BEFORE THE COMPETITION COMMISSION OF PAKISTAN

In the Matter of Show Cause Notice Issued to

M/s Reckitt Benckiser Pakistan Ltd

On the Complaint Filed By

M/s Square Distribution & Marketing System (Pvt) Limited

(File No. 332/R&B/OFT/CCP/2018)

Dates of Hearings	27 August 2020 4 September 2020
Adjudicating Members	Ms. Rahat Kaunain Hassan **Chairperson** Ms. Bushra Naz Malik **Member**
Present	
For Complainant	**Barrister Walid Iqbal** Wasif Majeed Malik, Advocate
For Respondent	**Barrister Harron Iqbal Dugal** Ms. Zara Khalid (Head of Legal) Mr. Mohsin Hameed (R&D Associated-Health)

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ORDER

1. This Order shall dispose of proceeding initiated pursuant to Show Cause Notice No.33 dated 27.08.2019 (hereinafter referred to as 'SCN') issued to M/s Reckitt Benckiser Pakistan Limited (hereinafter referred to as the 'Respondent') for prima facie violation of Section 10 of the Competition Act. 2010 (hereinafter referred to as the 'Act').

2. The Competition Commission of Pakistan (the 'Commission') received a complaint from M/s Square Distribution & Marketing System (Pvt) Limited (hereinafter referred to as the 'Complainant') alleging that the Respondent has indulged in deceptive marketing practices in violation of Section 10 of the Act by making various claims with respect to its product 'Strepsils' (the 'Product').

FACTUAL BACKGROUND

A. Complaint, Enquiry and SCN:

3. The Complainant, who is a distributor of medicinal products, alleged in its complaint that the Respondent has been engaged in dissemination of false and misleading information to the consumer by creating an impression of its product 'Strepsils' as a drug for sore throat and cough through advertisement commercials and sale of the Product. It has been submitted that for decades, the Product has been a well-known trademark known in Pakistan as a drug for curing throat ailments and consumers will continue to associate it with a 'drug' for curing the same. The Product was acquired in 2005 from Boots and at that time, it was registered as a pharmaceutical product or drug. However, the Respondent, upon acquisition, de-registered it as a drug but re-launched the Product with disclaimer 'Non-medicated Lozenges' without the pharmaceutical ingredient. According to the Complainant, the Respondent left the use of the medicinal ingredient in the Product but made no effort to educate and inform the consumer regarding the discontinuation of medicinal ingredient in it. Till date, the Respondent has been representing, packing, advertising, marketing, distributing and selling the Product in the same manner as if it is a drug.

4. The following claims made by the Respondent were alleged to be false/misleading by the Complainant:

   i. *"Karain gallay ki khich khich door" (From a television advertisement)*
   ii. *"Instant Relief—No itching, No scratching while you sing"*
   iii. *"Quick relief, Melodious voice!"*
   iv. *"Suffering during cold and flu? Use Strepsils to provide effective relief from sore throat"*
   v. *Having a sore throat and still wanna have ice cream? Try this"*

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vi. *"Soothes in less than 10 seconds"*

vii. *"Searching for a solution for your sore throat? Search no more"*

viii. *"Ab gallay ki kharish ko kero Bye Bye!"*

ix. *"Want to have mint that cures sore throat? Strepsils cool is the one for you"*

(Reference can be made to para 5.20, at page 17 of ER)

5. Furthermore, the Complainant also alleged that the Product is a kind of sweet/candy which is not manufactured and packaged by the Respondent itself. Instead, it is manufactured by a confectionary brand 'Candy Land" which belongs to Ismail Industries Limited. The Complainant alleged that the Respondent's failure to disclose such change in formulation, as well as the new status of the Product and its manufacturing by a third party, amounts to distributing misleading information to the consumer. Not only that, the Respondent is also alleged to have failed to mention sales tax on the packaging which would otherwise be mentioned on the food product, hence, giving the impression that the Product is exempted from sales tax for being a pharmaceutical drug within the meaning of the Drug Act, 1976.

6. Briefly, the legal grounds taken by the Complainant are:

- The Complainant has relied upon Commission's decision in the case of Proctor and Gamble Pakistan Limited 2010 CLD 1695 wherein it is observed that misleading information includes any information which is *capable* of giving the wrong impression or idea, is likely to lead to an error of conduct, thought or judgement, or which tends to misinform or misguide the consumer.
- The express and implied claims made by the Respondent in the advertisements and the overall general net impression created by such advertisements/marketing and positioning of the product in the mind of an 'ordinary consumer' is that the product is a medicinal product capable of providing instant relief.
- The continued use of the same brand 'Strepsils', after de-registering it as a drug and removing the medicinal ingredient but claiming the same efficacy without publicizing the removal of the medicinal ingredient is a deceptive omission and the omission is wilful. Reliance was placed on Commission's 'Zong Order' that "*the term consumer has to be construed liberally in the widest sense that unlike the ordinary prudent man the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquires) on the part of the consumer would not be considered relevant factors when looking at deceptive commercial practices.*"
- Throat Lozenges require mandatory enlistment under alternative medicine and health product (Enlistment Rules 2014).
- The Respondent, through its conduct both omission and commission, has resorted to deceptive marketing practice.

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- With reference to the disclaimer, the print on the box is negligible; it is only the box, not on each strip and points of sale are pharmacies where it is placed with other alternative over the counter drugs. Also importantly the Product is sold worldwide as a drug but not in Pakistan.

7. After reviewing content of the Complaint along with advertisement and claims made therein, the Commission initiated an enquiry under Section 37(2) of the Act and constituted an Enquiry Committee which concluded its Enquiry Report on 29.06.2019 (hereinafter referred to as the 'ER') in the following words:

> *"5.67. The above discussion clearly establishes that the marketing campaign of the Respondent appears to be, prima facie, deceptive in terms of Section 10 of the Act in general, read with sub-section 10(2)(b) of the Act which prohibits distribution of false and misleading information to consumers, including the distribution of information lacking reasonable basis, related to the character, properties, quality and suitability for use of a product.*
>
> *7.68. Moreover, various comments were made underneath on different posts of the Respondent also demonstrate that the public was actually deceived into perceiving that the Respondent's product was still a medicated sore throat remedy. Therefore, the Respondent's misleading campaign is also capable of harming the business interests of other undertakings in, prima facie, violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act."*

8. Subsequent to findings of the ER, the Commission issued a SCN to the Respondent under Section 30 of the Act and afforded the opportunity of hearings to the parties. The relevant portion of the SCN is reproduced herein below:

> *"**4. WHEREAS**, in terms of the Enquiry Report in general and paragraph 2.1 to 2.24, it has been alleged by the Complainant that Undertaking resorted to distribution of false and misleading information and/or withholding of material information related to its product 'Strepsils', prima facie, constitutes violation of Section 10(1) of the Act; and*
>
> ***5. WHEREAS**, in terms of the Enquiry Report in general and paragraph 5.29 to 5.67 in particular, it appears that the undertaking claims are deceptive and misleading lacking reasonable basis related to character, method of production, properties, quality and suitability of use of its product 'Strepsils', which, in prima facie, violation of Section 10(1), in terms of Section 10(2)(b) of the act; and*

*6. **WHEREAS**, in terms of Enquiry Report in general and paragraph 5.29 to 5.68 in particular, it appears that the undertaking's misleading campaign is also 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;"*

B. Written Reply and Arguments:

9. In its written reply, the Respondent primarily challenged the maintainability of the complaint. Its submissions are briefly:

    - No deceptive marketing or violation of Section 10 of the Act has been committed.
    - The Product and all its variants clearly indicate in a legible font that the same are non-medicated lozenges.
    - The Complainant has no *locus standi* and has approached the Commission with unclean hands. The Complaint is based on false and misleading facts to harass the Respondent.
    - The business of Complainant and Respondent are inherently different and Complainant's product i.e. Dr. Koff syrup is not a competing product.
    - It is against established principles of justice, the spirit of the Act and Article 18 of the Constitution to allow other undertakings to curtail the advancement of the business of the Respondent on the basis of an unsubstantiated complaint. The complaint is an attempt to drive the Respondent out of market in order to capture its market share.

10. It was asserted that the product of the Respondent i.e. 'Strepsils' and products distributed by the Complainant i.e. 'Dr. Koff syrup' fall in two distinct relevant markets; the former being a non-medicinal item, whereas the latter being a medicinal pharmaceutical drug. Therefore, no harm can be deemed to have been done to the business interests of the Complainant. It was further asserted that the product of the Respondent is over the counter lozenges that may supress cough for a limited time period but cannot by any stretch of imagination cure a sore throat. A consumer suffering from a sore throat would not buy 'Strepsils' to cure his ailment; he would use prescription cough syrup recommended by a doctor. However, it was argued, that the Enquiry Committee failed to consider this aspect of non-substitutability of the two products.

11. Furthermore, the Respondent also challenged the course adopted by the Enquiry Committee to determine the over-all net impression of its marketing campaign and incorrectly stating that the claims advertised give an impression of being therapeutic claims for sore throat. The Respondent not only denied making therapeutic claims, but also denied its failure to disclose discontinuation of medicinal ingredients on packaging of the Product. It asserted that the disclaimer '*Non-medicated Lozenges*' is duly printed on the packaging, therefore, no element of deception or misleading information can be said to have been communicated to the consumers.

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12. Moreover, the Respondent also challenged the standard of 'ordinary consumer' adopted by the Enquiry Committee and argued that international agencies have adopted the standard of 'reasonable consumer', which refers to how a reasonable consumer would behave in response to an advertisement. It was asserted that since the disclaimer is printed on the packaging a reasonable consumer is not likely to get deceived by the alleged advertisement. Even if the standard of 'ordinary consumer' is adopted, the Respondent argued, neither the alleged advertisements nor its packaging is capable of creating an impression that the Product is a medicine. Therefore, it denied that any omission on its part would be misleading and deceptive for the consumer.

ISSUES

i. Whether the complaint is maintainable?
ii. Whether the alleged claims are false or misleading within the meanings of Section 10(2)(b) of the Act?
iii. Whether the alleged claims are capable of harming business interest of the Complainant or other businesses within the meanings of Section 10(2)(a) of the Act?

ANALYSIS

Issue No. i: Whether the complaint is maintainable?

13. The Respondent argued that the Complainant has no *locus standi* to file the complaint against it since both parties are neither competitors *inter se*, nor do their products fall in the same relevant market. Hence, the complaint is argued to be non-maintainable. We are not in agreement with the Respondent in this regard for the simple reason that cases involving deceptive marketing practices are not dependent on the determination of relevant market or competing undertakings. We would like to reproduce here Section 10 of the Act:

> ***10.Deceptive Marketing Practices***--- *(1) No undertaking shall enter into deceptive marketing practices.*
>
> *(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if any Undertaking resorts to...*
>
> *(a) the distribution of false or misleading information that is capable of harming business interests of another undertaking;*
>
> *(b) the distribution of false or misleading information to consumers, including the distribution of information lacking reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;*

(c) false or misleading comparison of goods in the process of advertising; or

(d) fraudulent use of another's trademark, firm name, or product labelling or packaging"

14. As evident from of the above Section, there is no requirement of identification or establishment of 'relevant market'. We do appreciate that during the hearing the counsel for Respondent did not press this point as in light of the definition of an undertaking under the Act, it means '*any natural or legal person, government body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings*'. As per Section 37(2) of the Act, complaints can be received from any undertaking or association of undertakings. No such ground before the Bench was pressed by the Respondent that the Complainant is not an undertaking. It is an admitted fact that both the parties are involved in economic activity by selling/distribution of consumer products and are undertakings within the meanings of Section 2(1)(q) of the Act. The Complaint was also duly filed under Regulation 17 & 18 of Competition Commission (General Enforcement) Regulations, 2007. We cannot read in law i.e. the Act, any additional requirements for the Complainant either to be a competitor of the Product and/or the relevance or pre-requisite of the relevant market for invoking provisions of Section 10 of the Act.

Issue No. ii: Whether the alleged claims are false or misleading within the meanings of Section 10(2)(b) of the Act?

15. As per Section 10 of the Act, deceptive marketing practice is deemed to have existed if there is distribution of false or misleading information. We refer to the aforesaid reproduced Section 10 of the Act.

16. As relied upon by the Complainant, we are guided by the Commission's earlier decision in **China Mobile Company Case reported as 2010 CLD 1478 (Zong Order)** wherein the Commission elaborated distinguishing features of false and misleading information in the following words:

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

Misleading Information: "may essentially include oral or written statements or representations that are: (a) capable of giving wrong impression or idea,

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(b) likely to lead into error of conduct or judgment, (c) tend 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"

17. We are also guided by the above referred decision that a complete advertisement is to be looked at while evaluating its misleading or false nature and opinion is to be made on the net general impression conveyed by the alleged advertisements. Keeping the same in view, we shall determine whether the alleged claims are actually deceptive in nature for being false or misleading.

18. We now proceed to examine the ER which has found alleged claims in contravention of Section 10 of the Act. The ER primarily relied on and analysed images of the product packaging which are given below;

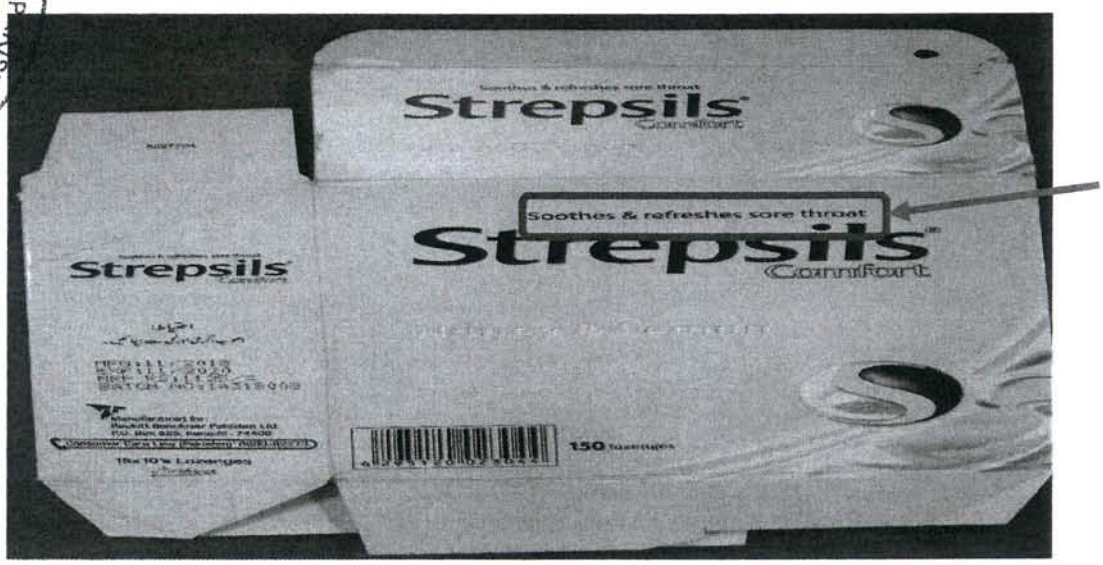

Figure 1 (at page 19 of ER)

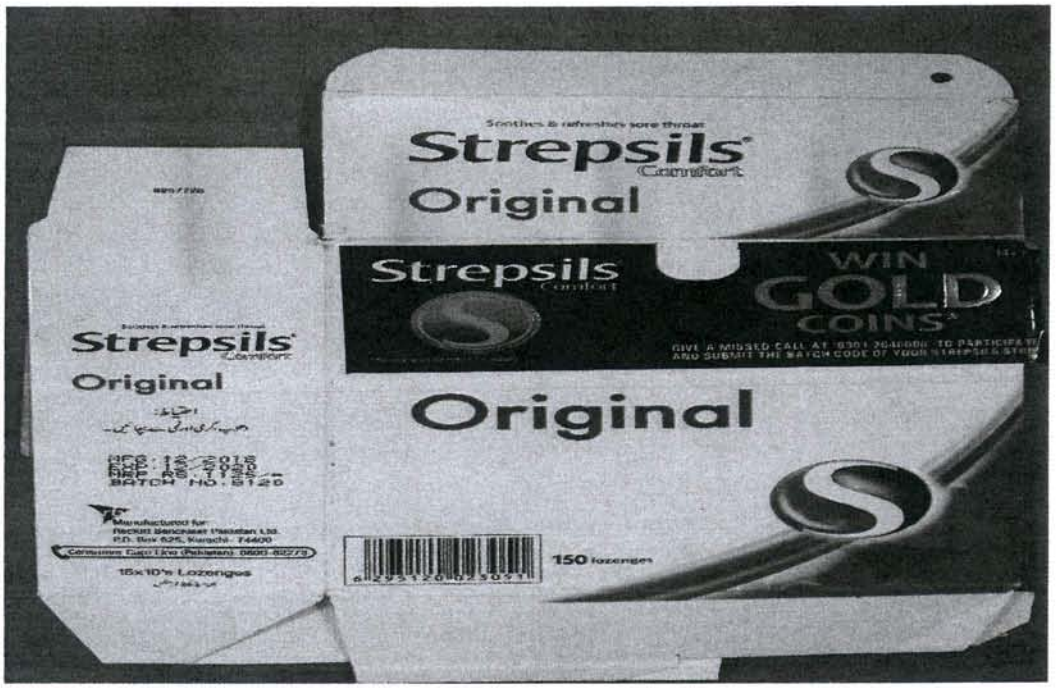

Figure 2 (at page 20 of ER)

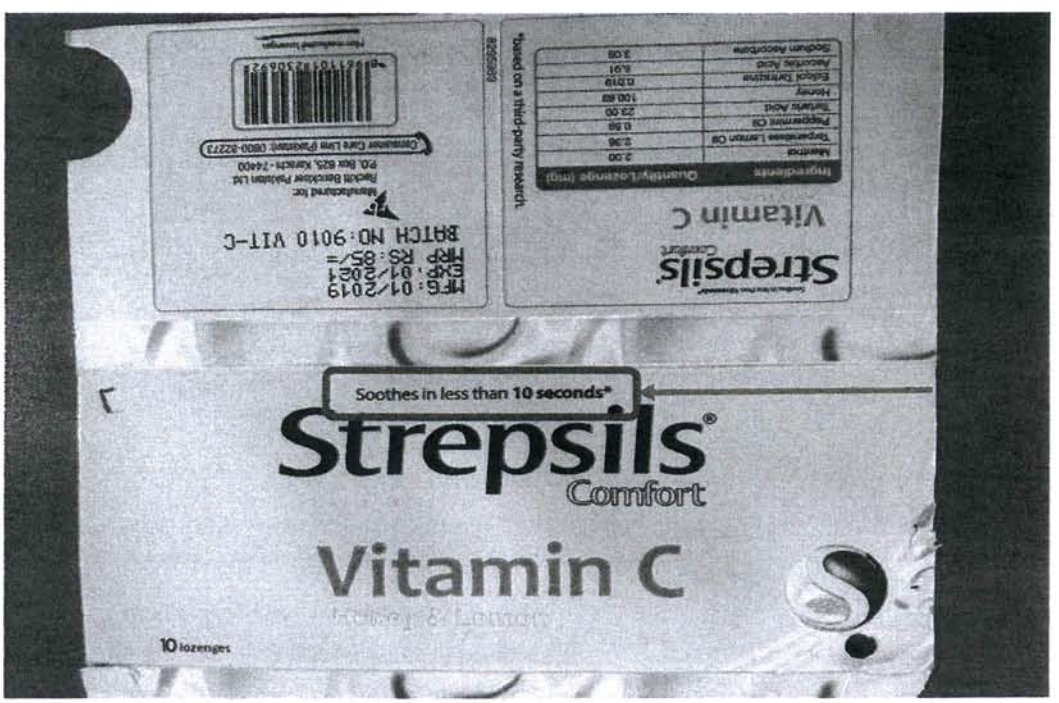

Figure 3 (at page 20 of ER)

19. As per the ER, the two claims deliberated upon were "*Soothes and Refreshes Sore Throat*" and "*Soothes in less than 10 seconds*". As for the former claim the Respondent maintains it is not therapeutic in nature instead provides symptomatic relief for sore throat. On the other hand, the ER has found these claims therapeutic in nature under the Drug Act, 1976 for relaying an impression of mitigating the disease. As for the claim "Soothes in less than 10 seconds" is concerned the ER

has found the same not deceptive in nature. Even, if we agree with the ER in this regard to the extent being analysed in isolation, we would prefer to analyse this along with the adequacy of disclaimer/disclosure regarding the change in character of the Product from medicated to Non-medicated the product. In our determination of over-all net general impression, we will not indulge in the debate to determine whether the claim is therapeutic or not. It is perhaps for Drug Regulatory Authority of Pakistan (DRAP) or the authority concerned that has barred the Respondent to make any such therapeutic claim. Under the Act, we will focus on whether the marketing of the Product is misleading under Section 10 of the Act and, if so, how?

20. During the course of arguments, the Respondent also asserted that the Product is not a drug, instead, it is a food item and the Commission has no jurisdiction to delve into controversy of any regulatory compliance on part of the Respondent.

21. The thrust of the issue before us, as we understand, is that the marketing of the Product allegedly lacks a reasonable basis, in particular, to its character. Earlier it was registered as a drug and despite the removal of medicinal components from it and being de-registered, sufficient disclosure of change in its character has not been made by the Respondent. Accordingly, marketing the Product under the same brand is alleged to have resulted in violation of Section 10 of the Act on part of the Respondent. Therefore, we are of the view that the Commission has jurisdiction to deal with the matter and to analyse whether the alleged marketing practice contains any deceptive element.

22. Brand cultivates affinity, trust and customer loyalty. As commonly understood, branding is a marketing strategy used to differentiate or distinguish products and plays an important role in consumer choices. Branding simplifies shopping of the product, distinguishing familiar from unfamiliar. Therefore, it has a significant role. Here, the change in formula of the Product has changed the character from being a medicine to a non-medicated product. Keeping in view, the history of the brand 'Strepsils' and also the fact that, internationally, it is known and marketed in various jurisdictions as a medicinal product, the disclosure of such fact becomes material for its marketing in Pakistan. The counsel of the Respondent himself argued that the special condition placed by the Ministry of Health was in view of the international reputation of the brand name and that non-medicated lozenges/products sold by other competing entities do not contain any such disclaimer. One cannot deny that one purpose of branding is how the brand owner wants it to be perceived by customers/consumers, and the consistency associated with such brand. A brand is a promise and its premium is encashed by the brand owner for such promise.

23. We also note that it is the trade mark name i.e. Strepsils Throat Guard and Strepsils Comfort that are registered as trademark in classes 5&30 (food & drug respectively) and the trademark 'Strepsils' is not registered in class 30 and continues to be shown in class 5 only. Whereas the trademark name

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in capital letters 'STREPSILS' is registered in both the classes 5&30. Therefore, using the brand name in the manner on the Product where the term Strepsils is used and beneath it the word 'comfort' is used as shown in the in figure below is distinct from STREPSILS COMFORT and does not appear to be without purpose. We find this also to be potentially misleading and deceptive.

24. Coming now to the disclaimer and assertion by the Respondent that the disclaimer "Non-Medicated Lozenges" is duly made on the Product's packaging as per directions of the concerned Ministry and is sufficient to discharge the Respondent from any liability.

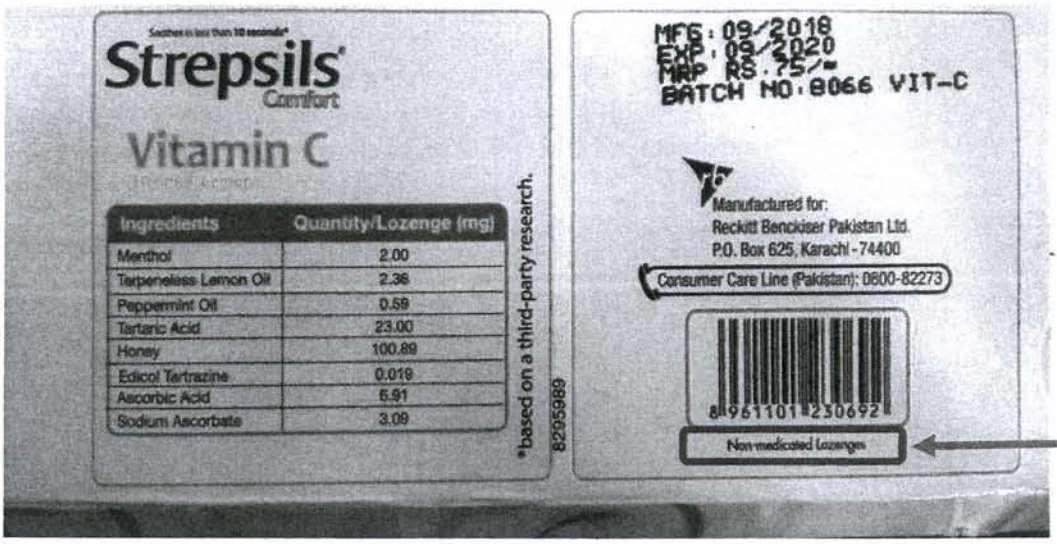

Figure 4 (at page 22 of ER)

25. It can be seen from the images that the disclaimer is made in small font and is not even a part of the packaging. While the Respondent has submitted that due to international reputation of the brand 'Strepsils', the Respondent, after the de-registration of the Product, undertook active efforts to educate the public as well as pharmacists through numerous drives, the fact remains that the Respondent has not been able to substantiate neither before the Enquiry Committee nor this Bench as to how and to what extent efforts have been made to inform the general public about change in the formula.

26. We note that the Enquiry Committee has rightly pointed out the inefficacy of the disclaimer which is only displayed on the box of the Product. As a matter of fact, the Product is usually sold as a single strip/packet, where the disclaimer is not given. Reference can be made to the following images:

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Figure 5 (at page 23 of ER)

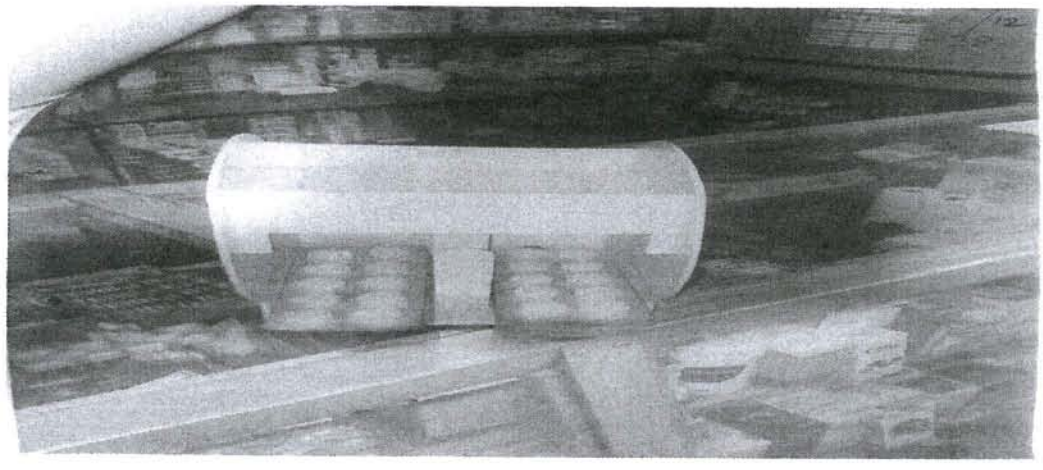

Figure 6 (at page 23 of ER)

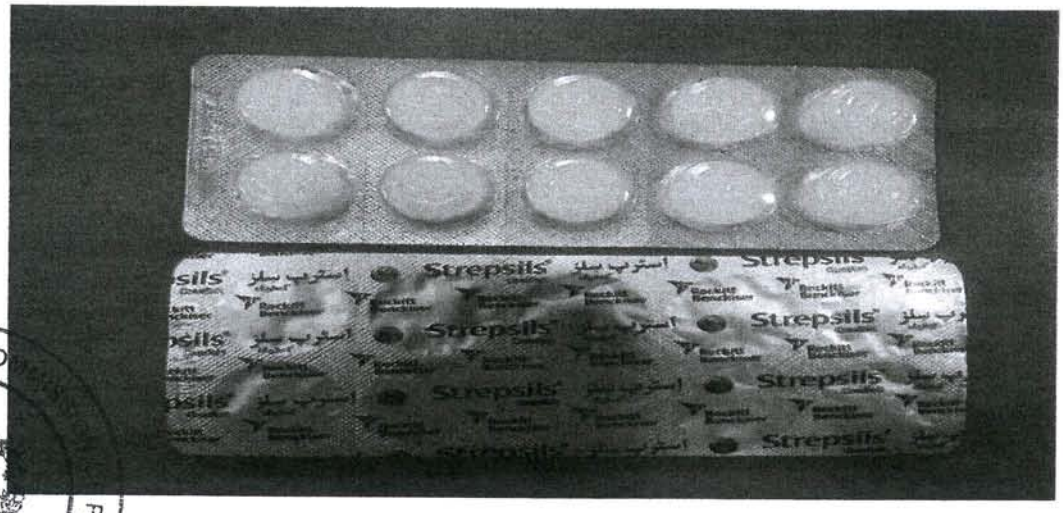

Figure 7 (at page 23 of ER)

Figure 8 (at page 24 of ER)

27. As observed in Commission's Zong Order, it is a settled principle that fine print disclaimers, are inadequate to correct the deceptive impressions. In fact such disclaimers are, in themselves, a deceptive measure. Barely printing 'Non-Medicated Lozenges' on the product box and that too in a very small font does not discharge the onus of making due and sufficient disclosures of such material change in the character of the Product. Also, as pointed out, it is relevant to note that the strips in the box of the said product are also sold separately and do not bear any such disclosure. We are, therefore, inclined to agree with the findings of the ER that the Respondent has not acted with due diligence and failed to display disclaimers on a conspicuous part of the Product which is tantamount to dissemination of misleading information.

28. We would like to add that the use of term 'Lozenges' with Non-medicated in the disclaimer/disclosure itself is perhaps misleading as per its ordinary dictionary meaning it has been defined as follows:

> *a small usually sweetened and flavored medicated material that is designed to be held in the mouth for slow dissolution especially : one that contains a demulcentsore throat lozenges (https://www.merriam-webster.com/dictionary/lozenge)*
>
> *medicine shaped like a sweet that you suck if you have a cough or sore throat (https://www.macmillandictionary.com/dictionary/british/lozenge)*
>
> *a small, medicated candy intended to be dissolved slowly in the mouth to lubricate and soothe irritated tissues of the throat. (https://medical-dictionary.thefreedictionary.com/Lozenges)*
>
> *a small sweet, often in a lozenge shape, especially one that contains medicine and that you dissolve (= turn to liquid) in your mouth (https://www.oxfordlearnersdictionaries.com/definition/english/lozenge)*

29. Relevant to the preceding paragraph is also the fact that for many decades, the trademark 'Strepsils' has been used in Pakistan and is currently being used internationally as a medicated product containing ingredients such as *2,4-Dichlorobenzyle Alcohol* and *Amylmetacrasol*. Reference can be made the following international packaging of the Product below:

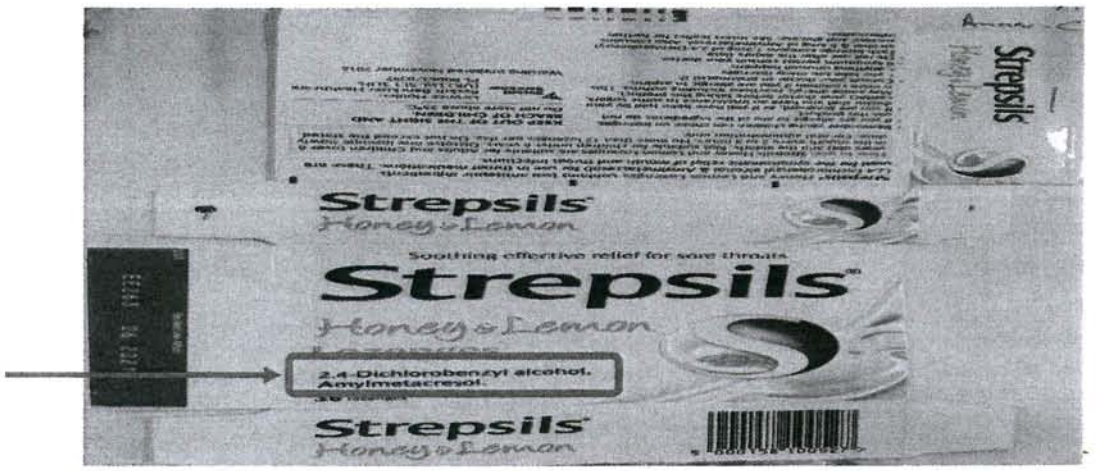

Figure 9 (at page 27 of ER)

30. Long usage of medicated ingredients is likely to create a general impression that the product 'Strepsils' is a medicated product for curing sore throat. Such impression definitely has an effect on the minds of the ordinary consumers in Pakistan where they can be misled regarding perception of the Product and its benefits by equating it to the international prevailing perception of the medicated drug/product. Concerning the Respondent's argument that the local customer does not buy the international product, may not be true and, more importantly, it is of no avail as it is the brand advantage that Respondent is alleged to encash and the Strepsils website also claims 'to be the most sold sore throat medicine in the world'. Also, we are not impressed with the argument that Non-medicated Lozenges are sold in India, China and Turkey without making any disclosure. Even if that is the case; two wrongs do not make a right.

31. The ER limited its scope to the extent of claims printed on product packaging as well as the marketing campaign on the Facebook page or website of the Respondent. Therefore, we are restricting our findings to that extent of the aforesaid sources of marketing and advertisement. Although, exclusion of other annexes/claims attached to the complaint in relation to the marketing of the Product campaign should also have been addressed in the ER. Nonetheless, the requirement of adequate disclaimers and disclosure would be relevant for any/or all claims under the trademark and or brand name 'Strepsils' used by the Respondent.

32. An advertisement is deceptive if it contains false or misleading statement or omits information that is likely to mislead consumers in ordinary circumstances; and is material in that it is important to a consumer's decision to buy or use the product. Examples of material information may include representations about a product's character, performance, features, safety, price, or

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effectiveness and one must recognize that advertisements having claims about health care product or safety and/or having semblance of being viewed as such products would require a higher degree of disclaimer and disclosure.

33. In the given case we find it of material significance and find merit in Complainant's argument that the use of the brand name 'Strepsils' by the Respondent after removal of medicinal ingredient (change in formula) and claiming the same efficacy without publicizing the removal of medicinal ingredient is a deceptive omission.

34. While such conduct i.e. marketing, is indicative of being done with the purpose whatever be the intent, we have no doubt in terming the marketing of the Product as misleading and deceptive. Also, there is merit in the argument that the trademark is misleading in terms of its function and badge of origin. In Hoffman-La Roche [1978] E.C.R 1139, para-7 and Philips Electronics NV v Remington Consumer Products Ltd [2002] ECR1-000, 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*".

35. We are also in agreement with the Complainant that as per the Commission's Zong Case the consumer to whom misleading or false 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. The scope of the term 'consumer' must be construed most liberally and in its widest amplitude*. 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, also be contrary to the intent of law.

36. As observed previously in the Zong case, the OFT's mandate is to oversee and act as a watch dog for misleading and deceptive marketing practices as enumerated in Section 10 of the Act. It aims at paving the way to create consumer awareness with the objective of making markets function better for consumers and to ensure fair dealing in businesses. The focus is on the protection of consumers from deceptive marketing practices to ensure provision of adequate information to enable informed consumer choices.

37. We now take into consideration following images which have been taken from the Respondent's facebook page by the Enquiry Committee:

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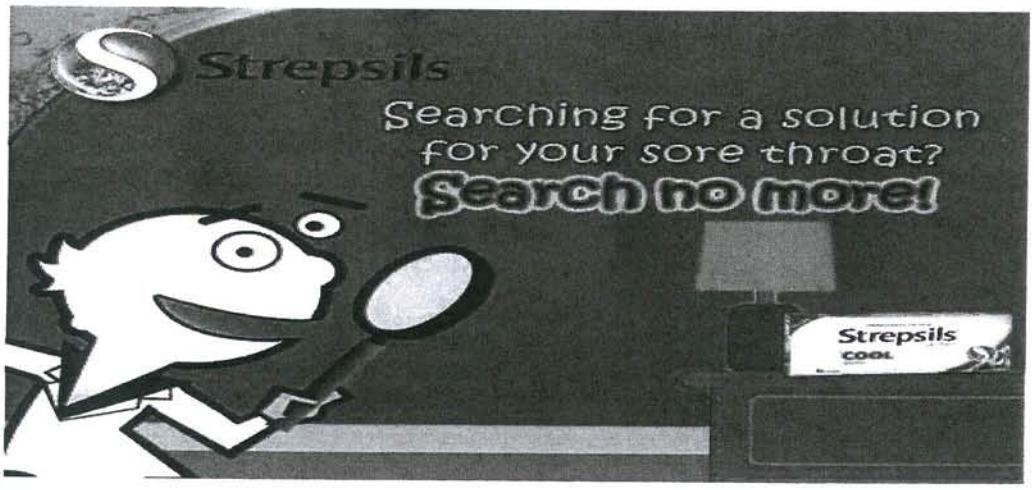

Figure 10 (at page 25 of ER)

Figure 11 (at page 25 of ER)

38. We do not wish to go into the merits of the claim made by the Respondent in its oral and written submissions that 'Strepsils' is only made for suppression of cough providing symptomatic relief and not for curing coughs. This may be possible for a product/substance(s), which may generally be suitable for treating and preventing any particular symptoms or disease. However, it cannot be allowed to be marketed as a medicinal product and perceived as such by an ordinary consumer. What is relevant is to examine whether the above plays a contributory factor in constituting a misleading marketing practice on part of the Respondent, particularly when such marketing/advertisement is disseminated after the Respondent has discontinued the usage of medicinal ingredients in the Product (such as *2,4-Dichlorobenzyle Alcohol* and *Amylmetacrasol)* in Pakistan or whether such change in character of the Product is adequately disclosed to the consumer. Merely deregistering from DRAP before the discontinuation of usage of the medicinal ingredients is not the issue.

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39. We also refer to the ER which specified the conditions laid by the then Ministry of Health when the Product was permitted to be advertised as confectionary item. These included:

> *"You may use the brand name Strepsils for the food product as confectionary manufactured and marketed under the Pure Food Act. However, it shall be ensured that no therapeutic claim for treatment, prevention, mitigation, symptoms or cure of disease shall be made...*
> *A disclaimer that the product is non-medicated shall be printed in Urdu and English version for awareness of general public"*

40. Although, the condition set by the Ministry of Health expressly bars the Respondent to make any therapeutic claim and cure of disease, we, for the purposes of Section 10 have to evaluate whether the claims are misleading or deceptive without the proper and sufficient disclosure in relation to the change of its character.

41. In the presence of reasons given in preceding paragraphs, we agree with the ER that the net general effect of the alleged claim such as *"Searching for a solution for your sore throat? Search no more"* and the relevant website extracts (as given below) is that the Product has been marketed as medicine and the same is not based on mere 'conjectures' and 'surmises' as alleged by the Respondent.

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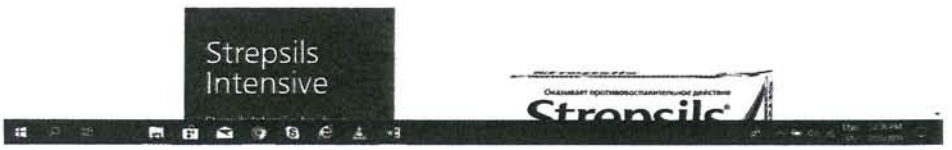
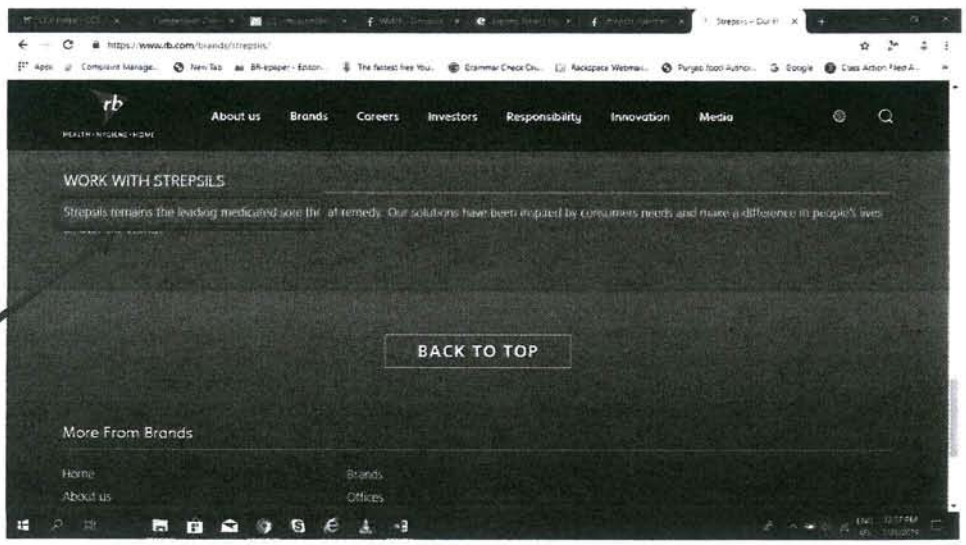
More than just relief

Strepsils was first launched as a gargle in 1950 and eight years later launched the lozenges we know and trust today. Since 1958, Strepsils has evolved into one of the most trusted sore throat medications in the world. In fact, Strepsils is the most sold sore-throat medicine in the world. [redacted] deliver efficacious solutions for any throat discomfort. We offer a wide range of lozenges for both adults and children and have recently launched our most effective innovation: Strefen Intensive Spray.

Strepsils products

Strepsils have a range of more than eleven specially formulated lozenges to choose from, so there is sure to be one to suit any need.





42. It is clearly mentioned on the website that it is a medicated remedy for sore throat. [In the intro para of the Product it is clearly mentioned] *"Strepsils was first launched as a gargle in 1950 and eight years later launched the lozenges we know and trust today. Since 1958, Strepsils has evolved into one of the most trusted sore throat medications in the world. In fact, Strepsils is the most sold sore-throat medicine in the world. That's because we're the throat care medical expert and deliver efficacious solutions for any throat discomfort. We offer a wide range of lozenges for both adults and children and have recently launched our most effective innovation: Strefen Intensive Spray."*

43. We must point out that the Respondent countered this ground stating that the enquiry officers have deliberately tried to create confusion by using the web link RBPlc, UK which is a separate entity from RB Pakistan Limited (https://www.rb.com/about-us/rb-pakistan/). The fact is that during the hearing the enquiry officers demonstrated that when the website RB Pakistan was opened it re-directed to the international page and when you scrolled down on the brands (https://www.rb.com/brands/strepsils/); 'Strepsils' appeared as a medicated drug without making any adequate disclaimer/disclosure in relation to the Product in Pakistan.

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44. We do not find the consumer using the website, as all insignificant or unrepresentative segment of the class of person to whom the representation is made. We are in agreement with the ER that in evaluating the instance of the deception, we will take the perspective of the ordinary consumer and that proof of the actual deception is not required. Rather, only the probability of deception involved matters. From the above, the change in character of the Product is nowhere evident, rather the information shared is more likely to lead to a misconception that it is a medical product that provides cure for sore throat.

45. Thus the above has the potential to deceive the consumer with respect to the characteristics, formulation and intended use of the Product. We are of the view that the Enquiry Committee has reached the right conclusion and the alleged claims in its marketing of the Product (textual and pictorial) are capable of misleading the consumers, hence, deceptive in nature within the meanings of Section 10(2)(b) of the Act.

Issue No. iii: Whether the alleged claims are capable of harming business interest of the Complainant within the meanings of Section 10(2)(a) of the Act?

46. During the course of the arguments, the Respondent asserted that Section 10(2)(a) of the Act cannot be violated since the parties are not competitors of each other.

47. Plain reading of the statutory text of sub-clauses (a) and (b) reveals that sub-clause (a) appears to be safeguarding business-to-business interest, in contrast to sub-clause (b) that safeguards only consumers' interest. Absence of the term 'consumer' in sub-cause (a) means that may have nothing to do with the dissemination of false or misleading information to ordinary consumers. Therefore,

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the two provisions can be construed as independent of each other. The representation in the marketing of the Product and the dissemination of the same to the public to say the least is potentially misleading for the consumers. The marketing leads them into the erroneous belief that it pertains to a drug/medicated product as originally the Product was sold, prior to its change in character. The marketing practices of the Respondent when taken holistically are to the prejudice and injury, not only of the consumers, but, also to other businesses. It is capable of harming businesses such as those of drugs for cold and flu which are subject to stringent regulatory framework or even the candies, which do not have the advantage or competitive edge as in the case of the Respondent's Product, of being perceived/consumed as a medicine and most likely also having a pricing advantage. Such unfair method of competition does affect commerce and may have its harmful effects. We also note that the Product is sold throughout Pakistan and there is no doubt that the impact of its marketing takes place throughout Pakistan and cannot be termed being restricted to any specific territorial boundaries within Pakistan.

48. During the hearing the Complainant has urged to place a bar on the Respondent for the use of the brand name 'Strepsils' and to restrain from manufacturing and selling the Product under the said brand. While we have come across certain judgments in the US wherein such relief has been granted, in the given circumstances and at this stage we are not inclined to consider grant of such relief. However, we have no doubt in concluding that the Respondent has violated the aforesaid provisions of Section 10 of the Act.

49. As pointed out by the Complainant, the Respondent itself has filed complaints, has been issued show cause notices by the Commission and been penalized for resorting to deceptive marketing practices and been reprimanded to ensure responsible behaviour in the future in cases of violation of Section 10 of the Act. Hence, it is not a case of first instance for the Respondent warranting only an opportunity to rectify. It is expected from such a huge global enterprise to keep the consumers informed as well as to create awareness concerning the nature and purpose of its products. In fact, the company maintains that each of its brands is responsible for improving lives through education and product information. Thus, in essence, the Respondent's policies and practices ought to be aligned with protecting consumer interest maintaining full transparency and disclosure about its brands/products.

50. In terms of the above findings for each of the violations of Section 10 read with Section 10 (2)(a) and (2)(b) related to deceptive marketing practices on account of omission and commission by the Respondent, a penalty of PKR 75 million (a total of PKR 150 million) is hereby imposed.

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51. In view of the foregoing, the Respondent is further directed to:

i) cease and desist from undertaking misleading marketing practices of the Product and to ensure inclusion of, a disclaimer/disclosure **'NON-MEDICATED'** in explicit, express bold words, which shall prominently be displayed on the Product in print and/or in electronic advertising/marketing and to use its registered trade mark along with such disclaimer;

ii) The Respondent is further directed to place/make sufficient disclosure and/or adequate disclaimer not only on the box packing of the Product, but also on each of the strips containing the tablets;

iii) Furthermore, along with the disclaimer/disclosure in English, a disclaimer/disclosure in Urdu in the same manner must also be included to the effect . یہ دوا نہیں ، دوا کے لئے ڈاکٹر سے رجوع کریں

The use of the above qualifying language is aimed to render harmless an otherwise deceptive use of brand name, as there is ambiguity that permits a misleading inference to be drawn with use of the brand name of the Product.

52. The Respondent is further barred from using or making any of the claims or captions in marketing and sale of its product without giving the aforesaid disclaimer/disclosure be it a publication, print or electronic media.

53. The Respondents are directed and required to ensure that its agents, distributors, dealers, employees, any and all representatives immediately remove from the market as well as on Facebook page and its website any/or all misleading publications and marketing material of the Product and are permanently restrained from indulging in deceptive marketing.

54. The compliance must be ensured within 40 days from the date of issuance of this Order. Meanwhile, the Respondent is directed to publicize/notify, conspicuously, at least three newspapers each, in English and Urdu, having nationwide circulation regarding the change in character of the Product from medicated/drug to food category in Pakistan such advertisements be given once a week until compliance is ensured within the time specified.

55. Matter stands disposed in terms of the above.

Rahat Kaunain Hassan
Chairperson

Bushra Naz Malik
Member

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ISLAMABAD, THE 9TH DAY OF FEBRUARY, 2021