

7th GNLU

INTERNATIONAL MOOT

COURT COMPETITION

2015

MOOT PROBLEM

ASGARD: MEASURES CONCERNING POWDERED INFANT**FORMULA****WT/DSxxx**

1. Asgard is a developing country, with a population of 10 million and 5% of the population under the age of 5. It is a member of a group of nine islands in the Circle Sea that share common historical, cultural and ethnic roots. The island nations were all colonies of the Agatean Empire till 1950s, after which they became independent. The nations take great pride in their shared struggle for independence and common ethnic values. Due to their shared history, the island nations in the Circle Sea consult on many matters relating to trade, economy, health and international affairs. As a result, it is common for the countries in the Circle Sea, including Asgard, to have similar policies relating to the above areas. All the Circle Sea nations are members of the WTO.

2. The Circle Sea islands hold an annual conference called the Nine Realms Summit, which is hosted in one of the island nations. In January 2014, Asgard hosted the Nine Realms Summit 2014 in its capital city of Krull. The theme for the Nine Realms Summit 2014 was 'Health'. Spanning four days, dignitaries from the Circle Sea islands discussed the possibility of a Circle Sea Code on Public Health and Nutrition ("CSCPHN"). On the final day, all the Circle Sea nations finalized the CSCPHN, which was hailed as a path breaking roadmap for good health practices for the Circle Sea Islanders. One of the more significant provisions in the CSCPHN related to the adoption of policies for infant health and wellbeing. Article 12 of the CSCPHN states the following:

Article 12

Recognizing that infant wellbeing is of prime importance, the parties to this Code shall ensure that:

.....

(g) Nutritious food and food supplements are made available at all times;

.....

With regard to the above, in general, the parties to the Code shall ensure that relevant information regarding nutritious content of food is made available to the public. The parties to the Code may take appropriate measures in this regard.

3. In early 2014, there was an alarming spike in Asgard of Type-1 diabetes among children below the age of 5, which caused widespread anxiety. The Asgard Department of Health (“ADOH”) conducted a study to understand the reason behind the sudden increase in diabetes, and in June 2014, released the report. In its report, the ADOH observed the following:

(i) Asgardians, in the preceding five years, have slowly shifted from breastfeeding to Powdered Infant Formula (“PIF”) for their children;

(ii) Doctors have increasingly recommended the usage of PIF due to its nutritional value;

(iii) At present, PIF sold under the names Rincenvind, Linacre, Diamanda and Cementac are available in the market;

(iv) Sampling and lab testing of the above supplements revealed that they contained high levels of corn syrup and sugar content, which was not specified on the packaging of these products;

(v) Generally, the packaging only mentioned the generic ingredients of PIF, such as “derived from cow milk”, “soy-based”, etc. without mentioning all the contents in terms of percentage or weight.

4. The ADOH further observed:

We believe that parents should know the exact ingredients and content in terms of percentage and weight in order to make an informed decision about using PIFs for their children. It is suggested that the government may introduce appropriate rules in this regard.

5. The ADOH report was published and garnered wide media coverage. Several other independent studies were conducted by NGOs and public interest groups, which reached similar conclusions. These studies, along with widespread sympathy for affected parents and their children led to a movement calling for immediate action from the government.

6. Under severe pressure, the Asgard Department of Law and Justice (“ADOL”) drafted and published Regulation No. 8/2014 “*Packaging of Commodities and its Enforcement (PaCE)*” inviting comments on the draft law from all stakeholders in July 2014.

7. Agatea, located in the Indian sub-continent, is a world leader in dairy and health supplement products. Castle, Viking, Flora and Theos are four corporations located in Agatea that control 90% of the world market of these products. These exporters of PIF from Agatea who sell PIF under the names Rincewind, Linacre, Diamanda and Cementac were deeply concerned about the implications of PaCE. In particular, Article 9, stipulating a timeline till 31 October 2014 to comply with the packaging requirements, was deemed difficult to meet.

8. Asgard depends completely on imports of PIF, and at present all its requirements are met by imports from Agatea. All the four corporations, through their association *Agatean Processed Food Members Association* (“APMA”) made representations in person and in writing to ADOL on relaxing the timeline in the draft law for complying with PaCE. The gist of the representation dated 25 July 2014 by APMA, which was made available publicly on ADOL website is as under:

(i) implementing PaCE would result in all APMA members incurring huge costs in changing the entire packaging of PIF products;

(ii) the entire demand of PIF is being met by imports from Agatea;

(iii) at present four (4) months of stock is available with Asgard [around twenty (20) million units]. It will not be possible to recall these products and change their packaging in a short time and re-ship it to Asgard. It takes one month for shipments to reach by sea the port city of Krull, the capital of Asgard, from Agatea.

(iv) it is estimated that after consideration of all factors, change in packaging for each unit would cost around U.S. Dollars 1.5. This cost is in addition to the time spent in re-packaging and shipping to and fro, during which period, no PIF product would be available in Asgard’s markets. Changing the packaging of our global brands to suit the needs of only one market, therefore, would be too expensive and difficult;

(v) adequate facilities to change the packaging are not available in Asgard;

(vi) the members have already shipped three (3) months worth of stock [around fifteen (15) million units] to Asgard, which would be placed on the shelves for sale by early December 2014;

(vii) the Government would appreciate that recalling products from the market generally brings a company into disrepute. Our customers would lose trust in our products and may shift to other brands if we recall our products;

(viii) APMA members would happily disclose the contents of PIF, but fail to understand how mere declaration of contents would help Asgard in achieving its health objectives. The Government may consider conducting further scientific research. APMA members would readily participate in such an endeavour;

(ix) the Government may consider addressing infant welfare by other means, and in the alternative increase the timeline for compliance till at least March 2015 till which time all members would be able to arrive at an appropriate solution to comply with PaCE;

(x) the members would make best efforts to ensure that they comply with PaCE.

9. Relicare, an industrial behemoth in Asgard, is a diversified group with presence in energy, petroleum, mining, processed food, retail and banking. Earlier in 2013, Relicare had announced in its annual general meeting about its intention to enter the growing market of infant food products. In June 2014, the ADOH approved Relicare's application for introducing its PIF in Asgard market. Relicare claims that its PIF would be a complete substitute to human milk unlike its competitors on the market. Relicare's chairman in the group's press release in July 2014 assured its shareholders that its new PIF would be launched on the market by the end of October 2014.

10. PaCE was tabled before Asgard Parliament on 28 August 2014. After two days of heated debates, the Parliament approved PaCE, which came into effect immediately. PaCE retained all provisions in the original draft regulation.

11. On 1 November 2014, the ADOH officers conducted raids all across Asgard and seized PIFs of all imported brands. None of the seized brands had been able to meet the two-month compliance deadline. Relicare's new product Likan, which was launched on the market on 1

November 2014 registered brisk sales. Its stocks ran out in one week. Relicare's chairman announced this event as unprecedented in his groups' history and assured Asgardians that the company would work day and night to ensure that infants were properly fed. Asgardian media raved about Relicare's clever and fast compliance with PaCE, while some business journals hailed Likan's entry at such a critical time as the best product launch by any company in decades. The media variously noted that it would be impossible for any other product to compete with Likan.

12. In early December 2014, an investigative journal SilentStream brought to light that the ADOH had, in November 2014, denied labeling of all imported PIF products with stickers that mentioned all the ingredients in terms of percentage and weight. SilentStream directed its users to the ADOH daily orders link, where an order dated 10 November 2014 was available.

13. *The Agatea Update*, a daily newspaper, reported in early December 2014 that Agatean government was planning to impose strict packaging and enforcement rules on energy drinks. It was reported that the new law would require all such products to mention sugar, caffeine and other contents in terms of percentage and weight on their packaging. It was speculated that Agatea was taking such a step in retaliation to Asgard's law on PIF products from Agatea. Asgard was the biggest exporter of energy drinks BigBull and Tadpole (both Relicare products), which were quite popular among teens and young adults in Agatea.

14. In late December 2014, Agatea requested consultations with Asgard under WTO Dispute Settlement Understanding (DSU). The consultations witnessed widespread protests in Asgard. Asgardians called the companies "the Killer Four". *The New Asgard Times* noted:

...while Asgardians continue to protest against the Companies, which they call the "Killer Four", it would not be wrong to add one more name to it, Relicare. But Asgardians would prefer to know the ingredients and contents of their own poison.

15. *The Agatea Update* noted:

...both countries intended to resolve the current crises in today's consultations. It is widely speculated that if Asgard could relax the strict compliance timeline in PaCE and release

imported PIFs for sale in Asgard, Agatea would consider stopping the passage of a similar law on energy drinks.

16. The consultations were unsuccessful.

17. Agatea requested for the establishment of a WTO Panel. Asgard did not object to this request. The DSB established a panel in April 2015. The WTO Director General composed the Panel in May 2015.

18. Agatea alleged the following in its request for establishment of Panel:

PaCE applies to the retail sale of PIF products in Asgard. PaCE regulates the appearance and form of the retail packaging of PIF products. These requirements appear to be inconsistent with Asgard's obligations under the following provisions of the TBT Agreement and the GATT 1994:

- (i) Article 2.1 of the TBT Agreement, because the technical regulation at issue accords to imported products treatment less favourable than that accorded to like products of national origin;*
- (ii) Article 2.2 of the TBT Agreement, because the technical regulation at issue creates unnecessary obstacles to trade and is more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create;*
- (iii) Article III:4 of the GATT 1994, because the regulation at issue accords to imported PIF products treatment less favourable than that accorded to like products of national origin.*



EXHIBITS

EXHIBIT 1**REGULATION NO. 8/2014 PACKAGING OF COMMODITIES AND ITS
ENFORCEMENT*****Statement of Objects and Reasons***

Asgard witnessed a sudden increase in type-1 diabetes among children below the age of 5 years in early 2014. The Asgard Department of Health (“ADOH”) reported that in the past 5-7 years, many parents have changed their preferences regarding infant daily diet. ADOH reported that a large portion of an infant’s daily dietary intake comprises usually of Powdered Infant Formula (“PIF”). ADOH conducted lab tests on all the available brands and variants of PIFs available in the market and found that all samples showed high contents of corn syrup and sugar. The Government is deeply concerned with this development.

Realising Asgard’s obligations under the Circle Sea Code on Public Health and Nutrition and noticing widespread calls for action from the Government, a draft of this regulation was circulated for comments from all stakeholders in July 2014.

Stakeholders from different sections of the society, public and private, made numerous representations to the Government. Their comments have been considered. The Government also took into consideration concerns expressed by the Parliament.

The Government believes that this is an emergency situation, which calls for urgent action. The Government, therefore, is implementing a comprehensive set of reforms by adopting standards that would ensure that packaged food and food supplements exhibit their nutritional content in a manner that lets the public take an informed decision, taking into account their dietary and health concerns. This reform is necessary and the only way forward to safeguard the health and future of the young populace.

In this regard, the Government promulgates this 30th day of August 2014, Regulation No. 8/2014, which may be called Packaging of Commodities and its Enforcement or PaCE. All entities in the business of packaged food and food supplements that are conducting business in Asgard may adopt these standards. The provisions are set out hereunder:

Article 2: Powdered Infant Formula

A food, in powdered form, for use by infants that is capable of completely or partially substituting human milk.

Article 3: *Retail packaging of all powdered infant formula products*

- (1) The retail packaging of all powdered infant formula products may comply with the following:
 - (a) the outer surface to mention all ingredients of the product in print;
 - (b) the outer surface to mention all the contents of the product in terms of weight in 'grams' or 'milligrams' per 100 grams of the serving in print;
 - (c) the outer surface to mention all the contents of the product in terms of their percentage of the overall weight of the product in print.
- (2) The minimum font size for requirements under clause (1) is "8" of any font preferred by a brand;
- (3) The contents under clause (1) shall be placed, preferably, inside a text box with an outer border in "RED" colour having a minimum line weight of "2".

Article 9: *Implementation*

The requirements under the Regulation are to be met by 31st October 2014. The Government is empowered to take appropriate action in the event of non-compliance.

Article 11: *Dispute Resolution*

Disputes under this Regulation shall be referred to the Commissioner, Asgard Department of Health, who shall dispose the matter expeditiously. The Commissioner in its order may allow a party to prefer an appeal before the High Court of Krull, Asgard.

EXHIBIT 2

26 July 2014

To

The Hon'ble Minister for Health
Asgard Department of Health
Millennium Building
Krull, Asgard

Dear Sir,

Subject: Expression of support to PaCE and assurance of compliance

Relicare is a well-known industrial group in Asgard having presence in energy, petroleum, mining, processed food, retail and banking sectors. Relicare provides employment to more than 700,000 Asgard people.

2. Relicare understands that the Department of Health is in the process of finalizing the draft regulation concerning packaging of food and food supplements and its enforcement. From the perusal of the draft law, Relicare understands that an implementation timeline of two (2) months has been laid down for companies to bring their products in line with the requirements under PaCE.

3. Relicare hereby expresses its support in this endeavour. The last couple of months have been quite unfortunate for some families in Asgard. Many young lives have fallen victim to Type-1 diabetes.

4. Relicare is in a unique position. Relicare intends to launch its first powdered infant formula ("PIF") that has already received approvals from the Department of Health. The product launch is set for end of October 2014. Relicare has undertaken comprehensive trial runs and gauged the tastes and preferences of the young populace of Asgard.

5. Relicare takes pride in informing the Government that its product is not only better, but also exceeds other products in the market on all parameters of nutritional value. Relicare's product is a complete substitute to human milk as it has more nutrients to meet the daily dietary requirements of an infant. While imported PIFs are only partial substitutes, as they can hardly meet the complete daily dietary requirements of an infant. Relicare's product is more nutritious, healthy and better suited to the needs of Asgard's young populace.

6. Relicare assures that it would be able to comply with the implementation timeline proposed in PaCE. As the packaging design for the new product is still in process, Relicare would be able to incorporate requirements in PaCE without any significant cost.

7. Relicare also expresses its gratitude to the Government for always providing a supportive and encouraging environment for its industries. Relicare notes that the Government also follows a generous policy framework to encourage trade with its allies. Certain entities, however, take advantage of this framework and put forth impossible demands and undue pressures on the Government. A typical example is the unwillingness of certain international corporations to comply with PaCE within the implementation timeline.

8. Relicare believes that such practices may not be encouraged and the law be applied equally to all entities, international and domestic. Relicare notes that due to the financial might of these corporations, it is quite possible for them to immediately comply with PaCE. Asgard cannot be held hostage to the demands of these corporations.

9. It is time for Asgard to look inward and introspect. Asgard can no longer depend on imports of powdered infant formula products, which do not comply with Asgard's laws and regulations. It is time for the Government to give Asgard's industry an opportunity to serve the country.

10. We assure the Government of our continued support and commitment. We request the Hon'ble Minister for an appointment to discuss our concerns and plans.

With regards,

Kare Alexander
Chairman
Relicare Industries Ltd.

Representation downloaded from ADOH website

EXHIBIT 3

FALL SESSION OF THE PARLIAMENT, 2014

Extracts from debates: 28-29 August 2014

House composition: 100

Ruling party: 67

Opposition: 33

Speaker: Ms. Tara

Mr. Keith (Minister of Health)

This House is aware of the recent incidents. Many young lives in Asgard have fallen victim to type-1 diabetes. My Department has worked day and night to understand the reasons. We have prepared a draft of what will, hopefully, become legislation when it receives this House's assent. Needless to say, this is an emergency situation. We need to take swift action. Much is expected from us today. My Government understands its moral duty and Asgard's obligations under domestic and international law. We committed in the Nine Realms Summit 2014 to take steps to bring transparency in the contents of packaged food and food supplements for infants. I read out the provisions from the draft. I seek constructive feedback, and attempt to bring forth a legislation that not only addresses all concerns, but also lays to rest widespread anxiety among the general public. This legislation is the first of many steps towards better infant health and wellbeing. It aims to safeguard the future of the young generation of Asgard.

Mr. Anderson (Opposition)

Madam Speaker, I am carrying ten (10) representations and I have about a hundred more in my office. Many parents have met me, and many have written to me. They are all worried. They are not sure if the PIFs are safe enough for their children. They all want strict actions against these corporations; they all want such products to be removed from the market.

Ms. Lucas (Opposition)

Madam Speaker, health is of primary concern to our society. We cannot let such products be sold in our markets. The ADOH report clearly shows there is a link between PIF consumption and Type-1 diabetes among infants. There is no reason that these products should continue to be sold on our markets. I believe that the two-month implementation timeline is nothing but a

time-buying tactic by these corporations. Why is our Government being held hostage by these foreign corporations? Why can't we just deny them market access? Their products are not safe for our children, we all know that. Instead of banning them, we are offering them more time. Our Government is for our people, to protect our people, not to play into the hands of foreign corporations.

Mr. Reid (Ruling party)

My Government understands the prevailing sentiments. We know there is a demand for an outright ban of these products. But let us face reality. There is still research going on to understand the exact detrimental effects of these products on infants. We are trying to understand how the contents of these products influence and lead to such conditions like diabetes. While it would take some time for the results to come out, in the interim, my Government has offered these brands an opportunity to come clean and declare the contents of their products. To this end, PaCE offers an opportunity to all companies to voluntarily adopt best practices. For any industry to adopt new practices requires time. PaCE offers that. Several representations have been made to us. We have talked to all the stakeholders and noted their concerns.

Mr. Cooper (Opposition)

Madam Speaker, the Government is not telling us the truth. I have with me a representation that was made by these foreign corporations to ADOH. It is unbelievable. None of these corporations are willing to comply with the implementation timeline. Instead, they have raised hue & cry over a few million dollars they would have to spend to comply with PaCE. Madam Speaker, the combined net worth of all these giant corporations touches U.S. Dollars 600 billion. They still refuse to spend a few millions to comply with our laws. They say it is impossible to ship products back and forth by sea. May I remind them that air transportation was invented more than a hundred years ago? The Agateans are pioneers in that field. They can deploy some aircrafts for this purpose.

Mr. Leed (Opposition)

Madam Speaker, I understand that the corporations have asked us to increase the implementation timeline till March 2014. But it is completely unacceptable. Our own company

Relicare is willing to comply with PaCE. It has expressed its support and commitment. None of the foreign corporations have expressed even a hint of support. In fact they tell us to pursue infant wellbeing by other means. Should we take instructions from them now? Two months is generous. They should not get even one extra day. Their products should be immediately removed from the market if they fail. We cannot take any more risks with the lives of our children.

Mr. Bright (Ruling party)

My Government assures that only those products that comply with PaCE shall be allowed on the market. We still believe that two months time for industries to adjust to the new legislation is necessary. If we don't do that, it might lead to unpredictability in our laws. Traders would be hesitant to conduct business with us. PaCE is a necessary step, but we have to reach a balance. We are offering the corporations to voluntarily meet the compliance timeline. If they are not able to, then we will take our next decision.

Ms. Leary (Opposition)

Madam Speaker, I cannot think of any other way but removal of these products from the market. That is the only step our Government can take. There is no other way. The Government should ban sale of these products with immediate effect. I am still not convinced that two months of relaxation should be given. I also hear that these corporations have committed to invest in Asgard and propose to finalise their plans by next year. Are we offering them two months of free run in return?

EXHIBIT 4

ORDER OF THE COMMISSIONER

ASGARD DEPARTMENT OF HEALTH

KRULL, ASGARD

10 November 2014

I have before me several importers, retailers and company representatives of the brands Rincewind, Linacre, Diamanda and Cementac. These are brands of powdered infant formula. On 1 November 2014, field officers of my Department seized a large quantity of these products. Apparently, none of these products could comply with the implementation timeline mentioned in Regulation No. 8/2014 Packaging of Commodities and its Enforcement, also called PaCE.

The parties argue that they applied stickers that complied exactly with the requirements under Article 3 of PaCE. They argue that by taking this step they had satisfied the requirements of Article 3. I do not agree with this interpretation.

Article 3, in clear terms, mentions that the requirements under sub-clauses (a), (b) and (c) of clause (1) have to be complied with “in print”. Nowhere in the text is it mentioned that stickers may be pasted on the packaging. While the parties are free to state additional information by way of stickers on their products, information that is mandatorily required by law to be on the retail packaging in print cannot be printed and pasted by such means. Article 3 does not allow that.

The Department has to function under the strict mandate of the law. I reject the arguments placed by the parties. The parties may prefer an appeal to this order.

Signed and Stamped

Commissioner
Asgard Department of Health

EXHIBIT 5

ORDER OF THE SINGLE BENCH

HIGH COURT OF KRULL, ASGARD

20 November 2014

Importers, retailers and company representatives of the brands Rincewind, Linacre, Diamanda and Cementac have preferred to appeal the order dated 10 November 2014 of the Commissioner, Asgard Department of Health. They argue that there is an important question of law arising due to the incorrect interpretation of Article 3 of Regulation No. 8/2014 Packaging of Commodities and its Enforcement, also called PaCE by excluding printed stickers from the ambit of Article 3.

I agree. List the matter for hearing after the vacation on 16 February 2015.

Signed and Stamped

Judge Poshnerr

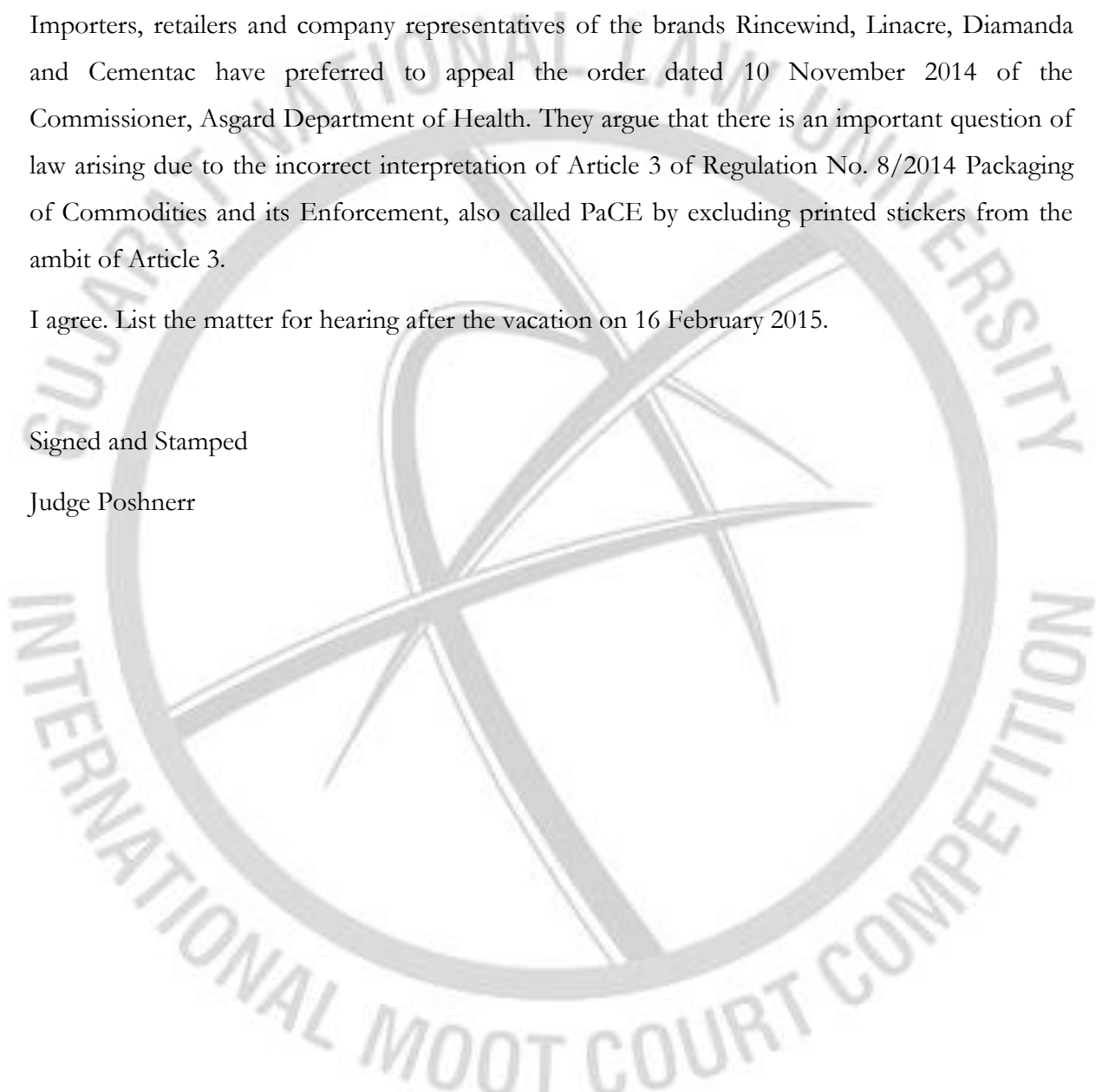


EXHIBIT 6

Extracts from a media report

The New Asgard Times

10 December 2014

By special correspondent Eli Graham

Likan is the undisputed king on the market right now. Relicare took a risky step entering a saturated market. Experts suggest that in ideal market conditions, Likan could have captured 5-10% of the market in a year. All such predictions, though, have been proved wrong. From day one, Likan took a firm foothold. Parents trust the product and the brand behind it. PaCE also played a big role in Likan's success. Had other products complied with PaCE, the situation could have been different.

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What makes Likan different from other products? For one, it claims to be the only complete substitute for human milk. We tried to understand from the parents what it means. Parents believe that there cannot be a complete substitute to human milk. Infants do need mother's milk; PIFs, at best, can only supplement that. However, parents do hint that their toddlers do not show frequent hunger pangs as before. Likan seems to be more filling. It is also available in carrot flavour.

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Rincewind is soy-based, Linacre is lactose-free, Diamanda and Cementac are standard cow milk-based formulas. Likan, though, offers all these variants and additionally, is available in carrot flavour for all the variants. But all this comes at a price. Carrot flavour is 20% more expensive than the standard offerings. Generally, Likan is 10% more expensive than its competition.

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Relicare believes it is important that infants learn to recognise healthy tastes early on, which will have a positive impact on their food choices later in life. Some parents that tried the carrot flavour report that their toddlers do not return any negative expressions. Relicare is also planning to introduce more vegetable flavoured formulas in the hope of creating a new segment and diversity in the market for such products. True to its motto, Relicare is always *one step ahead of the competition*.