

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under the provisions of Section 37(2) of the Competition Act, 2010)

IN THE MATTER OF COMPLAINT FILED BY PARENTS PAKISTAN (SMC-PRIVATE) LTD. AGAINST M/S NESTLÉ PAKISTAN LIMITED FOR DECEPTIVE MARKETING PRACTICES

BY

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Dated: March 01, 2021

1. BACKGROUND

- 1.1 M/s Parents Pakistan (SMC-Private) Limited (the “**Complainant**”), filed a complaint against M/s Nestlé Pakistan Limited (the “**Respondent**”) with the Competition Commission of Pakistan (the “**Commission**”) for alleged violation of Section 10 of the Competition Act, 2010 (the “**Act**”), about deceptive marketing practices.
- 1.2 It has been alleged in the complaint that the Respondent has distributed information in the form of its product packaging, labeling, television commercials, advertisements, and statements made by it on its official website and social media platforms in respect of three of its products, i.e., **Nido FortiGrow**, **Nido 3+** and **Bunyad**, which are not backed by reliable scientific data and is misleading consumers into believing that the product is milk and, as such, constitutes deceptive marketing.

After attaining the preliminary facts, the Competent Authority initiated an enquiry in accordance with subsection (2) of Section 37 of the Act by appointing Mr. Faiz-ur-Rehman, Deputy Director (OFT) and Mr. Amin Akbar, Management Executive (OFT) as enquiry officers (collectively the “**Enquiry Committee**”) to conclude the enquiry. The Enquiry Committee was directed to conduct the enquiry on the issues raised in the complaint and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following;

- a. Whether the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2) (b) of the Act.
- b. Whether the Respondent is involved in a false or misleading comparison of goods in the process of advertising in, *prima facie*, violation of Section 10(1) in general, and in particular, Section 10(2)(c) of the Act.

2. THE COMPLAINT:

- 2.1 The Complainant in its complaint to the Commission has made the following submissions. Complainant is a company registered under Section 16 of the Companies Act, 2017, according to which it is an association of consumers whose objects include educating the parents regarding overall wellbeing, health, nutrition, and balanced diet of the children.
- 2.2 Whereas the Respondent is a public limited company incorporated under the laws of Pakistan. As a subsidiary of Societe des Produits Nestlé S.A., one of the largest transnational food and beverage companies in the world. The Respondent is also engaged

in, *inter alia*, food processing, including dairy, juices, cereals, and confectionery products. The Respondent is also an undertaking within the meaning of Section 2(q) of the Act.

- 2.3 It has been further submitted that there are three dairy products of Respondent forming the subject matter of the complaint, which are marketed and sold as nutritional formulae in powdered form for children of different ages are **Nido FortiGrow** for school children, **Nido 3+** for Pre-School children between 3-5, and **Bunyard** for children between 4-14 years. (*Sample packaging of Nido FortiGrow, Nido 3+, and Bunyard have been attached herewith as Annexure-A respectively*).
- 2.4 It has been stated that the Respondent is engaged in actions that contravene the prohibition contained in Section 10(1) of the Act and constitutes deceptive marketing practices within the meaning of Section 10(2) (b). More specifically, that the Respondent has distributed false information in the form of its product packaging, labeling, television commercials, advertisements that is not backed by reliable scientific data, and is misleading consumers into believing the product is milk, hence leading towards deceptive marketing.

THE PRODUCTION OF MILK AND ITS REGULATION

- 2.4 The defining constituents of milk are milk fats (saturated, monosaturated, polyunsaturated, and other fatty acids) and milk solids not fat (lactose, caseins, whey proteins, and other minerals). It is available in several variations including low fat and skimmed milk where milk fats are removed by subjecting the milk to certain processes. In addition to being available in liquid form, it is also available in condensed and powdered form. It is imperative to point out that the quantity of milk fats present in the product are determinative of how the product will be categorized.
- 2.5 Essentially, milk can undergo two main types of processes, additive or extractive. In the case of the former, milk retains its original character as milk and is then fortified through the addition of other nutrients, minerals, and vitamins. On the other hand, once it undergoes an extractive process, it does not retain its character as milk, and can only be characterized as a variation thereof. For instance, once the milk fats are removed beyond a certain threshold, rather than being characterized as milk, the product can either be low-fat milk or skimmed milk depending on the extent of the extraction of milk fats. It is worth mentioning that skimmed milk can also be characterized as fat free milk as it possesses the lowest possible concentration of milk fats that can be achieved while retaining its character as a milk product. Similarly, the extraction of water from milk results in converting the milk into either condensed or powdered milk. Whereas condensed milk is produced through the partial extraction of water, powdered milk is produced through the highest possible removal of water and moisture content.

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2.6 It has been submitted that the dairy industry is heavily regulated in the country by various authorities at the federal and provincial levels providing standards to be conformed with in terms of, *inter alia*, product composition, packaging, and labeling. At the federal level, standardization of products is provided by the Pakistan Standards and Quality Control Authority (the “PSQCA”). At the provincial level, each province has its own set of standards, namely, the Punjab Food Authority (the “PFA”), the Khyber Pakhtunkhwa Food Safety, and Halal Food Authority (the “KPFSA”), and the Balochistan Food Authority (the “BFA”). At the international level, the relevant standards are provided in the Codex Alimentarius, which is a set of internationally recognized standards developed and maintained by the Codex Alimentarius Commission established under the auspices of the Food and Agriculture Organization of the United Nations.

2.7 The general scheme of regulation is that each respective authority provides a standard that must be mandatorily complied with for a manufacturer to claim that a particular product is what the manufacturer represents it to be. For instance, for a manufacturer to claim that its product is milk, the product must meet the constituent requirements of milk fats and milk solids not fat provided for in the standard applicable to milk. Moreover, a necessary corollary to the aforementioned is that where a particular constituent is used as an ingredient, the same must also conform to its governing standard. For instance, where a product contains skimmed milk as one of its ingredients, then the skimmed milk must also conform to the level of prescribed milk fats and milk solids not fat.

STANDARDS APPLICABLE TO MILK POWDERS

2.8 The mandatory standard for *Milk Powder* provided by PSQCA (PS: 363:2011) describes milk powders as “milk products which can be obtained by the partial removal of water from milk.” Furthermore, the standard provides that although the fat or protein content may be adjusted, the final product must still comply with the categories, namely: i) Whole Milk/Full Cream Milk Powder, ii) Partly Skimmed Milk Powder, iii) Semi-Skimmed Milk Powder, and iv) Skimmed/Low Fat Milk Powder.

The relevant requirements of the standard have been reproduced hereunder:

Sr. No.	Description	Whole Milk/Full Cream Milk Powder	Partly Skimmed Milk Powder	Semi-Skimmed Milk Powder	Skimmed/Low Fat Milk Powder
1.	Total solids (Milk solids and added	Not less than 95%	Not less than 95%	Not less than 95%	Not less than 95%

	solids) % by mass				
2.	Milk fat, % by mass	Not less than 26%	1.5% 15? - 26%	14% - 16%	Not more than 1.5%
3.	Milk Protein m/m Min.	30% of Milk Solids Not Fat (33% in the case of imported products)	30% of Milk Solids Not Fat (33% in the case of imported products)	30% of Milk Solids Not Fat (33% in the case of imported products)	30% of Milk Solids Not Fat (33% in the case of imported products)

2.9 The standard for *Dairy Safety Standards for Milk Products* (PS: 4873:2008) provides a standard for *Milk Powder Vegetable Fat Based* which is as follows:

- | | |
|------------------------------|--|
| a) Vegetable fat | not less than 26% |
| b) Moisture | not more than 5.0% |
| c) Milk Solids Not Fat (SNF) | not less than 69% |
| d) Bacterial count / gm | not more than 50,000 |
| e) Salmonella | Absent in 25 gms |
| f) Protein in SNF (Min) | 30% local and 33% in imported products |

2.10 Punjab Food Regulations, 2018 enacted by PFA provides standards for Dairy and Dairy Products, including, *inter alia*, various categories of liquid milk and powdered milk. In addition to permitting solely milk-based categories of powdered milk, such as whole milk powder, partly skimmed milk powder, and skimmed/nonfat dried milk powder, the Punjab Regulations have also provided standards for skimmed milk powder with vegetable fat in powdered form (Clause 01.6). It is noteworthy that the standard provided in Clause 01.6 must comply with the applicable Codex Standards elaborated later in the instant complaint. The relevant standards have been reproduced hereunder:

Sr. No.	Description	Dried Milk, Milk Powder, or Whole Milk Powder	Dried Skimmed Milk or Nonfat Dried Milk Powder or Skimmed Milk Powder	Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form	Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form

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i.	Total Milk Solids	Not less than 95%	Not less than 95%	Not less than 95%	Not less than 95%
ii.	Milk Protein of Solids Not Fat (% by mass)	Not less than 34%	Not less than 34%	Not less than 34%	Not less than 34%
iii.	Total Fats (% by mass)	Not less than 26% (milk fats only)	Not more than 1.5% (milk fats only)	Minimum total fat 26% (milk fats and vegetable fats)	Total fat more than 1.5% and less than 26% (milk fats and vegetable fats)

2.11 The Codex Alimentarius distinguishes between milk powders made purely from milk and those with other ingredients added therein. The relevant Codex Standards are “*Milk Powders and Cream Powder*” (CODEX STAN 207-1999) and “*Blend of Skimmed Milk and Vegetable Fat in Powdered Form*” (CODEX STAN 251-2006).

2.12 The CODEX STAN 207-1999 provides standards for i) cream powder, ii) whole milk powder, iii) partly skimmed milk powder, and iv) skimmed milk powder. Each respective standard provides specific milk fat and milk solids, not fat composition requirements based on which the same may be categorized. It is pertinent to mention that the only raw materials mentioned in the standard are milk and cream.

The relevant requirements of the standard have been reproduced hereunder:

Sr. No.	Description	Cream Milk Powder	Whole Milk Powder	Partly Skimmed Milk Powder	Skimmed Milk Powder
1.	Milk Fat	Minimum 42%	Minimum 26% and less than 42%	More than 1.5% and less than 26%	Maximum of 1.5%
2.	Minimum milk protein in milk solids not fat	34%	34%	34%	34%

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- 2.13 Moreover, CODEX STAN 251-2006 provides standards for i) blend of skimmed milk and vegetable fat in powdered form, and ii) reduced fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Unlike the standard governing milk powders and cream powders, this standard permits the use of skimmed milk and skimmed milk powders along with other non-fat milk solids and edible vegetable oils/fats.

The relevant requirements of the standard have been reproduced hereunder:

Sr. No.	Description	Blend of skimmed milk and vegetable fat in powdered form	Reduced fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form
1.	Total Fat	Minimum 26%	More than 1.5% and less than 26%
2.	Minimum milk protein in milk solids not fat	34%	34%

- 2.14 It has been submitted that besides, under clause 7.1 of the standard, the product label must specifically state the name of the food i.e. blend of skimmed milk and vegetable fat in powdered form or reduced fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Similarly, clause 7.2 mandates that ***“a statement shall appear on the label as to the presence of edible vegetable fat and/or edible vegetable oil.”*** It is clarified that this requirement is in addition to and distinct from the requirement of mentioning ingredients.

STANDARDS APPLICABLE TO NUTRITIONAL FORMULAE

- 2.15 Mandatory standards applicable to food for infants and children (PS: 1688-2008) provided by PSQCA, only applies to infants (0-12 months) and children (12-36 months) and no standard has been provided for children beyond this age. Standards for Foodstuffs intended for particular nutritional uses provided by PFA essentially governs standardization of products intended as nutritional formulae for infants (0 – 12 months), follow-on formula (12 months – 36 months), or infant formulae for special medical purposes. It is important to mention that, **Nido FortiGrow**, **Nido 3+**, and **Bunyad** are not covered by the standards provided by PFA. Similarly, standards are given by Sindh Regulations for *infant formulae*, *follow-up formulae*, and *formulae for special medical purposes for infants* (Chapter 13) also provide the same age limitation and require conformity with PS: 1688-2008.

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PLACING NIDO FORTIGROW, NIDO 3+ AND BUNYAD WITHIN THE APPLICABLE STANDARDS

- 2.16 The Complainant has claimed that all three products of the Respondent are marketed and sold as a special nutritional formula for school going children of various ages. It is reiterated that none of the aforementioned authority provides a standard that covers such products. As nutritional formulae can only be produced for a maximum age of 36 months, the products in question are prescribed for children beyond these ages. As such, each of the products needs to conform to any other standard applicable.
- 2.17 Nido FortiGrow is admitted to be a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Therefore, it must conform to all product composition, packaging, and labeling requirements provided for it in the applicable standards, which are mentioned above. It should be noted that Nido 3+ and Bunyad do not contain milk fats, rather they are products manufactured using milk solids not fat and vegetable fats/oils. Therefore, they are not even covered by the standards mentioned above.

PRODUCT PACKAGING AND LABELLING

a. Nestlé Nido 3+

- 2.18 Although Nido 3+ is labeled and marketed as a growing-up formula for preschool children between 3 to 5 years of age, it is reiterated that there is no standard governing such a product. The following are the ingredients mentioned on the product packaging: “*Milk Solids, Malodextrin, Vegetable Oils, Sugar, Oligofructose, Minerals Inulin, Soya Lecithin, Vitamins, and Lactobacillus Rhamnosus*”. It is evident that the product cannot even be categorized as a blend of skimmed milk and vegetable fat in powdered form like Nido FortiGrow as it does not contain any milk fats. Furthermore, the nutritional information on the product packaging further substantiates this as the product only contains 20 grams of vegetable fat and 16 grams of milk protein which is much lower than any applicable standard. Similarly, the product has added sugars that have no nutritional value and can be unhealthy for children. Despite the aforesaid, Nido 3+ is being marketed as a nutritional formula while given its product composition, it can at best be characterized as powder tea whitener, if at all.

b. Nestlé Bunyad

- 2.19 Similarly, Bunyad is also labeled and marketed as a growing-up formula despite there being no standard applicable thereto. The product packaging contains the image of a young boy with the words “*ghazayi taaqat*” printed thereon. The packaging also contains the words “Vegetable Fat & Milk Solids” at the bottom. The following are the ingredients mentioned on the product packaging: “*Milk Solids, Vegetable Fat, Corn Syrup, Soya Lecithin, Minerals, Stabilizer INS332, and Vitamins.*”

2.20 In addition to not containing any milk fats, as is the case with Nido 3+, Bunyad contains 20 grams of vegetable fats and a mere 15 grams of milk proteins, which is even lower than Nido 3+. Moreover, in addition to adding sugars, the product contains corn syrup which is widely recognized as an extremely unhealthy substance and is banned in several countries. It is pertinent to mention that although the product packaging contains the words “*Vegetable Fat & Milk Solids*” at the bottom, earlier versions of the product packaging even failed to disclose this information and labeled the product as a “*Dairy Based Formula*” or “*Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form*”.

(Sample packaging of earlier versions of Bunyad has been attached herewith as Annexure-B)

c. Nestlé Nido FortiGrow

2.21 As mentioned above, Nido FortiGrow is admittedly a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form, but despite having admitted this, Nido FortiGrow’s packaging and labeling fail to mention this. It is worth mentioning that the relevant applicable standards require that not only the name of the food be written on the packaging, but a statement highlighting the presence of edible vegetable fat or oil should also appear on the label which is not the case here. The following are the ingredients mentioned on the product packaging: *Milk Solids Non Fat, Milk Fat, Vegetable Fat, Soya Lecithin, and Vitamins & Minerals*.

2.22 The Complainant has alleged that mentioning the ingredients in the manner aforesaid is deceptive. The process of manufacturing Nido FortiGrow is essentially an extractive one where, *inter alia*, water/moisture, and milk fats are extracted from the milk to produce skimmed milk powder. Vegetable fats are then added to the skimmed milk powder to produce a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Therefore, skimmed milk or skimmed milk powder should replace milk solids not fat and milk fat in the list of ingredients. Separately mentioning milk fat in the list of ingredients implies that milk fats are being added which is simply not the case.

2.23 It has been submitted that the Punjab Regulations also require that ingredients be listed in “*in order of the proportion in which they were used*” which has simply not been done in the case of Nido FortiGrow. Reference in this regard may be drawn to sub-clause (b) (ii) of clause 8 of Part III of the Punjab Regulations.

2.24 Similarly, the packaging also states “BEST FOR SCHOOL KIDS” at the front end. The Complainant has also alleged that such a claim cannot be made on the product packaging under the applicable regulations. Reference may be drawn to the Codex General Guidelines

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on Claims wherein Clause 4.1 specifically prohibits the use of superlatives to this effect. Similarly, sub-clause 14 of clause 8 of Part III of the Punjab Regulations also prohibit the use of words indicating quality or superiority on the label in the manner aforesaid.

- 2.25 Moreover, the nutritional information provided on the product packaging itself shows that the product is not complying with the compositional requirements of the applicable standard. For instance, the nutritional information shows that Nido FortiGrow contains 23 grams of protein per 100 grams. Given that all applicable standards other than those of PSQCA require a minimum of 34% milk proteins in milk solids, not fat (23.46 grams of protein per 100 grams), Nido FortiGrow is not compliant with the standard applicable to the product it admits to being. Although the Nido FortiGrow packaging does not explicitly refer to the product like milk, it is undeniable that it has the effect of misleading the ordinary consumer into thinking the product is milk.

THE NESTLÉ PAKISTAN FLYER

- 2.26 It has been submitted that the Respondent is distributing a flyer to consumers in the market which makes various misleading statements. For instance, at the start, the flyer claims that ***“Nestlé Nido FortiGrow duniya bhar ki international food authorities jesay CODEX aur local food authorities jesay Punjab Food Authority, PSQCA, Sindh Food Authority, KPK Food & Halal Authority kay ghazayi asoolon ke mutabiq tayar kiya gaya hai.”*** The claim that Nestlé Nido FortiGrow complies with food standards made by international food authorities of the world is not only severely exaggerated but is, in fact, false. It is interesting to note, without prejudice to the foregoing, that even the sister concerns of Nestlé Pakistan in other countries are also producing products under the Nido brand name. The claim is also misleading as Nido FortiGrow is skimmed milk powder with vegetable fat in powder form, whereas several of the other products are whole milk powder.

(A copy of the flyer along with certified translation has been attached as Annexure-C).

- 2.27 Furthermore, the reference to CODEX as an international food authority in the aforementioned statement is also misplaced. The Codex Alimentarius is a set of internationally recognized standards developed and maintained by the Codex Alimentarius Commission, which is not an authority, established under the auspices of the Food and Agriculture Organization of the United Nations. It is reiterated that the reference to the Codex as an international food authority in such a manner gives the impression that Nestlé Nido FortiGrow is an internationally licensed product which it is not.
- 2.28 Moreover, in the case of PSQCA, Nido FortiGrow fails to comply with the mandatory standard applicable to milk powders as it contains vegetable fat which is not permissible under PS: 363:2011. Even if we assume that the product complies with the voluntary

standard PS: 4873: 2008, the product does not bear the Pakistan Standard mark on the product packaging. Similarly, in the case of PFA and SFA, the claim is false and misleading as the product packaging is mislabeled as a nutritional formula rather than disclosing that it is a blend of skimmed milk and vegetable fat in powdered form and it also does not contain the required amount of protein under the applicable standards.

- 2.29 Additionally, it would not be out of place to mention that while the flyer states that the product has been prepared following the international and local standards, the product's official Facebook page has gone a step further and claimed that the product has been approved by local and international food authorities.
- 2.30 Secondly, the flyer also states that "*Nestlé Nido FortiGrow school janay walay bachon ke liye khaas ghazayi formula hai jis mein doodh ke sath vitamins, minerals, khas fatty acid ALA shaamil hai jo unn ki zehni or jismani nash-o-numa mein madad kertay hain*". The statement clearly states that the product is milk fortified with other vitamins and minerals. The issue here is that the product is prepared using skimmed milk, other milk solids-not-fat such as lactose, caseins, whey proteins, and vegetable fats as has been explained above. It is imperative to appreciate that there is a distinction between milk and skimmed milk, where the amount of milk fats present in the product is the determinative factor for its categorization. For a product to qualify as milk, it must meet the necessary threshold of milk fats.
- 2.31 As aforementioned, Nido FortiGrow is prepared with skimmed milk, and the fat content in the product is predominantly sourced from vegetable oils. It is imperative to mention that this fact has been omitted in the flyer. It is reiterated that the use of phrases such as "*jis mein doodh ke sath sath...*" alludes to the claim that the product is milk based which is simply false, incorrect, and is misleading for a consumer. Moreover, there have been other instances where consumers have referred to the product as milk in the comments on Nido FortiGrow's official Facebook page and Nestlé Pakistan has failed to correct them despite responding to the said comments. (*Screenshots of Nido FortiGrow's official Facebook page have been attached herewith as Annexure-D*).

The Nestlé Pakistan Television Commercial (TVC)/Video Advertisement

- 2.32 Furthermore, the Respondent has also released a TVC where the primary focus is to show that the Nido FortiGrow is sourced from milk. The TVC repeatedly refers to the product as a "khaas ghizaai formula" which is simply untrue. The narration in the background reiterates the claims similar to those made in the flyer as mentioned above. The TVC then concludes with a mother giving her son a glass of white liquid. It is imperative to appreciate that although the TVC is forty-five (45) seconds long, only five (5) seconds are spent showing other ingredients of the product. As such, an overwhelming amount of the TVC

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focuses on how the product is milk based while other constituents/ingredients of the product are downplayed.

- 2.33 The issue pointed out by the Complainant is that the TVC completely omits any reference to the extractive processes that the milk is put through where moisture and milk fats are removed. Rather, the focus of the TVC is how milk is collected, and then milk fats, vitamins, minerals, and vegetable fats and other nutrients are added. It is further pointed out that close to the end, the TVC mentions that the product is a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. This further substantiates the deception on part of Nestlé Pakistan because once it has admitted the nature of the product, it cannot claim innocence in omitting crucial details about the manufacturing process as depicted in the TVC. ***The Respondent has provided a copy of the TVC titled Nestlé Nido FortiGrow TVC in digital form along with a transcription attached as Annexure-E.***

The Nestlé Pakistan Mission Nutrition

- 2.34 It has been stated in the complaint that the Respondent has also started a campaign by the name of “Mission Nutrition”. The campaign includes a statement on Respondent’s official website coupled with a promotional video of Respondent’s representatives conducting activity in school. This is firstly evident from Nestlé Pakistan’s official website which contains statements such as, “As children grow not only do their likes and dislike change but their nutritional needs continue to evolve, therefore Milk – an essential part of a growing child’s diet, should also change” and “unfortunately many parents remain unaware of the changing nutritional needs of their children and hence, do not understand that regular milk is not enough to fulfill these demands.” In addition to highlighting that parents are unaware of the growing needs of children, the statements also underscores the importance of and caution required in choosing the right kind of milk.
- 2.35 Secondly, the promotional video in addition to reiterating similar statements contains cartoon images of a child holding a glass of white liquid resembling milk and also actual children holding packets of Nido with a glass of white liquid printed thereon. While on the one hand, the campaign highlights the importance of milk to a child’s nutrition, it simultaneously provides Nido FortiGrow as the solution to this predicament. The whole theme of the campaign makes it evident that an ordinary consumer is likely to begin associating Nido FortiGrow with milk even though it is not milk. Given that, from a consumer’s perspective, milk is necessary as opposed to a luxury item, the consumer is inevitably bound to substitute its consumption of milk with that of Nido FortiGrow. ***Screenshots of the website and a transcribed version of the video have been attached as Annexures- F, respectively.***

Nestlé Pakistan #MORETHANMILK CAMPAIGN

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2.36 It has been submitted by the Complainant that the Respondent has launched a campaign on twitter, under the tag name “#morethanmilk”. There are two principle claims being made in the campaign. Firstly, the #morethanmilk campaign states “*Thank you for recognizing that we have the goodness of milk with added vitamins and minerals.*” Secondly, the campaign also states that “*Thank you for reminding us all that it’s not just milk, it’s #morethanmilk, the specialized nutritional formula for growing up children.*” The Respondent has indirect reference claimed that Nido FortiGrow is not just milk, but a healthier version of milk with added nutritional value. It has been pointed out by the Complainant that the Respondent, in addition to referring to Nido FortiGrow as milk repeatedly, omits mentioning its vegetable fat content or the extractive processes that its product is put through which no longer allows it to be categorized as milk. (*Copies of the #morethanmilk campaign statement and promotional materials have been attached as Annexure-G*).

Summary of Contraventions of the Competition Act, 2010:

- 2.37 In compliance with Regulation 18(2)(b) of Competition Commission (General Enforcement) Regulations, 2007, the Complainant alleged that the Respondent’s actions amount to deceptive marketing practices within the meaning of Section 10(2)(b) as they amount to providing information that is false, misleading and lacks a reasonable basis with respect to character, method of production, properties and quality of Nido FortiGrow ;
- 2.38 That the Respondent has also engaged in deceptive marketing practices within the meaning of Section 10(2)(c) by resorting to the misleading comparison of goods in the process of advertising by not only comparing Nestlé FortiGrow to milk but also claiming that it is a better version of milk;
- 2.39 The Complainant has further alleged that the Respondent’s product packaging, the flyer being distributed, the video advertisement, the Mission Nutrition Campaign, and the #morethanmilk campaign constitute the distribution of information which is false, misleading and qualifies as deceptive marketing;
- 2.40 That the Respondent’s extensive reference to milk in its marketing campaigns is deceptive and capable of misleading the consumer into thinking that Nido FortiGrow is milk;
- 2.41 It was stated that the Respondent’s omission of mentioning vegetable fat contents on various forums is misleading in terms of the character, method of production, properties, suitability for use, and quality of Nido FortiGrow.
- 2.42 Respondent’s #morethanmilk campaign claiming that Nido FortiGrow is better than milk is a misleading comparison as the same cannot be backed by reliable scientific evidence.

Presentation in Support of Contravention:

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2.43 Section 10(1) of the Act categorically prohibits undertakings from engaging deceptive marketing practices, whereas Section 10(2) of the Act outlines what constitutes deceptive marketing practices. The relevant portions of Section 10(2) have been reproduced for ease of reference hereunder:

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to-

(b) 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, properties, suitability for use, or quality of goods;

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

2.44 While the first factor under Section 10(2) (b) relates to substance, namely, the mode of dissemination which constitutes distribution, the second factor is more content based. The essential consideration under the second factor is whether the information is likely to confuse, impair the judgment of, or alter the conduct of the consumer due to the content of the information. In the instant case, Respondent has specifically undertaken a marketing campaign where it is repeatedly omitting the fact that its product is using vegetable fats as opposed to milk fats while still referring to it as milk. Moreover, it has not only labeled products as nutritional formulae in the absence of any applicable standards, but it has also failed to disclose the actual nature of the product. Similarly, it has made claims about the product being approved by local and international food authorities which is patently false. This misinforms the consumer with respect to the character of the product, the method of production, and the suitability of its use. In essence, based on the information being provided by the Respondent, consumers believing their products to be milk will end up buying them. Consequently, what is important to note is that in this way these products will be substituted to satisfy a consumer demand which they do not fulfill. It is also important to appreciate that these products would not be bought for that purpose otherwise, if not for the information being provided by Nestlé Pakistan.

2.45 The Commission has dealt with consumer expectations in its order in *Al-Hilal Industries (Private) Limited* dated June 20, 2012, wherein it specifically acknowledged that “consumers are entitled to expect that actual contents of the product match the overall impression being created by the packaging and the marketing of the product. The undertakings must say what they mean and show what they sell to prevent deceptive marketing.” In the instant case, the entire thrust of Nestlé Pakistan’s product marketing has been to give consumers the impression that its products are enriched nutritional formulae aiding children in their growth and wellbeing. Furthermore, the Commission in the *Al-Hilal Order* has also stated that “the labeling on the product can have a significant impact on not only the consumer’s purchasing decision but also the maintenance of fair competition

in the market.” Based on the way that the products forming the subject matter of this complaint are labeled, consumers are misled with respect to the nature and suitability of the product. In essence, consumers that want to feed their children milk are using these products believing they are feeding their children a better version of it.

- 2.46 In addition to other issues pointed out with respect to Respondent’s product labeling in this complaint, it is also highlighted that all product packaging contains the statement “*New & Improved*”. Notwithstanding the fact that such actions violate labeling requirements under applicable standards by indicating superiority on the product labeling, it must be appreciated that this is impermissible even within the scope of the Act as it is statements like these that go to the very heart of the Respondent’s deceptive marketing practices. It is a self-referential statement that is not substantiated in any manner and such a statement can only be justified in the instance that the products in question have specifically been improved from their earlier standard providing additional nutritional benefits which are not the case here.
- 2.47 Furthermore, the Commission in its *Zong Order*, while relying on *International Harvester Co. (104 FTC 949)*, held not only that “*it can be deceptive to tell only the half-truth and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading obligation...*”, but also went further to hold that “*it can also be deceptive for a seller to remain silent if he does so under circumstances that constitute an implied but false representation.*” This view finds further strength in the Commission’s order in the *Pakistan State Oil Company Limited matter (2017 CLD 932)*. It is important to reiterate, in this regard, that the Respondent’s actions are not limited to affirmatively providing information that is false and misleading with respect to, *inter alia*, the nature, character, and suitability for use of the product, as aforementioned. The Respondent’s culpability is further substantiated by the fact that it has not only misled consumers into believing the product is milk, but it has remained silent once the consumers have referred to the product as milk on its official Facebook page.
- 2.48 It has been submitted that in the instant case, the issue is that the Respondent is resorting to comparisons with milk on one hand and simultaneously omitting information relating to the product’s composition which establishes that the product is not milk on various forums. The Respondent has appreciated that the Commission has, *In the matter of Show-Cause Notice issued to Dry & Acid Lead Batteries*, observed that in evaluating advertising representation, the Commission is required to look at the complete advertisement and formulate its opinion on the basis of the general net impression conveyed by them and not on isolated scripts. This view finds further support in *the Standard Oil of California matter* before the FTC reported as 84 FTC 1401. The significance of this rule is that the

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Respondent's actions need to be the judge as a holistic effort and its effect on the ordinary consumer who is the usual, common, or foreseeable user or buyer of the product.

- 2.49 In dealing with violations of Section 10(2)(c), the Commission has held that "*the advertiser must have some recognizable substantiation for the claims made prior to making it in the advertisement.*" In elaboration thereof, the Commission has acknowledged that the relevant factors in this respect are, i) the type of claim, ii) the benefits if the claim is true, iii) the consequences if the claim is false, iv) the ease and cost of developing substantiation for the claims, v) the type of product, and vi) the level of substantiation experts in the field would agree is reasonable. Reference in this regard may be drawn to the Commission's order in the *Matter of Procter and Gamble dated 23.02.2010*. Reference may also be drawn to *Pfizer Inc. (81 FTC 23 1972)*.
- 2.50 All of the aforementioned standards provide a minimum threshold of milk fats and milk solids not fat in order for it to be categorized as whole milk powder or skimmed milk powder. In order for the product to be categorized as whole milk, the milk fat content should be at least 26%, whereas skimmed milk, on the other hand, requires a mere maximum of 1.5% milk fats. Interestingly, skimmed milk powder and vegetable fat in powdered form also require a minimum of 26% fat content making it seemingly at par with whole milk.
- 2.51 However, the pertinent distinction here is that the fat content in skimmed milk powder and vegetable fat in powdered form is sourced from edible vegetable oils to reach the required threshold. This itself makes it abundantly evident that powders made purely from milk and powders containing vegetable fats are distinct in nature and composition and are, therefore, governed under distinct standards. It is pertinent to mention that the Respondent cannot claim inadvertence in this regard either. The Respondent has repeatedly advertised that it is complying with the international and domestic standards applicable to Nido FortiGrow. As such, it is only logical to conclude that Respondent is aware of the distinction between milk and products containing vegetable fat. Similarly, it has claimed various nutritional benefits of its products in the product packaging and TVC, while specifically omitting any reference to vegetable fat contents and the extractive processes undertaken during the manufacturing processes that reduce the nutritional value of the product. Despite being aware of the distinction, the Respondent has chosen to market Nido FortiGrow in the manner aforesaid, which itself shows that its intention is clearly one to deceive and mislead the consumer about the nature of the product by downplaying the distinction.
- 2.52 It is further pertinent to point out that the August Supreme Court of Pakistan had initiated proceedings where various dairy products including Nido FortiGrow were to be tested for their contents. The backdrop of the proceedings was that companies were selling products as milk which were not milk. Like many other products, Nido FortiGrow was also tested

on the order of the August Court. Once the product had been tested, based on the results, the August Court categorically observed that the product is not natural milk. In this backdrop, the Respondent was directed to change its label to include a statement in the Urdu language that the product is not natural milk. Despite the August Court's observation, and the consequent modification of Nido FortiGrow 's packaging to explicitly state that the product is not milk, the Respondent is not only merely comparing Nido FortiGrow to milk, but is in fact marketing its product as a better and more nutritious version of milk. Moreover, the #morethanmilk campaign is aimed at projecting Nido FortiGrow as super milk. *(Copies of the orders of the August Supreme Court have been attached as Annexure-H).*

- 2.53 That the deception is all the more evident given the fact that consumers are referring to Nido FortiGrow as milk in the comments section on Nido FortiGrow 's official Facebook page. It has been submitted that it is worth mentioning that although the Respondent is responding to such comments, it has not pointed out that its product is not milk, at any instance. The overall effect of the marketing, as is evident from comments by consumers on the official Facebook pages, as aforementioned, is that consumers do, in fact, perceive the said products as milk, which they are not. These consumers are the ordinary general consumers feeding their children the aforesaid products instead of milk based on the claims and representations made by the Respondent.
- 2.54 The Complainant has stated that the subject matter of this complaint is not limited to misinformation or monetary losses, but in fact raises health concerns for children. The ill-effects of the deceptive nondisclosure by the Respondent, in this regard, cannot be cured by merely conforming to packaging or labeling requirements. It has been further stated that rather affirmative admissions of wrongdoing and disclosures are required to remedy the distortion in consumer perception caused by the Respondent.
- 2.55 It has been reiterated by the Complainant that the issue with Nido FortiGrow is not that it contains vegetable fats but that the marketing regarding the product by Nestlé Pakistan stresses that the product is milk sourced while omitting or downplaying the fact that its fat content is vegetable sourced. The crucial omission by the Respondent is that the product only matches the MSNF threshold for whole milk but lacks the fat content required for it to be categorized as milk. Such information is integral for a consumer's choice in choosing products it wants to consume.

Prayer:

- 2.56 The Complainant has, therefore, prayed that the Commission may kindly pass appropriate orders in following terms:

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- a. A prohibition order be issued restraining the Respondent from disseminating any information through any medium whatsoever where Nido FortiGrow has been related to natural milk;
- b. Respondent be directed that all future advertisements or other dissemination of information on a public forum relating to Nido FortiGrow are to categorically state that the product is not milk;
- c. All current video advertisements and other distributions of information relating to Nido FortiGrow be confiscated;
- d. Respondent be directed to modify the Nido FortiGrow packaging and labeling to clearly state that the product is a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form in conformity with the applicable standards;
- e. Respondent be immediately restrained from selling Nido 3+ and Bunyad as they fail to conform to any applicable standard;
- f. Nido FortiGrow, Nido 3+, and Bunyad be tested by an accredited and independent laboratory;
- g. A market survey be carried out to evaluate consumer perception about the nature of Nido FortiGrow, Nido 3+, and Bunyad; and
- h. Any other relief that the Commission may deem just and appropriate in the given circumstances also be kindly granted.

3. SUBMISSIONS OF THE RESPONDENT

- 3.1 The complaint was forwarded to the Respondent by the Enquiry Committee for comments on July 02, 2019. However, the Respondent requested an extension vide letter dated July 16, 2019, which was granted to it through a letter dated July 19, 2019. The Respondent requested a further extension in time on July 30, 2019, which was given vide letter dated August 01, 2019. The Respondent finally submitted its comments, through its authorized representatives AJURIS Advocates and Corporate Counsel, through letter dated August 16, 2019, the contents of which are reproduced below.

Preliminary Objections:

- 3.2 That the Respondent is a corporate entity engaged *inter alia* in the business of processing, packaging, manufacturing, sale, import, and export of food and beverage items, including milk and milk products. It subscribes to and welcomes the principles that underlie a progressive competition regime as they provide a level-playing field, enabling the Respondent to engage in ethical business practices without being subjected to abuse by competitors.
- 3.3 It has been submitted in the reply that the Complainant rather than initiating its business and establishing institutions, as stated in its Memorandum of Association, instead filed a complaint against the Respondent within few weeks of its incorporation. The relief sought in the complaint establishes that the intent for filing the complaint is to cause damage to the Respondent's reputation and business interests. The relief sought, requesting the

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Commission to confiscate all the advertising material in relation to the Respondent's products and seeking immediate restraint against the sale of the said products, is in essence an attempt to undermine free competition as opposed to bolstering and promoting it.

- 3.4 The Respondent has submitted that the superior courts have repeatedly held that parties presenting themselves as public interest litigators ought to justify their bona fides and failure to do the same warrants dismissal of the challenge raised by such parties. It is evident on bare perusal that the complaint has been presented in a manner of public interest litigation (i.e. for protection of interests of consumers at large), but in fact has been filed with a mala fide intent to harm the Respondent interests and undermine competition in the market. The Hon'ble Supreme Court of Pakistan, in the case of *Dr. Akhtar Hassan Khan v. Federation of Pakistan (2012 SCMR 455)*, quoted with approval of the judgment in the case of *Ashok Kumar Pandey v. State of West Bengal (AIR 2004 SC 280)*, wherein it has been held as follows:

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

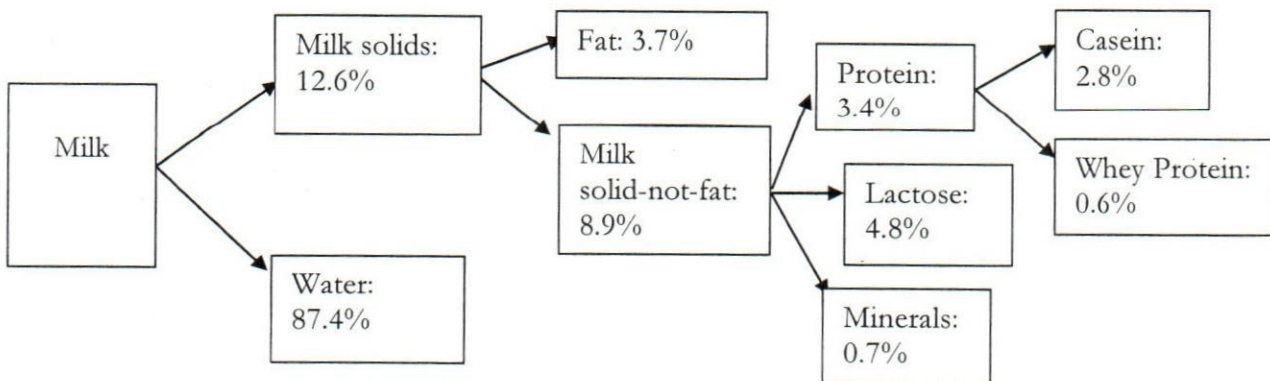
- 3.5 It has been alleged by the Respondent that the challenge raised in the complaint regarding the advertisements and packaging of its products is of such nature that relates to either consumer protection or to the labeling of food items as opposed to being a matter concerning competition. Pursuant to the constitutional scheme of distribution of powers between the center and the provinces, regulation of food items and consumer protection are subjects which fall within the exclusive competence of the provincial legislatures in terms of Article 142(c) of the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**") and the legislative field is already occupied through duly promulgated laws including, but not limited to, the Punjab Pure Food Rules 2011, the Punjab Pure Food Regulations 2018 and the Punjab Consumer Protection Act, 2005. The complaint falls within the exclusive jurisdiction of provincial legislation and the Complainant has burdened the Commission (which is exercising jurisdiction under federal legislation) with a matter that falls outside the purview of its jurisdiction.

3.6 It has been stated by the Respondent that the Complainant is a single member company and has presented itself as a consumer who has allegedly been deceived by the labeling and marketing campaigns of the Respondent, therefore, not an undertaking for purposes of the Act. The Complainant has neither alleged nor cited any evidence that Respondent has engaged in any anti-competitive practices that are capable of harming the business interests of another undertaking. Section 10 of the Act does not transform the Commission into a consumer protection agency and in the absence of any material establishing harm to other undertakings, the requirements of Section 10(2) of the Act are not satisfied. The Complainant has approached the Commission as a consumer and not as an undertaking. Reliance is placed on the Commission's judgment reported as **2018 CLD 919**, wherein it has categorically held that consumers are excluded from the definition of the undertaking, and complaints filed by consumers are not maintainable before the Commission.

3.7 In view of the above, it has been submitted that the inquiry ordered on the basis of the aforesaid complaint is without jurisdiction and in breach of Section 37 as interpreted by the Honorable Islamabad High Court.

Preliminary Submissions:

3.8 The Respondent has alleged that the Complaint is based on a sheer misunderstanding of milk and milk products' composition, properties, and regulation. Milk is a complex fluid consisting of water, fat, lactose, casein, whey proteins, and minerals in amounts varying with the milk of various species of animals. Milk is composed of water, milk fat, and Milk Solid Non Fat (**MSNF**). MSNF consists of protein, lactose, and minerals. MSNF are also referred to as skim solids. The term **total solids** refer to MSNF/skim solids plus the milk fat. The components (in percentage) of raw milk are as follows: Water (87.4%) and Milk Solids (12.6%). Milk Solids are further divided into Fat (3.7%) and MSNF (8.9%). MSNF is further divided into Protein (3.4%), Lactose (4.8%) and Minerals (0.7%). The said percentages are average values and vary on the basis of seasonality, feed, and breed of milking animals. Protein is further divided into Casein (2.8%) and Whey Protein (0.6%). A figurative illustration of the composition is provided below:



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- 3.9 In view of the aforesaid composition, it is abundantly clear that it is primarily MSNF which contains most of the nutrients that form part of milk and is the pivotal component as opposed to milk-fats as asserted in the complaint to create an impression that products not containing milk-fats cannot be deemed as milk products. The pivotal nature of MSNF/skim solids is also highlighted in products such as skimmed milk that are unambiguously categorized as milk products despite the absence/minimal quantity of milk-fats.
- 3.10 The Respondent has stated that the Complainant, by filing a challenge under the competition regime, is seeking a judgment from the Commission regarding the desirability of components of milk and milk products, which is completely beyond the parameters of competition law – the subject matter competence of the honorable Commission, and would in fact hamper competition in the market. As detailed above, the composition of food items, their labeling and packaging are governed by relevant legislation enforced by relevant food authorities across the country. The Complainant is essentially requesting the Commission to second guess the findings of competent regulatory bodies who have duly approved the Respondent’s products. Resultantly, such a complaint being based on mala fide intent, and being beyond the jurisdiction of the competition regime, ought to be dismissed without any further adjudication.

Respondent’s Compliance with the Applicable Regulatory Regimes:

- 3.11 The Respondent has submitted that its products under challenge, i.e., Nestlé Nido FortiGrow, Nestlé Bunyad, and Nestlé 3+ are fully compliant with the applicable regulatory regimes and all the claims made on the products identified are permissible and are neither false nor misleading. Therefore, such claims do not contravene Section 10 of the Act. The compliance of the Respondent’s products with the applicable standards is elaborated hereunder:

a. Nestlé Nido FortiGrow

• **Applicable Standards**

- 3.12 Nestlé Nido FortiGrow is a dairy based formula best suited to the nutrient requirements of the school going kids. For purposes of regulation, the following national and international standards are applicable to Nido FortiGrow :
- i. Clause 0.1.6 titled “Blend of Skimmed Milk and Vegetable Fat in Powdered Form” of Chapter 1 of the Punjab Pure Food Regulations 2018 (“**PPFR 2018**”) and in-pari-materia regulations in other provinces.
 - ii. Pakistan Standard 4873-2008 titled Dairy Safety & Standard for Milk and Milk Products issued by Pakistan Standards and Control Authority (“**PSQCA**”)
 - iii. Codex Standard 251-2006 titled Blend of Skimmed Milk and Vegetable Fat in Powdered Form (applicable due to incorporation vide PFFR 2018)

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- 3.13 It is stated at the outset that none of the requirements specified in the aforesaid standards are in conflict. Mostly the national standards adopted vide Clause 0.1.6 of PFFR 2018 and Section 4.18 of PS 4873-2008 are based on Codex Standard 251-2006. So compliance with Clause 0.1.6 of PFFR 2018 generally results in compliance with and Section 4.18 of PS 4873-2008 and Codex Standard 251-2006 and vice versa.
- 3.14 For the sake of clarity, it is imperative to highlight that PS 4873-2008 issued by PSQCA is a voluntary standard and not mandatory. As per Rule 12 of the Pakistan Standards Rules, 2008, the Pakistan Standards are voluntary, unless adopted by concerned parties via legislation, or if the same are referred to in a contract:

“12. Status of Pakistan standard - Pakistan standards are voluntary and available to the public. Their implementation depends on adoption by concerned parties. However, a Pakistan standard becomes binding if it is stipulated in contract or referred to in a legislation or made mandatory by specific orders of the Federal Government.”

- 3.15 Under Section 14 of the PSQCA Act, 1996, the Federal Government has the power to notify articles that cannot be manufactured or sold without complying with the applicable Pakistan Standards. PSQCA exercising powers under Section 14 has notified ‘List of Compulsory Items to meet Pakistan Standards’ along with applicable standards. PS 363-2011 applicable to the whole and skimmed milk powders is listed at Serial No.35 of the list published by PSQCA. However, PS 4873-2008 applicable to Milk Powder Vegetable Fat Based (relevant for present purposes) is not notified as a compulsory standard.

- **Compliance with Applicable Compositional Standards**

- 3.16 It is categorically stated that Nestlé Nido FortiGrow has never been marketed or categorized as “Natural Milk” or “Milk”. It is imperative to appreciate the distinction between “Milk” and “Milk Product”, which is deliberately being blurred by the Complainant. “Milk” is defined in Chapter 1, clause 1 (a) of the PFFR 2018 as;

“(a) “Milk” means normal, clean and pure secretions obtained from the mammary glands of healthy halal milk animals (buffaloes, cows, goats, sheep’s, camels and/or mixed), free from colostrum’s, having 12% minimum milk total solids including minimum 3.5% milk fat and minimum 8.5% milk solids not fat.”

Clause 0.1.1.1 defines “Fluid Milk (Plain)” as

“Means the normal, clean, and pure secretion obtained from the mammary glands of a healthy cow, buffalo, goat, camel or sheep (halal milk animals), whether boiled, homogenized, pasteurized, sterilized or UHT. Milk shall contain not less

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than 34 percent of milk protein in milk solids not fat and lactose not less than 46 percent in milk solids not fat. It shall be free from colostrum and any kind of adulterants like added water, urea, starch, formaldehyde, detergents, artificial milk, non-dairy fats, sugars, salts, ammonium sulphate, hydrogen peroxide, sodium bicarbonate, boric acid, salicylic acid, etc. Levels of melamine, hormones, antibiotic residues, aflatoxins and heavy metals shall meet the Codex Alimentarius standing guidelines.”

Clause 0.1.1.2 Defines “Milk Product” as

“Means a product obtained by any processing of milk, which may include food additives and other ingredients functionally necessary for processing and includes but not limited to cream, concentrated milk, condensed milk, skimmed milk, separated milk, flavored milk, milk for making tea, milk shake, milk drink, dahi, yoghurt, raita, rasmalai, lassi, khoya, barfi, pera, kalakand, cheese, dried milk, dried milk for making tea, ice cream and any other product made by the addition of any substance to milk or to any of the milk products and used for similar purposes. Milk products shall not contain any substance not found in milk unless specified in the standards.”

Clause 0.1.6 permits the use of vegetable oil and/or vegetable fat in the category of “**Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form**”. In view of the above-reproduced definition of “Milk Product”, Nestlé Nido FortiGrow consisting of skimmed milk and vegetable fat (along with other nutrients) is a “milk product”.

3.17 Nestlé Nido FortiGrow fully complies with the nutritional requirements specified for Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Clause 0.1.6.1 of PFFR 2018 states the following compositional requirements:

- i. Minimum total fat 26%
- ii. Maximum water 5%
- iii. Minimum milk protein in MSNF 34%

The average composition of Nido FortiGrow is as follows:

- i. Nido FortiGrow contains 28% total fat, out of which 14% is milkfat.
- ii. Moisture/water content is 3%.
- iii. Nido FortiGrow contains **67% MSNF**. Each 100 grams of Nido FortiGrow contains **23 grams of Milk Protein**. PFFR 2018 requires a minimum 34% **milk protein in MSNF** and not the whole product (as wrongly assumed by the Complainant). The percentage of milkfat in MSNF in Nido FortiGrow is calculated as follows:

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23 protein (declaration gram per 100g of product)/67 (MSNF) x 100 = **34.3% milk protein in MSNF**

- **Compliance of Nido FortiGrow with the Applicable Standards Detailed in Tabular Form Below**

<u>Product</u>	<u>PSQCA Standard (4873-2008)</u>	<u>PFA Regulation 01.6.1</u>	<u>Codex Standard (251-2006)</u>	<u>Compliance Status (Product Results)</u>
Nestlé Nido FortiGrow	Minimum Total Fat: 26%	Minimum Total Fat: 26%	Minimum Total Fat: 26%	Total Fat Content: 28%
	Maximum Water: 5%	Maximum Water: 5%	Maximum Water: 5%	Moisture/Water: 3%
	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Milk Protein in MSNF: 34.3%

- **Compliance with Applicable Labeling Standards**

3.18 In order to appreciate the Respondent’s compliance with PFFR 2018 labeling requirements, it is essential to understand the scheme of the said regulations. Part III of PFFR 2018 relates to the labeling of pre-packed foods. In Part III, PFFR 2018 lists down positive and negative obligations in relation to the labeling of a product. For example, Clause 8(24) specifically prohibits the use of the word “milk” alone on any product other than “milk”. Clause 8(28) requires manufacturers to specify detailed instructions for the preparation and storage of milk products.

3.19 Clause 8.5 of Part III provides more specific labeling requirements for various milk products, including infant formula, condensed milk, condensed skimmed milk, liquid tea whitener, powder tea whitener, milk powder, skimmed milk powder, frozen desert, etc. No specific labeling requirement under the category of Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form is provided under the said regulations. The said regulations do not prohibit the use of “**ghiziyai formula**” for products falling under the category of Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form and, therefore, the previous label of Nestlé Nido FortiGrow (referring it as a “ghiziyai formula” for school going kids) was not in breach of the applicable regulations and was never found by the competent authorities to be so.

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3.20 Clause 0.1.6 under the said category of Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form” states that the product shall comply with Codex Standards. Relevant Codex Standard 251-2006 in clause 7.1 states that the name of the food shall be Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form **or any other names allowed by the national legislation.** The national and provincial legislation (i.e., PS 4873-2008, Clause 0.1.6 of PFFR 2018) does not specify any specific labeling requirements for the said category. Instead under the prevalent national regulatory practice labels (not only the name) are to be approved by the relevant food authorities. The Punjab Food Authority duly approved the label of Nestlé Nido FortiGrow on 08.07.2017. In fact, the term “formula” was added on the label of Nestlé Nido FortiGrow on the direction of the Punjab Food Authority. In the Punjab Food Authority letter dated 10.05.2017 it was stated that:

“...it was decided by the Scientific Panel that the word “Milk” should not be used on label of such product; instead, any appropriate word e.g. “Formula Product”, may be used, subject to approval of the proposed word by the Punjab Food Authority under law.”

(Copy of PFA letters dated 10.05.2017 and 08.07.2017 is attached herewith as Annexure-I).

3.21 In April 2019, a new label of Nido FortiGrow was introduced and the product is now labeled as “Blend of Skimmed Milk and Vegetable Fat in Powdered Form”. Nido FortiGrow label expressly states that it is not natural milk, but a formula best suited for school going kids. It expressly states the presence of vegetable fats in the product. In view of the foregoing, any challenge regarding the labeling of Nido FortiGrow is without any basis and warrants dismissal. *(Copy of new label of Nido FortiGrow is attached herewith as Annexure-J)*

b. Nestlé Bunyad

• **Applicable Standards**

3.22 Nestlé Bunyad is a dairy based formula for school going kids composed of milk solids (including milk fat), vegetable fat, corn syrup, sugar, mineral, vitamins, and other ingredients. For purposes of regulation, the following national and international standards are applicable to Nestlé Bunyad:

- i. Clause 0.1.6.2 titled “Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form” of PFFR 2018 and pari materia regulations in other provinces.
- ii. PS 4873-2008 titled Dairy Safety & Standard for Milk and Milk Products issued by PSQCA

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- iii. Codex Standard 251-2006 titled Blend of Skimmed Milk and Vegetable Fat in Powdered Form (applicable due to incorporation vide PFFR 2018)

- **Compliance with Applicable Compositional Standards:**

3.23 Nestlé Bunyad fully complies with the nutritional requirements specified for Reduced Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Clause 0.1.6.2 of PFFR 2018 states the following compositional requirements:

- i. Total fat more than 1.5% and less than 26%
- ii. Maximum water 5%
- iii. Minimum milk protein in MSNF 34%

The average composition of Nestlé Bunyad is as follows:

- i. Total fat 20%. Out of which 3% is Milkfat.
- ii. Moisture/Water content is 3%.
- iii. Nestlé Bunyad contains **37% MSNF**. Each 100 grams of Nestlé Bunyad contains **15 grams of Milk Protein**. PFFR 2018 requires a minimum 34% **milk protein in MSNF** and not the whole product (as wrongly assumed by the Complainant). The percentage of milkfat in MSNF in Nestlé Bunyad is calculated as follows:

$$15 \text{ protein (declaration gram per 100g of product)} / 37 \text{ (MSNF)} \times 100 = \underline{\underline{40.5\% \text{ milk protein in MSNF}}}$$

- **Compliance of Nestlé Bunyad with the Applicable Standards Detailed in Tabular Form Below:**

Product	PSQCA Standard (4873-2008)	PFA Regulation 01.6.2	Codex Standard (251-2006)	Compliance Status (Product Results)
Nestlé Bunyad	Total Fat more than 1.5% and less than 26%	Total Fat more than 1.5% and less than 26%	Total Fat more than 1.5% and less than 26%	Total Fat Content: 20%
	Maximum Water: 5%	Maximum Water: 5%	Maximum Water: 5%	Moisture/Water: 3%
	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Milk Protein in MSNF: 40.5%

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- **Compliance with Applicable Labeling Standards:**

- 3.24 As mentioned above, no specific labeling requirement under the category of “**Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form**” is provided under PFFR 2018. The said regulations do not prohibit the use of “ghiziyai formula” for products falling under the category of Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form and therefore, the previous label of Nestlé Bunyad (referring it as a “ghiziyai formula” for school going kids) was not in breach of the applicable regulations and was never found to be in breach of the relevant regulations by the competent authorities.
- 3.25 Clause 0.1.6 of PFFR 2018 states that the product shall comply with Codex Standards. Relevant Codex Standard 251-2006 in clause 7.1 states that the name of the food shall be Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form **or any other names allowed by the national legislation.** The Punjab Food Authority duly approved the label of Nestlé Bunyad on 12.07.2017. *(Copy of the PFA letter dated 12.07.2017 is attached herewith as Annexure-K, respectively)*
- 3.26 The Respondent has submitted that in April 2019, a new label of Nestlé Bunyad was introduced and the product is now labeled as “Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form”. Nestlé Bunyad label expressly states/discloses that it is not natural milk, but a formula for school going kids. It expressly states the presence of vegetable fats in the product. The label of Nestlé Bunyad is fully compliant with the applicable regulatory regime and the objections raised in the complaint are without any merit. *(Copy of new label of Nestlé Bunyad is attached herewith as Annexure-L)*
- c. Nestlé Nido 3+*
- 3.27 Nestlé Nido 3+ is growing up formula for growing kids composed of milk solids (including milkfat), vegetable oil, soya, sugar, minerals, vitamins, and other ingredients. Nestlé Nido 3+ is designed for preschool kids aged 3-5 years. Till date, there is no local or international standard laid out for growing up formulas.
- 3.28 It has been asserted by the Respondent that the food industry is an evolving industry and it is not possible to specify standards for all conceivable recipes/formulas that are being developed and composed around the globe on an on-going basis. To the extent that a recipe or product is not in breach of a stipulated standard, the production and sale of such a product is not prohibited. The food regulations do not state that products not regulated by any standard are prohibited. In fact the history of the evolution of standards for different products establishes that prescription of standards for evolving products is a continuous

process. Many products without specifications in earlier regulations now have prescribed specifications.

- 3.29 It is conceivable that relevant food authorities in Pakistan and around the world will devise a standard for growing up formula in due course, but till date, no such standard exists. Punjab Food Authority vide Punjab Food Authority (Marketing of Infant Formula) Regulation, 2017 has recognized growing up formulas as a distinguishable category from infant formula even though it has not yet prescribed a mandatory standard. Regulation 19 states:

“Grown up formulas products should be clearly distinguishable in name and in design from infant formulas”

(Copy of Punjab Food Authority (Marketing of Infant Formula) Regulation, 2017 is attached herewith as Annexure-M)

- 3.30 Although no specific standard governs Nestlé Nido 3+, but Nestlé Nido 3+ complies with the minimum standards specified in following local and international standards:
- i. Clause 0.1.6.2 titled “Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form” of PFFR 2018 and pari materia regulations in other provinces.
 - ii. Pakistan Standard 4873-2008 titled Dairy Safety & Standard for Milk and Milk Products issued by PSQCA
 - iii. Codex Standard 251-2006 titled Blend of Skimmed Milk and Vegetable Fat in Powdered Form (applicable due to incorporation vide PFFR 2018)
 - iv. Chapter 13 of PFFR 2018 titled Foodstuff intended for particular nutritional purposes
 - v. PS 1688-2008 titled Pakistan Standard Specification for Food for infants and children
 - vi. Codex Standard 156-1987 titled Standard for follow up formula

- 3.31 Nestlé Nido 3+ is compliant with Chapter 13 of PFFR 2018, PS 1688-2008, and Codex Standard 156-1987, and the said compliance stands proven in view of the report submitted by the Pakistan Council of Scientific and Industrial Research (“**PCSIR**”) before the Supreme Court of Pakistan. Compliance with the minimum requirements stipulated in Chapter 13 of PFFR 2018, PS 1688-2008, and Codex Standard 156-1987 does not categorize Nido 3+ as a follow up formula. Nido 3+ as a growing up formula in addition to the components/nutrients specified for follow up formula has other nutrients and ingredients recommended for kids aged 3-5 years and therefore, falls under a distinct category of growing up formula for which no separate standard is specified by any local or international food authority till date. ***(Copy of PCSIR Report dated 06.04.2018 is attached herewith as Annexure-N)***

3.32 Nestlé Nido 3+ complies with the nutritional requirements specified for Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Clause 0.1.6.2 of PFFR 2018 states the following compositional requirements:

- i. Maximum total fat 26%
- ii. Maximum water 5%
- iii. Minimum milk protein in MSNF 34%

The average composition of Nestlé Nido 3+ is as follows:

- i. Nestlé Nido 3+ contains 20% total fat. Out of which 7% is milk-fat.
- ii. Moisture/water content is 2.5%.
- iii. Nestlé Nido 3+ contains **47% MSNF**. Each 100 grams of Nestlé Nido 3+ contains **16 grams of Milk Protein**. PFFR 2018 requires a minimum 34% **milk protein in MSNF** and not the whole product (as wrongly assumed by the Complainant). The percentage of milk-fat in MSNF in Nestlé Nido 3+ is calculated as follows:

$$16 \text{ protein (declaration gram per 100g of product)} / 47 \text{ (MSNF)} \times 100 = \underline{\underline{34\% \text{ milk protein in MSNF}}}$$

3.33 It has been further stated by the Respondent that the label of Nestlé Nido 3+, using the terms “**Growing up Formula**”, has been duly approved by Punjab Food Authority without any objection. The product categorically states that it is a nutritional formula for kids above 3 years. The label unambiguously states that it is not natural milk. The label also discloses the presence of vegetable oil on the label. In view of the foregoing, it is apparent that no deception is caused due to the label of Nestlé Nido 3+, which fairly and accurately discloses the content comprising the product. Therefore, the allegation of deception with regards to the labeling and marketing of Nestlé Nido 3+ is baseless.

- **Nestlé Nido 3+ Compliance with Standards for ‘Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form’ Detailed in Tabular Form Below:**

Product	PSQCA Standard (4873-2008)	PFA Regulation 01.6.2	Codex Standard (251-2006)	Compliance

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	Total Fat more than 1.5% and less than 26%	Total Fat 1.5% more than and less than 26%	Total Fat more than 1.5% and less than 26%	Total Fat Content: 20%
Nestlé Nido 3+	Maximum Water: 5%	Maximum Water: 5%	Maximum Water: 5%	Moisture/Water: 2.5%
	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Minimum Milk Protein in MSNF: 34%	Milk Protein in MSNF: 34%

The Respondent also submitted a para-wise reply to the complaint which is summarized below:

- 3.34 The Respondent has stated that the Complainant misperceives the category of milk products provided under the applicable regulatory regimes. The regulatory regimes have not distinguished amongst the additive and extractive processes. The definition of milk product as provided in Clause 0.1.1.2 of PFFR 2018 establishes that any kind of processing be that additive or extractive changes the character of fluid/plain milk to milk product.
- 3.35 The Respondent has further submitted that the regulation of the food industry is only relevant to the extent that a particular product falls in the category identified and regulated by given standards. If a product does not fall with any of the categories identified in the regulations it does not mean that the manufacturer is prohibited from manufacturing or selling such a product. The interpretation suggested by the Complainant is contrary to the prevalent practice in the food industry and Article 4 of the Constitution.
- 3.36 Contents of para 2.10 *ibid* have been denied to the extent that it lists down any nutritional requirements not specified in Clause 01.6.1 for Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form and Clause 01.6.2 for Reduced Fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form.
- 3.37 The Respondent has clarified that for purposes of the Respondent's products under challenge, the relevant Codex Standards are Codex Standard 251-2006 and Codex Standard 156-1987.
- 3.38 Contents of paragraph 2.14 *ibid* are denied for being misleading. Codex Standard 251-2006 has been made applicable by virtue of incorporation in PFFR 2018. Clause 7.1 of the said standard proposes names of the product but also allows for any other names allowed pursuant to national legislation. In the national regulatory practice, the label of the product including the name is approved by the relevant food authorities. Therefore, as far as the

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name has been approved by the relevant food authority, labeling the product as approved is in compliance with the Codex Standard. In relation to disclosure of vegetable fat in the product as stipulated in Clause 7.2 of Codex Standard 251-2006, there is no requirement to mention vegetable fat other than in the list of ingredients. So far as the presence of vegetable fat is disclosed on the label, the requirement specified in Clause 7.2 stands complied. The purpose of disclosing the list of ingredients is to educate and inform a consumer as regards the composition of the product. To claim that such disclosure must be provided separately in addition to the list of ingredients is ludicrous.

- 3.39 The Respondent has stated that it is incorrect that all three products under challenge are sold as a nutritional formula for school going kids. The categorization of all three products has been detailed under the preliminary submissions above.
- 3.40 It has been denied by the Respondent that Nido FortiGrow falls under PS 363:2011. The said standard is specifically applicable to full cream milk powder, partly skimmed milk powder, semi-skimmed milk powder, and skimmed low-fat milk powder. Nido FortiGrow is vegetable based milk powder and therefore, covered under PS 4873-2008.
- 3.41 It has been denied by the Respondent that Nestlé Bunyad and Nestlé Nido 3+ do not contain any milk-fats as this proposition is based on flawed understanding of milk composition. Labels of Nestlé Bunyad and Nestlé Nido 3+ disclose that the products contain milk solids (not MSNF). Where reference is made to MSNF and not milk solids, it is clearly labeled on the product (i.e., on the label of Nido FortiGrow). As detailed above, milk solids contain milk-fats as well. Therefore, the said products contain milk-fats as part of milk solids. Further, it is clarified that the presence of milk-fats is not necessary for a product to be covered under Clause 0.1.6 of PFFR 2018 and Codex Standard 251-2006.
- 3.42 The Respondent has vehemently denied that Nido 3+ contains 20 grams of vegetable fat and 16 grams of milk protein which is much lower than any applicable standard. It is once again clarified that there is no prohibition on manufacturing and selling a product not covered by any specified standard. Having said that it is submitted that Nestlé Nido 3+ complies with the local and international standards mentioned above in paras 3.11-3.33 *ibid.*
- 3.43 The Respondent has submitted that Nestlé Nido 3+ contains milk-fats as part of milk solids identified on the label. The paragraph under reply refers to protein and vegetable fat values present in each 100 gram of the product and not the whole product. As mentioned above Nestlé Nido 3+ contains 20% total fat out of which 7% is milk-fat and the remaining 13% is vegetable fat and 34% milk protein in MSNF. Although there is no standard specified for growing up formulas, but Nestlé Nido 3+ is compliant with the standards specified for follow up formulas and contains additional nutrients recommended for kids aged 3-5 years.

Reports submitted by PCSIR before the Honorable Supreme Court of Pakistan establish compliance of Nestlé Nido 3+ with the standards applicable to follow up formulas. It has also been clarified that the use of sugar is not prohibited or declared unhealthy under any applicable local and international standards.

- 3.44 The Respondent has further denied that the Nestlé Bunyad is labeled and marketed as a growing up formula. Nestlé Bunyad was earlier labeled as dairy based formula and is now labeled as “Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form”.
- 3.45 It has been vehemently denied that Bunyad contains 20 grams of vegetable fats and a mere 15 grams of milk proteins, which is even lower than Nido 3+. Nestlé Bunyad complies with the local and international standards mentioned in Para’s 3.22 – 3.26 *ibid*:
- 3.46 It has been asserted by the Respondent that Nestlé Bunyad contains milk-fats as part of milk solids identified on the label. The paragraph under reply refers to protein and vegetable fat values present in each 100 gram of the product and not the whole product. As detailed above in paragraph 21, Nestlé Bunyad contains 20% total fat out of which 3% is milk-fat, and the remaining 17% is vegetable fat and 40.5% Milk protein in MSNF. The Complainant though makes a scientific claim that corn syrup is widely recognized as an extremely unhealthy substance, but fails to provide any reliable scientific evidence to prove such assertion. Also, no evidence has been provided to substantiate that corn syrup has been banned in several countries. There have been some reports of high fructose corn syrup being regulated in the EU, but such regulation is regarding the production quota of high fructose corn syrup to ensure fair agricultural/economic development across the EU and is not due to any health concerns. Corn syrup is a permissible food ingredient under relevant local and international food regulations. The Complainant, by making utterly vague health-related claims, is merely attempting to raise doubts about the nutrient value of Nestlé’s products on the basis of bald assertions, not backed by scientific evidence.
- 3.47 The Respondent denied that earlier versions of the product packaging of Nestlé Bunyad failed to disclose the information that it contains Vegetable Fat & Milk Solids, whereas it was in fact labeled as a “Dairy Based Formula” or “Reduced Fat Blend of Skimmed Milk and Vegetable Fat in Powdered Form”. The Respondent has submitted that Nestlé Bunyad has been and continues to be labeled in accordance with the applicable regulatory practices and requirements. Required disclosures pertaining to ingredients and nutrient value of the product have been duly provided on the label.
- 3.48 The Respondent has alleged that the Complainant has just assumed the manufacturing process of Nido FortiGrow and claimed that the manner in which the ingredients are listed on the package are deceptive. The manufacturing process of Nido FortiGrow is as follows:

- 3.49 First of all, standardization of milk-fat is done as per the recipe, and then vegetable fat/oil is added, besides the addition of vitamins. Then it is processed in an evaporator, together with spray drying, to convert it into powder form. Nido FortiGrow contains 50% milk-fat and 50% vegetable fat. Therefore, MSNF, milk-fat, and vegetable fat are separately mentioned on the label. Ingredients have been mentioned in order of the proportion they are used. Nido FortiGrow contains 67% MSNF, 28% total fat – out of which 14% is milk-fat and 14% is vegetable fat. The said ingredients are listed in descending order, with MSNF being the largest component mentioned first, followed by Milk-fat and Vegetable fat.
- 3.50 Furthermore, the Respondent has denied that the claim “*Best for School Kids*” cannot be made on the product packaging under the applicable regulations. It is categorically stated that the claim “*Best for School Kids*” mentioned on the Nido FortiGrow label is not projected in a comparative sense in relation to any competitor, but instead it is used to inform the consumers that the product is best suited to the nutritional requirements of the school going kids. The following facts and circumstances are necessary to ascertain the purpose and intention behind using the terms “*Best for School Kids*”:
- a. The Respondent, as a company, caters to different age cycles of its consumer base. As the product may be consumed by kids of different age groups, the statement “*Best for School Kids*” is employed to convey to the consumer that the product is best for kids going to school;
 - b. The Respondent as a company manufactures and sells various products for a particular age group (i.e., Nido FortiGrow and Nestlé Bunyad both cater to school going kids), but the statement “*Best for School Kids*” is only used on Nido FortiGrow in comparison to the Respondent’s own products catering for the same age group. Both the products have been designed keeping in view the nutritional requirements of the kids of school going age and both comply with the standards specified for such formulas by international and local authorities. However, Nido FortiGrow is a premium product with more fortification, e.g., containing nutrients such as Alpha Linoleic Acid (“**ALA**”), etc., hence the use of terms “*Best for School Kids*” on Nido FortiGrow’s label. At the time the claim “*Best for School Kids*” was introduced, the label underwent other changes as well. On top of the label, change in the recipe of the formula was also disclosed on the package as “*New and Improved with ALA**”.
 - c. The claim that Nido FortiGrow is “*Best for School Kids*” has been designed to meet recommended dietary intakes for kids aged 4-8 years. Since school going kids are more exposed to the external environment, they need high immunity to fight infectious diseases without compromising on optimum physical and mental growth. The balanced diet should include adequate nutrition with the right combination of both macronutrients (carbohydrates, protein, and fats) and micronutrients (vitamins and

minerals). The Food and Nutrition Board of US studies issues of national and global importance on the safety and adequacy of food supply; establishes principles and guidelines for good nutrition; and provides authoritative judgment on the relationships among food intake, nutrition, and health maintenance and disease prevention. The Food and Nutrition Board has recommended the following Dietary References Intakes (DRIs) for kids aged 4-8 years:

Nutrients	4-8yrs Average DRIs/day
Energy	1700
Carbohydrates	230g
Proteins	28g
Fats	60g
ALA	0.9g
Vitamin B1	0.6mg
Vitamin B2	0.6mg
Vitamin B6	0.6mg
Vitamin E	9.52 IU
Vitamin A	1333IU
Vitamin D	600IU
Vitamin C	25mg
Folic Acid	120ug
Calcium	1000mg
Zinc	5mg
Iron	10mg

Health Benefits of Recommended Nutrients Levels are as Follows

- a. Protein:** Protein contributes to children’s bone growth and is also important for the growth and maintenance of muscle mass.
- b. Iron:** Contributes to the normal cognitive development of children, normal function of the immune system, and normal formation of red blood cells and hemoglobin.
- c. Zinc:** Contributes to normal cognitive function and normal function of the immune system.
- d. Vitamin C:** Contributes to a normal function of the immune system and increases non-haem iron absorption.
- e. Vitamin B6** Contributes to the normal function of the nervous system and the normal function of the immune system.
- f. ALA** is an essential nutrient for brain development in children. The source of ALA is vegetable oil. Alpha-linolenic acid, an essential fatty acid, contributes to brain and nervous system tissue development

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g. NIACIN Contributes to normal energy-yielding metabolism and the normal function of the nervous system

h. Vitamin B1 contributes to the normal function of the heart, normal function of the nervous system, and normal energy-yielding metabolism

- 3.51 The Respondent has submitted that Nido FortiGrow has been designed keeping in view the aforesaid DRIs recommended for school going kids aged 4-8 years. Nido FortiGrow contains the optimum levels of specialized nutrients that are recommended by the Food and Nutrition Board and are hence, best suited to meet the nutrient needs of school kids.
- 3.52 It has been denied that the product packaging of Nido FortiGrow itself shows that the product is not complying with the compositional requirements of the applicable standard. The Respondent highlighted that Nido FortiGrow fully complies with the nutritional requirements specified for Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. Nido FortiGrow contains 28% total fat. Out of which 14% is milk-fat. Nido FortiGrow contains **67% MSNF**. Each 100 grams of Nido FortiGrow contains **23 grams of Milk Protein**. PFFR 2018 requires a minimum 34% **milk protein in MSNF** and not the whole product (as wrongly assumed by the Complainant). The percentage of milk-fat in MSNF IS **34.3%**.
- 3.53 The claim of the Complainant that the overall marketing campaign of Nido FortiGrow is misleading, which could lead an ordinary consumer into thinking the product is milk, is denied for being vague and baseless. The Respondent has emphasized that Nido FortiGrow has never been marketed or labeled as “Natural Milk” or “Milk”. That Nestlé Nido FortiGrow has not even been referred to as a “milk product” on its label. The ingredients of the product (including vegetable fat) as required by law are duly disclosed on the label. Nido FortiGrow packaging clearly states that it is not a substitute of breast milk. The packaging also unambiguously states “*yeh qudrati doodh nae hai*” which has been added in compliance with Honourable Supreme Court orders in the case of Watan Party v. Government of Punjab (Civil Petition No. 2374-L/2016). The matter of Watan Party v. Government of Punjab etc. (Civil Petition No. 2374-L/2016) is pending adjudication before the August Supreme Court of Pakistan, which pertains to *inter alia* the safety and standard of various brands of packaged milk products being sold in Pakistan. The Honourable Supreme Court of Pakistan on 28.12.2017 issued notices to various entities that produce tea whitener/tea creamer/tea mixture. In the same order, the Honourable Court also held that “*the label should prominently disclose in the Urdu language that this product is not milk so that consumers are not deceived.*”
- 3.54 The Honourable Supreme Court of Pakistan through various agencies carried out inspection across the dairy industry and vide order dated 09.03.2018 directed all manufacturers of powder formula for child feed to add a clarification on their labels that it is not “natural

milk". The Honorable Supreme Court did not hold that the label of Nido FortiGrow was in breach of any of the applicable law. It was only in the interest of consumer clarity that the Honorable Supreme Court directed all the manufacturers of powder formula to declare on their labels that it is not natural milk. The said direction was duly complied with by the Respondent and the matter of Nido FortiGrow 's labeling was disposed of in the following terms:

"...representative of Punjab Food Authority have submitted that samples of Nido were sent for analysis. The results have been received which indicate that ingredients mentioned on the label match with the actual product. It is, however, clear that the product is not natural milk. The learned counsel representing Nido Milk submits that the requisite disclaimer has already been agreed to be printed conspicuously in the Urdu language on the container/label stating that the product is not natural milk. In view of such statement made by learned ASC for Nido Milk this matter is disposed of."

3.55 The Respondent has further emphasized that once the matter has been adjudicated and decided by the Honorable Supreme Court and the disclaimer on the label approved by the Supreme Court, there remains no justification and basis for allegations of deception being made in the complaint. ***(Copy of Supreme Court Orders dated 28.12.2017 and 06.01.2018 is attached herewith as Annexure-O)***

3.56 The Respondent has submitted that the assertion made by the Complainant that the flyer was distributed amongst the consumers is false. That it was not created for consumers or distributed amongst them. Notwithstanding this fact, there is nothing objectionable about its content, the said flyer was created for a restricted category of retailers only. It has been further submitted that reference to international food authorities in the flyer is correct as Codex Standards are based on sound scientific advice provided by independent international risk assessment bodies or ad-hoc consultations organized by FAO, World Health Organization (WHO), and Joint Expert Committee on Food Additives (JECFA),. Per Article 1 of the Statutes of the Codex Alimentarius Commission, the Codex Alimentarius Commission shall be responsible for making proposals to, and shall be consulted by, the Directors-General of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme, the purpose of which is:

"(d) finalizing standards elaborated under (c) above and, after acceptance by governments, publishing them in a Codex Alimentarius either as regional or worldwide standards, together with international standards already finalized by other bodies under (b) above, wherever this is practicable;

(e) amending published standards, after appropriate survey in the light of developments.”

- 3.57 The credibility of Codex Standards is proved through the consultative role which JECFA, FAO, and WHO perform to ensure that the standards comply with the latest scientific knowledge available. As the Codex Standards prior to finalization are subject to mandatory consultative procedure with FAO and WHO, therefore, the finalized standards are published in view of the recommendations/approval by the said organizations. Thus, the reference made in the impugned flyer to international authorities in plural form is accurate.
- 3.58 Content of paragraph 2.26 *ibid* has been denied for being utterly baseless and ludicrous. The flyer refers to Codex and not Codex Standards. The Codex Alimentarius Commission or CAC is the body responsible for all matters regarding the implementation of the joint FAO/WHO Food Standards Programme. CAC is an international body publishing standards for food in consultation with FAO and WHO. The Complainant on one hand asserts that CAC is not an authority for food products and on the other hand, relies on CAC's published standards throughout the complaint to assert that the Respondent's products, which do not comply with Codex Standard, cannot be manufactured and sold.
- 3.59 It has been denied that Nido FortiGrow fails to comply with the mandatory standard applicable to milk powders as it contains vegetable fat which is not permissible under PS: 363:2011. Even if we assume that the product complies with the voluntary standard PS: 4873: 2008, the product does not bear the Pakistan Standard mark on the product packaging. It is clarified by the Respondent that the use of PSQCA mark is not a mandatory requirement. Product complying with a PSQCA standard is entitled to use the mark but is not mandated to use the mark. Merely because the PSQCA mark is not placed on the product (as a matter of choice), it does not establish non-compliance of the product with the applicable PSQCA standard. Compliance with PS 4873-2008 has been detailed above.
- 3.60 The Respondent has stated that the assertion raised in the complaint that the flyer omits mentioning the product as a blend of skimmed milk and vegetable fat in order to create an impression that the product is milk is utterly incorrect as the perusal of the impugned flyer shows that a sufficiently visible picture of Nido FortiGrow pack is part of the impugned flyer. The packaging of Nido FortiGrow present on the flyer clearly states that it is "Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form". The said pack also contains the disclaimer that the product is not natural milk. Therefore, the allegation of deception raised in the paragraph under reply is without any merit and liable to be dismissed.
- 3.61 Moreover, it has been stated that the reply of the Respondent to the query raised by a consumer on the Facebook page is accurate and based on the composition of Nido

FortiGrow. Also, there is no obligation under the applicable laws that require the Respondent as a manufacturer to respond to all the comments made on various social media pages.

- 3.62 It is not denied that Nido FortiGrow is in fact sourced from milk and is a milk-based product. But it is incorrect to assert that the primary focus of the advertisement is to show that Nido FortiGrow is sourced from milk. The referred advertisement accurately represents the composition, nature, and manufacturing process of Nido FortiGrow.
- 3.63 The Respondent has further stated that no untrue and deceiving claim has been made in the advertisement. That it is not prohibited under any applicable local and international food regulations that a milk product being sold as Blend of Skimmed Milk and Vegetable Fat in Powdered Form cannot be in white colour or cannot be shown as such. It is a milk product composed largely of milk solids and milkfats and therefore, possesses characteristics similar to milk. All ingredients including vegetable fats are clearly mentioned in the advertisement. Although there is no law regulating the time that can be devoted to a particular ingredient in an advertisement, the division of time in the advertisement corresponds to the proportion of ingredients used in Nido FortiGrow. As detailed above, Nido FortiGrow contains 67% MSNF and 14% Milk fats, i.e., approximately 81% of the product is based on milk constituents. Therefore, displaying cows as a source of the product and devoting substantial time in showing that the product is milk-based is neither inaccurate nor deceptive.
- 3.64 It has been asserted that it is settled law that an advertisement will be looked into holistically and not in isolation. It is incorrect that the nature/category of Nido FortiGrow is only mentioned in the end. The advertisement opens with the logo of Nido FortiGrow which clearly states “Blend of Skimmed Milk and Vegetable fat in Powdered Form”. It is admitted by the Complainant that the advertisement shows the addition of vegetable fats in Nido FortiGrow and also mentions the nature/category of the product as Blend of Skimmed Milk and Vegetable Fat in powdered form. Therefore, any allegation of deception has been negated by the Complainant’s admission itself.
- 3.65 It has been alleged that the Complainant has created the impression that “*Mission Nutrition*” campaign is a current campaign. It was a campaign run in 2015 and was discontinued thereafter. At the time Mission Nutrition campaign was introduced, Nestlé Nido was full cream milk powder with additional nutrients to address the health requirements of the school going kids. The campaign was run in the most diligent manner possible. When the recipe was changed to a combination of skimmed milk powder and vegetable fat, the campaign was discontinued and replaced by a new one representative of the changed product form. Furthermore, the Respondent’s mission nutrition campaign was based on the widely accepted scientific opinion that only milk is not the best diet for kids:

- a. In a statement from 2011, the Nutrition Committee of the Pediatric Society of France recommends growing-up milk for all young children instead of cow's milk based on a cross-sectional nutritional survey (3-day weighed food diaries) conducted in 2005 in France on children between 1 and 36 months of age. In this survey, 63 young children aged 12–24 months, who did not consume Infant Formula or Follow-On Formula or Growing Up Milk, but only cow's milk or other dairy products (at least 250 ml/day), had a 3 to 4-fold higher protein intake than recommended and intakes of essential fatty acids, iron, zinc, vitamins C, D, and E below the recommended daily allowance or adequate intake. Whilst cow's milk products provided 43% of the total diet volume, they contributed much lower percentages of the total daily intake of LA, ALA, iron, vitamins C, D, and E. In contrast, the nutrient intake of 55 young children between 12 and 24 months of age who consumed at least 250 ml of Growing up Milk/day was in conformity with recommended intakes for that age group with the exception of vitamin D.¹ This proves that cow's milk cannot always be relied upon as a dietary component superior to alternatives; its consumption when not supplemented by other nutrients could lead to much higher protein intake than recommended for children, while depriving them of crucial vitamins and minerals.
- b. Amy Lanou, a professor of nutrition at the University of North Carolina at Asheville states that most people in the world do not drink milk after they are weaned from breast milk and yet, still get adequate nutrition. The protein and calcium content in cow's milk is often cited as the reason behind its supposed status as an indispensable feature of the human diet. However, calcium can be found in many other food sources besides milk, including nuts, beans, and greens. New research also raises questions about the notion that milk keeps bones strong. A 2013 study published in the journal, JAMA Pediatrics, found that children who live in countries with lower rates of milk consumption have lower fracture rates than those in milk-drinking countries.
- c. Although vitamin D is certainly an essential nutrient, it does not occur naturally in milk, so other fortified foods such as breakfast cereal, orange juice, and soymilk are equally good sources. The amount of protein in milk can also be found in lots of other sources, including beans and eggs. Fresh milk is also low in essential minerals such as iron and zinc. Therefore, it is now a widely accepted opinion that fortified foods, which have additional vitamins and minerals in addition to protein content, are a suitable choice for children.

- 3.66 It is once again highlighted that at the time the mission nutrition campaign was introduced, Nestlé Nido was full cream milk powder. Therefore, the image of a child holding a glass of white liquid cannot be deemed deceptive.
- 3.67 The claims raised against the Respondent's #morethanmilk Campaign have been denied for being baseless and unsubstantiated. It has been clarified that nowhere in the Respondent's advertising campaign it has been claimed that Nido FortiGrow is milk or a better version of milk as wrongly alleged in the Complaint. The advertising states that Nido FortiGrow not only has "goodness of milk", but also has additional nutrients as well. Such a claim is accurate as Nido FortiGrow has been specifically designed to meet the recommended dietary intake for school going kids which is not fully met by the consumption of plain milk. A comparative chart of nutrients present in Nido FortiGrow and nutrients present in cow's milk is reproduced below:

S.No.	Nutritional Information	Nido FortiGrow per 32.5g (250 ml)	GDA/ DRI	%GDA/ DRI	Loose Milk Per 250 ml	%GDA /DRI
1.	Energy (Kcal)	161.00	1700	9%	187.0	11%
2.	Total Carbohydrates (g)	12.20	230	5%	11.5	5%
3.	Proteins (g/100g)	7.50	22	34%	6.4	29%
4.	Fat (g)	9.10	60	15%	12.9	22%
5.	Linoleic acid (g)	1.50	10	15%	traces	traces
6.	Alpha lenolenic acid (g)	176	900	20%	traces	traces
7.	Calcium (mg)	244.00	10000	24%	351.0	35%
8.	Iron (mg)	2.90	10	29%	traces	0%
9.	Zinc (mg)	1.20	5	24%	1.2	24%
10.	Vitamin A (IU)	585.00	1333	44%	132.0	10%
11.	Vitamin D (IU)	78.00	600	13%	5.0	1%
12.	Vitamin E (IU)	1.80	10.4	17%	traces	0%
13.	Thiamine (mg) Vit B1	0.10	0.6	17%	0.1	8%

14.	Riboflavin (mg) Vit B2	0.30	0.6	50%	0.3	55%
15.	Vit B6 (mg)	0.13	0.6	22%	0.1	17%
16.	Niacine (mg)	1.80	8	23%	0.1	1%
17.	Folate, Folic acid (µg)	44.00	120	37%	11.0	6%
18.	Vitamin C (mg)	21.00	25	84%	16	64%

Presentation in support of contraventions:

- 3.68 It needs to be appreciated that the Act was enacted by the Parliament with the primary objective of protecting the market from anti-competitive practices. The Complainant has neither alleged nor cited any evidence that the Respondent has engaged in any anticompetitive practices that are capable of harming the business interests of another undertaking. Section 10 of the Act is not a consumer protection provision and in the absence of any material establishing harm to other undertakings, the requirements of Section 10(2) of the Act are not satisfied.
- 3.69 All the marketing material challenged by the Complainant expressly refers to Nido FortiGrow as a “Blend of Skimmed Milk and Vegetable Fat in the powdered form” and/or the presence of vegetable fats in the product is duly disclosed. The description and claims made in the advertisement correspond to the nature, categorization, ingredients, and nutrient value of the product.
- 3.70 The terms “New and Improved” are clearly referring to the product’s previous version and the claim is not made in relation to any competing products. The terms “New and Improved” have been added to reflect the change in the recipe of Nido FortiGrow as in 2018 keeping in view the nutritional requirements of the school going kids ALA was added to the formula that helps in brain development.
- 3.71 The Respondent has never feigned ignorance as to the categorization and applicability of relevant standards to its products. Standards applicable to Nido FortiGrow and its compliance with the said standards have been detailed under preliminary submissions.
- 3.72 It is denied that the August Court categorically observed that Nido FortiGrow, not being natural milk, is misleading. The Honourable Supreme Court of Pakistan, through various agencies, carried out inspection across the dairy industry and vide order dated 09.03.2018 directed all manufactures of powder formula for child feed to add a clarification on their labels that it is not “natural milk”. The Honorable Supreme Court did not hold that the label of Nestlé Nido FortiGrow is in breach of any of the applicable law. The Supreme Court of

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Pakistan did not make any declaration with regards to the nutrient value of Nestlé Nido FortiGrow. It was only in the interest of consumer clarity that the Honorable Supreme Court directed all the manufacturers of powder formula to declare on their labels that it is not natural milk. The said direction was duly complied with by the Respondent. Therefore, no allegation of deception stands proven against the Respondent.

- 3.73 It is reiterated that the referred advertising campaigns of Nido FortiGrow clearly disclose the presence of vegetable fats in the product. Mere presence of vegetable fat in the product largely constituted of milk solids and milk-fats does not take it out of the category of milk-based products. In view of the definition of milk products, it is clear that products falling in the category of “Blend of Skimmed Milk and Vegetable Fat in the powdered form” are milk products derived from constituents of milk and can be referred, labeled, and marketed as such.
- 3.74 In view of the foregoing, the Respondent requested that the relief sought by Complainant is liable to be dismissed.

4. REJOINDER

- 4.1 The Respondent’s reply was forwarded to the Complainant for a rejoinder vide letter dated August 29, 2019. The said rejoinder was received through a letter dated October 01, 2019, the contents of which are summarized below:
- 4.2 The Complainant denied all preliminary objections raised by the Respondent for being misleading and distractive. The objections regarding the Act being ultra vires the Constitution as mentioned in reply are not relevant for the present purposes, hence; do not merit a response from the Complainant. It has been highlighted that the Commission has been established under the Act to “*ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior*”. Consequently, the Complainant has filed the instant complaint bringing into the notice of this Hon’ble forum regarding the engagement of the Respondent in actions contravening the prohibitions contained in Section 10(1) of the Act constituting deceptive marketing practices within the meaning of Section 10(2) (b) of the Competition Act.
- 4.3 The Complainant submitted that the allegation of the Respondent regarding mala fide intentions of the Complainant is bald, generic, and imaginary and hence, is liable to be rejected on this ground alone. That it is axiomatic and firmly established by successive judgments of the Superior Courts of this country that full particulars of facts constituting mala fide are to be given and mere vague allegations of the same are of no legal consequence. In this regard, the Complainant has placed reliance on a case titled **Messrs**

Lanvin Traders, Karachi v. Presiding Officer, Banking Court NO.2, Karachi, and others, cited as **2013 SCMR 1419**; **Tabassum Shahzad v. I.S..I** cited as **2011 SCMR 1886** and **Sub. (Retd.) Muhammad Ashraf versus District Collector, Jhelum, and others** reported as **PLD 2002 SC 706**.

- 4.4 Moreover, the filing of the complaint has a direct connection with the objects of the Complainant as divulged in its constituent documents. As has been mentioned before, the complaint primarily aims at setting in motion the statutory mechanism for the enforcement of the mandate as contained in the Act and the Competition (General Enforcement) Regulations, 2007 (the “GER”). Therefore, the allegation of mala fide is a weak attempt to distract the Commission from the actual point of controversy, i.e., contravention of Section 10 of the Act by the Respondent by adopting deceptive marketing practices in respect of three of its products, i.e. Nido FortiGrow, Nido 3+ and Bunyad (collectively referred to as the “Three Products”).
- 4.5 The Complainant denied the assertions made by the Respondent regarding the mandate of the Commission and the Act. It has been stated that deceptive marketing is one of the cornerstones of the legal regimes governing competition law around the globe. Section 10 of the Act profoundly empowers the Commission to enquire and proceed against deceptive marketing practices. As mentioned before, the primary focus of the complaint is the false and misleading information – coupled with the fact that the same lack any reasonable basis – which the Respondent is providing regarding the character, method of production, properties, and quality of the aforementioned three products. Reliance is placed on a decision of the Commission in the matter of **Kitchen Stone Foods on Complaint Filed by Messrs. Quick Food Industries (Pvt.) Limited and Messrs. Seasons Foods (Pvt.) Limited** reported as **2018 CLD 778**.
- 4.6 The Complainant further denied the objection that the complaint has not been filed by an “undertaking” as defined in section 37 (2) of the Act. The Complainant has submitted that it is a registered association of consumers whose objects include educating the parents regarding overall wellbeing, health, nutrition, and a balanced diet of the children. Intertwined with this education is the spreading of awareness amongst parents about the diets and eatables which are harmful for the children. The instant complaint is part of the said awareness/advocacy campaign of the Complainant. This being so, the Complainant squarely falls within the purview of Section 37 of the Act and Regulation 17 of the GER to file the instant complaint. In addition to this, the contents of the reply completely ignore the *suo motto* powers of the Commission to conduct enquiries into any matter relating to purposes of the Act duly conferred by Section 37(1) of the Act. Thus, the objections raised in the reply may be discarded on this score alone.

Rejoinder to the Rest of the Assertions Made in the Reply by the Respondent:

- 4.7 It has been submitted that the overall complexion of the reply filed by the Respondent is misleading and distractive. That the Respondent distributed information in the form of its product packaging, labeling, television commercials, advertisements, and statements made by it on its official website and social media platforms such as Twitter and Facebook that is false, misleading and lacks any reasonable basis and is persuading the consumers into believing the product is milk and, as such, constitutes deceptive marketing within the meaning of the Act, and this is the bottom line of the instant complaint. That the assertions made in the reply filed by the Respondent regarding contents and composition of the three products are altogether irrelevant for the purposes of the instant complaint. That it is categorically submitted that the Complainant does not intend to obtain any content specific ruling from the Commission. In this regard, assertions made in the preceding paragraphs are reiterated.
- 4.8 The Complainant has submitted that the misleading and deceptive labeling and packaging of Nido 3+ assert the same to be the nutritional formula for preschool children between 3 to 5 years of age. However, Nido 3+ can best be characterized as a powder tea whitener. Similarly, Bunyad is packaged and labeled as a growing up formula despite there being no standard applicable thereto. Similarly, although the Nido FortiGrow packaging does not explicitly refer to the product as milk, once the Respondent's overall marketing of the product is looked at holistically, it is undeniable that it has the effect of misleading the ordinary consumer into thinking the product is milk. In essence, the packaging and labeling of the three products lead the parents to believe that they are essentially necessary for the growth and upbringing of their children. This is done by creating false impressions by means of advertisements and other mediums of communication.
- 4.9 Furthermore, the Respondent's Flyer has made false, misleading, and deceptive impressions regarding Nido FortiGrow to be milk fortified with other minerals and vitamins despite of the fact that it does not qualify to be called as milk. Similarly, the Respondent's Television Commercial (TVC)/Video Advertisement deceptively portrays that Nido FortiGrow is milk. The major part of the said TVC depicts how milk is collected and then milk fats, vitamins, minerals, and vegetable fats, and other nutrients are added. The TVC has been designed so deceptively that it would make any common man believe that the product is milk.
- 4.10 In addition to this, the Respondent's Mission Nutrition campaign, which on one hand highlights the importance of milk to a child's nutrition and on the other, provides Nido FortiGrow as a sufficient provider thereof. The whole theme of the campaign makes it evident that an ordinary consumer is likely to begin associating Nido FortiGrow with milk even though it is not milk. Given that, from a consumer's perspective, milk is necessary as opposed to a luxury item, the consumer is inevitably bound to substitute its consumption of milk with that of Nido FortiGrow. In continuation of this deceptive strategy is the

Respondent's #morethanmilk campaign which goes on to portray Nido FortiGrow as a healthier version of milk with added nutritional value.

- 4.11 The Complainant has stated that the Respondent has undertaken an extensive marketing campaign in the form of its product packaging and dissemination of information in various modes outlined in the instant complaint that make several false and exaggerated claims about its products. The nature of these claims ranges from mislabeling the product to making false and unsubstantiated claims about product compositions. The overall effect of the campaign is that consumers do, in fact, perceive the said products as milk which they are not. These consumers are the ordinary general consumers feeding their children the aforesaid products instead of milk based on the claims and representations made by the Respondent.
- 4.12 In view of the aforesaid, it is apparent that the Respondent acted in violation of the prohibitions of Section 10(1) of the Act by misleading consumers and engaging in deceptive marketing practices, where such actions amount to deceptive marketing practices within the meaning of Section 10(2) (b) as they amount to providing information that is false, misleading and lacks a reasonable basis with respect to character, method of production, properties and quality of the three products.
- 4.13 In light of the abovementioned circumstances, it has been respectfully prayed by the Complainant that the reply filed by the Respondent be discarded and the relief sought by the Complainant may very kindly be granted.

Further correspondence with the Respondent:

- 4.14 A letter dated: October 14, 2020 was sent to the Respondent, wherein they were called for a meeting dated: October 16, 2020. During the meeting the Respondent was directed to submit their written arguments in support of their defence. The Respondent submitted their written arguments via email dated: November 02, 2020, the content of which are reproduced below.
- i. "Signed labels along with latest approvals of PFA.
 - ii. *All labels of Nido 3+, Nestle Nuyad and Nido Fortigrow from 2017-2020 along with PFA approvals of 2017. Minor design changes were made in the labels between 2017-2020. These labels were submitted in Supreme Court and the same were approved by Supreme Court. PFA was also a party in the proceedings and did not object to the changes made.*
 - iii. *The statement of "Best for School Kids" was added on Nido Fortigrow Label after addition of ALA in the product. Nestle's response to the objection raised on the said claim is furnished at*

paragraph 3.65 ibid of Nestle's Reply to Parents Pakistan's Complaint. Nestle's Quality Assurance Centre Report establishing presence of ALA in Nido Fortigrow is attached with the instant email."

- 4.15 Furthermore, a letter dated: November 23, 2020 was written to the Respondent in order to seek the below mentioned documents:
- i. Written submissions with regards to the oral submissions dated October 16, 2020.
 - ii. Exact launching dates of the product packaging for Nido 3+, Nido Bunyad and Nido FortiGrow for the year 2017-2020.
 - iii. Punjab Food Authority approvals and signed copy of product packaging for Nido 3+, Nido Bunyad and Nido FortiGrow for the year 2018-2019.
 - iv. Currently approved colored copy of product Nestle Bunyad.

The Respondent replied vide letter dated November 30, 2020, the contents of which are reproduced below:

- 4.16 The Respondent submitted that the queries raised by the enquiry officers as mentioned in para 4.13 above, was the same as discussed in the meeting held dated: October 16, 2020. The response submitted by the Respondent via email dated: November 02, 2020 may be considered as the submissions of the Respondent. During the above mentioned meeting the Respondent was asked to submit the below mentioned information:
- i. PFA approval and signed colored copies of recently approved labels of Nido 3+, Nestle Bunyad and Nido Fortigrow.
 - ii. All packaging of Nido 3+, Nestle Bunyad and Nido Fortigrow from 2017-2020 in chronological order along with detail of labels approved by PFA and those that were submitted during the Honorable Supreme Court proceedings.
 - iii. Evidence for the presence of ALA in the new recipe of Nido Fortigrow.

The Respondent stated that it had submitted all of the above information via email dated: November 02, 2020. The detail of which is mentioned below:

Nestle Nido 3+:

- 4.17 The Respondent submitted that in 2017, the label of 800g pack was labelled as "Growing up Formula". Same label of 400g pack with identical claim was approved by PFA vide letter dated: July 08, 2017. The two labels has minor design changes due to packaging size. In 2018 the label of 800g was amended with the term "New & Improved" due to change in recipe. The same label was submitted to the PFA for approval and subsequently, pursuant to the orders of Honorable Supreme Court of Pakistan in the case Watan Party v. Government of Punjab C.P. 2374/L/2016, a disclaimer in Urdu was also added in 2018

packaging. The 2018 label with Urdu disclaimer was approved by PFA vide letter dated: October 15, 2020. In addition to the aforesaid PFA approved label, in 2019, 1800g pack was imported from Dubai. The said label is in compliance with the directions of Government of Pakistan issued vide SRO No. 237(1)/2019 dated: February 19, 2019.

Nestle Bunyad:

- 4.18 The Respondent submitted that in 2017, yellow label of Nestle Bunyad 910g was labelled as “Dairy Based Formula”. This was approved by PFA via letter dated: July 12, 2017. Furthermore, the same product was labelled as “Reduced fat blend of skimmed milk and vegetable fat in powdered form”. The change in description was added on the label in view of the PFA’s letter dated: May 10, 2017 that directed the Respondent to use the term “Formula”. In 2017 blue label of Nestle Bunyad was labelled as “Dairy Based Formula”. Additionally, the label categorically states “Vegetable Fat and Milk Solids”. The term “Naya aur Behtar” was also added due to change in recipe. In the 2018 label of Nestle Bunyad 910 g a disclaimer was added on top of the label and the product was described as “Vegetable fat & Milk Solids” in view of the directions passed by Honorable Supreme Court of Pakistan. The 2019 label of Nestle Bunyad is identical to the 2018 label except the change in the description of the label that now refer the product as “Reduced fat blend of Skimmed Milk powder & Vegetable fat in powdered form”. This label has been approved by PFA vide letter dated: June 15, 2020.

Nestle Nido Fortigrow:

- 4.19 The Respondent submitted that in 2017 the 910g product pack is labelled as “Dairy Based Formula”. This label was approved by PFA via letter dated: July 08, 2017. In 2018 Urdu disclaimer is added on top of 910g packaging. Due to change in the recipe the term “New & Improved” was added on the label. ALA is added in the recipe which helps in the development of the brain and hence the product is best suited for School children’s. The rationale and basis of which is mentioned in para 3.50 *ibid*. In 2018 almost identical label of 910g packaging was introduced. This revised label was based on the informal communication by PFA, the white glasses at the bottom of the previous 2018 label were changed to green colored glasses. Additionally, the product was described as “Blend of Skimmed Milk Powder & Vegetable Fat in powdered form”. This label has been approved by PFA via letter dated: October 15, 2020.
- 4.20 The Respondent stated that the PFA does not sign and stamp the approved labels but only issue an approval letter and appends the (Unsigned) label with the approval. Moreover, on the request of the Commission the Respondent requested PFA to sign the recently approved labels of Nido 3+, Nestle Bunyad and Nido Fortigrow and same has been shared via email dated November 02, 2020. Furthermore, PFA does not sign the labels as a matter of practice

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therefore the Respondent is unable to furnish the signed and stamped copies of previously approved labels. In regards to the claim of “New and Improved” and “Best for School Kids” on the label of Nido Fortigrow, the response submitted in para 3.50 above is reiterated. The test report of ALA presence in Nido Fortigrow is shared via email dated: November 02, 2020.

4.21 Moreover, the Respondent was asked telephonically to clarify the calculations of the protein content in MSNF in each of the product, in response to which the Respondent submitted the below mentioned email.

 Reply  Reply All  Forward




Tue 1/5/2021 2:29 PM

Zainab Janjua <zainab.janjua@ajuris.com.pk>


Nestle - QRI Reports

To aakbar@cc.gov.pk

Cc Raza,Faisal,LAHORE,Legal Affairs; Mitha,Mian,LAHORE,Regulatory Affairs - HO

 You replied to this message on 1/6/2021 11:15 AM.

 Message

 NIDO FORTIGROW (QRI Report).pdf (372 KB)

 NESTLE BUNYAD (QRI Report).pdf (1 MB)

Please see the attached QRI Reports that establish the minimum content of Milk Protein in MSNF in Nestle's products.

--

Zainab Janjua
Partner

AJURIS, Advocates & Corporate Counsel
251-B, Street 4, F-10/3
Islamabad
Work: +(92) 51-2112910/11
Fax: +(92) 51-2112912

 Zainab Janjua Re: Nestle - QRI Reports



The reply submitted by the Respondent required further clarification, Hence, the Respondent was directed via email dated January 06, 2021, to submit the below mentioned information;

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Wed 1/6/2021 11:16 AM
Amin Akbar <aakbar@cc.gov.pk>
Nestle - QRI Reports

To 'Zainab Janjua'
Cc 'frehman@cc.gov.pk'; 'szafar@cc.gov.pk'

Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Dear Ms. Zainab,

With reference to our telephonic conversation dated January 05, 2021, We have carefully analyzed the calculation of Protein in MSNF submitted in your reply to the complaint dated July 30, 2019 for Nido 3+, Nido Bunyad and Nido Fortigrow. Following concerns have been raised during the analysis;

- I. Kindly provide the calculation of MSNF in each of your product i.e 67% in case of Nido FortiGrow, 37% in case of Nido Bunyad and 47% in case of Nido 3+.
- II. The QRI reports submitted by you dated January 05, 2021 shows a different percentage of Protein content as compared with the figure calculated in your reply dated July 30, 2019. The date of the report is before the submission date of your reply dated July 30, 2019. Kindly provide the reason for not providing the reports earlier.
- III. The QRI report for protein content in Nido 3+ has not been provided.

Therefore, you are called upon to arrange comments on or before **Wednesday, January 13, 2021.**

The Respondent requested for extension in time which was dully granted via email dated January 12, 2021. It is pertinent to mention here that, the Respondent has not submitted its reply till date.

5. ANALYSIS

5.1 The Enquiry Committee was given the mandate to conduct an enquiry regarding the issues raised in the complaint and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following issues:

- (i) Whether the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2) (b) of the Act.
- (ii) Whether the Respondent is involved in a false or misleading comparison of goods in the process of advertising in, *prima facie*, violation of Section 10(1) in general, and in particular, Section 10(2)(c) of the Act.

5.2 Moving forward, the Enquiry Committee is of the view that various issues of different nature have been raised in the complaint against the conduct of the Respondent. However, the Enquiry Committee will keep the scope strictly limited to detecting a *prima facie* violation of Section 10 of the Act by the Respondent which pertains to deceptive marketing practices, also reproduced below for ease of reference:

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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 an Undertaking resorts to—

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;

(b) 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, properties, suitability for use, or quality of goods;

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

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

5.3 It is further stated that Undertakings in a market have a range of means and mediums available through which they can distribute information – true, false, or misleading – to consumers regarding their goods and services and to promote them, including TVCs, audio commercials, tools in print and electronic media, brochures, banners, firm name, product labeling, packaging, social media, websites, awareness campaigns, promotional activities, various public engagement activities, providing sponsorships to different events, etc.

5.4 Consequently, as opposed to submissions of the Respondent that 'product labeling' is a provincial subject, it is emphasized that product labeling is also a form of marketing which is used to distribute information to potential consumers. Therefore, the Enquiry Committee will also analyze the same, however, will only determine whether it has been used as a tool for deception by the Respondent strictly in light of Section 10 of the Act.

Whether the Respondent's Conduct Amounts to Prima Facie Violation of Section 10 of the Act

5.5 Now the Enquiry Committee will move towards the main mandate of this enquiry, i.e., to determine whether actions of the Respondent constitute a *prima facie* violation of Section 10 of the Act which prohibits deceptive marketing practices. In order to achieve that, the Enquiry Committee will take the net general impression of the Respondent's marketing material, on all mediums and in all forms, pertinent to the three products highlighted in the complaint.

5.6 In this regard, it is submitted that the Enquiry Committee will take into consideration the marketing materials, submitted by the Complainant and the Respondent as well as any evidence discovered by the Enquiry Committee in the process of this enquiry with respect to the three subject products of the Respondent, namely Nestlé Nido 3+, Nestlé Nido FortiGrow and Nestlé Bunyad. Additionally, this would be done keeping in view findings and directions of the Honorable Supreme Court, in C.P. 2374- L/2016 titled "*Watan Party versus Government of Punjab, etc.*" which pertains to *inter alia* the safety and standard of various brands of packaged milk products being sold in Pakistan, according to which:

“...the samples of Nido were sent for analysis. The results have been received which indicate that ingredients mentioned on the label match with the actual product. It is, however, clear that the product is not natural milk. The learned counsel representing Nido Milk submits that the requisite disclaimer has already been agreed to be printed conspicuously in the Urdu language on the container/label stating that the product is not natural milk.”

5.7 According to PSQCA (PS: 363:2011), **Milk Powder** describes as *“milk products which can be obtained by partial removal of water from milk. The fat and/or protein content of milk may have been adjusted, only to comply with the compositional requirements, by the addition and/or withdrawal of milk constituents in such a way as not to alter the whey protein to casein ratio of the milk being adjusted”*

The following milk products are allowed for protein adjustment purposes:

- Milk retentate: Milk retentate is the product obtained by concentrating milk protein by ultrafiltration of milk, partly skimmed milk, or skimmed milk;
- Milk permeate: Milk permeate is the product obtained by removing milk proteins and milk fat from milk, partly skimmed milk or skimmed milk by ultrafiltration; and
- Lactose

5.8 According to Punjab Food Regulations 2007, **Dried skimmed milk or Skimmed Milk or skimmed milk powder** defined in as *“the products obtained from skimmed cow or buffalo milk or a combination thereof by the removal of water. It may contain added calcium chloride, citric acid, and sodium citrate, sodium salts of orthophosphoric acid as linear phosphate not exceeding 0.3 percent by weight of the finished product”*

5.9 According to CODEX STAN 251-2006 **blend of skimmed milk and vegetable fat in powder form** describes as *“a blend of skimmed milk and vegetable fat in powdered form is a product prepared by the partial removal of water from milk constituents with the addition of edible vegetable oil, edible vegetable fat or a mixture thereof, to meet the compositional requirements.”*

The relevant requirements of the standards have been reproduced hereunder²:

Sr. No.	Description	Blend of skimmed milk and vegetable fat in powdered form (FortiGrow)	Reduced fat Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form (Nido 3+, Nestle Bunyad)
1.	Total Fat	Minimum 26%	More than 1.5% and less than 26%
2.	Minimum milk protein in milk	34%	34%

² <http://www.fao.org/3/i2085e/i2085e00.pdf>

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	solids, not fat (MSNF)	
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PRODUCT PACKAGING AND LABELLING

Market Survey:

5.10 The enquiry committee conducted a market survey and collected the currently available packaging of all three products. We shall discuss each packaging one by one as below:

a. Nestlé Nido 3+

5.11 Below are images of the latest approved packaging of Nestlé Nido 3+ by PFA:



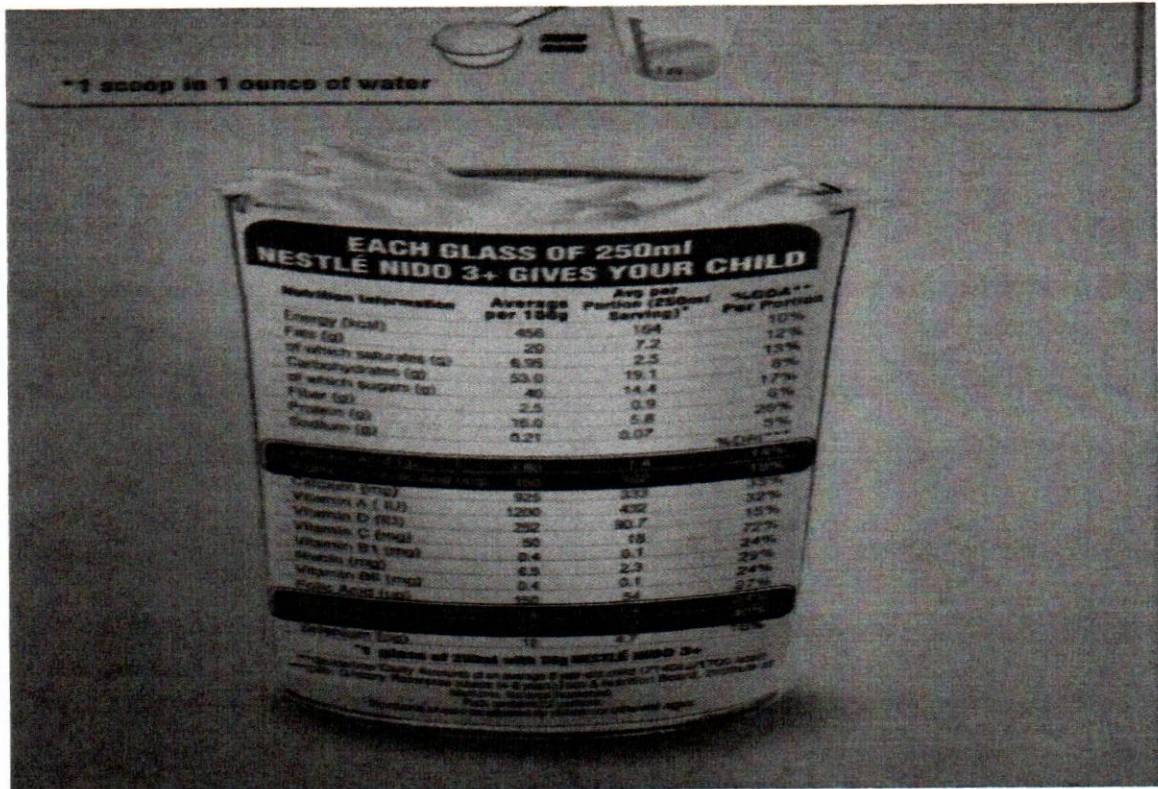
5.12 Arguments of both parties have been evaluated and it has been noticed that the packaging submitted by the Complainant and the latest packaging as shown above has been approved by PFA vide letter dated: October 15, 2020. It is pertinent to mention here that the packaging submitted by the Complainant and the packaging currently available in the market is same. Since, the same packaging has been approved by PFA, therefore, the packaging does not raise any issue against the Respondent.

5.13 Furthermore, the Complainant alleged that the nutritional information on the product packaging shows that it contains 20g of vegetable fats and 16g of milk protein which is much lower than any applicable standard that's why it cannot be characterized as "Blend of Skimmed Milk and Vegetable fat in powdered form" as it does not contain any milk fats. The Respondent in its reply made the following submissions in this regard:

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“The Average composition of Nestle Nido 3+ is as follow:

- i. Nestle Nido 3+ contains 20% total fat. Out of which 7% is milk fat.
- ii. Moisture/water content is 2.5%.
- iii. Nestle Nido 3+ contains 47% MSNF. Each 100 gram of Nestle Nido 3+ contains **16 gram of Milk Protein**. PFFR 2018 requires minimum 34% **Milk protein in MSNF** and not the whole product (as wrongly assumed by the complainant). The percentage of milk fat in MSNF in Nestle Nido 3+ is calculated as follows:
- iv. $16 \text{ protein (declaration gram per 100g of product)}/47 \text{ (MSNF)} * 100 = 34\% \text{ Milk protein in MSNF.}”$



5.14 The submissions of both the Complainant and Respondent were analyzed and the following observations are made. In this regard, the Respondent was asked to provide the basis of above said calculations (5.14 (iii) & (iv)) via email dated January 06, 2021, in response to which the Respondent submitted the below mentioned email:

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Reply Reply All Forward



Tue 1/5/2021 2:29 PM

Zainab Janjua <zainab.janjua@ajuris.com.pk>

Nestle - QRI Reports

To aakbar@cc.gov.pk

Cc Raza,Faisal,LAHORE,Legal Affairs; Mitha,Mian,LAHORE,Regulatory Affairs - HO

You replied to this message on 1/6/2021 11:15 AM.

Message

NIDO FORTIGROW (QRI Report).pdf (372 KB)

NESTLE BUNYAD (QRI Report).pdf (1 MB)

Please see the attached QRI Reports that establish the minimum content of Milk Protein in MSNF in Nestle's products.

Zainab Janjua
Partner

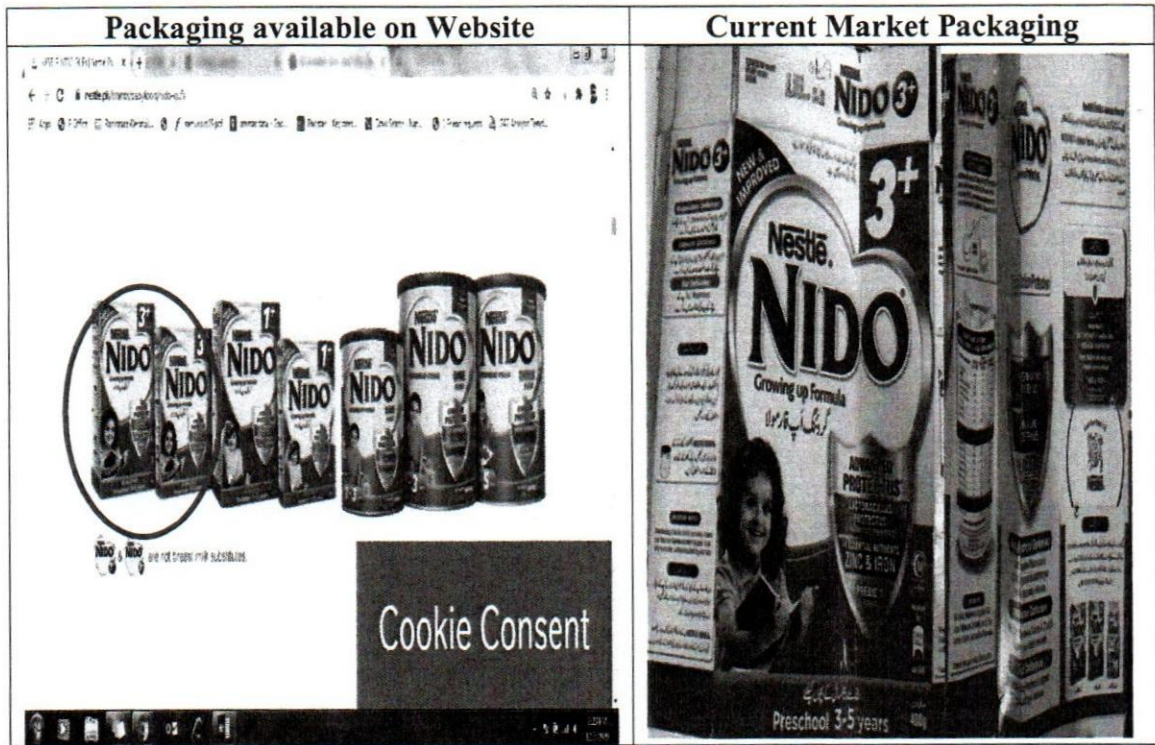
AJURIS, Advocates & Corporate Counsel
251-B, Street 4, F-10/3
Islamabad
Work: +(92) 51-2112910/11
Fax: +(92) 51-2112912

Zainab Janjua Re: Nestle - QRI Reports



- 5.15 Moreover, certain discrepancies were also noticed while evaluating the above made submissions. Meanwhile, the Respondent requested for extension in time which was duly granted via email dated January 12, 2021. In this regard, it is relevant to mention that the Respondent has not submitted its reply till date.
- 5.16 As shown in the screenshot above, it is clearly evident that the Respondent tried to establish the minimum content of Milk protein in MSNF via Qarshi Research International Pvt. Ltd (QRI) reports. In this regard, it is pertinent to mention here that the Respondent has provided average calculations in its earlier reply dated July 30, 2019 but, when they were asked to explain the basis of said calculations, they started relying on QRI report, which for this particular product i.e Nestle Nido 3+ was not even provided.
- 5.17 Hence, based on the changing stance of the Respondent, it can be safely concluded that either the earlier calculations were fabricated or the reports submitted afterwards were not authentic. It further proves the point that the nutritional information on the product packaging is not in line with the applicable standards
- 5.18 The images of the current packaging available in the market and the packaging available on the Respondent's website is depicted below:

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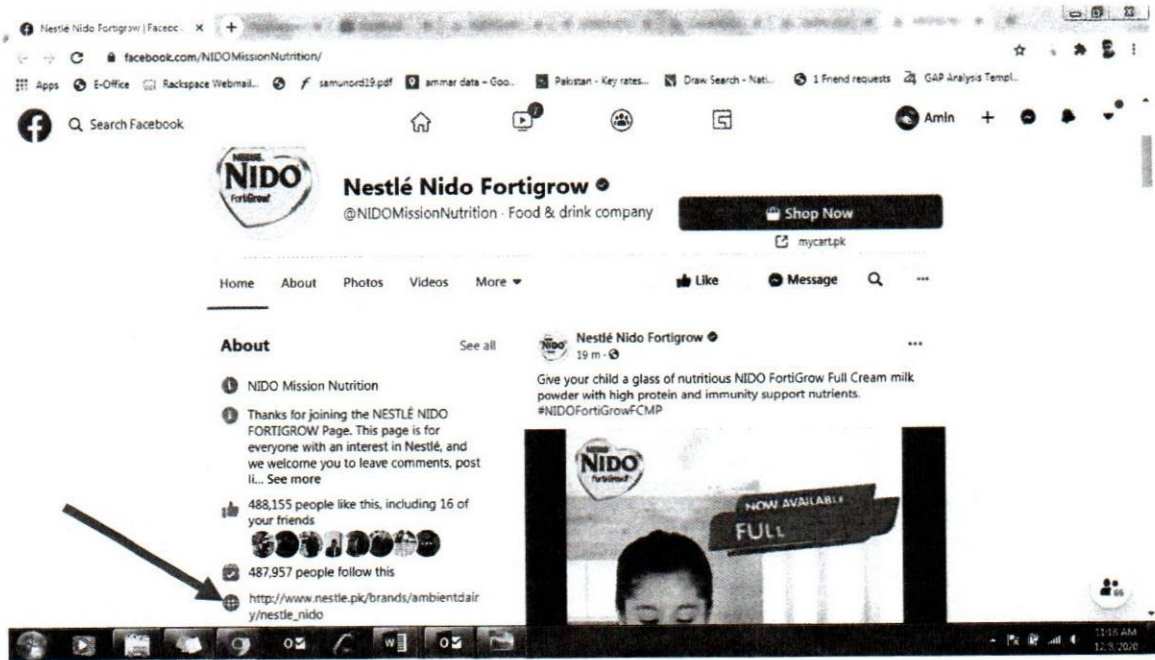


5.19 However, packaging available on the website of the Respondent shows that it has complied with the orders of the Honorable Supreme Court by labeling the product as Growing up Formula. While at the same time, if we visit the website of the Respondent from the link available on its Facebook page we see that the updated product packaging is not available rather the packaging before the year 2018 is available stating Nido 3+ as “**Growing Up Milk**”. We need to follow following steps:

Step # 1

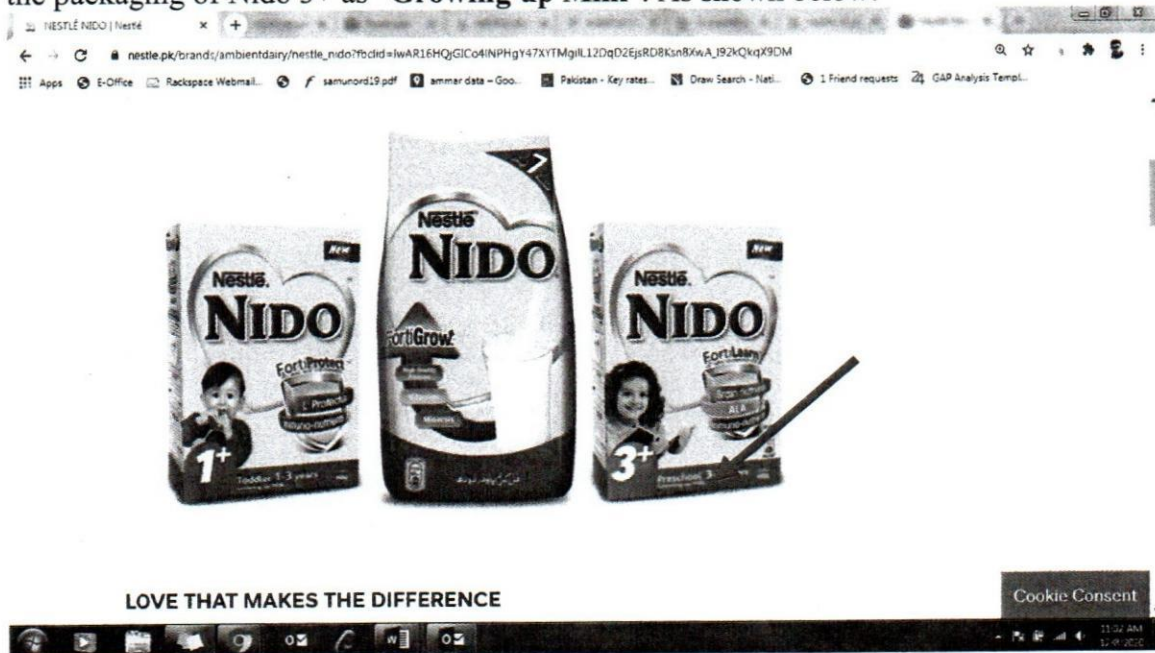
Open the Facebook page of the Respondent Named “**Nestlé Nido Fortigrow**” by clicking the URL <https://www.facebook.com/NIDOMissionNutrition/> the below screen will appear:

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Step # 2

Click on the website link available on the Facebook page mentioned in step# 1 above pointed with arrow. The link will direct to the Respondent's website which clearly shows the packaging of Nido 3+ as "Growing up Milk". As shown below:



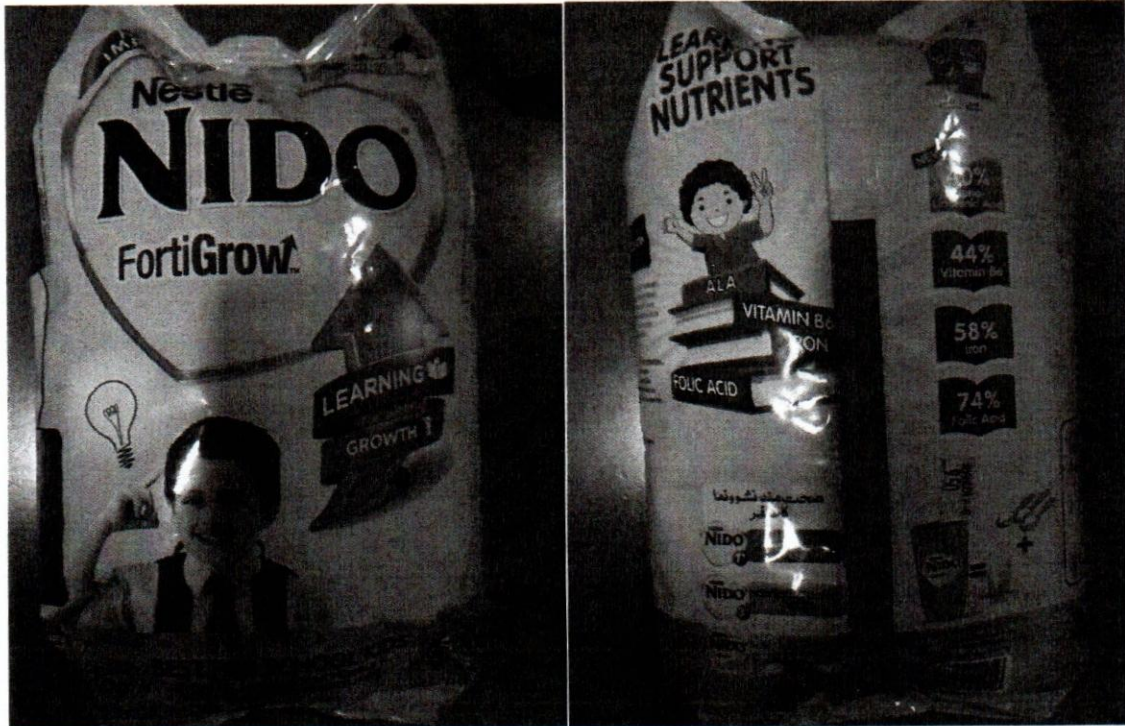
5.20 Hence, it is evident that the Respondent is still marketing its product with the old packaging available on its website, and also the nutritional information on the product packaging is not in line with the applicable standards. The Respondent in this way has disseminated false and misleading information to the consumers that lacks reasonable basis related to

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character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

b. Nestlé Nido FortiGrow

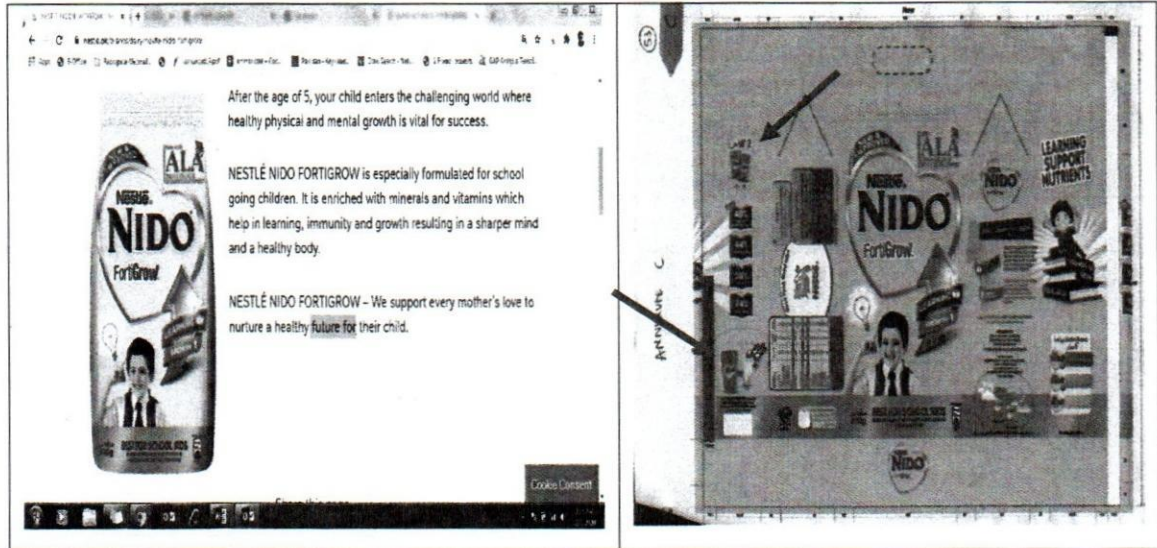
5.21 Below are images of the latest approved packaging of Nestlé Nido FortiGrow by PFA:



5.22 For this product also, submissions of both parties have been assessed and the following observations are made. The latest packaging as shown above appears to be in compliance with various requirements, such as the report by PCSIR endorsed the correctness of the nutritional labels. Other particulars of the packaging also appear to be in line with directions of PFA according to which this product should be labelled as not milk, but *“...instead any appropriate word e.g. “Formula Product”*”. It is relevant to mention here that the Respondent in its packaging for the year 2019 as alleged in the Complaint was not using the phrase **“Blend of Skimmed Milk Powder & Vegetable Fat in Powdered Form”** for labeling of Nido FortiGrow. It was only after the Respondent got approval from PFA vide letter dated October 15, 2020, that they included the phrase **“Blend of Skimmed Milk Powder & Vegetable Fat in Powdered Form”** in its packaging. Furthermore, it was also observed that prior to getting the approval from PFA a white color glass was used by the Respondent in its Nido FortiGrow packaging. After getting the said approval the Respondent has changed the color of the glass from white to green. Subsequently the same was also updated on its website. For the sake of clarity both of the packaging are reproduced below:

Packaging Available on Website	PFA Approved Packaging
--------------------------------	------------------------

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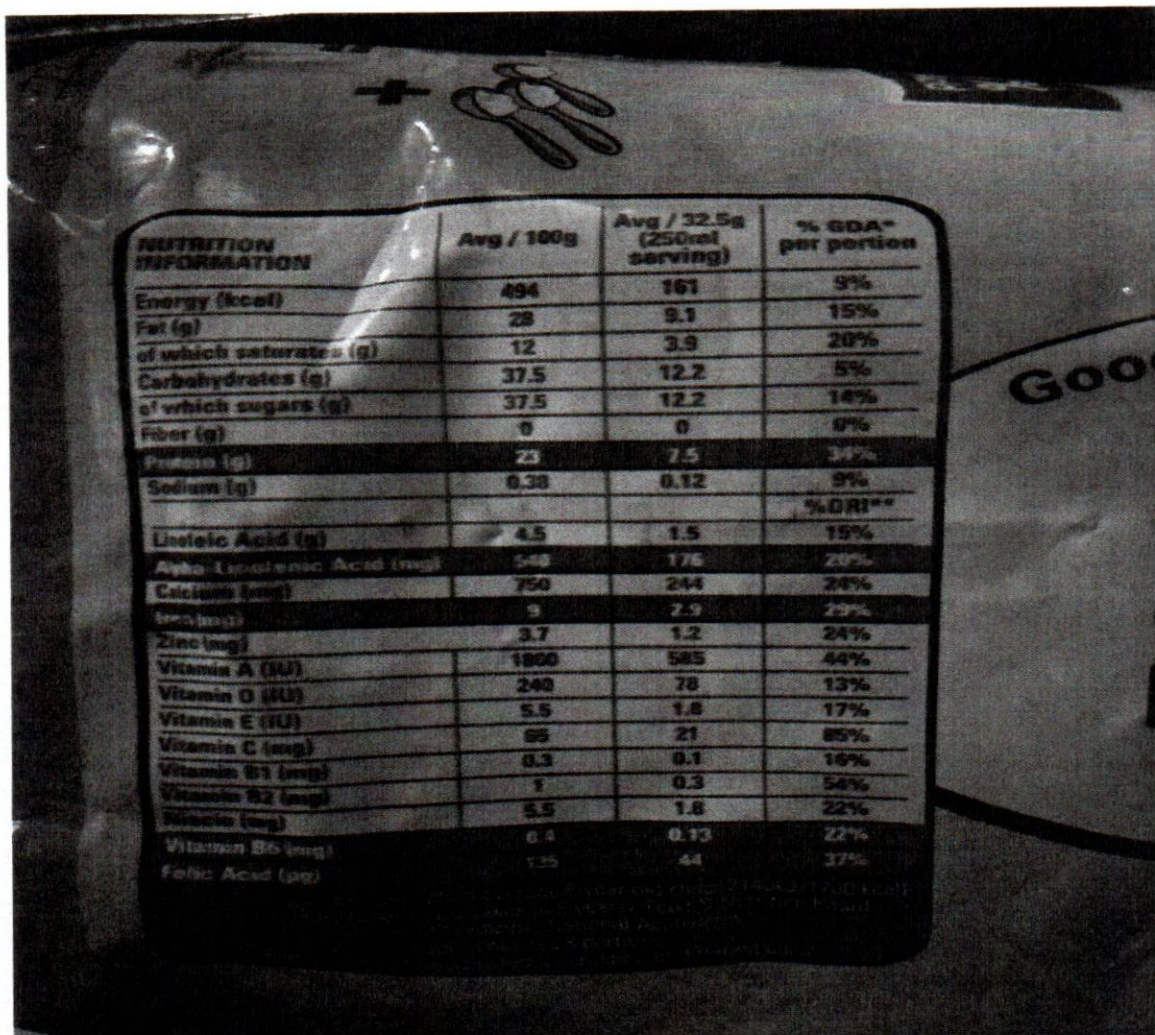
5.23 Arguments of both parties have been evaluated and it has been noticed that the packaging submitted by the Complainant and the latest packaging as shown above are not the same. It is pertinent to mention here that the packaging submitted by the Complainant has been subsequently approved by PFA vide letter dated: October 15, 2020 with certain amendments. Therefore, the packaging used by the Respondent prior to the approval by PFA was, prima facie, deceptive in nature.

5.24 Furthermore, the Complainant alleged that the nutritional information on the product packaging shows that it contains 23g of milk protein per 100 grams which is much lower than any applicable standard. The Respondent has made following submissions in this regard:

“The Average composition of Nido Fortigrow is as follow:

- i. Nido Fortigrow contains 28% total fat. Out of which 14% is milk fat.*
- ii. Moisture/water content is 3%.*
- iii. Nido Fortigrow contains 67% MSNF. Each 100 gram of Nido Fortigrow contains 23 gram of Milk Protein. PFFR 2018 requires minimum 34% Milk protein in MSNF and not the whole product (as wrongly assumed by the complainant). The percentage of milk fat in MSNF in Nido Fortigrow is calculated as follows:*
- iv. $23 \text{ protein (declaration gram per 100g of product)}/67 \text{ (MSNF)} * 100 = 34.3\% \text{ Milk protein in MSNF.}”$*

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5.25 The submissions of both the Complainant and Respondent were analyzed and the following observations are made. In this regard, the Respondent was asked to provide the basis of above said calculations (5.27 (iii) & (iv)) via email dated January 06, 2021, in response to which the Respondent submitted the below mentioned email:

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Reply Reply All Forward



Tue 1/5/2021 2:29 PM

Zainab Janjua <zainab.janjua@ajuris.com.pk>

Nestle - QRI Reports

To: aakbar@cc.gov.pk

Cc: Raza, Faisal, LAHORE, Legal Affairs; Mitha, Mian, LAHORE, Regulatory Affairs - HO

You replied to this message on 1/6/2021 11:15 AM.

Message

NIDO FORTIGROW (QRI Report).pdf (372 KB)

NESTLE BUNYAD (QRI Report).pdf (1 MB)

Please see the attached QRI Reports that establish the minimum content of Milk Protein in MSNF in Nestle's products.

Zainab Janjua
Partner

AJURIS, Advocates & Corporate Counsel
251-B, Street 4, F-10/3
Islamabad
Work: +(92) 51-2112910/11
Fax: +(92) 51-2112912

Zainab Janjua Re: Nestle - QRI Reports

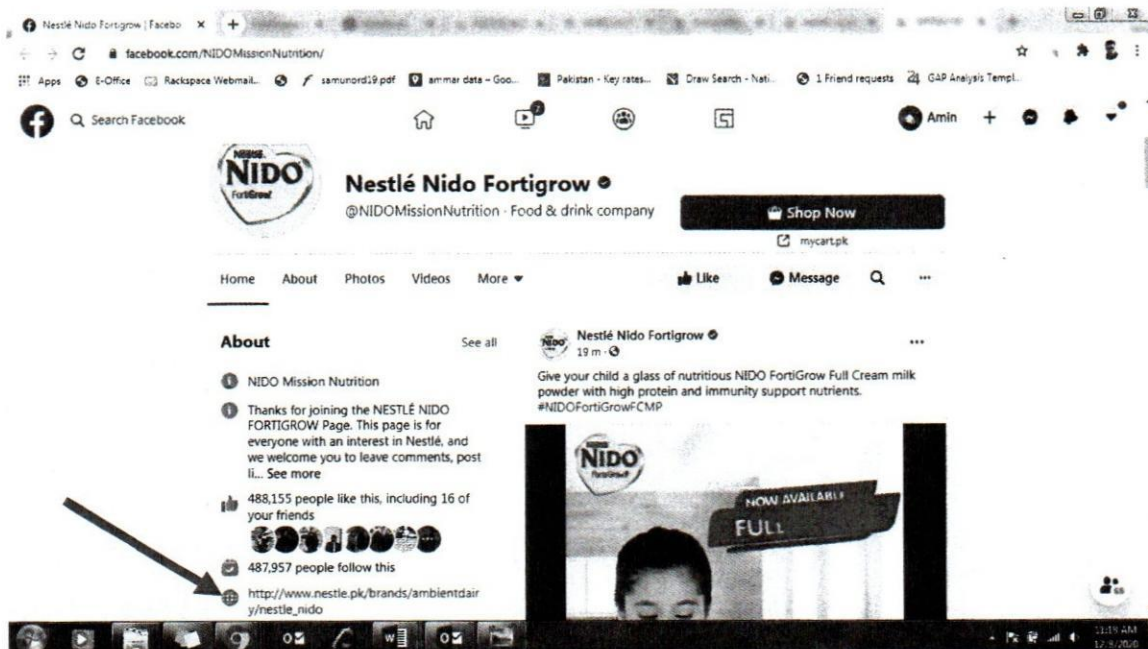


- 5.26 Moreover, certain discrepancies were also noticed while evaluating the above made submissions. Meanwhile, the Respondent requested for extension in time which was duly granted via email dated January 12, 2021. So far it is relevant to mention that the Respondent has not submitted its reply till date.
- 5.27 As shown in the screenshot above, it is clearly evident that the Respondent relied on Qarshi Research International Pvt. Ltd (QRI) reports for establishing the minimum content of Milk protein in MSNF. In this regard, it is pertinent to mention here that the Respondent has provided average calculations in its earlier reply dated July 30, 2019 but, when they were asked to explain the basis of said calculations, they started replying on QRI report. Hence, it can be concluded that either the earlier calculations were fabricated or the reports submitted afterwards were not authentic. It further prove the point that the nutritional information on the product packaging is not in line with the applicable standards.
- 5.28 It is pertinent to mention here that, if we visit the website of the Respondent from the link available on its Facebook page we see that the updated product packaging is not available rather the packaging before the year 2018 is available stating Nido FortiGrow as “Full Cream Powder Milk”. We need to follow following steps:

Step # 1

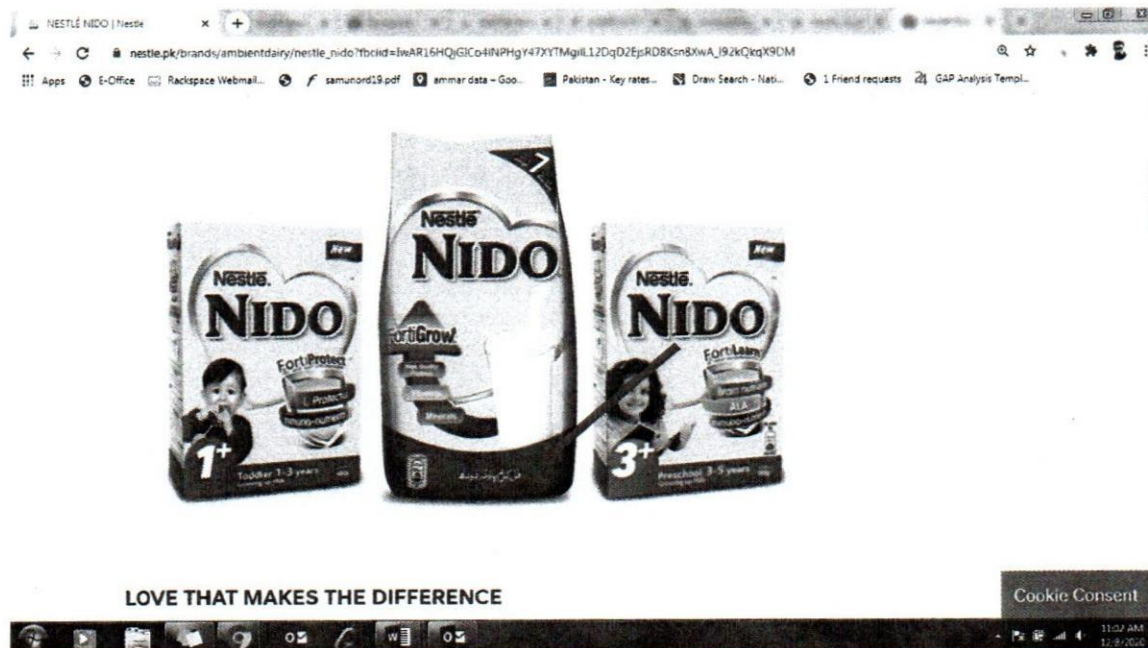
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Open the Facebook page of the Respondent Named “Nestlé Nido Fortigrow” by clicking the URL <https://www.facebook.com/NIDOMissionNutrition/> the below screen will appear:



Step # 2

Click on the website link available on the Facebook page mentioned in step# 1 above pointed with arrow. The link will direct to the Respondent’s website which clearly shows the packaging of Nido Fortigrow as “**Full Cream Powder Milk**”. As shown below:



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- 5.29 Hence, it is evident that the Respondent is still marketing its product with the old packaging available on its website, and also the nutritional information on the product packaging is not in line with the applicable standards. The Respondent in this way has disseminated false and misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.
- 5.30 Addressing the allegation regarding **Best for School kids**, it is necessary to first determine whether the Respondent has indulged in comparison of goods at all? The Respondent in its defense submitted that this statement only suggests that this product is best suited for school going children. The Respondent also submitted that the statement “**Best for School Kids**” is only used on Nido FortiGrow in comparison to the Respondent’s own products catering for the same age group. Moreover, the Respondent stated that Nido FortiGrow is a premium product with more fortification, e.g., containing nutrients such as Alpha Linoleic Acid (“**ALA**”), etc., hence the use of terms “**Best for School Kids**” on Nido FortiGrow’s label. Furthermore, the Respondent submitted that at the time the claim “**Best for School Kids**” was introduced, the label underwent other changes as well, on top of the label, change in the recipe of the formula was also disclosed on the package as “**New and Improved with ALA**”.
- 5.31 While evaluating the response of the Respondent, it is important to note that when the claim of **Best for school kids** is made, it indeed infers superiority or a certain position of a product compared to other competing product. The claim of Best for school kids will never be used if there is no competition in the field (market in this case). Here it is also relevant to mention that the practice of comparing competing goods in the process of advertising is not prohibited. What is considered a violation is that the assessments made have false or misleading inferences. Therefore, the Enquiry Committee is of the view that this statement is a comparative statement which implies its superiority of other competing products, which in this case is milk, considering the net general impression of the overall marketing material of this product and its range of products. Since the Respondent has not been able to prove its superiority to milk or any other competing product, this claim appears to be deceptive.
- 5.32 In light of the above discussion, it can therefore be determined that the claim made by the Respondent is false and misleading. Moreover, the Respondent is also found involved in false and misleading comparison of goods in the process of advertising in, *prima facie*, violation of section 10 (1) in general and section 10 (2) (c) in particular.
- 5.33 Furthermore, whereby the basic labeling on the packaging of these products appear to be satisfactory, however, other high sounding claims like “*BEST FOR SCHOOL KIDS*” and other claims related to “*Respiratory Defenses*”, “*Immune Defenses*”, “*Gut Defenses*”, “*Brain Support Nutrients*”, “*Growth Development*” and other detailed adjoining explanatory claims require further clarifications and substantiation. Additionally, it appears that these benefits can only be attained vide consumption of Nestle Nido FortiGrow. Therefore, it would still have to be proven if the same cannot be attained vide consumption of regular milk and an overall regular diet, which have not been demonstrated. In absence of any scientific evidence, such claims appear to be misleading.

c. Nestlé Bunyad

5.34 Below are images of the latest packaging of Nestlé Bunyad by PFA:



5.35 For this product also, submissions of both parties have been assessed and the following observations are made. The latest packaging as shown above appears to be in compliance with various requirements, such as the report by PCSIR endorsed the correctness of the nutritional labels. Other particulars of the packaging also appear to be in line with directions of PFA. It is relevant to mention here that the Respondent in its packaging for the year 2019 as alleged in the Complaint was using the phrase “**Vegetable Fat & Milk Solids**” for labeling of Nestle Nido Bunyad. It was only after the Respondent got approval from PFA vide letter dated October 15, 2020, that they included the phrase “**Reduced fat blend of skimmed milk powder & vegetable fat in powder form**” in its packaging. Therefore, the packaging used by the Respondent prior to the approval by PFA was, prima facie, deceptive in nature.

5.36 Furthermore, the Complainant alleged that the nutritional information on the product packaging shows that it contains 20g of vegetable fats and 15g of milk protein per 100 grams which is much lower than any applicable standard. The Respondent has made following submissions in this regard:

“The Average composition of Nestle Bunyad is as follow:

- i. Nestle Bunyad contains 20% total fat. Out of which 3% is milk fat.
- ii. Moisture/water content is 3%.

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- iii. Nestle Bunyad contains 37% MSNF. Each 100 gram of Nestle Bunyad contains 15 gram of Milk Protein. PFFR 2018 requires minimum 34% Milk protein in MSNF and not the whole product (as wrongly assumed by the complainant). The percentage of milk fat in MSNF in Nestle Bunyad is calculated as follows:
- iv. $15 \text{ protein (declaration gram per 100g of product)} / 37 \text{ (MSNF)} * 100 = 40.5\% \text{ Milk protein in MSNF.}$

	Avg Per 100g	Avg Per Portion 25g (250ml serving)	% GDA* Per Portion
Energy (kcal)	458	129	7%
Fat (g)	26	5.2	9%
of which saturates (g)	11	2.9	14%
Carbohydrates (g)	55	14.3	6%
of which sugars (g)	42	10.9	13%
Fiber (g)	0	0	0%
Protein (g)	15	3.9	18%
Sodium (g)	0.4	0.1	7%
			%DRI**
Calcium (mg)	850	221	22%
Vitamin A (IU)	1577	410	31%
Vitamin B (mg)	132	36	6%
		19.5	78%
		3	30%

5.37 The submissions of both the Complainant and Respondent were analyzed and the following observations are made. In this regard, the Respondent was asked to provide the basis of above said calculations (5.36 (iii) & (iv)) via email dated January 06, 2021, in response to which the Respondent submitted the below mentioned email:

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Reply Reply All Forward



Tue 1/5/2021 2:29 PM

Zainab Janjua <zainab.janjua@ajuris.com.pk>

Nestle - QRI Reports

To aakbar@cc.gov.pk

Cc Raza,Faisal,LAHORE,Legal Affairs; Mitha,Mian,LAHORE,Regulatory Affairs - HO

You replied to this message on 1/6/2021 11:15 AM.

Message

NIDO FORTIGROW (QRI Report).pdf (372 KB)

NESTLE BUNYAD (QRI Report).pdf (1 MB)

Please see the attached QRI Reports that establish the minimum content of Milk Protein in MSNF in Nestle's products.

--

Zainab Janjua
Partner

AJURIS, Advocates & Corporate Counsel
251-B, Street 4, F-10/3
Islamabad
Work: +(92) 51-2112910/11
Fax: +(92) 51-2112912

Zainab Janjua Re: Nestle - QRI Reports



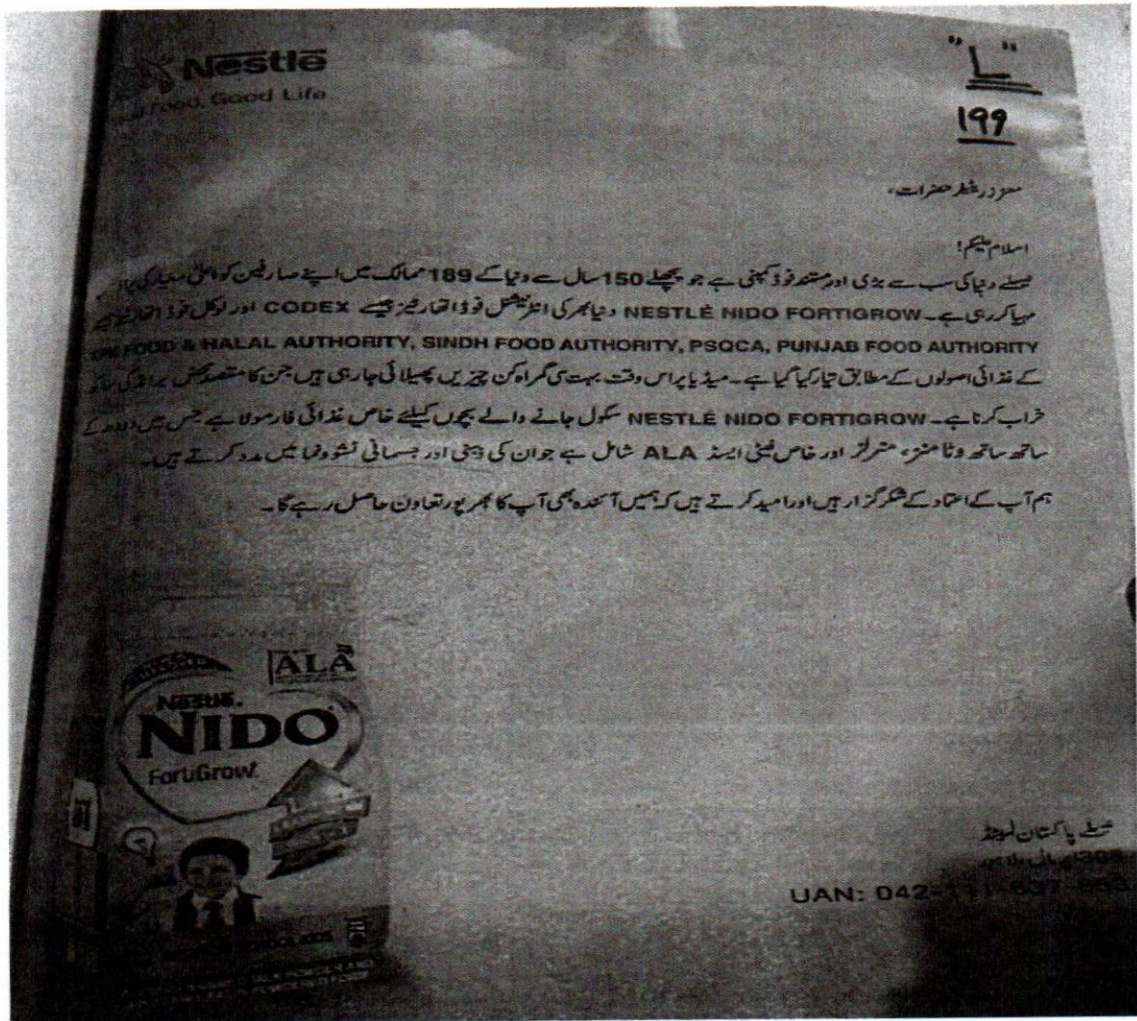
- 5.38 Moreover, certain discrepancies were also noticed while evaluating the above made submissions. Meanwhile, the Respondent requested for extension in time which was duly granted via email dated January 12, 2021. So far it is relevant to mention that the Respondent has not submitted its reply till date.
- 5.39 As shown in the screenshot above, it is clearly evident that the Respondent tried to establish the minimum content of Milk protein in MSNF via Qarshi Research International Pvt. Ltd (QRI) reports. In this regard, it is pertinent to mention here that the Respondent has provided average calculations in its earlier reply dated July 30, 2019 but, when they were asked to explain the basis of said calculations, they started replying on QRI report. Hence, it can be concluded that either the earlier calculations were fabricated or the reports submitted afterwards were not authentic. It further prove the point that the nutritional information on the product packaging is not in line with the applicable standards.
- 5.40 Hence, it is evident that the nutritional information on the product packaging is not in line with the applicable standards. The Respondent in this way has disseminated false information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

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5.41 In light of the discussions made in para 5.10 to 5.29 & para 5.33 to 5.40 above, it is concluded that although the packaging has now been approved by PFA but, the Respondent is still marketing its product with old packaging for Nestle Nido 3+ and Nestle Nido FortiGrow on its website opened via its Facebook page. The same does not apply to Nestle Nido Bunyad. Hence the Respondent is, prima facie, involved in disseminating false and misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

THE NESTLÉ PAKISTAN FLYER

5.42 The Complainant has also raised objections against a flyer distributed by the Respondent amongst the retailers. Image of its copy is provided below:

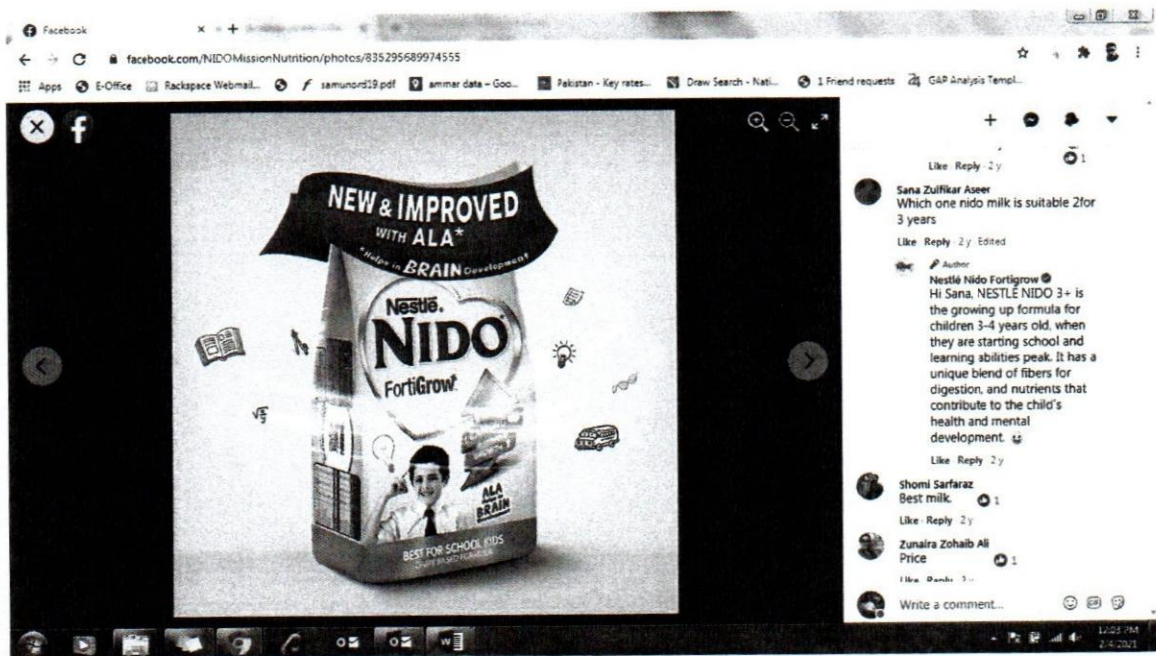


5.43 The said flyer states, “Nestlé Nido FortiGrow school janay walay bachon ke liye khaas ghazayi formula hay jis mein doodh ke sath sath vitamins, minerals, khas fatty acid ALA shaamil hai jo unn ki zehni or jismani nash-o-numa mein madad kertay hain”. It can be concluded that the statement implies the product is actually milk, which has been

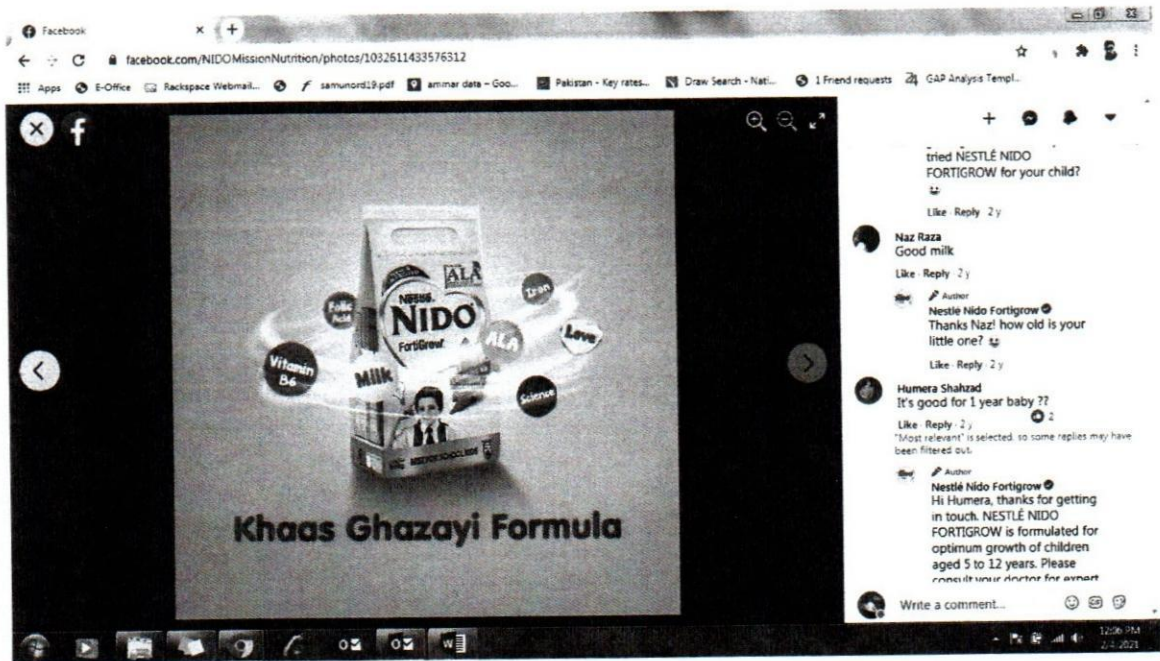
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additionally fortified with other vitamins and minerals. In this regard, it is important to note that this information is contrary to the true nature of the product as it is prepared using ingredients, including skimmed milk and other milk solids-not-fat such as lactose, caseins, whey proteins, and vegetable fats, and so on, whereas it is necessary to recognize there is a difference between milk and skimmed milk. This also means that there is a significant difference between “fortified milk” – as alluded by the flyer by using the phrase “*jis mein doodh ke sath sath...*” – and a “milk product fortified with additional nutrients”.

5.44 This misperception can be confirmed by the instances where consumers have referred to the product as milk in the comments on Nido FortiGrow’s official Facebook page. The Respondent in this regard has argued that there is no obligation under the applicable laws that require the Respondent as a manufacturer to respond to all the comments made on various social media pages. However, it has been observed that on various occasions, when the Respondent’s products have been praised by the public, the Respondent has acknowledged the appreciation, without clarifying the misperception of the consumer identifying its product as milk, while there being onus on the Respondent to ensure that the public is not misled or deceived in any manner. Screenshot of the Facebook comments are depicted below:



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5.45 Arguments of the Respondent are reiterated that the assertion raised in the complaint that the flyer omits mentioning the product as a blend of skimmed milk and vegetable fat in order to create an impression that the product is milk is incorrect as the perusal of the impugned flyer shows that a sufficiently visible picture of Nido FortiGrow pack is part of the impugned flyer. The packaging of Nido FortiGrow present on the flyer clearly states that it is “Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form”. That the said pack also contains the disclaimer that the product is not natural milk. It is submitted in this reference that the statement, “Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form” is visible, however, the disclaimer that this product is not milk is barely visible. Moreover, the previously mentioned statement states the opposite which is the main message of the flyer, hence, as previously established by the Commission, merely using a disclaimer in fine print to avoid deception is not sufficient. Therefore, it can be concluded that this flyer of the Respondent also has the ability to mislead the consumer and its viewers, whether it is the retailers or the end consumers.

5.46 In view of the above, it can be concluded that the Respondent is involved in disseminating misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

TELEVISION COMMERCIALS (TVCS)/VIDEO ADVERTISEMENT

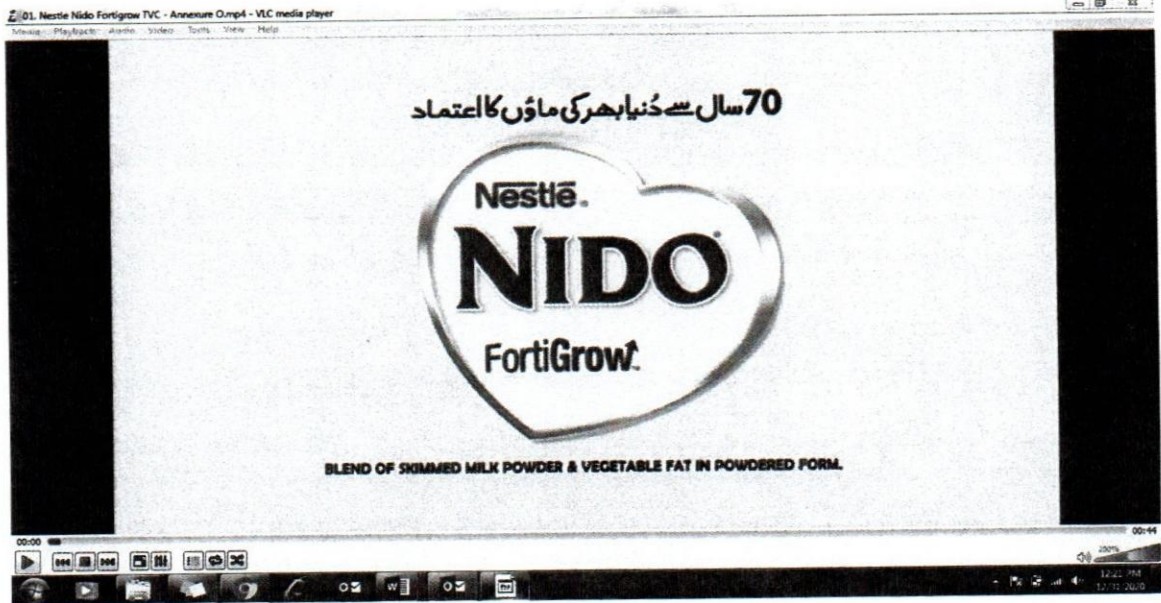
5.47 Reference is made to the video advertisement of the Respondent which focuses on the process of formulation of Nido FortiGrow. As is the case with the above flyer, the contents of this advertisement also imply that Nido FortiGrow is actually milk, additionally fortified with nutrients. The advert ends with the statement, “Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form”, however, keeping in view the net general impression of this product created over the years as well as the major part of this specific advert, one

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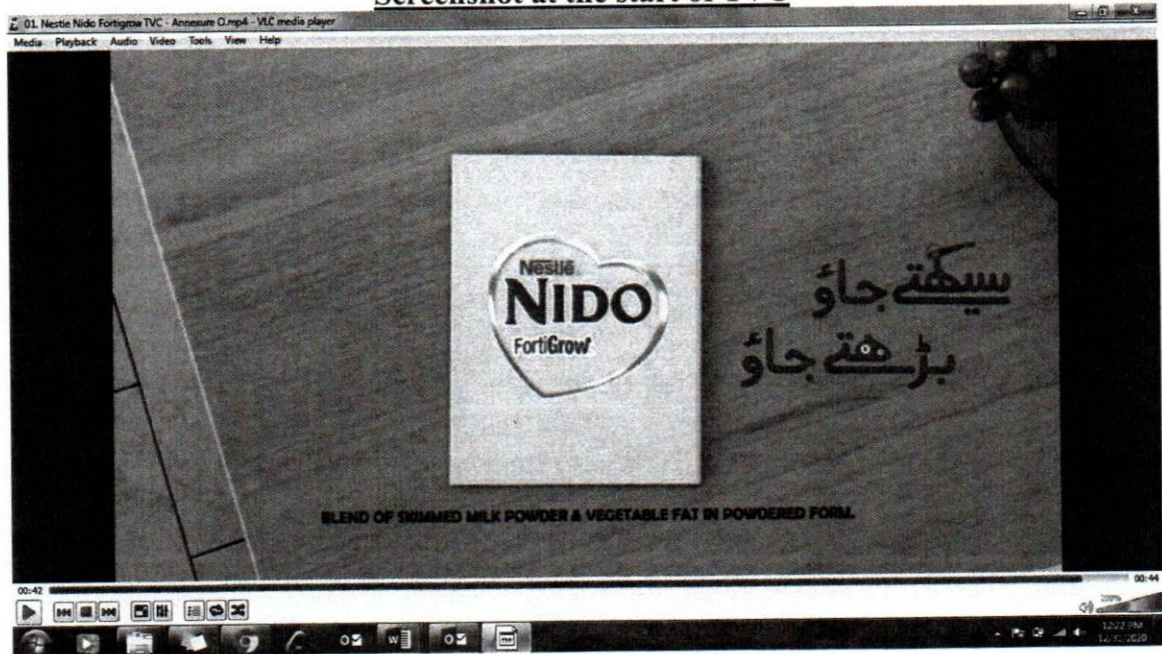
written statement appearing at the end for such a short period is insufficient to undo the impression created by the preceding audio and visuals of this advert.

- 5.48 In addition to the above, the remaining marketing campaigns of the Respondent, particularly TVCs – which have wide public coverage and have been to have a high impact on consumer perception – pertinent to the subject products of this enquiry have been analyzed in light of allegations of the Complainant.
- 5.49 The Complainant has also submitted a TVC wherein, it was alleged that the primary focus in the TVC was to show that the Nido FortiGrow is sourced from milk. The TVC then concludes with a mother giving her son a glass of white liquid. It was further alleged during the 45 seconds TVC, only five (5) seconds were spent showing other ingredients of the product. The main focus of the TVC is on how the product is milk based while other constituents/ingredients of the product are downplayed. The Complainant further stated that the TVC completely omits any reference to the extractive processes that the milk is put through where moisture and milk fats are removed. Rather, the focus of the TVC is how milk is collected, and then milk fats, vitamins, minerals, and vegetable fats and other nutrients are added. The Complainant submitted that in the end the TVC mentions that the product is a Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. This further substantiates the deception on part of Nestlé Pakistan because once it has admitted the nature of the product, it cannot claim innocence in omitting crucial details about the manufacturing process as depicted in the TVC.
- 5.50 Respondent in its reply stated that Nido FortiGrow is in fact sourced from milk and is a milk-based product. But it is incorrect to assert that the primary focus of the advertisement is to show that Nido FortiGrow is sourced from milk. The referred advertisement accurately represents the composition, nature, and manufacturing process of Nido FortiGrow. The Respondent has further stated that it is not prohibited under any applicable local and international food regulations that a milk product being sold as Blend of Skimmed Milk and Vegetable Fat in Powdered Form cannot be in white color or cannot be shown as such. It is a milk product composed largely of milk solids and milk fats and therefore, possesses characteristics similar to milk. Respondent stated that all ingredients including vegetable fats are clearly mentioned in the advertisement. Although there is no law regulating the time that can be devoted to a particular ingredient in an advertisement, the division of time in the advertisement corresponds to the proportion of ingredients used in Nido FortiGrow. Therefore, displaying cows as a source of the product and devoting substantial time in showing that the product is milk-based is neither inaccurate nor deceptive.
- 5.51 The Respondent further submitted that it is settled law that an advertisement will be looked into holistically and not in isolation. It is incorrect that the nature/category of Nido FortiGrow is only mentioned in the end. The advertisement opens with the logo of Nido FortiGrow which clearly states “**Blend of Skimmed Milk and Vegetable fat in Powdered Form**”.
- 5.52 Below are screenshots of Respondent’s TVC pertinent to Nido FortiGrow as submitted by the Complainant.

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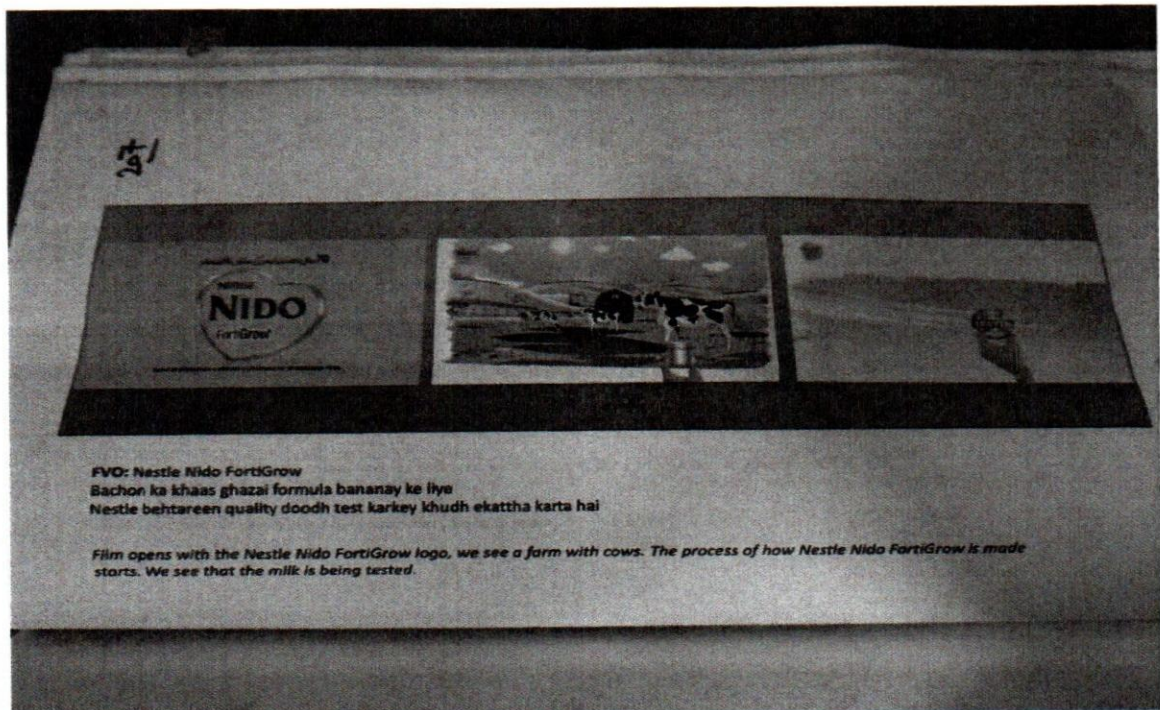


Screenshot at the start of TVC



Screenshot at the end of TVC

- 5.53 While evaluating the TVC, it has been observed that the advertisement starts with the logo of Nido FortiGrow which clearly states that it is a “**Blend of Skimmed Milk and Vegetable fat in Powdered Form**”. But, the Complainant in its transcript has knowingly avoided this fact during its submissions. The screenshot of the TVC transcript is depicted below:



- 5.54 It has also been observed that the TVC accurately represents the composition, nature and manufacturing process of Nido FortiGrow. Hence, the primary focus of the advertisement is not to portray Nido FortiGrow as Milk but rather sourced from Milk. Moreover, the TVC towards the end specifically mentions the fact that it is a “**Blend of Skimmed Milk and Vegetable fat in Powdered Form**”. The statements in the Respondent’s TVC are hence found to be true, with respect to their claim. As a result Respondent has not been found involved in violation of section 10 of the Act.

THE NESTLÉ PAKISTAN MISSION NUTRITION

- 5.55 The Complainant has also raised concerns against the Respondent’s campaign by the name of “Mission Nutrition”. The Mission Nutrition Campaign appears to be an awareness campaign conducted by a team of the Respondent’s representatives, wherein they conducted various activities in schools engaging students and teachers and maybe parents as well. The Respondent has made the following statements while introducing their Mission Nutrition campaign on the website, which is followed by videos of its coverage (images provided below);

*“As children grow not only do their likes and dislike change but their nutritional needs continue to evolve, **therefore Milk – an essential part of a growing child’s diet**, should also change.....unfortunately many parents remain unaware of the changing nutritional needs of their children and hence, do not understand that regular milk is not enough to fulfill these demands.....That is why NESTLÉ NIDO FORTIGROW has set out on a mission*”

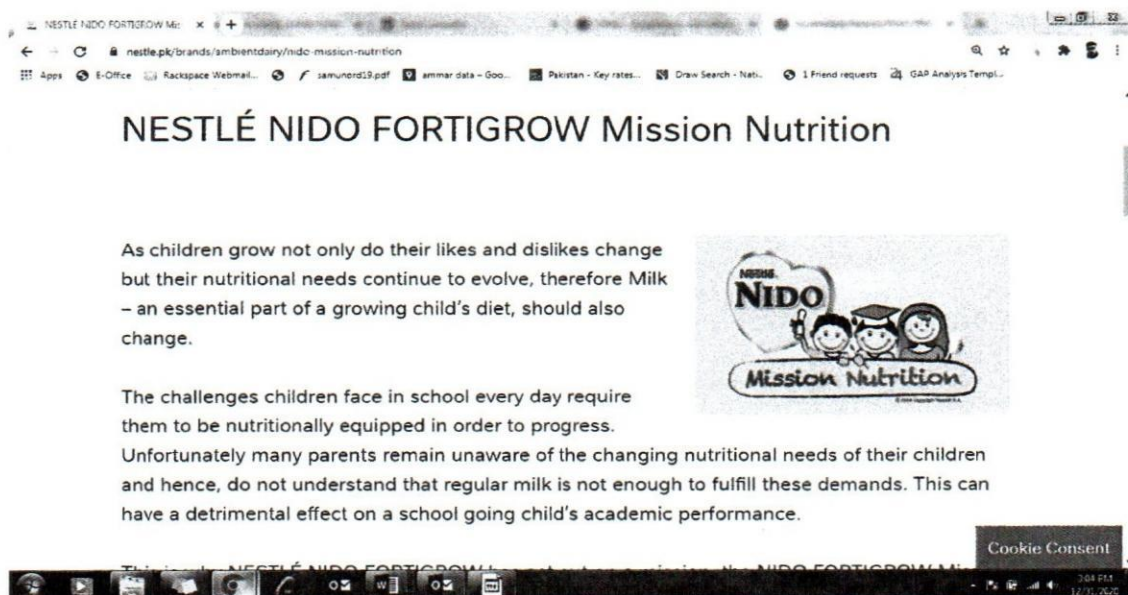
- 5.56 A perusal of the text and video exhibits that the Respondent firstly highlights the importance of milk for a child’s nutritional needs and overall wellbeing followed by

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inadequacy or regular milk and finally, provides Nido FortiGrow as the perfect (better) alternative. The whole theme of the campaign makes it evident that an ordinary consumer is likely to begin associating Nido FortiGrow with milk even though it is not milk.

5.57 Therefore, the Complainant is right to state that from an ordinary consumer's perspective, milk is a necessity as opposed to a luxury item and therefore, after such messages, the ordinary consumer is inevitably bound to substitute its consumption of milk with that of Nido FortiGrow considering it as "*BEST FOR SCHOOL KIDS*", as stated on its packaging.

5.58 The Respondent has submitted that this campaign was run in 2015 and was discontinued thereafter and at the time, Nestlé Nido was full cream milk powder with additional nutrients to address the health requirements of the school going kids. The latest examination of the Respondent's website (December 31, 2020) shows that even though the deceptive video has been removed, the remaining text remains the same as reproduced below.



Website Screenshot – Dated: December 31, 2020

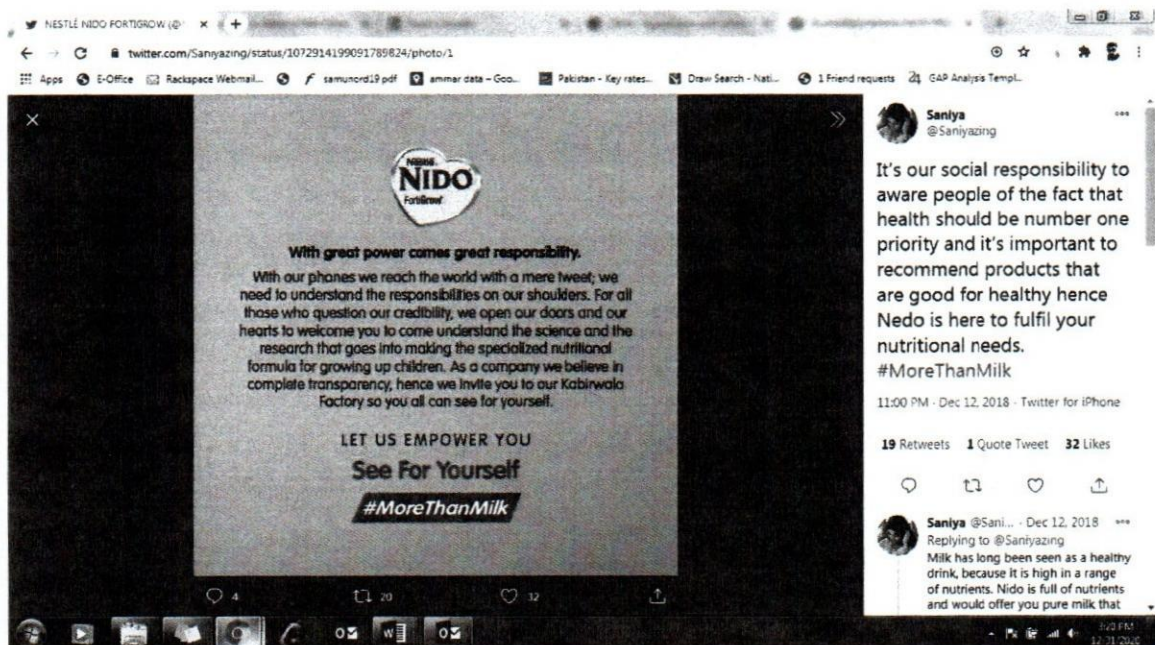
5.59 Furthermore, the Respondent submitted that the mission nutrition campaign was based on the widely accepted scientific opinion that only milk is not the best diet for kids, which *inter alia* included the view that although vitamin D is certainly an essential nutrient, it does not occur naturally in milk, so other fortified foods such as breakfast cereal, orange juice, and soymilk are equally good sources. The amount of protein in milk can also be found in lots of other sources, including beans and eggs. Fresh milk is also low in essential minerals such as iron and zinc. Therefore, it is now a widely accepted opinion that fortified foods, which have additional vitamins and minerals in addition to protein content, are a suitable choice for children. However, it is important to note that this is not how the Respondent has marketed its product. The Respondent itself, on its website and through its video, has emphasized on the importance of milk, followed by introducing its product Nestlé Nido FortiGrow as the best version of it, which is "*BEST FOR SCHOOL KIDS*".

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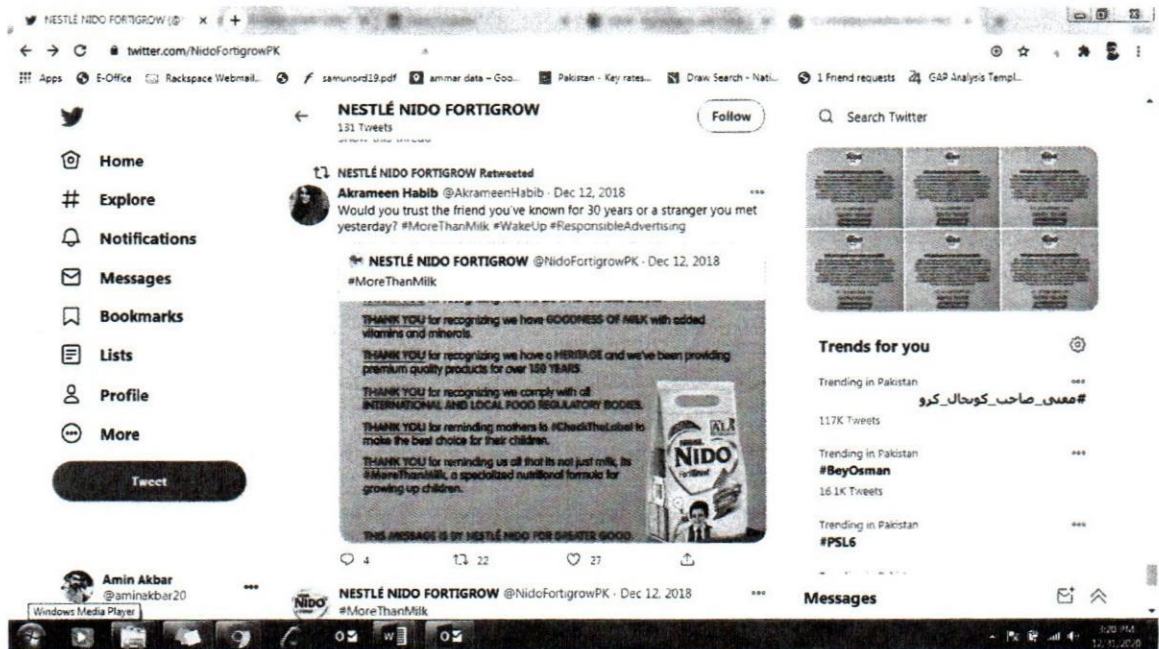
- 5.60 It can be seen that in addition to the rest of the marketing material, through the Respondent's awareness campaign of "Mission Nutrition" the general public, like students, teachers, and parents were given an impression that Nestlé Nido is milk/natural milk or a substitute thereof with added nutrition and hence, it should be made a constant part of a child's diet as it is the better substitute.
- 5.61 In view of the above, it can be concluded that the Respondent is involved in disseminating misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

NESTLÉ PAKISTAN #MORETHANMILK CAMPAIGN

- 5.62 It has been submitted by the Complainant that the Respondent has launched a campaign on twitter, under the tag name "#morethanmilk", images provided below:



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- 5.63 Reviewing the campaign shows the emphasis of the Respondent being on conveying the message that Nido FortiGrow is #morethanmilk. As highlighted by the Complainant that the impression of this claim is that Nido FortiGrow is not just milk, but a better version of milk with added nutritional value. Moreover, this has been done without making it clear to the public that this product is not milk.
- 5.64 It is further imperative to emphasize that even though the latest packaging of these products do not explicitly refer to these products as milk, however, once the Respondent's overall marketing of the product is examined, it is undeniable that it has the effect of misleading the ordinary consumer into thinking the products are milk and that that they are essentially necessary for the growth and upbringing of their children owing to their fortification. It is safe to conclude that the overall effect of the campaign is that ordinary consumers do perceive the said products as milk which they are not. These consumers are the ordinary consumers who have been misled to feed their children the aforesaid products instead of milk based on the high sounding claims and representations made by the Respondent.
- 5.65 In view of the above, it can be concluded that the Respondent is involved in disseminating false and misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, prima facie, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular.

6. SPILLOVER EFFECT:

- 6.1 Holistic analysis of the product packaging and other promotional materials of the Respondent regarding its product Nestlé Nido 3+, Nestlé Nido FortiGrow, and Nestlé (Nido) Bunyad, the Enquiry Committee found that the products are being marketed and sold nationwide and are not limited to one particular province.

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- 6.2 As regards the effect of anti-competitive behavior spilling over territorial limits of other provinces is concerned, the packaging and other promotional materials of the Respondent was circulated via nationwide TV Commercials and Facebook page. Hence the scope of the TVC and Facebook was not restricted to a particular area or province, in fact, it is available to ordinary consumers around the country. The advertisement by the Respondent has a nationwide effect because the ordinary consumers can access the TVC's via Television and Facebook page.
- 6.3 In view of the above, it can be established that the effect of anticompetitive behavior is spilling over the territorial limits of other provinces.

7. CONCLUSION AND RECOMMENDATIONS

- 7.1 Therefore, keeping in view the overall marketing campaign of the Respondent regarding the Nestlé Nido products, including Nestlé Nido 3+, Nestlé Nido FortiGrow, and Nestlé (Nido) Bunyad, along with the technicality of the issue concerning the various categories of milk and dairy based/milk products, the Enquiry Committee is of the view that the general public has been misled by the Respondent into believing that this product is milk. The same has also been held by the Honorable Supreme Court in its order titled Watan Party versus Government of Punjab, etc., that the product is not natural Milk. Additionally, the Respondent has also portrayed these products to be a better alternative of milk without a reasonable basis as the deliberation on efficacy and necessity of these products compared to natural/regular/loose milk is still being studied and under debate. Whereas till a final opinion is endorsed by all relevant expert national and international organizations, to make any such claims which imply the superiority of these formulae over milk for a child's health appears to be unsubstantiated and hence, false and misleading.
- 7.2 It is also very important to mention here that the packaging of the Respondent's Nestlé Nido products, including Nestlé Nido 3+, Nestlé Nido FortiGrow, and Nestlé (Nido) Bunyad are approved by PFA and the Glass of Milk initially with white color is now changed to Green color in order to follow the Honorable Supreme Court's order. Despite of the changed packaging, the marketing campaign as discussed above shows that the Respondent's product is milk or a substitute of milk.
- 7.3 As a result, the Respondent has been found involved in distribution of false and misleading information to the consumers that lacks reasonable basis related to character, method of production, properties and quality of goods which, *prima facie*, constitutes violation of section 10 (1) in general and section 10 (2) (b) in particular. Furthermore, the Respondent is also found involved in false and misleading comparison of goods in the process of advertising in, *prima facie*, violation of section 10 (1) in general and section 10 (2) (c) in particular.
- 7.4 In conclusion, deceptive marketing practices as discussed in this enquiry report have a direct impact on the public at large as well as the principles of fair competition. It is, therefore, in the interest of the general public and other players in the market that the undertakings should be curtailed from advertising their products/services in a deceptive manner and be encouraged to resort to the advertising practices that are transparent and

give consumers true and correct information. Consequently, *prima facie*, violations under the Act in terms of the findings of this enquiry report warrant initiation of proceedings against M/s Nestlé Pakistan Limited under Section 30 of the Act.



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