1989 and



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he got registered trademark ‘**Super Tuff**’ for its products in 1991. Along with the complaint, the Complainant also annexed a copy of Registration Certificate issued by Trademark Registry. Furthermore, the complaint also annexed copies of Certificate of Registration of Designs issued by patent office for water tanks. It includes designs which are horizontal, vertical and loft. Such certificates show the Complainant’s proprietorship over water tank designs since 1997. Ownership of Complainant over trademark and design is proved by two facts. First; that these documents are issued by public authority and carry presumption of truth attached. Secondly; that the existence of Complainant’s trademark and design patent is not even denied by the Respondent, neither in his written reply nor in verbal arguments. Hence, the principle envisaged in Article 113 of Qanoon-e-Shahadat Order 1984 is applicable here. It says;

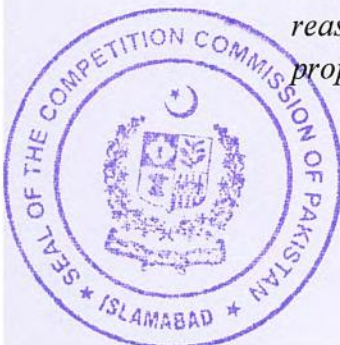
*“113. Facts admitted need not be proved: No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing that facts admitted need not be proved...”*

19. Therefore, we are of the considered view that ‘**Super Tuff**’ is registered trademark of the Complainant, whereas, water tank designs are also the patent protected and the intellectual property of the Complainant.

**ISSUE NO. (b): Whether the Respondent has violated provisions of Section 10 of the Act?**

20. We are of the view that for reaching conclusiveness in the matter, it would be appropriate to address the aforesaid issue in three sub-parts, which are as follows:

- (i). *Whether the Respondent has violated Section 10(2)(d) of the Act by fraudulently using the trademark and trade name of the Complainant?*
- (ii). *Whether the Respondent has violated Section 10(2)(b) of the Act by disseminating false and misleading information to the consumers lacking a reasonable basis vis-à-vis the character, method or place of production, properties, suitability for use or quality of the goods?*



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(iii). *Whether the Respondent has violated the provisions of Section 10(2)(a) of the Act by distributing false or misleading information capable of harming the business interest of another undertaking, in particular, complainant?*

21. Given the above, and owing to the stress made by the Complainant vis-à-vis the violation of trademark and trade name by the Respondent, we also would first deliberate on the first sub-issue, which is as follows:

***Whether the Respondent has violated Section 10(2)(d) of the Act by fraudulently using the trademark and tradename of the Complainant?***

22. As per allegations in the complaint and finding of the enquiry report, the Respondent has used trademark “**Super Power Tuff**” and brand name “**Polygon**” which are deceptively similar to the Complainant’s trademark and brand name. In this regard, we deem it appropriate to first highlight the importance of trademark towards any business identity and its relatability with the consumers. In this regard, we deem it appropriate to refer to one of our earlier decision in the matter of **In the matter of Show Cause Notice issued for violation of DHL Trademark, 2013 CLD 1014**, wherein *vis-à-vis* the goodwill and the value of trademark has been acknowledged in the following words:

*...[i]t is important to recognize 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 a larger sense, trademarks promote initiative and enterprise worldwide by rewarding the owners of trademarks with recognition and financial profit. Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. This enables people with skill and enterprise to produce and market goods and services in fair conditions, thereby facilitating international trade.”*

23. Being mindful of the above, we now proceed to evaluate the evidentiary material available on the record. For ease of reference, the trademarks registered in favour of the Complainant are reproduced below:





24. The Complainant's Brochure (back and front side) in comparison with the Brochure of the Respondent (back and front side), for ease of reference is reproduced below:

**THE ONLY FOOD GRADE WATER TANK IN PAKISTAN** **سپر ٹاف واٹر ٹینک**

- Special food grade polymer
- U.V. resistant against Sun & Weather
- Seamless Construction & completely leakproof
- Easy to install, All-brass fittings provided
- Corrosion-proof, rust proof, termite-proof
- Easy to clean, smooth surface
- Hygienic water storage, Germ free, odourless and algae free
- Strong but light weight, Capacity as embossed
- Comprehensive warranty, Competitive prices

Capacity Gallons	Length inches	Breadth inches	Height inches
75	46	23	27
150	55	29	35
200	60	37	36
250	63	37	45
300	69	40	45

Capacity Gallons	Diameter inches	Height inches
50	21	36
125	36	32
150	36	37
200	36	53
250	54	37
300	48	44
350	51	47
400	51	57
500	51	70
1000	75	62
1200	69	81
1500	75	87
2000	82	110
2500	82	116

Capacity Gallons	Length inches	Breadth inches	Height inches
125	32	38	38
150	32	40	40
200	36	53	53
300	47	44	44
400	49	56	56
500	48	73	73
1000	66	73	73

Capacity Gallons	Length inches	Breadth inches	Height inches
100	36	36	16
150	48	36	16

**POLYCON PAKISTAN (PVT) LTD**  
 82-GMA OFFICERS COLONY 4TH STREET LAHORE CANTT. 54810 - PAKISTAN  
 Phone: (042) 35862420-35869655-35872029 Fax: (042) 35869652  
 E-mail: info@polycon.com.pk Website: www.polycon.com.pk  
**KARACHI OFFICE**  
 85-G, 2nd Floor, COMMERCIAL AREA 'A', DEFENCE HOUSING AUTHORITY, KARACHI.  
 PHONE: (021) 3586782-35869251 Fax: (021) 35867795

**TÜV AUSTRIA** ISO 9001:2008 Equipped  
**PSQCA** MEMBER  
 MEMBER ISO 9001:2008

**THE ONLY FOOD GRADE WATER TANK IN PAKISTAN**

**سپر ٹاف واٹر ٹینک**

خریدتے وقت **SUPER TUFF** کا کثیرہ شدہ ٹریڈ مارک ضرور دیکھ لیں

تقارون سے ہوشیار

LONG LIFE  
 REASONABLE PRICE  
 CAPACITY AS EMBOSSED

**POLYCON**  
 ISO 9001:2000 Certified

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**SUPER TUFF WATER TANK**

**سپر پاور ٹف واٹر ٹینک**

**The Only Food Grade WATER TANK IN PAKISTAN**

- Special food grade polymer
- UV Stabilized against discoloration
- Seamless Construction & completely leakproof
- Easy to install, All-brass fittings provided
- Corrosion-proof, rust proof, termite-proof
- Easy to clean, smooth surface
- Hygienic water storage, Germ free, odorless and algae free
- Strong but light weight, Capacity as embossed
- Comprehensive warranty, Competitive prices

Capacity	Price
500 Ltr.	7,685
700 Ltr.	9,400
1000 Ltr.	11,020
1200 Ltr.	13,195
1500 Ltr.	15,370
2000 Ltr.	19,885
2500 Ltr.	25,085

**SUPER POWER TUFF MULTI LAYER WATER TANKS**

Capacity	Price
50 Gallon	4200
100 Gallon	7000
150 Gallon	10100
200 Gallon	12000
300 Gallon	17900
400 Gallon	22700
500 Gallon	26000
1200 Gallon	61000
2500 Gallon	135000

**SUPER POWER TUFF VERTICAL WATER TANKS**

Capacity	Price
50 Gallon	4200
100 Gallon	7000
150 Gallon	10100
200 Gallon	12000
300 Gallon	17900
400 Gallon	22700
500 Gallon	26000
1200 Gallon	61000
2500 Gallon	135000

**POLYGON PAKISTAN PLASTIC INDUSTRY**  
30-Km. Lahore Road, Faisalabad

**SUPER TUFF WATER TANK**

**سپر پاور ٹف واٹر ٹینک**

**سپر پاور ٹف**

**واٹر ٹینک**

آپ اور آپ کی فیملی کی صحت کا حاسن

نفاوں سے ہوشیار

نورنگری میٹروں سے چار گروہ

حفظان صحت کے اصولوں کے عین مطابق

REASONABLE PRICE

CAPACITY AS EMBOSSED

پیشگی کے تجربہ کار ماہرین کی زیر نگرانی

**ITC** PIPE & FITTINGS

**EGO** PIPE & FITTINGS

**SUPER TUFF WATER TANK**

25. Upon careful analysis of the material on the record, which is reproduced in the preceding paragraphs, following similarities between original (Complainant's) and offending (Respondent's) Brochure are identified;

<u>THE COMPLAINANT</u>	<u>THE RESPONDENT</u>



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<p>سپر ٹف واٹر ٹینک</p>	<p>سپر پاور ٹف واٹر ٹینک</p>
	
<p>تقالوں سے ہوشیار</p>	<p>نقالوں سے ہوشیار</p>
<p>LONG LIFE REASONABLE PRICE CAPACITY AS EMBOSSED</p> <p>یرپا ناسب قیمت کل گنجائش</p>	<p>LONG LIFE REASONABLE PRICE CAPACITY AS EMBOSSED</p> <p>یرپا ناسب قیمت کل گنجائش</p>
<p>(The Complainat Company was incorpoated in 1986)</p>	

26. We have considered the independent exercise undertaken by the enquiry committee to verify the contents of the allegation levelled in the complaint against Respondent. Perusal



*[Handwritten signature]*

of the material makes abundantly clear that the Respondent has not only copied the trademark and transformed it from “**Super Tuff**” into “**Super Power Tuff**”, but also, produced brand name “**Polygon**” which is phonetically identical to “**Polycon**”. The Complainant confirmed that no authorization has been given to anyone so far to use of their trademark or brand name, except the authorized dealers and the Respondent is not an authorized dealer of the Complainant. In addition, despite repeated question by us, the Respondent failed to produce even a single documentary evidence proving authorization. It is also emphasized here that with minute alterations made to the trademark, logo, trade dress, etc., the overall look of the products and their marketing material still remains the same and hence, the Respondent’s conduct is capable of misleading the consumers into buying the Respondent’s products while being in search of the Complainant’s products. Such behavior, where slight variations are made to the marketing material is referred to as “Parasitic Copying” or “Copycat Packaging”. **In the matter of Show Cause Notice issued to Ace Group of Companies, 2010 CLD 1840**, it was held as under:

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

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

*31. Hence, keeping in view the above legal and factual position, I am of the considered view that, deceptive marketing in terms of Section 10 of the Ordinance has been carried out by AGI and the fraudulent use of the trademark by AGI was very much capable of harming the business*



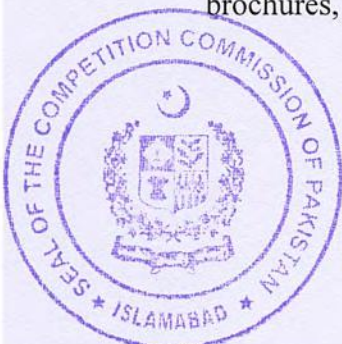
*interest of the complainants in violation of Section 10(1) read with Section 10 (2)(a) & (d) of the Ordinance.*

27. We would like to refer to **in the Matter of Show Cause Notices issued for violation of trademark of DHL, 2013 CLD 1014**, wherein while holding the Respondents guilty of violating the provisions of Section 10(2)(d) of the Act, the Commission observed that:

*“45. The counsel for the Complainant has consistently submitted throughout the proceedings that the Complainant or its principal has not authorized any of the Respondents to use its trademark or logo. It was also submitted by the counsel for the Complainant that in order to facilitate deliveries, the Complainant operated approximately 49 service outlets with the support of approximately 100 vehicles and 500 employees across the country and there are no authorized dealers or otherwise in Pakistan. The Complainant operates only through its own service outlets.*

*46. We are of the view that such conduct of the Respondents, in the given facts, is aimed at capitalizing on the goodwill attached to Complainant’s trademark by misleading the consumer through the deceptive logo and thus capable of harming the business interest of the Complainant in terms of clause (a) & (b) of subsection (2) of Section 10 of the Act read with subsection (1) of Section 10 of the Act. Reliance in this regard can be placed on our Order **in the matter of ZONG 2010 CLD 1478**.*

28. In addition to the above, we have also perused various other materials used by the Respondent in the process of marketing, inter alia, visiting cards, letter pad, envelopes, and brochures, the images whereof are, for ease of reference, reproduced herein below:



**Respondent's Business Card**



**Respondent's Brochure**

**سپر ٹف واٹر ٹینک**

ISO 9001 CERTIFIED

125 گالین سے 1000 گالین تک

آپ کی اور آپ کی فیملی کی صحت کا ضامن

حفظان صحت کے اصولوں کے عین مطابق

نوڈ گریڈ میٹریل سے تیار کردہ

LONG LIFE  
REASONABLE PRICE  
EMBOSSED

دیرپا  
مناسب قیمت  
مکمل گنجائش

ITC SUPER TUFF POLYCON

**سپر ٹف واٹر ٹینک**

The Only Food Grade WATER TANK IN PAKISTAN

- Special food grade polymer
- U.V Stabilized against Sun & Weather
- Seamless Construction & completely leakproof
- Easy to Install, All-brass fittings provided
- Corrosion-proof, rust proof, termite-proof
- Easy to clean, smooth surface
- Hygienic water storage. Germ free, odorless and algae free
- Strong but light weight. Capacity as embossed
- Comprehensive warranty, Competitive prices

**SUPER TUFF BLUE & WHITE VERTICAL WATER TANKS**

125	Dia 32" Height 38"	11,335
150	Dia 32" Height 46"	12,669
200	Dia 36" Height 53"	16,670
300	Dia 47" Height 44"	23,338
400	Dia 49" Height 56"	27,840
500	Dia 48" Height 73"	36,260
1000	Dia 66" Height 73"	73,350

**SUPER TUFF BLUE & WHITE HORIZONTAL WATER TANKS**

150	Length 55", Height 25", Width 26"	16,700
200	Length 61", Height 29", Width 30"	21,700
300	Length 64", Height 37", Width 39"	36,700

Joint Venture of

**ITC** **SUPER TUFF**

POLYCON PAKISTAN (PVT) LTD.

LAHORE OFFICE: K-77 CHOKH CHERRY, P.O. BATA RUI, BATA KHAN, SHAKI DAMRAH  
LAHORE OFFICE: SAHIB-UL-ARSHAD, C-10, DUSTAN-E-ARSHAD  
Phone: (042) 3546425-2546482, Fax: (042) 3546483  
E-mail: sales@polycon.com.pk Website: www.polycon.com.pk

FASALA-30 OFFICE: 177-B, 4, NISAR CHOKH, Faisalabad  
Tel: (030) 4840751, (030) 9661134

KARACHI OFFICE: "BFC" 5th Floor, Commercial Area "A", Defence Housing Authority, Karachi  
Phone: (021) 35892162-35892153, Fax: (021) 35892156



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Respondent's Brochures

## سپرٹف واٹر ٹینک

آپ کی اور آپ کی فیملی کی صحت کا ضمان

Since 1986



خریدتے وقت ہوشیار

کندہ شدہ فریڈ مارک ضرور دیکھیں

- ▶ Special food grade polymer U.V. Stabilized against Sun & Weather
- ▶ Seamless Construction & completely leakproof
- ▶ Easy to install, All-brass fittings provided
- ▶ Corrosion-proof, rust proof, termite-proof
- ▶ Easy to clean, smooth surface
- ▶ Hygienic water storage. Germ free, odorless and algae free
- ▶ Strong but light weight. Capacity as embossed
- ▶ Comprehensive warranty, Competitive prices



50 گالین - 5000 لیٹر





## سپرٹف واٹر ٹینک

The Only Food Grade WATER TANK IN PAKISTAN

### RATE LIST

سپرٹف واٹر ٹینک

#### SUPER TUFF HORIZONTAL TANKS

Capacity in US Gallons	Dimension in Inches	Retail Price
75	Length 46" Height 27" Width 23"	11,000
150	Length 55" Height 35" Width 29"	20,000
200	Length 60" Height 36" Width 37"	26,870
250	Length 63" Height 45" Width 37"	35,000
300	Length 69" Height 45" Width 20"	41,875



سپرٹف واٹر ٹریٹمنٹ ٹینک

#### SUPER TUFF WATER TREATMENT TANK

500	White	40,000
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سپرٹف واٹر ٹینک

#### SUPER TUFF VERTICAL TANKS

Capacity in US Gallons	Dimension in Inches	Retail Price
50	Diameter 21" Height 36"	6,870
125	Diameter 36" Height 32"	13,836
150	Diameter 36" Height 37"	16,336
200	Diameter 36" Height 53"	21,671
250	Diameter 51" Height 37"	27,672
300	Diameter 48" Height 44"	30,500
350	Diameter 51" Height 47"	36,670
400	Diameter 51" Height 57"	38,340
500	Diameter 51" Height 70"	41,670
1000	Diameter 75" Height 62"	83,380
1200	Diameter 69" Height 81"	91,685
1500	Diameter 75" Height 87"	108,355
2000	Diameter 82" Height 106"	146,665
2500	Diameter 82" Height 116"	198,000
5000	Diameter 100" Height 177"	450,000



سپرٹف لوٹ ٹینک

#### SUPER TUFF LOFT TANKS

100	Length 36", Height 18", Width 36"	16,300
150	Length 48", Height 18", Width 36"	22,800

Joint Venture of




POLYCON PAKISTAN (PVT) LTD.

**LAHORE OFFICE:** 171-B, Gulistan Colony, Milat Chowk, Sheikhupura Road, Faisalabad. Tel: +92-41-8860701, 8561589. Mob: 0323-8667155, Fax: +92-41-8794069  
**FAISALABAD OFFICE:** 171-B, Gulistan Colony, Milat Chowk, Sheikhupura Road, Faisalabad. Tel: +92-41-8860701, 8561589. Mob: 0323-8667155, Fax: +92-41-8794069  
**JEDDAH OFFICE:** 66-C, 3rd Floor, Commercial Area "A", Defence Housing Authority, Sakaka, Jeddah. Phone: 0211 5686782 5584623, Fax: 0211 5588709

Respondent's Envelops




Manufacturers, Exporter, Importer & Distributors of  
PPRC, PE, uPVC PIPES & FITTINGS

FAISALABAD:  
171-B, Gulistan Colony, Milat Chowk, Sheikhupura Road, Faisalabad  
Tel: +92-41-8860701, 8561589. Mob: 0323-8667155, Fax: +92-41-8794069

E-mail: info@itc.net.pk











LAHORE: P-1056, SL # 10, Gulberg III, Lahore. 0321-9997155

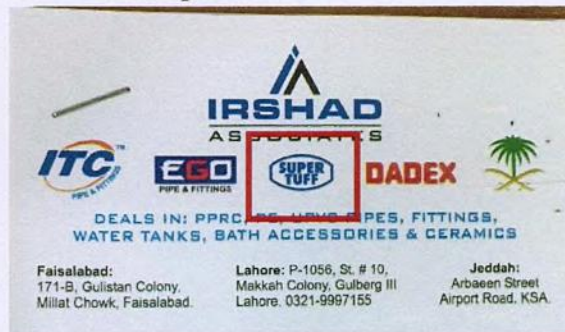
JEDDAH: Arbabian Street, Airport Road, KSA

Web: www.itc.net.pk



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**JV Partner Visiting Cards of the Respondent**



29. From the above images, it becomes further clear that the Respondent is using the 'Super Tuff' trade mark of the Complainant and that too without any authorization. The only justification provided by the Respondent during the hearing is that the Proprietor is an illiterate man and he was not aware about any existing law which prohibits such kind of attitude of the Respondent. We are not impressed with this response, and would like to refer to one of our earlier Orders i.e. **In the matter of Show Cause Notice issued to Ace Group of Companies, 2010 CLD 1840**, wherein it was held:



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

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

30. The Respondent, despite repeated requests during the hearing and thereafter, was unable to provide the documents pertaining to any authorization or permission from the Complainant with reference to the Joint Venture Partnership as has been claimed by them in the written reply and the hearing. Further, the Respondent has also alleged that in order to establish a monopoly the Complainant wants to kick out the Respondent from the market. It is astonishing that the Respondent is making such submissions, as the Complainant has brought this action only to protect its rights with reference to the trademarks and the patents which he holds with reference to the water tanks. The Respondent is at liberty to do the business in this domain in accordance with law. From the foregoing, we are of the firm view that the Respondent has not discharged its burden *vis-à-vis* providing the authorization from the Complainant to use the trademarks and tradenames in question.
31. Therefore, in view of the foregoing, we have reached the conclusion that the Respondent has fraudulently and without any authorization has used the trademark and tradename of the Complainant in order to free ride on the goodwill earned by the Complainant, in violation of Section 10(2)(d) of the Act.

***Whether the Respondent has violated Section 10(2)(b) of the Act by disseminating false and misleading information to the consumers lacking a reasonable basis vis-à-vis the character, method or place of production, properties, suitability for use or quality of the goods?***

*HA S W*



32. Now we move on to the second limb of the main issue i.e. the distribution of false and misleading information, if any, by the Respondent. In this regard, we would like to refer to one of our earlier decisions **In the matter of China Mobile Pak Limited and Pakistan Telecom Mobile Limited** reported as **2010 CLD 1478**, wherein the Commission has observed that in determining whether an advertisement or marketing material amount to deceptive marketing practices, the Commission shall:

*“...evaluate complete advertisement and make an opinion regarding deception [...] on the basis of net general impression conveyed by them and not an isolated script”.*

33. With regard to “consumers,” the Commission has held that:

*“the term ‘consumer’ under Section 10 of the [Ordinance] is to be construed as an ‘ordinary consumer’ but need not be necessarily be restricted to the end consumer of the goods or services”*

34. False and misleading information has been interpreted by the Commission to include:

*False information: “oral or written statements or representations that are (a) contrary to the truth or fact and not in accordance with reality or actuality; (b) usually implied either conscious wrong or culpable negligence; (c) has a striker and stronger connotation, and (d) is not readily open to interpretation...”*

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

*HA*      *AS*      *W*





35. Furthermore, while evaluating the ‘net general impression’ or dominant message, the Commission also delineates and examines express and implied claims contained in an advertisement or promotional campaign while holding the advertiser liable for both. The advertiser is liable for all such claim if they are false and/or misleading or lack a reasonable basis for the same. Neither proof of intent to disseminate a deceptive claim nor evidence that consumers have actually been misled is required for an act or omission to constitute violations under Section 10 of the Act.
36. From bare perusal of these brochures and visiting cards, it is evident that the public at large might have been deceived and led to believe that the Respondent and the Complainant had probably entered into a “*Joint Venture*” and that the goods sold by this fictitious joint venture were those of the Complainant. Whereas in reality, the goods were either being sourced by Respondent from other vendors or possibly being manufactured by the Respondent himself. It is relevant to highlight that the Respondent was asked repeatedly during the hearing to produce any document, justifying the stance of Joint Venture Partner, however, no document was presented by him.
37. We are conscious of the fact that in the instant matter, the Respondent has not provided any agreement or document which may be used as an evidence for a Joint Venture between Complainant and the Respondent. Further, copy of the award certificates presented by the Respondent during the hearing also strengthens the view that the Respondent was the distributor of the Complainant. In addition, the Complainant also lodged FIR No. 126 of 2019 dated 01 February 2019 under Section 406 and 483 of Pakistan Penal Code, 1860. The Pre-arrest bail of the Proprietor of the Respondent was rejected concurrently by the Court of Sessions, High Court and August Supreme Court of Pakistan. This perhaps is a case, where the distributor after termination of distributorship has started capitalising on the trademarks, association with the manufacturer and the goodwill attached thereof in order to make his own name. While, doing an independent business is not barred, but free riding on someone else intellectual property and good needs to be discouraged. The manufacturers enter into distribution arrangements for multiple reason, the broader ones are listed below:



JA ————— S ————— b

- (a) **Administrative Savings:** *The core business practice of a manufacturer is to make and package products. A distributor becomes the sales arm of the manufacturer for which they do not have to invest independently. By using distribution, the manufactures are able to reach a mass audience of retail outlets without having to invest any of their own company money into developing and maintaining that business network.*
- (b) **Customer Exposure:** *One of the key functions of a distributor is to grow and administer a network of viable retail outlets. Many distributors also offer specialized retailers that can reach a specific target audience. When manufacturer use a distributor, they are able to get their product out to a mass market to expand their customer exposure, or they can reach a specialty target audience without having to do any of the necessary market research.*
- (c) **Market Research:** *Distributors deal with retail clients on a regular basis, and those retail clients sell to end users. If a manufacturer wants to do market research on a current product or get input on new ideas on which they are working, a distributor can collect that information for the manufacturer directly from end users. This allows the manufacturer to utilize a distributor's large network of retail clients to keep updated on customer preferences.*
- (d) **Expansion:** *Distributors present a ready-made audience of retail clients in any market for a manufacturer that is looking to expand its product reach. For example, if a manufacturer company has decided to try and compete in another country's market, they can find an international distributor that will find a network of international retail outlets and give the manufacturer the information they need on what kind of product features the international audience would prefer.*

38. However, in the instant matter, it is an alarming situation for any manufacturer that after termination of distribution arrangement the distributor might go rouge and start free riding on the trademark, trade names and goodwill of the manufacturer. This conduct is deplorable.



39. In addition, the Respondent has also made similar claims with respect to its products in the revised brochures which are reproduced in Paragraphs 24-26, in this regard, the Respondent was also asked about the justification and documents to substantiate and provide a basis for the claims. However, no evidence of any nature was provided by the Respondent in this regard too. At this point, we deem it appropriate to refer to one of our earlier decision where both the Complainant and the Respondent were operating in the same relevant market providing similar kind of goods i.e. **In the matter of Show Cause Notice issued to M/s Tara Crop Sciences (Private) Limited, 2016 CLD 105,**

*44. Section 10 (2) (b) of the Act provides that the distribution of false or misleading information to consumers, including the 'distribution of information lacking a reasonable basis related to the price, character, method or place of production, suitability for use or quality of goods' constitutes a deceptive marketing practice, use of which amounts to a violation of Section 10(1) of the Act.*

*45. This provision relates clearly to consumer protection and unlike Section 10 (2) (a) of the Act does not require the potential of harm to be actionable. Any dissemination of false or misleading information to consumers lacking reasonable basis constitutes a violation under the Act. The definitions of 'false' and 'misleading' have both been provided above in paragraph 22 and as regards the types of information, it has been held in the Order **In The Matter Of Show Cause Notices Issued To Askari Bank Ltd, United Bank Ltd. Mv Bank Ltd & Habib Bank Ltd. ('Banks Order')** that the list of examples of false or misleading information to consumers is 'by no means exhaustive and does not preclude the possibility of a violation of Section 10 in instances other than that stated'. Lastly, a 'consumer' under the Act has been held in the Zong Order to be the*

*'ordinary consumer' who is the usual common or foreseeable user or buyer of the product. Such a consumer*

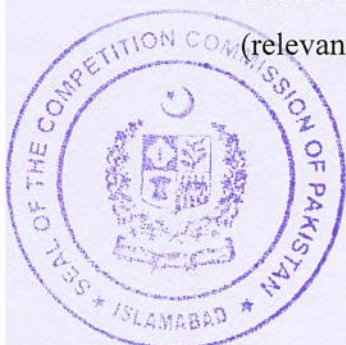


*[Handwritten signature]*

*need not necessarily be restricted to the end user. Here if it may be relevant to point out that the concept evolved under contract law. Unlike the 'ordinary prudent man' the thrust on ordinary diligence, caution duty or care and ability to mitigate (possible inquiries) on the part of the consumers would not be considered relevant factors."*

40. Taking guidance from the above decision, and reviewing the facts and evidence available in the matter, the ordinary consumers being targeted by the Respondent through its marketing practices are normal and ordinary persons. The overall market in which both parties operate is that of water tanks. While, the Complainant is in the business of providing the products under its registered trademark and trade name i.e. 'SUPER TUFF' and 'POLYCON', respectively, the Respondent is using the name of the Complainant without authorization. The information used on the brochure of the Respondent is not just misleading but also false with reference to Respondent's affiliation with the Complainant, the place of production of the goods, the suitability for use and the quality of the goods being sold under the trademark of complainant by the Respondent fraudulently.
41. In addition to the above, the similarities highlighted in Paragraphs 23 to 25 clearly shows that various claims such as "*The Only Food Grade Tank in Pakistan*", "*Long Life Reasonable Price*", "*Capacity Embossed*" (In English and Urdu), "*Khareeday Waqt Super Tuff (Super Power Tuff by the Respondent) Ka Kuninda Shuda Trademark Zarur Daikhain*" have all been copied directly by the Respondent from the Complainant's brochure. Moreover, the tag, "*Since 1986*" has been printed on the Respondent's brochure, however, 1986 is the year in which actually the Complainant was established. Firm name of the Respondent "**ITC**" on the brochures proves that the brochures belong to the Respondent. Not only that, the Respondent astonishingly went one step further and printed in Urdu on its brochure "*Naqalon say Hoshiaar (be careful of the counterfeiters)*", a warning to the consumer to beware of counterfeiters which is absolutely ridiculous. The text is in exact same color scheme and font, which makes its actions further deceptive

(relevant brochure are reproduced above)



42. Our considered view for the purposes of Section 10(2)(b) of the Act, it is sufficient that information is being provided to the consumer which is capable of leading customers to believe that the goods available at the shop have an association, quality or endorsement which belongs or would belong to the goods associated with those of the Complainant, leading to errors of judgment and conduct. Hence, we are constrained to hold that the Respondent has violated the provisions of Section 10(2)(b) of the Act by providing false and misleading information through its marketing material to the consumers with reference to the character, method or place of production, properties, suitability for use or quality of the goods.

***Whether the Respondent has violated the provisions of Section 10(2)(a) by distributing false or misleading information capable of harming the business interest of another undertaking, in particular, complainant?***

43. With reference to the third limb, a violation of Section 10(2)(a) occurs where the Respondent is found (i). *Disseminating false or misleading information to the consumers, and (ii). The information so disseminated is capable of harming the business interest of other undertakings.*

44. It is only after the satisfaction of both the above elements that a violation of Section 10(2)(a) can be made out. The terms ‘false’ or ‘misleading’ information have previously been defined **In the matter of China Mobile Pak Limited and Pakistan Telecom Mobile Limited** reported as **2010 CLD 1478** and have been referred in Paragraph 34 of this Order. The term ‘Business interest’, not being a term of art, has not been defined exhaustively either in the Act or in any of our earlier Orders. The Commission has however, **In the Matter of Show Cause Notice issued to M/s Jotun (Private) Limited, 2015 CLD 1638**, briefly touched upon the definition of the term by considering the ‘image, goodwill and sales’ of an undertaking as its business interests. The concept of goodwill has also been discussed previously by the Commission in one of its earlier Orders i.e. **in the Matter of Show Cause Notices issued for violation of trademark of DHL, 2013 CLD 1014** – referred in Paragraph 22 of this Order.

45. Foregoing in view, we would like to refer to one of our earlier order with reference to the information being capable of harming the business interest of other undertakings i.e. **In**



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**the matter of Show Cause Notice issued to M/s Shainal Al-Syed Foods**, reported as **2018 CLD 1115**, wherein it was held that:

44. *With respect to the term “business interest” in clause (a) of subsection (2) of Section 10 of the Act, the Commission observed **in the matter of Violation of Trade Mark of M/S. DHL Pakistan (Pvt.) Ltd** reported as **2013 CLD 1014** that, ‘it is important to recognize that part of any business’ identity is the goodwill it has established with consumers, while part of a product’s identity is the reputation it has earned for quality and value’.*
45. *As per the ruling laid down by the Commission in the **2016 CLD 1128**, “in the event that there exists a contravention of Section 10(2)(d) by an undertaking, a concurrent violation of Section 10(2)(a) is also made out”. Furthermore, as established above, copycat packaging, being a practice that falls within the ambit of clause (d) of subsection (2) of Section 10 of the Act, in itself also amounts to the dissemination of misleading information to the public as it amounts to an unfair and deceptive trading practice. The unavoidable consequence of the dissemination of such information is that it is capable of harming the business interest of and resulting in a serious injury to competitors whose product packaging and labelling has been copied in terms of the goodwill that the competitor has established in the market and reputation it has earned for the quality of its product. It is also placed on record that clause (a) of subsection (2) of Section 10 of the Act has a much broader scope than clauses (b) & (d) of subsection (2) of Section 10 of the Act and therefore, a contravention of clauses (b) & (d) of subsection (2) of Section 10 of the Act will almost in every circumstance lead to a consequent contravention of clause (a) of subsection (2) of Section 10 of the Act, unless there exist exceptional circumstances in a particular case that warrant otherwise.*



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

46. As has been discussed in first and second limb of the main issue, the Respondent has engaged itself in fraudulent use of trademark in violation of Section 10(2)(d) of the Act and is also disseminating false and misleading information in violation of Section 10(2)(b) of the Act. We are constrained to hold in view of the above that dissemination of the above information is capable of harming the business interest of the Complainant; as both the Complainant as well as the Respondent operate in the same market and cater to largely the same category of consumers We also find that the use of the same trademark ,trade name and brand by the Respondent, identical to that of the Complainant, is capable of misleading consumers into creating both negative and positive associations between the two undertakings which do not in fact exist. Consumers relying on their experience with the Complainant's products may be swayed into purchasing the Respondent's products solely on the basis of the association created in their minds through the use of the same trademarks and tradenames by the Respondent. This amounts to the Respondent's free-riding on the Complainant's reputation. Similarly, Consumers having a negative experience with the Respondent's products may not only be dissuaded from purchasing the Complainant's products resulting in direct harm to sales and revenue, but also, can result in damage to the Complainant's brand, image, reputation, goodwill, and value, all of which are elements of business interests. Therefore, we are constrained to hold that the Respondent has also violation the provisions of Section 10(2)(a) of the Act.

47. The crux of the above deliberations is that the Respondent's conduct of fraudulently using the trademark and tradename of the Complainant, disseminating false and misleading information with reference to to the character, method or place of production, properties, suitability for use or quality of the goods and dissemination of such information being



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capable of harming the business interest of other undertakings, including the Complainant, is violative of Section 10 of the Act.

### REMEDIES & PENALTY

48. In the instant matter, we encountered a strange scenarios, where a distributor/franchisor (Respondent) whose contract is terminated owing to his own fault i.e. non-payment of dues, resorted to free riding on the trademark, tradename and patented products of the Manufacturer (Complainant) and, thereafter, falsely claimed to be the Joint Venture Partner. Such is an alarming state of affairs and if such conduct is not dealt with appropriately then every manufacture would be under a fear of being exploited by their dealers/franchisors.
49. At the same time we cannot ignore that facts that in the instant matter no agreement was executed by the Parties i.e. Complainant and the Respondent, perhaps, due to absence of any written agreement, the Respondent took the false impression of being a Joint Venture Partner. All the undertakings doing business, must put their relationship in writing, as failure may result in violation of law. We, in this regard, are guided by the primary source of law i.e. Al-Quran and we refer to the Al-Baqarah; 2:282:

#### Arabic:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدِينٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْب كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسْ مِنْهُ شَيْئًا فَإِن كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَنْ يُمِلَّ هُوَ فَلْيُمْلِلْ وَلِيُّهُ بِالْعَدْلِ وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِن لَّمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَن تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ وَلَا يَأْب الشُّهَدَاءُ إِذَا مَا دُعُوا وَلَا تَسْأَمُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلِهِ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَىٰ أَلَّا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ وَلَا يُضَارَّ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ تَفَعَّلُوا فَإِنَّهُ فَسُوقٌ بِكُمْ وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ



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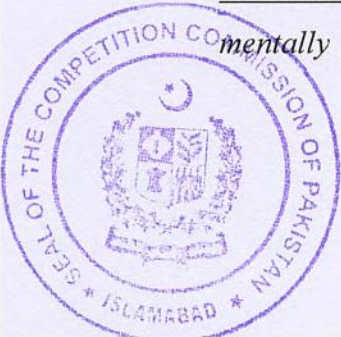


### Urdu Translation:

اے ایمان والو! جب تم کسی مقررہ مدت تک کے لئے آپس میں قرض کا معاملہ کرو تو اسے لکھ لیا کرو، اور تمہارے درمیان جو لکھنے والا ہو اسے چاہئے کہ انصاف کے ساتھ لکھے اور لکھنے والا لکھنے سے انکار نہ کرے جیسا کہ اسے اللہ نے لکھنا سکھایا ہے، پس وہ لکھ دے (یعنی شرع اور ملکی دستور کے مطابق وثیقہ نویسی کا حق پوری دیانت سے ادا کرے)، اور مضمون وہ شخص لکھوائے جس کے ذمہ حق (یعنی قرض) ہو اور اسے چاہئے کہ اللہ سے ڈرے جو اس کا پروردگار ہے اور اس (زر قرض) میں سے (لکھواتے وقت) کچھ بھی کمی نہ کرے، پھر اگر وہ شخص جس کے ذمہ حق واجب ہوا ہے ناسمجھ یا ناتواں ہو یا خود مضمون لکھوانے کی صلاحیت نہ رکھتا ہو تو اس کے کارندے کو چاہئے کہ وہ انصاف کے ساتھ لکھوا دے، اور اپنے لوگوں میں سے دو مردوں کو گواہ بنا لو، پھر اگر دونوں مرد میسر نہ ہوں تو ایک مرد اور دو عورتیں ہوں (یہ) ان لوگوں میں سے ہوں جنہیں تم گواہی کے لئے پسند کرتے ہو (یعنی قابل اعتماد سمجھتے ہو) تاکہ ان دو میں سے ایک عورت بھول جائے تو اس ایک کو دوسری یاد دلا دے، اور گواہوں کو جب بھی (گواہی کے لئے) بلایا جائے وہ انکار نہ کریں، اور معاملہ چھوٹا ہو یا بڑا اسے اپنی میعاد تک لکھ رکھنے میں اکتایا نہ کرو، یہ تمہارا دستاویز تیار کر لینا اللہ کے نزدیک زیادہ قرین انصاف ہے اور گواہی کے لئے مضبوط تر اور یہ اس کے بھی قریب تر ہے کہ تم شک میں مبتلا نہ ہو سوائے اس کے کہ دست بدست ایسی تجارت ہو جس کا لین دین تم آپس میں کرتے رہتے ہو تو تم پر اس کے نہ لکھنے کا کوئی گناہ نہیں، اور جب بھی آپس میں خرید و فروخت کرو تو گواہ بنا لیا کرو، اور نہ لکھنے والے کو نقصان پہنچایا جائے اور نہ گواہ کو، اور اگر تم نے ایسا کیا تو یہ تمہاری حکم شکنی ہوگی، اور اللہ سے ڈرتے رہو، اور اللہ تمہیں (معاملات کی) تعلیم دیتا ہے اور اللہ ہر چیز کا خوب جاننے والا ہے

### English Translation:

*O believers! Whenever you strike deals with one another for a fixed period, reduce the transaction to writing. And the scribe amongst you should write it with justice, and should not refuse to write as Allah has taught him to write. So he should write (i.e., meet the requirements of documentation with utmost honesty, in accordance with Islamic law). And he on whom the liability (i.e., debt) falls should dictate the contents of the contract. And he should fear Allah, Who is his Sustainer, and (whilst writing) he should not diminish anything (from the indebted sum). Then if he who has undertaken the liability is mentally deficient or physically weak or lacks the ability to dictate the contents, his*



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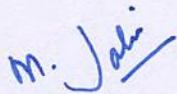
*guardian should dictate with fairness. And get two witnesses out of your own men. But if two men are not available, then a man and two women: (they) should be from amongst those whom you like as witnesses (i.e., consider trustworthy), so that if either of the two women forgets, the other may remind her. And the witnesses should not refuse whenever they are called (for evidence). And do not be weary of writing it down for its term, whether the transaction is small or large. This documentation by you is more just in the sight of Allah, and makes evidence more solid and nearer to keeping you from doubt, except that if transactions are hand-to-hand which you carry out amongst yourselves, then there is no sin on you if you do not write it down. And take witnesses whenever you bargain amongst yourselves. And let no harm be done to either the scribe or the witness, but if you do so, it will be sheer disobedience on your part. And keep fearing Allah. And Allah grants you knowledge (of the principles of mutual dealing) and Allah knows everything well.*

50. From the above guidance given by Almighty Allah in the Holy Quran, we are of the firm view, that every agreement, unless reduced in writing in the context explained in the aforesaid verse would create confusion and may result in infringement of rights and violations of law, like in the instant case.
51. It is evident from the facts and materials available on record that the Respondent is not using the trademark of the Complainant and has also given the commitment before us not to use any similar trademark or trade name. We also cannot ignore the fact that the Complainant also failed to execute any agreement in the instant matter which may have defined the relationship between the parties with precision. Therefore, we are inclined to impose a penalty which may not result in persuading the Respondent from exiting the market and go bankrupt. Accordingly, in the facts and circumstances of the matter, we are constrained to impose a penalty to the tune of PKR 5,000,000/- (Rupees Five Million Only) on the Respondent for violating the provisions of Section 10 of the Act. The Respondent is directed to deposit the aforesaid penalty with the Registrar of the Commission within sixty (60) days of receipt of this Order, failing which the Office of Registrar is directed to proceed under Section 38(5) of the Act.

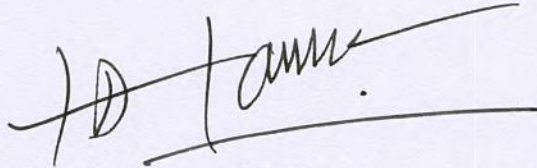


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52. The Respondent is hereby reprimanded to ensure responsible behavior in future with respect to the marketing of their business and is directed to cease and desist from the using the trademark, tradename and products of the Complainant or to claim any kind of association with the Complainant in the absence of any proof or document. The Respondent is directed to ensure that its products are packaged in a manner that is distinct in its overall layout, design, shape, size, language and color scheme so as to be easily distinguishable from the products of the Complainant. The Respondents are also directed to file, within sixty (60) days from the date of this Order, the compliance report with the Registrar of the Commission reporting compliance with this Order, ensuring future compliance and non-contravention with any provision of the Act, in particular Section 10 of the Act with respect to the subject matter. In case the violation of this Order continues, it is then warranted that Respondent shall be made further liable under sub-section (3) of Section 38 of the Act to pay an additional penalty amounting to Rs. 500,000/- (Rupees Five Hundred Thousand Only), per day from the date of such violation.
53. In terms of the above, Show Cause Notice No. 34 of 2019 dated 30 September 2019 is hereby disposed of.



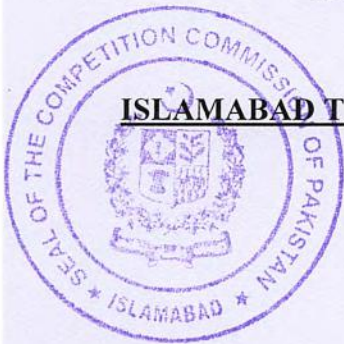
(Dr. Muhammad Saleem)  
*Member*



(Dr. Shahzad Ansar)  
*Member*



(Ms. Bushra Naz Malik)  
*Member*



**ISLAMABAD THE 24<sup>th</sup> DAY OF DECEMBER 2019.**