

# **COMPETITION COMMISSION OF PAKISTAN**

## **ENQUIRY REPORT**

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

**IN THE MATTER OF COMPLAINT FILED BY M/S NESTLÉ PAKISTAN  
LIMITED AGAINST M/S ENGRO FOODS LIMITED FOR DECEPTIVE  
MARKETING PRACTICES**

**BY**

**MARRYUM PERVAIZ, FAIZ-UR-REHMAN & FATIMA SHAH**

**DATED: September 16, 2019**

## 1. BACKGROUND

- 1.1 M/s Nestlé Pakistan Limited (hereinafter refer to as the “**Complainant**”), through its legal counsel, M/s AJURIS Advocates and Corporate Counsel, has filed a complaint before the Competition Commission of Pakistan (the “**Commission**”) u/s 37(2) of the Competition Act, 2010 (the “**Act**”) against M/s Engro Foods Limited (hereinafter refer to as the “**Respondent**”), for alleged violation of Section 10 of the Act which prohibits deceptive marketing practices.
- 1.2 It has been alleged in the complaint that the Respondent recently launched a marketing campaign to promote its brand ‘Olper’s Full Cream Milk Powder’ by way of television commercials. Through this campaign, the Respondent has made several outrageous claims related to quality, efficacy and fitness of the Complainant’s product Nestlé Nido FortiGrow. It was further alleged that on 23.11.2018, a new advertisement of Olper’s Full Cream Milk Powder was released, wherein a pack of yellow dairy based formula, pictorially identical to the well-recognized pack of the Complainant’s Nido FortiGrow, was shown and various deceptive, false and misleading assertions relating to the character, properties, suitability and quality of Nestlé Nido FortiGrow were made, which amount to *prima facie* violation of Section 10 of the Act, i.e., Deceptive Marketing Practices.
- 1.3 Keeping in view of the above, the Commission has initiated an enquiry in terms of sub-section (2) of Section 37 of the Act by appointing Ms. Marrayum Pervaiz, Joint Director (OFT), Mr. Faiz-ur-Rehman, Deputy Director (OFT) and Ms. Fatima Shah, Assistant Director (OFT) as enquiry officers (the “**Enquiry Committee**”). The Enquiry Committee has been 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;

***Whether the allegations leveled in the complaint constitute, prima facie, violation of Section 10 of the Act?***

## 2. COMPLAINT

- 2.1 The Complainant in its complaint to the Commission has made the following submissions.
- 2.2 It was submitted in the Complaint that the Complainant is engaged in the business of, *inter alia*, processing, packaging, manufacturing, sale, import and export of food and beverage items, including, Packaged Milk, UHT Standardized Milk, Dairy Based Formulas etc. Milk brands of the Complainant include 'Nestlé Milk Pak' and 'Nestlé Nesvita Calcium Plus', milk substitute products of the Complainant include, *inter alia*, 'Nestlé Nido FortiGrow' and 'Nestlé Bunyad' (Milk and Cream Powder Analogues as per Punjab Pure Food Regulations 2017, 2018 & Codex Alimentarius). Nestlé Nido FortiGrow has been in the market for decades and due to its consistent quality over the years coupled with extensive advertisement, Nestlé Nido FortiGrow is a well-known commodity in the general public. Nestlé Nido FortiGrow is the most popular dairy based formula for school going children and its popularity is evident from the

fact that in the category of such dairy based formulas Nestlé Nido FortiGrow has the significant market share.

- 2.3 The Complainant owns and operates one of the best and most sophisticated testing equipment in Pakistan, which is utilized to detect any deviations from its own standards as well as the standards notified under the applicable laws in Pakistan.
- 2.4 It was further submitted that all products of the Complainant fully meet all local and international regulatory and food safety requirements, being completely free of contaminants/ adulterants as well as the applicable labeling requirements. The Complainant has put strict quality control procedures in place throughout its manufacturing process, testing everything from raw materials to finished products as sold to the end consumers.
- 2.5 The Complainant has been operating in Pakistan since 1988 and is a subsidiary of Nestlé S.A. ("Nestlé") headquartered in Vevey, Switzerland. It is one of the world's leading nutrition, health and wellness companies. The Complainant's factory in Kabirwala, Pakistan is the largest milk intake plant in the Nestlé world. It operates the biggest milk collection system in Pakistan collecting milk from an estimated 190,000 farmers in the provinces of Punjab and Sindh.
- 2.6 It was further stated that the Complainant has publicly declared 39 commitments that it intends to meet by 2020. Among these are milk collection and dairy development, a nutrition support programme, Nestlé's healthy kids programme, the Healthy Women programme and Nestlé - DRDF Dairy Project.
- 2.7 The Complainant's commitment to dairy development enabled it to deliver the lowest microbial level and minimal Mycotoxin level. These programmes reflect its commitment to developing and delivering healthy milk and milk products throughout the country. It has proved to be an unsurpassed leader in the field of milk production and innovation in Pakistan.
- 2.8 It was also stated that the Respondent is a private limited company competing in the milk products market including milk formulas market through its brand 'Olper's Full Cream Milk Powder' and can be reached at Address 5<sup>th</sup> Floor, Harbour Front Building Block 4, Clifton Karachi.
- 2.9 It was submitted that On 23.11.2018, a new advertisement of Olper's Full Cream Milk Powder was released [<https://www.youtube.com/watch?v=T35921byKJg>] ("Impugned Advertisement") wherein a pack of yellow dairy based formula, pictorially identical to the well-recognized pack of Nestlé Nido FortiGrow, is shown and various deceptive, false and misleading assertions relating to the character, properties, suitability and quality of Nestlé Nido FortiGrow are made in violation of Section 10 of the Act.
- 2.10 It was stated that in the Impugned Advertisement, while making the projected reference to Nestlé Nido FortiGrow, it has been claimed that Nestlé Nido FortiGrow

is not natural milk and that it is in fact a mixture of oil and whitener, having no nutrient value. It has been further suggested in the Impugned Advertisement that the Complainant has been deceiving its consumers for years. Vide the Impugned Advertisement, the Respondent has launched a negative and malicious marketing campaign in blatant disregard of the provisions of the Act. It has done so to disseminate false and misleading information with the ulterior motive of making inroads into the market share of Nestlé Nido FortiGrow by advertising false information about its characteristic and properties, by undermining the beneficial value of the product, by creating false impression that vegetable oil is not a permitted or usual ingredient of milk/growing up formulas and by creating false perception in the consumer market that the Complainant has been misleading and deceiving its consumers.

2.11 The comments published by the official Facebook page of 'Olper's Full Cream Milk Powder' and the public response establish that the reference to the "yellow pack powdered milk" in the Impugned Advertisement is a reference to Nestlé Nido FortiGrow and has been undeniably perceived as such by the consumers, gravely impacting the reputation and business interests of the Complainant. Some of the comments are reproduced below for ready reference:

- i. The post of Olper's Full Cream Milk Powder' on 23.11.2018 at 19:50 solicited the comment *"lets stop using nido start Olper's"*.
- ii. Another Facebook post of 23.11.2018 at 19:58 solicited the comment *"Only thing missing is grandmother and kid spitting on nido pack at the end"*.
- iii. In the aforesaid post at 19:58, one of the consumers commented *"As part of EFL early days, it's always good to see development within EFL portfolio however felt a difference in marketing strategy with this Adv as it could be launch without mentioning the competitors product."*

2.12 It was submitted that the negative marketing campaign is being continued vide the official Facebook page of Olper's Full Cream Milk Powder. Underneath a post of Olper's Full Cream Milk Powder dated 23.11.2018 at 19:50, a member of the public stated that *"But expert dietitian is using nido for their own kids how we can believe that Olper's is right choice kisi next add m kisi or milk company, nay keh dia k red packing wala bhi sahi nahi tu phir kia hoga"*, the page of Olper's Full Cream Milk Powder stated *"One of the leading brands in powders used widely in child nutrition which is perceived by most consumers as being milk, is actually a formulation blended with vegetable oil However, Olper's Full Cream Milk is made from Natural Milk and has no vegetable oil in it."*

2.13 Such comments not only establish the intentional reference made to Nestlé Nido FortiGrow in the said advertisement but also evidence the malicious intent to hamper the reputation and business interests of the Complainant, which leads the market in the formula category for children and is a competitor of the Respondent.

2.14 Section 10 of the Competition Act is reproduced hereunder for ease of reference:

**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;*

2.15 It was submitted that the Impugned Advertisement makes representations that are false and misleading affecting the conduct and decision of an ordinary consumer to the detriment of Nestlé Nido FortiGrow and therefore liable to be declared a product of deceptive marketing.

2.16 The Impugned Advertisement refers to a yellow package, identical to the distinctive yellow color packaging of Nestlé Nido FortiGrow on which it is stated that "*It is not natural milk*". In view of the established identity and recognition of Nestlé Nido FortiGrow, there can be no doubt as to the understanding of the Respondent that the yellow colour pack shown in the Impugned Advertisement would cause an ordinary consumer to identify the said pack with Nestlé Nido. In a case titled *Messrs A. Rahim Foods (Private) Limited For Deceptive Marketing Practices*, reported as 2016 C L D 1128, this Honorable Commission while adjudicating a deceptive marketing complaint held as follows:

"19. We begin with the most contentious issue of the identical "red" colour scheme used by the parties. The facts presented demonstrate that K&N Packaging, by virtue of having been introduced prior in time, acquired a reputation and distinctiveness in the relevant market for frozen and or processed meat products. The Respondent's contentious red packaging was introduced after the Complainant's. The timing of the Respondent's actions suggests that there can be no doubt as to the awareness, knowledge and anticipation of the Respondent that its red coloured re-designed packaging would cause deceptive confusion in the mind of the consumer. On such basis, the Commission observes that the Respondent stands to gain an undue benefit and unfair advantage at the expense of the Complainant, which it would otherwise not have obtained. As such, the only rational conclusion which can be drawn is that the conduct of the Respondent has the purpose and effect of deceiving the consumer.

20. *Notwithstanding the Commission's independent adjudicatory powers as permitted and within the scope of the Act, it may be pertinent to make reference to the recent Judgment of the High Court of Sindh in Messrs Golden Thread Industries v. J & P Coats Limited Company a case of "passing off" and deceptive measures pertaining to a trading specific commodity, wherein it was observed that "when all the three packets are kept side by side - for example in a showcase of the shopkeeper, an ordinary purchaser would not be able to distinguish between the three on account of the identical size of the packs in the backdrop of yellow colour with typical rectangular border running across the packing, they will tend to cause confusion in the mind of unwary purchaser. It is also to be noted that the goods of the opposing parties are to be offered in same and common outlets/sale point, therefore, if the packets are mixed with each other an unwary buyer may be deceived". It was further observed therein that where the prefixes are similar but the colouring of the packaging boxes are different, an ordinary person cannot be deceived. It was lastly concluded that "a particular colour scheme plays a vital part in the Identification of a product ... (and it is particularly so when such product is used mainly by illiterate persons). ""*

2.17 It was evident from the pictorial illustration of the yellow pack shown in the Impugned Advertisement that it has been dressed up in distinctive yellow colour to identify it as Nestlé Nido FortiGrow. The visual impression created by the yellow pack shown in the Impugned Advertisement is evidenced by the comments of the ordinary consumers on social media as reproduced above. In a case titled *Messrs Shainal Al-Syed Foods For Deceptive Marketing Practices* reported as 2018 CLD 1115, the Honorable Commission observed as follows:

"29. *In short, there is no doubt from the visual observation of pictorial illustrations placed on the record in this matter, that any ordinary consumer, would at first instance be deceived as to the origin of the products at the time of exercising a choice of purchase. In this regard we deem it appropriate to refer to the judgment of Delhi High Court reported as Colgate Palmolive Co. v. Anchor Health and Beauty Care Pvt. Ltd. 2003 (27) PTC 478 Del, wherein Colgate sought an interim injunction against the Anchor Health's use of the trade dress and colour combination of red and white in relation to identical products (tooth powder), even though the rival marks were completely different. The court held that: "If the first glance of the article ... gives the impression as to deceptive or near similarities in respect of these ingredients, it is a case of confusion and amounts to passing off one's own goods as those of the other with a view to encash upon the goodwill and reputation of the latter. "*

30. *In view of the foregoing, the Commission is fortified in its view that the Respondent is responsible for and has in fact resorted to parasitic copying. Marketer's traditionally focus on designing advertising campaigns and other promotional strategies to promote a brand name. However, with evolving consumer preferences and laws, presentation; trade dress have become Just as essential for making products and services distinctive and for building brand recall. The cultural diversity of the Pakistan market makes a compelling case for the importance of product identification by packaging and visual impression. This has resulted in third parties creating lookalikes of popular products with similar packaging in order to grab consumers'*

*attention and generate demand for their own products in the market. In the considered view of the Commission, the consumers are clearly susceptible and at a serious risk: of falling prey to deceptive confusion pertaining to the origin and quality of the products, due to the striking similarity in the Complainant's Trade Dress and the Respondent's Trade Dress. "*

2.18 It was submitted that in the case of *M/s China Mobile Pak Limited vs. M/s Pakistan Telecom Limited*, with regard to the terms false and misleading, this Honorable Commission held that *"False information' can be said to include: oral or written statements or representations that are; (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not reality open to interpretation. Whereas 'misleading information' may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent."* In view of the aforesaid, it was submitted that the implied representation creating an impression that Nestlé Nido FortiGrow was marketed and sold as "Natural Milk" is utterly false and misleading which will be material in influencing the decision of an ordinary consumer and distort his/her economic behavior to the disadvantage of Nestlé and thus falls within the purview of deceptive marketing as defined in section 10(2)(a) of the Act.

2.19 The aforesaid false and misleading assertion and insinuation that Nestlé Nido FortiGrow was marketed as "Natural Milk" has been made without any reasonable basis and therefore liable to be declared deceptive under section 10(2)(b) of the Act. In view of the fact that Nestlé Nido FortiGrow was not labelled as "Natural Milk" but as Ghizai Formula or Blend of Skimmed Milk and Vegetable Fat in powdered form and has always complied with the applicable labelling and disclosure standards specified in the Punjab Pure Food Regulations, 2017 (now Punjab Pure Food Regulations 2018) and Codex Standards, the implied assertion is without any reasonable basis. Reliance is placed on a case titled as *Messrs Shainal Al-Syed Foods For Deceptive Marketing Practices* reported as 2018 CLD 1115, wherein "reasonable basis" has been interpreted as follows:

36. *The Commission now considers the term 'reasonable basis' in light of section 10 of the Act. The concept of having a reasonable basis is an established doctrine in USA which was first recognized in the case of Pfizer, Inc., 81 F T.C 23 (1972). In its seminal Pfizer decision, the Federal Trade Commission held that, even if an advertiser does not specify a level of support for its claims, i.e., it does not make an "establishment claim," it nevertheless must have a "reasonable basis" for making objective claims about product. The Commission further ruled that, when an advertisement does not make a specific level of substantiation of its claims, it is assumed that consumers expect that the advertiser had a 'reasonable basis' for making the claims."*

2.20 It was submitted that if the Impugned Advertisement is looked at in totality, the general impression it seeks to create by virtue of the implied and express representations made therein is that usage of oil in a formula for young children is neither permissible nor beneficial. Such representation is without any reasonable basis and therefore amounts to deceptive marketing as defined in section 10(2)(b) of the Act. In a case titled *Messrs Colgate Palmolive For Deceptive Marketing Practices, reported as 2017 CLD 1550*, this Honorable Commission held:

*"23. Furthermore, as stated above, the Commission examines the net general impression of the advertisement, which may contain both express or implied claims and absolute or qualified claims. The advertiser itself is responsible for material substantiation of all such claims. Neither proof of intent to disseminate a deceptive claim nor evidence that the consumers have actually been misled is required for a violation under section 10(2)(b) of the Act to be made out. This approach is also consistent with that of the Fair Trade Commission (FTC) USA. "*

2.21 It was submitted that Nestlé Nido FortiGrow is a Ghizai formula and for purposes of compliance with the regulatory framework fell under Regulation 01.6, Chapter 1 of Appendix 1 of the Punjab Pure Food Regulations, 2017 which provided for a category of "Milk and Cream Powder Analogues". Regulation 01.6, Chapter 1 of Appendix 1 of Punjab Pure Food Regulations, 2018 has renamed the aforesaid category of "Milk and Cream Powder Analogues" as "Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form" and defines it as follows:

*"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 product shall comply with Codex Standards."*

2.22 In view of the aforesaid, it is apparent that the use of edible vegetable oil is not only a standard industry practice but also legally permissible, thus the false representation being made by the Impugned Advertisement is without any reasonable basis. Given that it is assumed that an ordinary consumer expects that the advertiser had a reasonable basis for making the claims, allowing the Impugned Advertisement to continue would result in the consumer being misled by the false and baseless representations made vide the Impugned Advertisement and would certainly result in damage to the reputation of Nestlé Nido, hamper its business interest and give undue advantage in relevant market to the Respondent.

2.23 It was stated that the Impugned Advertisement is in essence comparative marketing where reference is made to the competing product i.e. Nestlé Nido FortiGrow. The honorable Commission while dilating upon the issue of comparative marketing in a case titled *Messrs Colgate Palmolive for Deceptive Marketing Practices, Reported as 2017 CLD 1550* has laid down stringent scrutiny standards for comparative marketing in following terms:



*"51. Section 10(2)(c) of the Act prohibits the 'false or misleading comparison of goods in the process of advertising' and also constitutes a deceptive marketing practice in terms of section 10(1) of the Act. Similar to the preceding subsection, a comparison of goods lacking' a reasonable basis will be considered to be false and misleading in terms of this provision. A comparison is made whenever the qualities of two or more products or services are judged against each other.*

*52. The FTC has developed the Statement of Policy Regarding Comparative Advertising (comparing a product to another company's product in an advertisement) which provides that comparative advertising is appropriate where the comparisons are clearly identified, truthful, and non-deceptive. The Commission is of the opinion that in addition to the above the comparison must be analyzed and held to the highest level of scrutiny in order to ensure that the statements made are accurate and narrowly drawn. It is only when comparative advertising compares material, relevant, verifiable and representative features and is not misleading, may there be a legitimate means of informing consumers of their advantage.*

*53. With regard to the Comparative Claims, the Respondent contends that its trade letter is an internal manual which states that in sonic attributes, Max APC is better than Dettol SC. To this extent, it has placed reliance on a presentation by Marketmatics, which it claims is based on the internal research conducted by a credible agency. A perusal of the presentation shows that there is no mention of which cross section of society the surveys and figures are based on. Reference therein has been made to terms such as "consumer's desire", "sounds good for the consumers", "product rating". The presentation cannot be considered as evidence by the Commission as it is vague and ambiguous and does not make reference to any source of data collection whatsoever. Even otherwise, the presentation does not highlight any flaws or defectiveness of Dettol SC or its packaging for it to be relied on by the Respondent when making the Comparative Claims. Therefore, the Commission is of the considered view that the Comparative Claims relating to price, expiry of the product and leakage and defective packaging - lack a reasonable basis and are hence deceptive within the meaning and scope of section 10(1) in terms of section 10(2)(c) of the Act.*

*54. As regards the Respondents submission that the trade letter was an internal confidential memo only meant for the viewing and training of its employed staff being the distributors, reference is made to the Oreck Ruling, wherein the FTC has observed that deceptive information provided to franchised stores for their use in marketing the product was itself a means and instrumentality to its distributors to deceive consumers. The fact and admission on part of the Respondent that the trade letter was circulated among persons responsible for marketing Max APC is sufficient for the Commission to conclude that a violation has in fact been made out due to the inclusion of deceptive comparisons therein. Even if the trade letter was meant solely for the viewing and consumption of its distributors, the deceptive comparisons have no doubt created an impression in their minds as to the harmful effects of Dettol SC, which impression is eventually passed onto the consumer try the sales force marketing Max APC, especially at the promotional stage of launch of the product. "*

- 2.24 It was further submitted that the Impugned Advertisement creates an impression that usage of oil by Nestlé Nido FortiGrow is injurious whereas perusal of the Olper's Full Cream Milk Powder pack reveals that Olper's Full Cream Milk Powder itself contains "fish oil". In view of aforesaid, it was submitted that the Impugned Advertisement makes false and misleading comparisons between two competing products and therefore tantamount to deceptive marketing under section 10(2)(c) of the Act and in violation of the principles laid down by this Honorable Commission in the case reported as *2017 CLD 1550*.
- 2.25 With respect to the content of paragraph 2.12, it is patent that a member of general public directed the attention of Olper's social media team to the beneficial value of Nestlé Nido FortiGrow and its anti-competitive marketing to hamper the interests of the Complainant. However, Olper's team refuted the statement by directly making misleading and incorrect statement regarding the properties of its competitors product and comparing it to its own product to gain undue advantage in the market in violation of section 10(2)(c) of the Act. Such conduct shows that the Respondent, thorough its social media presence, deliberately and in a calculated manner is continuing to mislead the general public with the ulterior motive of capturing the market share of the leading competitor in contravention of Section 10(1) of the Act.
- 2.26 The Impugned Advertisement contains incorrect and misleading statements regarding the properties and suitability of Nestlé Nido FortiGrow for growth and learning of young children, which create an overall impression that Nestlé Nido FortiGrow is only a mixture of oil and whitener, having no nourishment value or benefit whatsoever. Nestlé Nido FortiGrow is enriched with nutrients essential for growing up kids and school kids such as iron, folic acid, proteins, vitamin A, B1, B2, B6, C etc. The falsity of the Impugned Advertisement is apparent in view of the test reports of Nestlé Nido FortiGrow submitted by Pakistan Council of Scientific & Industrial Research ("PC SIR") and SGS Pakistan (Private) Limited before the Honorable Supreme Court of Pakistan, which clearly establish that Nestlé Nido FortiGrow contains Protein, Vitamins A, B1, B2, B6, C, D, E, Folic Acid and Calcium. Needless to say that such false claims aim to disparage Nestlé Nido's nourishment value and the Complainant as a supplier of consumer goods, which will necessarily affect and inform the decision of the ordinary consumer to the detriment of the Complainant.
- 2.27 It is patent that the Impugned Advertisement was a deliberate and calculated attempt to malign a leading competitor in the relevant market by misleading the ordinary consumer into believing that they have been intentionally and actively deceived into buying a product of no beneficial use. The aforesaid representation is false, misleading and without any reasonable basis aimed to deter the ordinary consumer from purchasing the most trusted Ghizai formula that is the market leader, therefore liable to be treated as deceptive marketing under section 10(2)(a) and 10(2)(b) of the Act.
- 2.28 The Impugned Advertisement falsely asserts that Nestlé Nido FortiGrow has been deceiving its consumers since years. It was submitted that neither Nestlé Nido FortiGrow has been marketed as "Natural Milk" nor any deception has been committed with regards to the ingredients and nutrient value of Nestlé Nido FortiGrow. As aforesaid, all Nestlé

milk products and milk substitute products including Nestlé Nido FortiGrow are fully compliant with all relevant regulatory laws and pass through stringent testing before being supplied to the market. The content of Impugned Advertisement is false, misleading, without- any reasonable basis and intentionally deceitful, therefore deceptive marketing in terms of section 10(2)(a) and 10(2)(b) of the Act.

2.29 It was further stated that the Complainant in compliance with its strict policy has always provided requisite disclosure regarding the ingredients and nutrient value of its products. The products of the Complainant being sold as Infant Formula, Follow up Formula, Growing up Formula and Ghizai Formula/ Milk and Cream Powder Analogues are entirely compliant with the definition, composition and labeling requirements applicable in Pakistan as well as internationally. For the assistance of this honorable Commission, the products, their nature and compliance status are included below:

Sr. No.	Product of Nestlé	<i>Classification</i>	Compliance
1.	Lactogen 1	Infant Formula	<ul style="list-style-type: none"> <li>• 2002 Ordinance</li> <li>• Codex Standard for Infant Formula</li> <li>• PSQCA Standard</li> <li>• 2017/2018 Regulations</li> </ul>
2.	Lactogen 2	Follow Up Formula	<ul style="list-style-type: none"> <li>• Codex Standard for Follow up Formula</li> <li>• PSQCA Standard</li> <li>• 2017/2018 Regulations</li> </ul>

3.	Lactogen 3	Growing Up Formula	<ul style="list-style-type: none"> <li>• Codex Standard for Follow up Formula</li> <li>• PSQCA Standard</li> <li>• 2017/2018 Regulations</li> </ul>
4.	Nido 1+	Growing Up Formula	<ul style="list-style-type: none"> <li>• Codex Standard for Follow up Formula</li> <li>• PSQCA Standard</li> <li>• 2017/2018 Regulations</li> </ul>
5.	Nido 3+	Growing Up Formula	<ul style="list-style-type: none"> <li>• Para 01.6.2 Chapter 1 of Appendix 1 of 2017/2018 Regulations</li> <li>• Codex standard for blend of Skimmed Milk and vegetable fat in powder form</li> </ul>
6.	Nido FortiGrow	Dairy Based Formula /Ghizai Formula/ Blend of Skimmed Milk and vegetable fat in powder form	<p>Para 01.6.1 Chapter 1 of Appendix 1 of Punjab Pure Food Regulations 2018. Blend of skimmed milk and vegetable fat in powder form.</p> <p>Codex standard for Skimmed Milk and vegetable fat in powder form</p>

7.	Bunyard	Dairy Based Formula /Ghizai Formula/ Blend of Skimmed Milk and vegetable fat in powder form	Para 01.6.2 Chapter 1 of Appendix 1 of 2018 Regulations. Blend of skimmed milk and vegetable fat in powder form.  Codex standard for Skimmed Milk and vegetable fat in powder form
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- 2.30 The Punjab Pure Food Regulations, 2017 provided the legal and regulatory framework for products titled as “Growing-Up Formula” and “Ghizai Formula/Blend of Skimmed milk and Vegetable Fat in Powder Form" under the category of "Milk and Cream Powder Analogues”. Now, the Punjab Pure Food Regulations 2018, provides regulatory framework for the said products under the category of "Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form". The Punjab Pure Food Regulations, 2017 & 2018 with respect to the above products have been enacted primarily in line with and are similarly based upon CODEX Alimentarius Standard No. 251-2006 (“Codex Standard for Blend of Skimmed Milk and Vegetable Fat in Powder Form”) formulated by WHO and Food and Agriculture Organization of United Nations.
- 2.31 Regulation 0.1.6.1 and Regulation 01.6.2 of Chapter 1 of Appendix 1 of the Punjab Pure Food Regulations, 2017 & 2018 provide standards for composition of Milk and Cream Powder Analogues or “Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form” and require the same to be in compliance with Codex Standards. Codex Standard for Blend of Skimmed Milk and Vegetable Fat in Powder Form provide for essential composition and quality standards as well as labelling standards. Nestlé Nido FortiGrow in compliance with Codex Standard for Blend of Skimmed Milk and Vegetable Fat in Powder Form disclose the total fat content, protein content and list of, ingredients on its pack. The test reports of independent bodies such as SGS and PCSIR in relation to Nestlé Nido FortiGrow submitted before the Honorable Supreme Court of Pakistan by Punjab Food Authority categorically establish that the composition and ingredients of Nestlé Nido FortiGrow is completely in line with the disclosures provided on the pack of Nestlé Nido FortiGrow. Therefore, any assertion of deception by Nestlé Nido FortiGrow is utterly false and baseless.
- 2.32 The Complainant is duly licensed for the manufacturing license from Punjab Food Authority. It is compliant with all legal requirements imposed by the aforementioned licensing authorities which leaves no doubt as to the quality and method of production of its milk products.
- 2.33 It has been held in the case of *M/ s China Mobile Pak Limited vs. M/ s Pakistan Telecom Limited* that "the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer'" who has been distinguished from a reasonable consumer. It has

also been held in the case of International Harvester Co., 104 F.T.C. 949 at pg. 1058, that "[i]t can be deceptive to tell only half the 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 impression ". Therefore, it is clear that the Respondent, through the Impugned Advertisement and its Facebook page Olper's Full Cream Milk Powder has been consistently engaged in disseminating information to consumers which is completely false, misleading, without any reasonable basis and has concealed relevant information which would lead the ordinary consumer to believe that (1) the Complainant has misled and deceived its consumers; (2) Usage of oil by Nestlé Nido FortiGrow is impermissible and injurious for growth of young children; and (3) that Nestlé Nido has no nutrient value and is not beneficial for the growth of kids. The blatant misleading through the Impugned Advertisement and marketing on social media is likely to be deceptive for an 'ordinary consumer'.

- 2.34 It was submitted that in view of the above, it is clear that the Respondent is engaged in anti- competitive practices which amount to deceptive marketing under sections 10(2)(a), 10(2)(b) and 10(2)(c) and therefore violates Sections 10(1) of the Act. The nature of the Impugned Advertisement is such that it has made false and misleading representations to ordinary consumer and such representations are material in influencing consumers in favor of Olper's Full Cream Milk Powder as is evident from the comments of consumers reproduced above. Such sentiment received on the deceptive marketing of the Respondent reveals that (i) the aforesaid implicit and explicit representations are false, misleading and baseless, (ii) the representations are material in informing the decisions of consumers and influencing their preference for dairy based formula, and (iii) are causing injury to the business interests of the Complainant, influencing the decision of consumers in favour of Olper's Full Cream Milk Powder and therefore resulting in unjust enrichment of the Respondent at the expense and detriment of Nestlé Nido FortiGrow.
- 2.35 Notwithstanding the falsity, misleading nature and maliciousness of the Impugned Advertisement in relation to Nestlé Nido FortiGrow, the said advertisement is misleading with regard to Olper's Full Cream Milk Powder brand it seeks to promote at the expense of Nestlé Nido FortiGrow.
- a. The advertisement's story line starts out with the claim that Nestlé Nido FortiGrow ought to be rejected because when it comes to the health and nutrition needs of children, the fact that a product is not real/natural milk is material.
  - b. It goes on to assert that consumers have been deceived because they have not been made aware that Nestlé Nido FortiGrow is not real/natural milk. This false assertion is then followed up by assuring consumers that they need not worry anymore as they now have the option of consuming Olper's Full Cream Milk Powder.
  - c. The overall impression the Impugned Advertisement creates is that Nestlé Nido FortiGrow is not real/natural milk, but Olper's Full Cream Milk Powder is real/natural milk, without highlighting that (i) as a powdered product, Olper's Full Cream Milk Powder is not real/natural milk, and (ii) its ingredients include oil, the

presence of which in Nestlé Nido FortiGrow is otherwise projected as a ground for asserting that Nestlé Nido FortiGrow has no nourishment value.

2.36 In view of breach of Section 10 of the Act by the Respondent, as detailed above, there is grave risk of serious and irreparable damage to the goodwill, reputation and market share of the Complainant, It would thus be in public interest to prevent the Respondent from continuing to deceive the general public during the pendency of any proceedings that may be initiated by this Honorable Commission.

2.37 In view of the foregoing it was requested that:

- (i) Proceedings may please be initiated against the Respondent for contravention of Section 10 of the Act;
- (ii) Due to the nature of the violation and the very real and substantial threat it poses to the good will and business interests of the Complainant, such proceedings may be initiated without further inquiry as envisaged by Regulation 22(2) of the Competition General Enforcement Regulations, 2007 given that sufficient information is available on record to establish *prima facie* contravention of Section 10 of the Act;
- (iii) An injunction under Section 32 of the Act may be granted restraining the Respondent from publishing the Impugned Advertisement and to remove the Impugned Advertisement on any platform under the direct or indirect control of the Respondent pending adjudication of this matter.

### **3. SUBMISSIONS OF THE RESPONDENT**

3.1 The complaint was forwarded to the Respondent by the Enquiry Committee for comments on February 11, 2019 and later a reminder was issued on February 28, 2019.

3.2 The Respondent submitted its reply vide letter dated March 12, 2019. The contents of the reply are provided below:

3.3 It has been submitted in the reply that, the complaint filed by the Complainant and the allegations contained therein were wholly misconceived. The crux of Complainant's allegations is that the Respondent has launched a smear campaign to malign the Complainant by disseminating information that is false and misleading and has, therefore, engaged in deceptive marketing practices within the meaning of Section 10(1) of the Act. It was categorically stated that the Respondent had neither engaged in deceptive marketing practices nor has it disseminated any information that is false or misleading. Rather, the claims made by the Respondent are truthful and can be substantiated.

3.4 It has been asserted by the Respondent that, although the Complainant is well within its rights to pursue any legal recourse it deems fit, it was stated with due respect that the instant complaint is a frivolous attempt by the Complainant to play the victim by not only

distorting facts but also withholding crucial background information necessary to fully appreciate the true nature of the controversy at hand.

- 3.5 It has been alleged by the Respondent that the contents of the complaint not only display a fundamental lack of understanding of food standards under the applicable food laws but also fails to demonstrate an understanding of the concept of deceptive marketing. The complaint itself fails to identify the true nature of Nido FortiGrow, and rather incorrectly conflates various applicable food standards.
- 3.6 The Respondent submitted that the Complainant's position regarding the nature of Nido FortiGrow is self-contradictory and cannot be reconciled under the applicable legal regimes. Under the Punjab Pure Food Regulations, 2018, Chapter 1 relates to “*Dairy and Dairy Products*” whereby standards for milk and other dairy products have been provided. It is noteworthy that the primary determinative factor in the categorization of products under Chapter 1 is the quantities in which milk fats and milk solids not fat are present in the product. Moreover, certain standards permit the addition of vegetable fats, however, such products are by their very composition not milk in terms of the standards provided in this chapter. One such standard relevant to the instant context is for Blend of Skimmed milk powder and vegetable fat in powdered form (Clause 01.6).
- 3.7 It has been further submitted that, Chapter 13 provide relates to “*Foodstuffs Intended for Particular Nutritional Uses*” whereby standards for infant formula (0 - 12 months) and follow-on formula (12 - 36 months) have been provided. The standards in Chapter 13 are specifically intended as a substitute on medical grounds for breast milk in case of infants and supplement to the liquid diet in case of follow-on formulas. As such, the standards in this chapter pertain not only to the presence of milk fats and milk solids not fat but provide extensive compositional requirements in terms of various nutrients. It is further noteworthy that due to the extensive compositional requirements, the products under this chapter may be called substitutes for milk as the compositional requirements specifically mimic the composition of milk.
- 3.8 It has been stated by the Respondent that each chapter not only has specific compositional requirements but also specific labelling requirements to be complied with in order to adequately inform consumers as to the nature of the product. What is integral to appreciate is that a product falling under Chapter 1 cannot, by its very nature, refer to itself as a nutritional formula under Chapter 13 and vice versa. The Complainant has conflated these standards and is on the one hand, claiming to conform to the compositional requirements of Clause 01.6, but at the same time, claiming on its packaging to be a nutritional formula. The issue in doing so is that nutritional formulas may be labelled and marketed as a substitute for milk whereas products conforming to Clause 01.6 may not. It is also worth mentioning that Nido FortiGrow cannot, even otherwise, be referred to as a nutritional formula as Chapter 13 does not provide a standard for nutritional formula for school going children as they are beyond the age of 36 months. The Complainant cannot conform to the standard for skimmed milk powder with vegetable fat on the one hand and simultaneously refer reap the benefits of referring to itself as a nutritional formula. It is this lack of clarity that harms the ordinary consumer by hampering its ability to make informed choices with respect to the products it wishes to consume. Therefore, clarity on the standardization of



such products under the law is essential in order to appreciate the claims made by the Respondent in the advertisement forming the subject matter of this complaint.

- 3.9 In addition to misstating the standards applicable to Nido FortiGrow, the Complainant has painted an incomplete picture by relying on test reports and certifications, appended with the complaint, that lend no credence to the Complainant's case as the same fail to disclose any information relevant to the instant context, namely, the failure to disclose the content of milk fats and vegetable fats present in the product. It was submitted that the test reports and certifications may create a façade of legitimacy, however, reliance on the same is an attempt by the Complainant to frame the issue to its benefit. It was submitted that the issue is not whether Nido FortiGrow has any nutritional benefits or whether the addition of vegetable fats is permitted under the law, but simply whether Nido FortiGrow can be categorized as natural milk under the applicable regulatory frameworks. It is not out of place to mention that Nido FortiGrow is not natural milk, a fact admitted by the Complainant before the August Supreme Court of Pakistan.
- 3.10 It has been asserted by the Respondent that by way of background, it is imperative to highlight that the test reports appended with the complaint were carried out as a result of an industry wide probe undertaken by the August Supreme Court of Pakistan in C.P. 2374-L/2016 titled *Watan Pary versus Government of Punjab, etc.* Although the initial focus was on adulteration of milk and its fitness for human consumption, the August Court subsequently launched an inquiry into dairy companies for selling, marketing and labeling their products as milk when they cannot be categorized as such under the applicable food standards.
- 3.11 It was further submitted that even though the Complainant has appended and placed reliance on test reports, it failed to disclose the context in which these reports were sought and the observations the August Court made as a consequence. The Complainant has categorically failed to disclose a crucial fact that during the course of the proceedings, the August Court had observed that various products claiming to be powdered formulas for children, including Nido FortiGrow, were neither natural milk nor its substitute. This is a fact that was admitted by the Complainant during the course of the proceedings. Consequently, the August Court ordered that the packaging of such products, including Nido FortiGrow, legibly state that they are neither milk nor substitutes thereto. The significance of this is that the August Court had looked into an industry wide practice and observed that no company was producing natural milk in powdered form, however, consumers were being misled into believing the same were milk.
- 3.12 It must be appreciated that consumers had several products of liquid milk available in the market, however, the segment of consumers looking for natural milk in powdered form were left in a void. In this backdrop, the Respondent took a business decision to fill this uncaptured space in the market and consequently launched Olper's Full Cream Milk Powder, a product containing the requisite milk fats and milk solids not fat under the applicable food standards to be categorized as a whole milk powder. The relevant standard may be found at Clause 01.5.3 of Chapter 1 of the Punjab Regulations.

- 3.13 In furtherance of this strategy, the Impugned Advertisement was launched, intending to target such a segment of consumers who previously did not have the option of purchasing a full cream milk powder. Naturally, the purpose of the Impugned Advertisement was also to educate consumers of this segment about the difference between milk powders and other products available in the market, including Nido FortiGrow, which contain vegetable fat. It was clarified that the purpose is not to deter consumers wishing to consume products with vegetable fat from doing so, but rather, to target consumers of the powdered milk segment by highlighting distinguishing features of its own product based on truthful information. It was submitted that the Impugned Advertisement needs to be viewed in this context.
- 3.14 It was also stated that the Impugned Advertisement in question runs for a period of 35 seconds wherein the first 16 seconds are spent in comparison with other products in the market, in order to educate consumers about the distinction between whole milk powders and powders with added vegetable fat. It was clarified that no nutritional claims are made in this part of the Impugned Advertisement, only a distinction is drawn between a full cream milk powder and a product containing vegetable fats and it was stated that consumers have been misled into thinking the latter is milk. The remaining time is spent introducing the Respondent's own product, which has no nexus with the former comparison. It was stated that one of the Complainant's claims was that the use of vegetable fat is an industry wide practice and also legally permissible. Be that as it may, it was clarified that such products are not milk and it is undeniably in the interest of consumers that they be made aware of such distinctions.
- 3.15 Thus, the Impugned Advertisement must be viewed in bifurcation. The latter part only speaks to the benefits of the Respondent's product and is not relevant for the purposes of this complaint. The former part merely highlights that any formula made by using vegetable oil/fat is not natural milk but a product containing vegetable fat. Yet, the Complainant has attempted to distort the issue by claiming that the Respondent has engaged in the dissemination of false information in violation of competition laws.
- 3.16 Moreover, there is no standard for a ghizai formula for school going children under the applicable food laws as aforementioned, yet Nido FortiGrow is marketed and labelled as such. Nido FortiGrow can only be categorized as a blend of skimmed milk powder with vegetable fat in powdered form under the food standards, which is the relevant classification that Nido FortiGrow's packaging fails to expressly state, despite the same being a requirement under the Punjab Regulations and the relevant Codex Standard appended with the instant complaint. It was specifically pointed out that Nestlé has relied on the said standards for claiming that it is compliant with the same.
- 3.17 The Complainant had alleged that the Respondent has disseminated false and misleading information which is violative of Sections 10(2)(a), (b) & (c) of the Act and, therefore, constitutes deceptive marketing in terms of Section 10(1). The Commission's *order in China Mobile Pak Limited versus Pakistan Telecom Limited* reported as 2010 **CLD** 1478 (the "**Zong Order**") dealt with defining false information and misleading information as follows:

*'false information' can be said to include: oral or written statements or representations that are; (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation. On the other hand, misleading information may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent."*

- 3.18 Based on the aforementioned, it is evident that the truth can neither constitute false nor misleading information. It was reiterated that the only information disseminated in the Impugned Advertisement relevant for the purposes of this complaint relates to the distinction between whole milk powder and products containing vegetable fats. The Respondent's reliance on such information is based not only on the applicable food standards but also on the observations of the August Supreme Court in C.P. 2734-L/2016. It was submitted that such information is neither contrary to the truth nor is it capable of giving the wrong impression.
- 3.19 Moreover, the Zong Order also defines the consumer as the ordinary consumer of the product, namely, the usual, common or foreseeable user or buyer of the product. In the instant case, such consumers are the segment demanding powdered milk. It was submitted that the Respondent is well within its rights and the bounds of legality when it chooses to inform consumers of this segment as to the characteristics of a product satisfying this demand by virtue of being milk in comparison with others that do not. It was further submitted that the Respondent cannot be blamed or penalized for educating consumers by providing them information that allows them to make informed decisions.
- 3.20 A violation of Section 10(2)(a) requires both, that the information must be false and misleading, and also that such information should be capable of harming business interests of others. Reference in this regard may be drawn to the Commission's order in *Tara Crop Sciences (Private) Limited* reported as **2016 CLD 105**. Firstly, the information disseminated by the Respondent is neither false nor misleading, as aforementioned. The primary claim was that any product made by using vegetable oil/fat, including Nido FortiGrow, are not natural milk; a fact stated on Nido FortiGrow's product packaging and the same may also be ascertained by placing reliance on the applicable food standards. Similarly, the proceedings before the August Supreme Court of Pakistan must also be taken to appreciate the basis on which the claim was made. It was reiterated that the August Court had specifically observed the industry wide practice that products claiming to be powdered formulas for children, including Nido FortiGrow, were mistakenly being bought by consumers. It was specifically highlighted that the disclosure that the product is not natural milk printed on Nido FortiGrow's packaging and also referred to in the Impugned Advertisement was directed to be printed thereon by the August Supreme Court due to its observations about the prevalent practice in the industry and the misperceptions of consumers. Another important fact in this regard is that the August Court never banned

such products but only required that due disclosures be made for the benefit of the consumer.

- 3.21 Moreover, it is also important to appreciate that the Complainant has no legitimate business interest that can be harmed in the instant case due to the very nature of Nido FortiGrow given that the segment of consumers targeted by the Impugned Advertisement are consumers of milk powders. The information provided only educates consumers that products such as Nido FortiGrow are not natural milk whereas Olper's full cream milk powder is made from natural milk. Any consumers that alter their consumption as a result of this information are not consumers whose demand would be satisfied by Nido FortiGrow in the first place, nor do they fall within the legitimate business interests of the Complainant. Rather, only consumers that continue using Nido FortiGrow despite this information fall within the legitimate business interests of the Complainant and the same are not the target audience for the Impugned Advertisement.
- 3.22 Similarly, dissemination of information related to the price, character, method or place of production, properties, suitability for use, or quality of goods violates Section 10(2)(b) unless there is a reasonable basis for making such a claim and the same must be substantiated. Reference in this regard may be drawn to the Commission's order in *Proctor and Gamble Pakistan (Private) Limited* reported as 2017 **CLD 1609**. It must be appreciated that in essence, Section 10(2)(b), unlike Section 10(2)(a), is about consumer protection rather than the business interests of competitors. As such, for the purposes of this section, the information provided must not harm the interests of consumers. Reference in this respect may also be drawn to the Commissions' order in *Tara Crop Sciences* mentioned above. The Impugned Advertisement makes no claims regarding the nutritional value of the products in question, rather it truthfully distinguishes between characteristics of the two distinct categories of products as aforementioned. It cannot be stressed enough that a well-informed consumer is the base on which the structure of competition law is built. Rather than violating the spirit of the Act, the dissemination of such information conforms to its mandates by providing consumers the information they require to make informed decisions about the products they wish to consume.
- 3.23 Lastly, to establish a violation of Section 10(2)(c) there must be a comparison in qualities or characteristics of two or more products and that such comparison be false or misleading. Reference may be drawn to the Commission's order in *Reckitt Benckiser Pakistan Limited* reported as 2015 **CLD 1864**. The only comparison made by the Impugned Advertisement is that Olper's Full Cream Milk Powder is powdered whole milk whereas the other product cannot be categorized as such. Even otherwise, it may also be noted that there is no prohibition on comparative advertisement and the disparagement of other products based on truthful information. Reference in this regard may be drawn to the Federal Trade Commission's (the "FTC") Statement of Policy Regarding Comparative advertising which clearly stipulates as follows:

*The Commission has supported the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement*

*and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.*

- 3.24 Moreover, the FTC's stance on the permissibility of disparagement has been dealt with in *Carter Products, Inc.*, 60 F.T.C. 782. In the interest of competition, the FTC narrowly monitors comparative advertisement and strongly discourages any restriction that may be placed thereon in cases of truthful information. In *Carter Product, Inc.* the FTC, while dealing with the issue of prevention of companies from engaging in disparagement held that nothing should prevent companies from *making truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess. Such a comparison may have the effect of disparaging the competing product, but we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products.* "60 F.T.C. at 796.
- 3.25 The Respondent also submitted para-wise reply to the complaint which is summarized below:
- 3.26 It was submitted that the Complainant has incorrectly categorized its products. The Complainant, itself states that its milk brands include 'Nestlé Milk Pak' and Nestlé Nesvita Calcium Plus' whereas its milk substitute products include 'Nido FortiGrow' and 'Nestlé Bunyad'. It was reiterated that the latter is skimmed milk powder with vegetable fat in powdered form under the applicable standards and not natural milk. Moreover, Nido FortiGrow was referred to as the most popular dairy based formula for school going children. It was further reiterated that no standard governs such a product rendering such a categorization incorrect.
- 3.27 The Respondent further submitted that the Complaint's health and safety claims have no relevance to the instant complaint as the issue in the instant complaint relates to categorization of the product. However, it was specifically denied that Nido FortiGrow meets all local and international regulatory food, safety and labelling requirements. It was specifically reiterated that Nido FortiGrow fails to mention that it is skimmed milk powder with vegetable fat in powdered form on its packaging as required under the relevant standard. Moreover, the ingredients listed on the product packaging also mention milk fats as a separate ingredient whereas the product only uses skimmed milk and no milk fats are added separately.
- 3.28 The Respondent admitted to the extent that the Impugned Advertisement was aired. However, it was categorically denied that any deceptive, false or misleading assertions were made relating to the character, properties, suitability and quality of Nido Fortigrow have been made therein. It was specifically reiterated that the Impugned Advertisement merely shows that products made by using vegetable oil/fat, including Nido FortiGrow, are not natural milk. The Complainant has attempted to play the victim by claiming that the Respondent has tried to unfairly capture the Complainant's market share by undermining Nido FortiGrow without disclosing that the consumer segments for each product are materially distinct from each other. In this regard, there is little doubt that disseminating information to such a segment of consumers which educates them about

products that are milk and products that are not, cannot amount to deceptive marketing as the information is truthful and in the best interest of the relevant consumers.

- 3.29 Moreover, it was specifically highlighted that the Complainant's claims that the Respondent is creating a "false impression that vegetable oil is not a permitted or usual ingredient of milk/growing up formulas". Such statements show that the Complainant itself is unclear about the distinction between milk and other dairy products. It cannot be stressed enough that no standard of milk permits the use of vegetable fat. Under the scheme of regulation, any product containing vegetable fat is by definition not milk and can only be categorized as a dairy product under a distinct standard. Similarly, the Complainant is referring to Nido FortiGrow as milk and growing up formula interchangeably which is patently incorrect. It was reiterated that there is no standard for a growing up formula. The only standards are mentioned above are for nutritional formulae, namely, infant and follow-on formulae which Nido FortiGrow is not. Such nutritional formulae are also not milk but substitutes for milk on medical grounds. Furthermore, the Complainant cannot blame the Respondent for educating consumers about the true nature and categorization of products. The Complainant refers to the "market in the formula category for children". It was submitted that this statement is patently incorrect as Nido FortiGrow cannot be categorized as a formula for children although it is marketed as such by the Complainant. It is skimmed milk powder with vegetable fat in powdered form and the Complainant cannot lay claim to a legitimate business interest in this consumer segment if such consumers choose to discontinue using Nido FortiGrow once they are informed that the product is not milk.
- 3.30 Furthermore, the precedents relied on by the Complainant were irrelevant to the issue at hand. The issue before the Commission in those cases related to passing off a product as another to gain undue benefit from its reputation which is simply not the case at hand. The Respondent has not tried to pass off its product as another's but has, in fact, compared the compositional characteristics of its products based on truthful statements.
- 3.31 The Impugned Advertisement merely highlights that products made by using vegetable fat/oil, including Nido FortiGrow, are not natural milk. What the Complainant has failed to disclose is that the statement present on its product, Nido FortiGrow, is a result of the orders of the August Supreme Court of Pakistan. It was reiterated that the reason why such a statement was directed to be printed was that the August Court had observed that such products, including Nido FortiGrow were not natural milk. Moreover, marketing and labelling the product as "ghizai formula" is illegal and the same does not conform to local or international regulatory requirements. It is further incorrect for the Complainant to claim that it complies with such requirements as by labelling the product as ghizai formula rather than skimmed milk powder and vegetable fat in powdered form, it is violating the very standards it claims to comply with.
- 3.32 The Commission in the Zong order referred to therein had laid defined 'false information' and 'misleading information'. The test laid down by the Commission makes it evident that truthful statements cannot be false or misleading. Moreover, the Complainant states that the information provided by the Respondent will influence the decisions of an ordinary consumer and distort his/her economic behavior the disadvantage of the Complainant and thus constitute a violation of Section 10(2)(a).

- 3.33 In addition to the Complainant's own marketing, the basis for the Respondent's claim is the proceedings of the August Supreme Court. Moreover, it is incorrect for the Complainant to state that it has labelled its product as a blend of skimmed milk and vegetable fat in powdered form which is a requirement under the applicable food standards. In this regard, the Complainant is put to strict proof thereof.
- 3.34 It was stated that nutritional value of vegetable fats/oil is not at issue in the instant complaint. Furthermore, although the use of vegetable fats/oil is permissible in nutritional formula for children between 0 to 36 months, Nido FortiGrow does not fall within this category. It is admittedly a blend of skimmed milk powder and vegetable fat in powdered form (which cannot be categorized as milk), however, it is labelled and marketed as a nutritional formula in the absence of any standard permitting the Complainant to make such a claim. It was further stated that the reference to 'formula for young children' by the Complainant in the said paragraph is patently misleading as the product is not a nutritional formula.
- 3.35 It was further submitted that the ghizai/nutritional formulas are not dealt with under Chapter 1 of the Punjab Regulations but under Chapter 13. The purpose of the Impugned Advertisement was to educate consumers that the usage of vegetable fat is not permissible in milk and any product containing vegetable fats cannot be categorized as milk.
- 3.36 It was firstly that the Respondent has made any claim regarding the injuriousness of vegetable oil. It was further stated that the Complainant's reference to Olper's Full Cream Milk Powder containing fish oil is misconceived. It was clarified that the Respondent is a full cream milk powder and does not use fish oil as an ingredient. Rather, the applicable regulations require the mentioning of allergens such as fish oil on the product packaging, if they may be found, irrespective of the quantity. Although fish oil is not used as an ingredient, the permitted stabilizers and emulsifiers used in the product may contain very minute traces of fish oil, if at all. This practice is the equivalent of certain products in the market mentioning the potential presence of nuts in their product. The reason for such disclosure is that although products such as chocolates may not use nuts as an active ingredient, however, there may be small traces present therein. Due to the risk involved in case of any consumer with allergies to such products, it is in the best interest of the consumer that the potential presence of such allergens be disclosed on the product packaging and the same is also required by law.
- 3.37 It was explained that the Complainant has made no claims regarding the suitability of Nido FortiGrow with respect to growth and learning of young children. Moreover, the vitamin and nutrient composition of Nido FortiGrow is not at issue as the only claim made by the Impugned Advertisement is that the product is not milk which it is not. Moreover, it was reiterated that the Complainant's reliance on the PCSIR and SGS reports is also misplaced as not only do the same not disclose any information relevant for the purposes of this complaint, the Complainant also failed to disclose the context in which such reports were sought by the August Supreme Court.

- 3.38 It was clarified that the Complainant and the Respondent are not competitors for the purposes of consumers of the powder milk segment of consumers given that the Complainant does not produce milk powder but a skimmed milk powder with vegetable fat in powdered form. The Respondent has merely informed consumers of this distinction. The Complainant cannot claim to be a victim where consumers wishing to consume milk no longer consume its product upon being educated as to the true nature of products such as Nido FortiGrow.
- 3.39 The Complainant not only withheld crucial information regarding the proceedings before the *August* Supreme Court of Pakistan but also mislabels its product as nutritional formula which it is not. It was evident that the Complainant itself refers to Nido FortiGrow as part of its milk substitute products which they are not as aforementioned. In this regard it was pointed out that the Punjab Pure Food Regulations, 2017, do not provide any standards or regulatory framework for “Growing-Up Formula” or “Ghizai Formula /Blend of Skimmed milk and vegetable fat in powder form”.
- 3.40 It was specifically denied that the Respondent has disseminated any information that is false, misleading or without reasonable basis. Similarly, it was specifically denied that the Respondent has concealed any information, rather it is the Complainant that has withheld information related to the proceedings before the August Supreme Court of Pakistan and also misstated the standards that apply to Nido FortiGrow.
- 3.41 It was specifically denied that the Respondent has violated the mandates of Section 10 of the Act. It was specifically denied that the information disseminated by the Respondent is influencing the decisions of the consumers of dairy based formula and causing injury to the business interests of the Complainant. It cannot be stressed enough that Nido FortiGrow is not a dairy based formula under the applicable standards although it markets itself as such. Moreover, the target consumers are those of whole milk powders in which the Complainant has no legitimate business interest as admittedly it does not produce milk.
- 3.42 It was specifically pointed out that the impression created by the Impugned Advertisement is truthful as any product such as Nido FortiGrow made by using vegetable oil/fat is not natural milk. Moreover, Olper’s Full Cream Milk powder may be a powdered product but what is important to appreciate is that it is made from natural milk. The only constituent extracted from milk while producing it is water, which is then added back by consumers before consumption. The formula alluded to in the Impugned Advertisement, on the other hand, does not simply extract water but also extracts milk fat from milk and replaces it with vegetable fat, by virtue of which it can no longer be characterized as milk.
- 3.43 It was specifically submitted that the Complainant has failed to establish any violation of the Act on part of the Respondent. Moreover, the complaint not only contains misstatements but the Complainant has also withheld crucial information, as such the Complainant is not entitled to any equitable relief at the interim stage.
- 3.44 In view of the foregoing, it was requested that the instant complaint may kindly be dismissed.



## 4. REJOINDER

- 4.1 The Respondent's reply was forwarded to the Complainant for a rejoinder, if any, vide letter dated March 14, 2019. The Complainant vide its letter dated April 15, 2019, requested for extension in time to file the comments till April 22, 2019. The said rejoinder was received on letter dated April 22, 2019, the contents of which are summarized below.
- 4.2 The Complainant submitted that the perusal of the reply filed by the Respondent reveals that the Respondent has admitted that representations and statements made in the Impugned Advertisement were directed towards Nestlé Nido FortiGrow with the intention to target the existing market of its competitor's product and to carve out a new market for its product. In response to the Complaint, the Respondent has taken the defense of truth based on (i) alleged contravention of applicable food laws by Nestlé Nido FortiGrow, and (ii) the proceedings before the Honorable Supreme Court of Pakistan wherein manufacturers of milk products were directed to furnish additional clarifications regarding their products.

### **Allegation of Mis-Categorization and Deception by the Complainant:**

- 4.3 It was categorically stated at the outset that Nestlé Nido FortiGrow has never been marketed or labelled as "Natural Milk" or "Milk" as falsely and misleadingly being alleged by the Respondent in the Impugned Advertisement and the reply filed before this Commission. It is imperative to appreciate the distinction between "Milk" and "Milk Product", which is deliberately being blurred by the Respondent. "Milk" is defined in Chapter 1, clause 1 (a) of the Punjab Pure Food Regulations 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 than 34 per cent 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, flavoured 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 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” and therefore the same can be referred as such. It was once again reiterated that neither on the label of Nestlé Nido FortiGrow nor in the complaint filed by the Complainant, it has been claimed that Nestlé Nido FortiGrow is “Natural Milk” or “Milk”. It was further clarified that Nestlé Nido FortiGrow is not even referred as a “milk product” on its label.

- 4.4 In order to appreciate the Complainant’s compliance with Punjab Pure Food Regulations 2018, it is essential to appreciate the scheme of the said regulations. Part III of the Punjab Pure Food Regulations 2018 relates to the labelling of pre packed foods. In Part III, Punjab Pure Food Regulations 2018 list down positive and negative obligations in relation to labelling of a product. For example, Clause 8(24) specifically prohibits the use of word “milk” alone on any product other than “milk”. Clause 8(28) require manufacturers to specify detailed instructions for preparation and storage of milk products.
- 4.5 It was further submitted that Clause 8.5 of Part III provides more specific labelling 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 labelling 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 “ghizai formula” for products falling under the category of Blend of Skimmed milk powder and vegetable fat in powdered form and therefore, the label of Nestlé Nido FortiGrow (referring it as a “ghizai formula” for school going kids) is not in breach of the applicable regulations.
- 4.6 It was asserted by the Complainant that 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. Pakistan Standard and Quality Control Authority Specification for Dairy Safety Standards (4873), Punjab Pure Food Regulations 2018) do not specify any specific labelling requirements for the said category, but requires the label to be approved by the Punjab Food Authority. The Punjab Food Authority has duly

approved the label of Nestlé Nido FortiGrow. In fact, the term “formula” was added on the label of Nestlé Nido FortiGrow on the direction of Punjab Food Authority. In 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.”*

- 4.7 It was also submitted by the Complainant that consequently, vide letter dated 08.07.2017, the label of Nestlé Nido FortiGrow was approved by the Punjab Food Authority.
- 4.8 It was further stated that Nestlé Nido FortiGrow is neither labelled nor marketed as an Infant Formula or Follow-on Formula or Formula for Special Medical Purposes for Infants (categories provided under Chapter 13 of the Punjab Pure Food Regulations, 2018). On the packaging of Nestlé Nido FortiGrow it is stated that Nestlé Nido FortiGrow is “**Best for School Kids**”. It is also stated on the Nestlé Nido FortiGrow packaging that it is neither a substitute of breast milk nor it is to be consumed by kids **below 12 months**. In view of such unambiguous statements it is evident that Nestlé Nido FortiGrow does not fall under the category of Infant Formula or Follow-on Formula or Formula for Special Medical Purposes for Infants and is not marketed as such. Use of words “ghizai formula” are not prohibited in the Punjab Pure Food Regulations, 2018 and have been added on the label on the advice of the competent authority i.e. Punjab Food Authority. In view of the foregoing, any allegation of deception by the Complainant regarding the categorization and labelling of its product is without any merit. Consequently, the Respondent’s reliance on alleged deception by the Complainant to justify its claims in the Impugned Advertisement is utterly baseless and misleading.

#### **Reliance on Supreme Court Proceedings to justify false and misleading claims made in the Impugned Advertisement**

- 4.9 It was submitted that the Impugned Advertisement starts with reference to a disclaimer “yeh qudrati doodh nahi hai” on the packaging of Nestlé Nido FortiGrow, which was added in compliance with the Honourable Supreme Court orders in the case of Watan Party v. Government of Punjab (Civil Petition No. 2374-L/2016). The Respondent relies in an unauthorized manner (using Honourable Supreme Court Order as tool to drive the campaign of its product) on the said disclaimer to create an impression that (i) the Complainant has been deceiving its consumers as to the nature of the product being sold, (ii) Nestlé Nido FortiGrow contains ingredients which are either injurious for kids or impermissible, and (iii) that Nestlé Nido FortiGrow is a product with no nutrient value. It was submitted that reliance by the Respondent on the proceedings before the Honorable Supreme Court to claim the defence of truth in support of the representations, statements and insinuations made in the Impugned Advertisement is completely misplaced, self-defeating and in fact self-incriminating.
- 4.10 The Respondent in its reply has concealed the relevant history of the subject matter before the Honorable Supreme Court of Pakistan. The matter of Watan Party versus 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 Honorable Supreme Court of Pakistan, on 28.12.2017 issued notices to the various entities that produce tea whitener/tea creamer/tea mixture, including the Respondent (which manufacturers tea whitener by the name of ‘Tarang’). In the same order the Honorable 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.*” In view of the orders dated 28.12.2017 and 06.01.2018 of the Honorable Supreme Court of Pakistan, all manufacturers of tea whiteners including the Respondent were directed to add clarification on the labels of tea whiteners that “it is not milk”, which was also added on the label of the Respondent’s product ‘Tarang’. If the Respondent’s claim (in the Impugned Advertisement and the reply filed before the Commission) is admitted that insertion of clarification on the package of Nestlé Nido FortiGrow pursuant to the orders of the Honorable Supreme Court of Pakistan establishes deception by the Complainant than the same argument is self-defeating and incriminates the Respondent itself.

- 4.11 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 existing label of Nestlé Nido FortiGrow is in breach of any of the applicable law. Supreme Court of 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 Complainant. Therefore, neither any allegation of deception stands proved against the Complainant nor the false and misleading statements/representations made in the Impugned Advertisement regarding the Complainant’s product can be substantiated by relying on the proceedings before the Honorable Supreme Court of Pakistan.

#### **Deception by the Respondent regarding its own product being equivalent to “Natural Milk”**

- 4.12 It was stated that the overall impression created by the Impugned Advertisement is that a consumer of Nestlé Nido FortiGrow has not been consuming milk but a consumer of Olper’s Milk Powder would in fact be consuming “milk” as it is made from natural milk. In view of the definitions of “milk” and “fluid milk” reproduced above, it is abundantly clear that the Respondent’s product cannot be categorized as milk or fluid milk, but is only a milk product. It is the Respondent’s assertion that by adding water to Olper’s Powder Milk it becomes milk, which is deceptive and contrary to the categorization under Punjab Pure Food Regulations, 2018. The Respondent’s product falls under a separate category of “**Milk Powder and Cream Powder**” under Clause 0.1.5 of Chapter 1 of the Punjab Pure Food Regulations 2018 and cannot be marketed as “milk” or “natural milk”.
- 4.13 The labelling of Olper’s Milk Powder is also in violation of the Honorable Supreme Court’s order dated 09.03.2018, which requires all sellers of “powder formula for the child feed”

to state on their label that it is not “natural milk”. The Respondent’s product as evident from its label and the Impugned Advertisement is a powder formula for kids but fails to give a disclaimer on its label that it is not natural milk. Instead the Impugned Advertisement asserts that Olper’s Milk Powder is made of natural milk, which is deceptive as to the nature/category of the product.

### **Impugned Advertisement in Violation of the Permissible Limits of Comparative Advertising**

4.14 The Respondent in its reply had admitted that (i) the Impugned Advertisement refers to Nestlé Nido FortiGrow, (ii) the Impugned Advertisement targets the existing market of Nestlé Nido FortiGrow, (iii) the Impugned Advertisement by drawing comparison between Nestlé’s product and the Respondent’s product is trying to carve out a new market for its product, and (iv) the Impugned Advertisement is in fact comparative advertising.

4.15 It is the Respondent’s contention that since comparative marketing is permissible under law therefore the Impugned Advertisement cannot be deemed prohibited. It was not denied that comparative marketing is not completely prohibited under law. Comparative advertisement may refer to competitor’s goods or services in positive or negative way. In the second case, where the competitor’s goods or services are portrayed in a negative light the question of denigration or disparagement arises. European Union’s “Misleading and Comparative Advertising Directive 2006/114/EC” defines comparative advertising as “...any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.” The comparative advertising is permitted only if the advertising is truthful, non-deceptive and some conditions are fulfilled. In the case of EU legislation these conditions are stated in Article 4 of the “Misleading and Comparative Advertising Directive 2006/114/EC”. One of these conditions is situation when comparative advertising “**does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor.**” A comparative advertising that only focuses on negative aspects of the competitor or its product is therefore not permissible.

4.16 In the cases titled *Smith-Victor Corporation v. Sylvania Electric Products, Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965) and *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir. 1927), the US courts set out following three groups of statements that can be actionable for disparagement:

- (i) *Statements which refer to the rival’s goods and impute to the rival dishonesty or reprehensive business methods in connection with the goods;*
- (ii) *Statements that relate to the quality of the goods without attributing dishonest or reprehensible business methods to the manufacturer; and*
- (iii) *Alleged libellous statements that amount to no more than assertions by one tradesman that his goods are superior to those of his rival.*

4.17 In the case titled *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd 1996 (16) PTC 393*, the Delhi High Court held that manufacturer is entitled to make a statement that his goods

are the best and also make some statements for puffing of his goods **but this should not disparage or defame the goods of another manufacturer. A manufacturer is not allowed to portray the competitor's product in a negative light.**

- 4.18 In the instant case, the Respondent vide the Impugned Advertisement only focuses on negative aspects of the competitor's product, specifically imputes dishonesty to the Complainant by asserting that it has been deceiving its consumers for years, creates a false impression that Nestlé Nido FortiGrow has misleadingly been marketed as "milk" or "natural milk", identifies certain ingredients of competitor's product in a highly demeaning manner by referring it as "tail mili safaidi" as opposed to its true and accurate term "skimmed milk", intentionally omits to disclose the nutrient value of the competitor's product, and goes on to assert the superiority of its own product in comparison. Such comparative advertising disparages and defames the Complainant's product and portrays it in a negative light and is therefore not permissible.
- 4.19 The Complainant also submitted para-wise comments to the reply submitted by the Respondent, which is summarized below:
- 4.20 It was submitted that the Complainant as part of its complaint has provided disclosure of the proceedings before the Honorable Apex Court and no material information for purposes of the complaint has been concealed. The Respondent is misleadingly relying on the proceedings before the Honorable Apex Court to defend its deceptive marketing practices. Perusal of the order sheets appended with the reply reveal that Supreme Court of Pakistan did not declare that (i) Nestlé Nido FortiGrow is a product with no nutrient value and merely a mixture of "tail and safaidi", (ii) the Complainant has been deceiving its consumers, and (iii) usage of vegetable oil or vegetable fat in milk or dairy based products is prohibited as claimed and propagate in the Impugned Advertisement. The Supreme Court of Pakistan categorically held that:

*"...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."*

By no stretch of interpretation can the aforesaid findings of the Honorable Supreme Court be equated with the disparaging statements and insinuations made in the Impugned Advertisement. Therefore, the defense of truth on the basis of the proceedings before the Supreme Court of Pakistan was misconceived and baseless.

- 4.21 It was stated that the Complainant in its Complaint has unambiguously stated that for purposes of compliance with food laws (i.e. Punjab Pure Food Regulations 2018 and Codex Standards) Nestlé Nido FortiGrow falls under the category of Blend of Skimmed Milk and Vegetable Fat in powdered form. The Respondent is intentionally creating confusion relating to the category of Nestlé Nido FortiGrow. The terms used for Nestlé Nido FortiGrow in the titled complaint accurately describe the nature of the product. Wherever

reference is made in relation to compliance with food laws, Nestlé Nido FortiGrow is categorized as Blend of Skimmed Milk and Vegetable Fat in powdered form. As detailed above as part of preliminary submissions, use of terms ‘formula’, ‘ghizai formula’ or ‘dairy based formula’ is not prohibited under the Punjab Pure Food Regulations, 2018 and the Punjab Food Authority has itself suggested the use of words such as “powder formula” for products like Nestlé Nido FortiGrow.

- 4.22 Moreover, it was further stated that the Respondent is intentionally attempting to mislead this Commission by creating an impression that the Complainant is claiming that Nestlé Nido FortiGrow is “natural milk”. Nowhere in the Complaint or on the label of Nestlé Nido FortiGrow is it stated that Nestlé Nido FortiGrow is “milk or natural milk”. At certain places in the Complaint, Nestlé Nido FortiGrow is referred as a dairy product which is a correct reference as the category of Blend of Skimmed Milk and Vegetable Fat in powdered form is provided under Chapter 1 titled “*Dairy and Dairy Products*” of Punjab Pure Food Regulations 2018. It was specifically denied that any product merely due to exclusion of vegetable fats can be deemed as “milk”. As detailed above, definition of “milk” and “fluid milk” is provided under Punjab Pure Food Regulations 2018, and the Respondent cannot categorize its product as milk only due to absence of vegetable fat in its product. As aforesaid, the Respondent’s product is a milk product and not milk and falls under a separate category of “Milk and Cream Powders”.
- 4.23 It was further submitted that. Nestlé Nido FortiGrow does not fall under Chapter 13 titled “*Infant Formulae, Follow-on Formulae and Formulae for Special Medical Purposes for Infants*” of Punjab Pure Food Regulations 2018. The Complainant has not claimed either in the titled complaint or on its label that Nestlé Nido FortiGrow is an Infant Formula or Follow-on Formula or Formula for Special Medical Purposes for Infants. On the packaging of Nestlé Nido FortiGrow it is stated that Nestlé Nido FortiGrow is “Best for School Kids”. It is also stated on the Nestlé Nido FortiGrow packaging that it is neither a substitute of breast milk nor it is to be consumed by kids below 12 months. In view of such unambiguous statements no question of deceiving the consumers arise. It was once again highlighted that the use of term “formula” is not prohibited under Punjab Pure Food Regulations. The applicable Codex Standard 251-2006 states that any name permissible by national legislation can be used for products falling under the category of Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form. In the instant case, the Punjab Food Authority being the competent authority under the national legislation has approved the terms “ghizai formula” on the label of Nestlé Nido FortiGrow. Therefore, the Respondent’s lack of clarity regarding Nestlé Nido FortiGrow’s categorization is utterly baseless and an attempt to create confusion to divert attention from the real controversy at hand i.e. the Respondent’s deceptive and disparaging marketing campaign.
- 4.24 The Respondent instead of providing any plausible justification of its deceptive marketing campaign is deliberately attempting to divert attention from the relevant issue. Nestlé Nido FortiGrow discloses the ingredients of the product on its packaging in compliance with the requirements specified in Punjab Pure Food Regulations 2018 and the applicable Codex Standards. Relevant Codex Standard 251-2006 does not require that content of milk fats and vegetable fats to be disclosed separately, but rather it only requires that the total fat content and protein content be disclosed. The issue of nutrient value of Nestlé Nido

FortiGrow is the core issue for purposes of the instant Complaint. The Complaint relates to comparative marketing, where the Respondent as a competitor has made false, misleading and incomplete statements regarding the ingredients and nutrient value of a competitor's product. The Impugned Advertisement without any verifiable material and basis creates an impression that the use of vegetable oil is not beneficial and not permissible in formulae for kids. Therefore, the test reports submitted before the Honorable Supreme Court of Pakistan, certifying the nutrient value of Nestlé Nido FortiGrow, are relevant and also substantiate the falsity and inaccuracy of statements made in the Impugned Advertisement. Any issue relating to Nestlé Nido FortiGrow not being "natural milk" is completely irrelevant as the Complainant has never claimed as such.

- 4.25 As detailed above, Nestlé Nido FortiGrow has never been marketed as "natural milk". The Complainant in compliance with the orders of the Supreme Court of Pakistan has furnished an additional statement on its packaging that "it is not natural milk". The Respondent, on the one hand, admits to compliance with the aforesaid orders by the Complainant but, on the other, falsely alleges deceptive marketing by the Complainant to justify its own anti-competitive practices.
- 4.26 It was highlighted that the Respondent is in fact continuing to assert its misleading position that Opler's Milk Powder is in fact an equivalent to liquid natural milk. Punjab Pure Food Regulations 2018 very clearly categorize fluid milk as a separate category and do not permit addition of any adulterants including water. Whereas Olper's Milk Powder requires addition of water and cannot, therefore, be treated as natural milk or liquid/fluid milk as misleadingly being asserted by the Respondent.
- 4.27 It was reiterated that the Impugned Advertisement makes misleading and inaccurate references regarding the ingredients of a competitor's product in gross violation of stringent principles applicable to comparative marketing. The permissible limits for comparative marketing laid down by this Commission in its judgments reported as **2017 CLD 1550** and **2015 CLD 1864** can be summarized as follows:
- i. *The statements and representations made must be based on competent and reliable evidence;*
  - ii. *The statements and representations made must be based on some reasonable basis;*
  - iii. *The statements and representations made must be clearly identified, truthful, and non-deceptive*
  - iv. *The statements and representations made must be material, relevant, verifiable and not misleading*
- 4.28 The Impugned Advertisement does not only refer to usage of vegetable fat but in fact states that Nestlé Nido is merely a mixture of "tail mili safaidi". Such statement not only omits to mention all the ingredients of the competitor's product but also refers to the ingredients used in inaccurate and disparaging terms. The Impugned Advertisement further goes on to assert that the Complainant has been deceiving its consumers for years. Having made such false and misleading statements about the Complainant's product, the Impugned Advertisement goes on to furnish the nutrient advantages and superiority of its product. The Impugned Advertisement gravely hampers the repute of a competitor, which is



evidenced by the comments on social media pages appended with the Complaint. In view of the foregoing, it is evident that the Impugned Advertisement amounts to disparagement of the Complainant and its product and is therefore not permissible.

- 4.29 The insinuation made in the Impugned Advertisement is that Nestlé Nido FortiGrow is inferior to the Respondent's product due to usage of vegetable fat/oil in its product. The Respondent has failed to provide any verifiable basis for making such claim. All around the world, use of vegetable fats and oil in dairy products is permissible and a standard practice. The Respondent's parent company is also manufacturing dozens of such dairy products that use vegetable fat/vegetable oil. While the various regulatory regimes in the most developed countries insist that formulae for kids provide sufficient amount and proportions of fatty acids for proper growth and development of growing up kids, the sources of such fats (i.e. dairy fats or vegetable fats) is irrelevant. Till date there is no verified study concluding that addition of cow's milk or dairy fats in formulae for kids offers any nutritional advantage over vegetable oils/fats. The Respondent without any material has created a false and misleading impression vide the Impugned Advertisement and has therefore violated section 10 of the Act.
- 4.30 It was also stated that the Respondent has relied on the proceedings before the Honorable Supreme Court of Pakistan to claim that the statements and representations made in the Impugned Advertisement are true. On bare reading of the order sheets of the Honorable Supreme Court of Pakistan, it is evident that the said statements and representations in the Impugned Advertisement cannot be justified on the basis of orders of the Honorable Supreme Court of Pakistan. Other than the orders of the Honorable Supreme Court of Pakistan, no evidence has been appended by the Respondent to substantiate the comparative claims made in the Impugned Advertisement. Therefore, the statements and representations made in the Impugned Advertisement are made without any reliable evidence, reasonable basis or any verifiable material. It is evident that the intention behind the Impugned Advertisement is not to inform consumers but to deter them from consuming a competitor's product. It has been held in the case of International Harvester Co., 104 F.T.C. 949 at pg. 1058, that **“[i]t can be deceptive to tell only half the 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 impression...”** The Respondent in the Impugned Advertisement has intentionally omitted to disclose the nutrient value and other ingredients of Nestlé Nido FortiGrow in order to mislead the consumers to its advantage and therefore the Impugned Advertisement is deceptive and falls foul of the permissible limits of comparative marketing.
- 4.31 It was once again reiterated that the issue of Nestlé Nido FortiGrow's packaging is not germane to the present complaint. Notwithstanding the irrelevance of the baseless allegations made, it was clarified that the Punjab Pure Food Regulations 2018 do not prohibit the use of terms “ghizai formula” on the label and Punjab Food Authority has approved the label of Nestlé Nido FortiGrow.
- 4.32 It was further stated that the Respondent is downplaying the statements and insinuations made in the Impugned Advertisement by claiming that the Impugned Advertisement only creates a distinction between whole milk powder and products containing vegetable fats.

The Impugned Advertisement makes incomplete, inaccurate and disparaging statements regarding the ingredients and nutrient value of Nestlé Nido FortiGrow. The Impugned Advertisement also makes false statement that the Complainant has been deceiving its consumers for years. The Impugned Advertisement makes a false impression that usage of vegetable oil is not permissible in dairy products or in any manner creates deception in the mind of the consumer. The said statements and insinuations made in the Impugned Advertisement are contrary to the facts and reality; they create a wrong impression about a competitor's intention and its product and misinform the consumers as to the nutrient value and ingredients of a competitor's product. Therefore, the statement and representations made in the Impugned Advertisement amount to false and misleading information under section 10 of the Act.

- 4.33 It was once again highlighted that the Supreme Court of Pakistan did not declare that Nestlé Nido FortiGrow has no nutrient value or that it is only a mixture of oil and whitener or that the Complainant has been deceiving its consumers or that vegetable oil cannot be used in dairy products. Therefore, the Respondent's reliance on the proceedings before the Supreme Court of Pakistan to justify the statements and representations made in the Impugned Advertisement was wholly misconceived.
- 4.34 Moreover it was pointed out that on one hand the Respondent admits to targeting the consumers of Nestlé Nido FortiGrow and altering their choices in favour of their product and on the other hand claims that the Impugned Advertisement does not hamper the business interests of the Complainant.
- 4.35 The Impugned Advertisement makes inaccurate, incomplete and defaming statements about a competitor's product that are against the principles of permissible comparative marketing. The Statement of Policy Regarding Comparative Advertising issued by the Federal Trade Commission only permits comparative advertising if it is truthful and non-deceptive. An advertisement that discredits a competitor and its products is nor permissible. The National Advertising Division of US (responsible for monitoring all national advertising) applies stringent standards to advertising that disparage a competitor's product and claims that expressly or implicitly disparage a competing product are held to the highest level of scrutiny in order to ensure that they are truthful, accurate and narrowly drawn.
- 4.36 It was reiterated that Nestlé Nido FortiGrow has never been categorized as "natural milk". In view of the definition of "Milk Product" under Clause 0.1.1.2 and the permissible use of vegetable fat in Clause 0.1.6 of the Punjab Pure Food Regulations 2018, reference to Nestlé Nido FortiGrow as a milk product is accurate and permissible.
- 4.37 Additionally it was clarified by the Complainant that Nestlé Nido has 82% milk components (including 15% milk fat).
- 4.38 It was once again highlighted that the Respondent is intentionally raising the irrelevant issue of Nestlé Nido FortiGrow's categorization to divert focus from the core issue of anti-competitive marketing campaign of the Respondent.

- 4.39 It was finally stated that on bare reading of the reply filed by the Respondent, it is evident that the Respondent admits that the reference to the distinctive yellow pack in the Impugned Advertisement is of Nestlé Nido FortiGrow. Throughout the reply the Respondent is admitting to the comparative nature of the Impugned Advertisement and claiming the defence of truthful statements about the category and ingredients of Nestlé Nido FortiGrow and baselessly refutes reference to Nestlé Nido FortiGrow in the Impugned Advertisement. It was further highlighted that the yellow color is registered trademark with Nestlé Nido and no other similar product with same color scheme is available in the market. Therefore, the reference to the yellow color package in the Impugned Advertisement does not only amount to deceptive marketing but also in violation of the intellectual property laws.
- 4.40 It was once again reiterated that use of the term “ghizai formula” is not prohibited under the Punjab Pure Food Regulations, 2018 and therefore cannot be deemed illegal. It is settled law that pursuant to Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 no private entity can be prohibited from doing what is not prohibited by law.
- 4.41 The absence of fish oil traces in the Respondent’s product was denied for want of knowledge and the Respondent is put to strict proof thereof. The Impugned Advertisement creates a false impression that usage of vegetable oil in dairy products is impermissible.
- 4.42 It was stated that the Complainant has not concealed any material information. As detailed above, Nestlé Nido FortiGrow has been described accurately and in terms permissible under law. The Respondent has failed to provide any plausible defense of its deceptive marketing and is therefore liable for contravention of section 10 of the Act.

## 5. ANALYSIS

- 5.1. The Enquiry Committee was given the directive 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 conduct of the Respondent is capable of harming the business interests of other undertakings including the Complainant in, *prima facie*, violation of Section 10(1) in general, and in particular, Section 10(2)(a) of the Act.
  - (ii) 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 the Complainant’s products that are subject matter of this enquiry report in, *prima facie*, violation of Section 10(1) in general and in particular, Section 10(2)(b) of the Act.
  - (iii) Whether the Respondent is involved in 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. The allegations made in the complaint state that the Respondent through its latest advertisement campaign for its newly launched product, Olper’s Full Cream Milk Powered, has been engaging in deceptive marketing practices, primarily negatively targeting the Complainant’s product, Nestlé Nido FortiGrow. Furthermore, it has been alleged that the same is being done to disseminate false and misleading information with the ulterior motive of making inroads into the market share of Nestlé Nido FortiGrow by presenting false information about its characteristic and properties in the following manner;
- i. by undermining the beneficial value of the product
  - ii. by creating false impression that vegetable oil is not a permitted or usual ingredient of formula products
  - iii. by creating false perception in the consumer market that the Complainant has been misleading and deceiving its consumers for years by advertising its product as natural milk.
- 5.3. Firstly, it should be noted that the Impugned Advertisement uses a blurred image of a yellow pack of powdered dairy product. As a result, we need to determine the general impression disseminated by that blurred image to determine whether the allegations made by the Complainant holds true with respect to its product Nestlé Nido FortiGrow or not. As rightly stated by the Complainant, the powdered dairy formula range, Nestlé Nido is one of the leading brands in this category which caters to children of different age groups and has yellow packaging. Moreover, in addition to the assessment of the Complainant, the Enquiry Committee is of the view that the blurred image gives the impression that the Impugned Advertisement is referring to the general brand of Nestlé Nido catering to this age group, which includes its previous product called Nestlé Nido Fortified. The same can also be verified by the Facebook comments of the general public, submitted by the Complainant, which refer to the product as “Nido” and not “Nido FortiGrow”.
- 5.4. Resultantly, the following products of the Complainant; Nido Fortified and Nido FortiGrow, including any other variant of the said product range introduced since inception (the “**Complainant’s Nido Product Range or Complainant’s Products**”), will be taken into consideration by the Enquiry Committee for the purpose of this inquiry:

Sr. No.	Product of Nestlé	Classification	Compliance
1.	Nido FortiGrow	<ul style="list-style-type: none"> <li>• Dairy Based Formula</li> <li>• Ghizai Formula</li> <li>• Blend of Skimmed Milk and Vegetable Fat in Powder Form</li> <li>• Previously also labelled as Full Cream Powder Milk</li> </ul>	<ul style="list-style-type: none"> <li>• Para 01.6.1 Chapter 1 of Appendix 1 of Punjab Pure Food Regulations 2018. Blend of Skimmed Milk and Vegetable Fat in Powder Form</li> <li>• Codex standard for Skimmed Milk and Vegetable Fat in Powder Form</li> <li>• No record available for product composition as per previous label</li> </ul>

2.	Nido Fortified	<ul style="list-style-type: none"> <li>Labelled as Full Cream Powder Milk</li> </ul>	<ul style="list-style-type: none"> <li>Record not available</li> </ul>
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5.5. Subsequently, having that established, in order to determine the veracity of the complaint, the evidence gathered in the process of enquiry will be analyzed in view of each of the allegation made therein.

**I. Presenting False Information About the Characteristics and Properties of the Complainant’s Nido Product Range by Undermining its Beneficial Value**

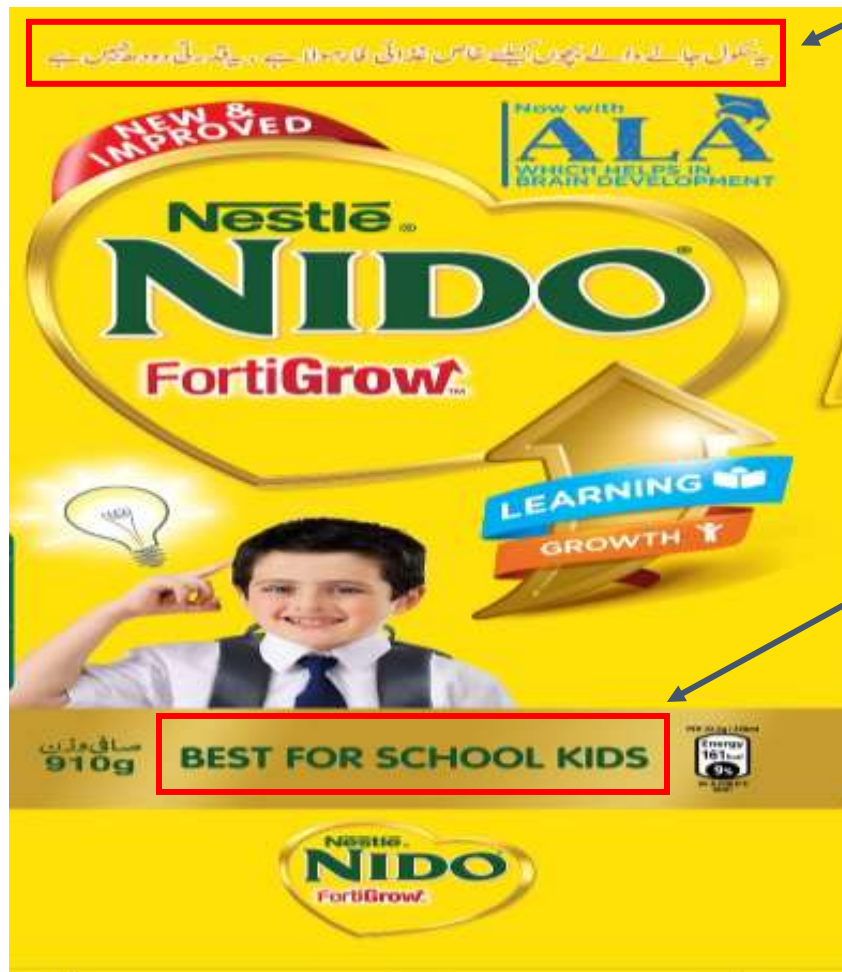
5.6. In order to ascertain this allegation, we will analyze the statements made in the Impugned Advertisement. It has been observed that while referring to the Complainant’s Product – Complainant’s Nido Product Range, the Respondent calls it “*tail mili safaidi*”, which suggests that it is a mixture of oil and whitener, wherein the term “oil” denotes the usual ingredient, i.e., vegetable oil present in the Complainant’s Products. Taking into consideration the overall net general impression of this TVC, it appears that, as submitted by the Complainant, Complainant’s Nido Product Range has no nutritional value.

5.7. It may also be noted that since the Complainant has specifically highlighted the issue in relation to only one of its products from the Nido range, i.e. Nestlé Nido FortiGrow, therefore, most of the documents submitted and discussed will be related to this product specifically.

5.8. Subsequently, it is stated that keeping in view the various documents submitted by the Complainant, including several reports drafted by PFA and other scientific laboratories, it can be concluded that Nestlé Nido FortiGrow is in line with the applicable food standards. As per these documents, including the reports submitted to the Honorable Supreme Court, Nestlé Nido FortiGrow contains all the nutrients according to the label printed on its packaging. The same may be confirmed with respect to Nestlé Nido Fortified as it appears that it is an older version of Nestlé Nido FortiGrow. Moreover, PFA, as one of the food standards maintenance authority, has sanctioned the Complainant vide its letter dated May 10, 2017, to label its Nido Product Range as “not milk *...instead any appropriate word e.g. “Formula Product”*”. Accordingly, the Complainant has labelled the growing up formulae, i.e., Nestlé Nido 1+ and Nestlé Nido 3+ as “*Growing up Formula*” and Nestlé Nido FortiGrow – its new relevant product, as “*khaas ghizai formula – special nutritional formula*”. Therefore, it can be concluded that Nestlé Nido FortiGrow does contain nutritional qualities which may be beneficial for a child’s wellbeing and fulfils relevant food standard requirements. Whereas to infer otherwise, that too in such a disparaging manner, which suggests that Nestlé Nido FortiGrow have absolutely no nutritional value and that it is merely a combination of oil and whitener amounts to distribution of false and misleading information to consumers without a reasonable basis related to characteristics, properties, suitability for use and quality of the Complainant’s Nido Product Range by the Respondent in, *prima facie*, violation of Section 10(2)(b) of the Act.

5.9. It should, however, be mentioned that the Complainant had submitted certain letters drafted by PFA, according to which PFA had given approval to the Complainant to use its latest

packaging, shown below. As per this packaging, Nestlé Nido FortiGrow is not natural milk – “yeh qudrati doodh nahi hay”, but it is a special nutritional formula for school going children – “yeh school janay valay bacchon kay liye aik khaas ghizai formula hay” which is “BEST FOR SCHOOL KIDS”. Nestlé Nido FortiGrow is currently available in the market in the same packaging. The relevant packaging sample is shown below:



**Fig. 1: Packaging Submitted to the Enquiry Committee as PFA Approved Packaging**

- 5.10. Whereas when the said letters were sent for verification to PFA, it was revealed to the Enquiry Committee that the Complainant had submitted false sample of packaging as the “approved” packaging. The relevant correspondence with the PFA has been attached as **Annexure – A**. The packaging of Nestlé Nido FortiGrow actually approved by PFA vide letter dated July 08, 2017, is exhibited below for ease of reference:



**Fig. 2: Packaging Actually Approved by PFA**

5.11. There are a few primary differences among the two packaging samples:

- i. Fig 2., which is the actual PFA approved packaging, has been simply labelled as, **“FOR SCHOOL CHILDREN – DAIRY BASED FORMULA”**.
- ii. Whereas Fig 1. is the current packaging of the Complainant which has been falsely submitted by the Complainant, in the complaint submitted to the Commission, as the PFA approved packaging. According to this packaging, Nestlé Nido FortiGrow is **“BEST FOR SCHOOL KIDS”**.
- iii. Moreover, a disclaimer has been given in Urdu which states: **“Yeh qudrati doodh nahi hay – this is not natural milk”**. This disclaimer has been added to the label at a later date in compliance of an order dated March 19, 2018, given by the Honorable Supreme Court of Pakistan, which stated:   
*“.....all the sellers of the powder formula for the child feed must write on their boxes that this is not natural milk and not even a substitute thereto”*
- iv. As mentioned earlier, it further contains the label in Urdu stating: **“Yeh school janay valay bacchon kay liye khaas ghizai formula hay - This is a special**

**nutritional formula** for school going children”, which appears to be in line with PFA directions.

v. A few other additions have also been made, such as “**NEW & IMPROVED**”, “*Now with ALA WHICH HELPS IN BRAIN DEVELOPMENT*”

5.12. In light of the above, it can be concluded that the Complainant has misrepresented certain facts to the Enquiry Committee vide the abovementioned documents in the process of inquiry, which may be examined by the Commission. The Complainant was also called upon to clarify its position to which it submitted a written reply vide letter dated September 13, 2019. The said reply is attached herewith as **Annexure – B** for the Commission’s perusal.

## **II. Presenting False Information About the Complainant’s Product’s by Creating False Impression that Vegetable Oil is not a Permitted or Usual Ingredient of Formula Products**

5.13. Taking into consideration the overall net general impression of this TVC, it appears that vegetable oil present in Nestlé Nido product range is not legally permissible. Whereas, according to the submissions of the Complainant, Nestlé Nido 3+ and Nestlé Nido FortiGrow fall in the category of “Blend of Skimmed Milk and Vegetable Fat in Powdered Form” and the said products comply with the relevant Codex Alimentarius standards as well as relevant PSQCA Standards and 2017/2018 Food Regulations.

5.14. In this reference, it has been observed that the applicable food rules allow use of vegetable oil in formula products of these categories. Regulation 01.6, Chapter 1 of Appendix 1 of Punjab Pure Food Regulations, 2018 has renamed the aforesaid category of “Milk and Cream Powder Analogues” as “Blend of Skimmed Milk Powder and Vegetable Fat in Powdered Form” and defines it as follows:

*“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 product shall comply with Codex Standards.”*

5.15. The above information makes it very clear that adding vegetable oil to this category of dairy based product is permissible under the law. Resultantly, to show that the Complainant is doing something wrong or illegal by adding vegetable oil to its products amounts to distribution of false and misleading information to consumers without a reasonable basis related to characteristics, properties, suitability for use and quality of the Complainant’s Nido Product Range by the Respondent in, *prima facie*, violation of Section 10(2)(b) of the Act.



**III. Presenting False Information About the Complainant’s Product by Creating False Perception in the Consumer Market that the Complainant has been Misleading and Deceiving its Consumers for Years by Making Them Believe that Nestlé Nido Product Range is (Natural) Milk**

5.16. In order to evaluate legitimacy of this allegation, some of the marketing material of the Complainant over the years will be analyzed. Below are screenshots of various TVCs aired by the Complainant over the years pertinent to its product, Nestlé “Nido”. Complete TVCs of the same have been annexed herewith as **Annexure – C**. Furthermore, images below include screenshots of the Complainant’s website. Both sets of images also give us an opportunity to view the old packaging of Nestlé Nido Fortified. The Complainant was also called upon to submit TVCs and packaging of the relevant product range for the last 10 years. The same were submitted pertinent to the time period between 2009 and 2019.



**Product Packaging (2009): Nestlé Nido Fortified – Full Cream Milk Powder**



Product Packaging (2011): Nestlé Nido Fortified – Full Cream Milk Powder/Doodh, izafi taaqat kay saath (milk with added nutrition)



TVC Screenshot: Nestlé Nido Fortified – Doodh, izafi taaqat kay saath (milk with added nutrition)



**TVC Screenshot: Nestlé Nido Fortified**

**Verbatim of the TVC above:** “.....*Star toh laina hay, iss liye ab Nestlé Nido laya naya fortified doodh, izaafi taaqat kay saath.....*”

**Translation:** .....You have to get the Star, that is why Nestlé Nido presents new fortified milk with added nutrition.....



**2011 TVC Screenshot: Nestlé Nido Fortified**

**Verbatim of the TVC above:** “.....yeh sahi grow kar rahay hain kyunke yeh peetay hain Nido Fortified, doodh say kuch barh kar, iss main hay khalis doodh say barh kar kuch izafi vitamins aur minerals.....”

**Translation:** .....they are growing right because they drink Nido Fortified, which is more than just milk, it has additional vitamins and minerals along with pure milk.....



2013 TVC Screenshot: Nestlé Nido FortiGrow – Full Cream Powder Doodh (Milk)

**Verbatim of the TVC above:** “.....kabhi aap karainge aisa? Nahi na? Toh phir doodh kay saath kyun? Issi liye meri choice hay No. 1 milk for growing kids, Nestlé Nido FortiGrow.....”

**Translation:** .....Will you ever do this? No, right? Then why with milk? That is why my choice is No. 1 milk for growing kids, Nido FortiGrow.....



2014 TVC Screenshot: Nestlé Nido FortiGrow – Full Cream Powder Doodh (Milk)

**Verbatim of the TVC above:** “.....Nestlé Nido FortiGrow, apnay haathon say bana kar pilaati hun iss ko, jis kay har glass main shaamil hay full cream richness.....”

**Translation:** .....Nestlé Nido FortiGrow; I give it to him with my own hands, which has full cream richness in every glass.....



2015 TVC Screenshot: Nestlé Nido FortiGrow – Full Cream Powder Doodh (Milk)



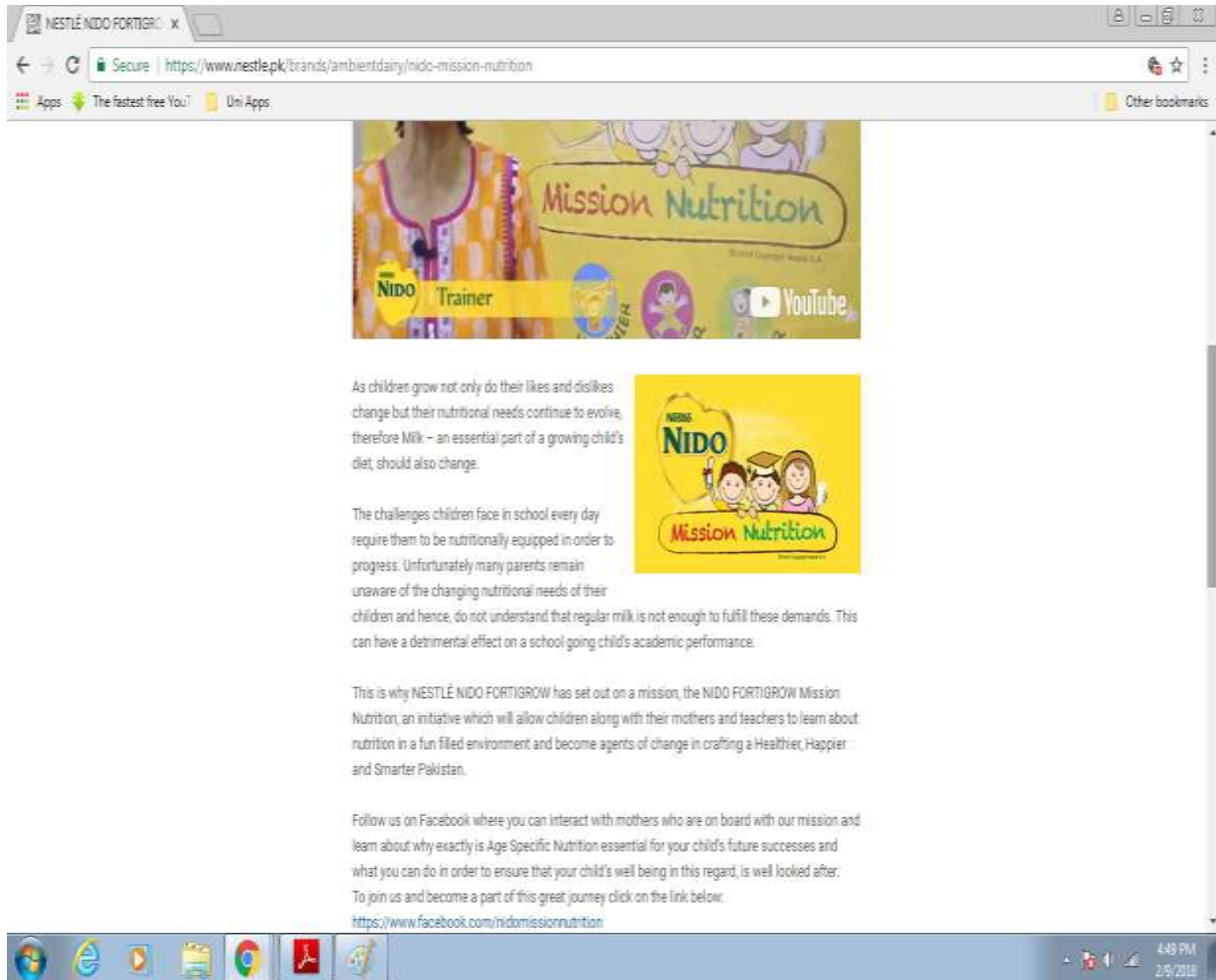
2015 TVC Screenshot: Nestlé Nido FortiGrow – Full Cream Powder Doodh (Milk)

**Verbatim of the TVC above:** “.....kia koi bhi doodh school kay challenges ko face karnay kay liye perfect hay? Nahi, koi bhi doodh perfect nahi hay. Inhain chahiye hay Nestlé Nido FortiGrow.....”

**Translation:** .....Is any milk perfect enough to face challenges of school? No, no milk is perfect. They (school going kids) need Nestlé Nido FortiGrow.....



**Complainant’s Website Screenshot Dated 09-02-2018 and 01-03-2018: Nestlé Nido Product Range – Growing up Milk and FortiGrow – Full Cream Powder Doodh (Milk)**



**Complainant's Website Screenshot Dated 09-02-2018: Mission Nutrition**





**Latest Screenshot of Complainant’s Website Dated 17-07-2019: Nestlé Nido Product Range – Growing up Milk and FortiGrow – Full Cream Milk Powder**

- 5.17. One of the allegations of the Complainant is that the Respondent has been presenting false and misleading information about the Complainant by creating a false perception in the Impugned Advertisement. Furthermore, it is being claimed in the Impugned Advertisement that the Complainant has been misleading and deceiving its consumers for years by making them believe that Nestlé Nido Product Range is pure/natural milk. In order to evaluate this allegation, previous marketing campaign of the Complainant has been analyzed which includes its TVCs in the past and packaging of Nestlé Nido Product Range.
- 5.18. In this reference, it should be noted that labelling rules as well as standards for milk products have been evolving and so has been product labelling by the Complainant. Similarly, the statement that the Impugned Advertisement starts with, wherein the child reads out a disclaimer on the Complainant’s Product’s packaging stating that “this is not natural milk” has also been placed there in compliance with the directions of the Honorable Supreme Court, such practices on behalf of the Complainant should be appreciated, whereas presenting it in a maligning manner could have a very misleading impact on the general public. The said order held that, **“all the sellers of powder formula for the child feed must write on their boxes that this is not natural milk and not even a substitute thereto.”**, in order to avoid any probable deception. However, the same disclaimer cannot be found on the Respondent’s product packaging, which itself can have a misleading impact on the consumers with respect to the nature of the Respondent’s product, Olper’s Full Cream Milk Powder.

- 5.19. On the other hand, it is also important to note that most of the product packaging of the Complainant have images of white liquid pouring into glasses which appear to be “milk”. Furthermore, most of the TVCs (**Annexure – C**) have either referred to relevant products of Nestlé Nido Product Range as milk or has drawn a comparison with milk, where Nestlé Nido Product Range is actually a better alternative, without clarifying that Nestlé Nido Product Range is not milk at all. Considering the ordinary consumers, who are most likely to be unaware of the differences between milk and natural milk or various categories of dairy products which are usually used as substitutes of natural milk, it can be assumed that they have a high probability of being an easy victim of deception.
- 5.20. In this reference, the Commission in one of its orders, *In the Matter of Show Cause Notices Issued to Dairy Companies for Deceptive Marketing Practices* (2017) (the “**Order**”), has been of the following view regarding various categories of dairy products and the public’s perception regarding them:

“15. ....The front side of the package, however, displays a glass being filled white liquid (presumably milk) as under:<sup>1</sup>



In this Order, it has also been presumed that an ordinary consumer is most likely to interpret this product to be milk due to the picture of white liquid in a glass and its “**apparent**” suitability of use. The same is found repeatedly on the packaging of Nestlé Nido Product Range as well as its TVCs. Additionally, the same Order goes on to stating;

“26. It is observed that DAIRY OMUNG’s TVC coupled with EFL’s Website contents, expressly or by implication omit material information that the Product is ‘milk reconstitute’ or ‘milk-based product with certain additives and food stabilizers’. The visual/aural imagery of the TVC is capable of conveying more than one meaning to consumers and to create a false or misleading impression in the minds of ordinary consumers i.e. whether the Product is ‘milk’ or ‘dairy drink’. The concern is heightened by the fact that ‘dairy drink’ is a technical classification of dairy/non-dairy based products and is not well-known in Pakistan. There is

<sup>1</sup> [http://www.cc.gov.pk/images/Downloads/dairy\\_companies.pdf](http://www.cc.gov.pk/images/Downloads/dairy_companies.pdf), pg. 08, para 15

*strong likelihood that consumers could draw a false conclusion about the character and properties of the product, especially when it is compared to raw milk. Thus EFL marketing/campaign material to promote DAIRY OMUNG is likely to misguide the consumers regarding the true nature, characteristics, properties and use of the product, hence is in violation of Section 10(2)(b) read with Section 10(1) of the Act.”<sup>2</sup>*

- 5.21. In addition to the Complainant’s TVCs and the rest of the marketing material, the same has been the case with the Complainant’s awareness campaign of “Mission Nutrition” (Video attached in **Annexure – D**), wherein it can be seen that the general public, like students, teachers and parents have been made to believe 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. All the TVCs as well as this awareness campaign encourage a switch from regular milk to Nestlé Nido Product Range. Finally, the Honorable Supreme Court also, in its order dated March 09, 2018, C.M.A. No. 124-L/2018 in C.P No. 2374-1/2016, held that **“this is neither the natural milk nor substitute of mother’s milk, therefore, all the sellers of powder formula for the child feed must write on their boxes that this is not natural milk and not even a substitute thereto.”** Whereas the Complainant has sold the Nestlé Nido Product Range either as milk or as its better substitute, contrary to the true nature of its product range. Even though the actual packaging has been changed, the material on the website still has labels written on the products, such as “full cream powder milk”, “growing up milk”, and the Mission Nutrition videos which still contain the deceptive material. Additionally, where the local labelling rules were not present, international standards such as Codex Alimentarius, acknowledged by the Complainant itself, have placed the said products in a different category of milk products since 2006. Moreover, all national and international laws have defined milk in a clear manner for decades which none of the variations of the Complainant’s products matched with. Furthermore, the fact that the Complainant continued to market its product as milk, in fact a ‘better’ substitute thereof appears to be a deceptive practice on its part. The same can also be observed through various comments of the general public made on the Complainant’s Facebook page, where they have referred to Nido Products as “milk” and the response from the Complainant is such that it has not corrected the general public’s perception that the product is **not** milk.
- 5.22. Therefore, keeping in view the overall marketing campaign of the Complainant regarding the Nestlé Nido Product Range 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 Complainant into believing that this product is milk, as also noted and concluded by the Honorable Supreme Court. The statements made in the Respondent’s TVC are hence, found to be true with respect to this claim. As a result, the Respondent has not been found *in prima facie* violation of Section 10(b) of the Act with respect to this issue.

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<sup>2</sup> [http://www.cc.gov.pk/images/Downloads/dairy\\_companies.pdf](http://www.cc.gov.pk/images/Downloads/dairy_companies.pdf), pg. 11, para 26

#### IV. Other Issues:

##### a) Presence of Fish Oil in Olper's Full Cream Milk Powder

- 5.23. In reference to the allegations levelled by the Complainant that the Respondent is itself adding fish oil to its product while maligning the Complainant for adding oil (vegetable oil) to its product, certain clarifications have been collected. In this regard, the Respondent submitted that it in fact does not use fish oil as an ingredient, however, it has been printed on the package as a precautionary allergen, which may be present only in traces. The Respondent's packaging states, "*\*May contain traces of fish oil*". It has been further submitted that this practice is in compliance with relevant Codex Alimentarius labeling laws. The same has been verified by the Enquiry Committee and therefore, the Respondent is not found in *prima facie* violation of Section 10 of the Act pertinent to this issue.

##### b) False Impression Created by the Respondent that Nestlé Nido FortiGrow is not real/natural milk, but Olper's Full Cream Milk Powder is real/natural milk

- 5.24. The Complainant in its advertisement has also claimed that the overall impression the Impugned Advertisement creates is that Nestlé Nido FortiGrow is not real/natural milk, but Olper's Full Cream Milk Powder is real/natural milk. In this reference, it is presented that it has been observed that the Impugned Advertisement makes the claim that Olper's Full Cream Milk Powder is "made" from natural milk which has been verified by the Enquiry Committee from relevant authorities as a valid statement. The Respondent has also received the mandatory required license to produce this product from relevant authorities, i.e., PSQCA. However, as rightly highlighted by the Complainant, the manner in which this statement is made does have the connotation that where Nido Product Range is not natural milk, Olper's Full Cream Milk Powder is, which appears to be another false and misleading comparison. Even though the Respondent's new product, Olper's Full Cream Milk Powder is in fact a full cream milk powder, the Respondent does not have the prerogative to imply that its product is natural milk or a substitute thereof in the same manner the Complainant is not allowed to do so. Even though the labeling has been in line with the relevant labeling rules, excluding the requirement laid down by the Honourable Supreme Court, the TVC of the Respondent, as in the case of the Complainant does appear to be misleading in the sense that it gives the overall impression that the product is natural milk or its perfect substitute, whereas to make such insinuation has been strictly prohibited by the Honourable Supreme Court as well as other national and international labeling laws. Consequently, the Respondent also appears to be making a false or misleading comparative claim regarding this matter and hence, further appears to be in *prima facie* violation of Section 10(2)(b) and 10(2)(c) of the Act.
- 5.25. Finally, as the Respondent has been *prima facie* found engaged in deceptive marketing practices according to paragraphs 5.6 to 5.24 *ibid*, it is important to note that such conduct can create a false impression regarding the Complainant's Nido Product Range, especially in reference to the Respondent's new product Olper's Full Cream Milk Powder. Resultantly, such behavior is also capable of affecting the decision making process of the consumers which is further capable of giving an unfair advantage to the Respondent, while harming business interest of the Complainant. Therefore, the Respondent has also been

found in *prima facie* violation of Section 10 of the Act, read with sub-Sections 10(2)(a) of the Act in particular.

## 6. CONCLUSION AND RECOMMENDATIONS

- 6.1. Various allegations were levelled against the Respondent by the Complainant out of which the two allegations, i.e., i) creating a false impression that vegetable oil is not a permitted or usual ingredient of such products, that ii) Complainant's Nido Product Range has no nutritional value have been *prima facie* proven against the Respondent and that iii) Nestlé Nido FortiGrow is not real/natural milk, but Olper's Full Cream Milk Powder is real/natural milk. As a result, the Respondent has been found in *prima facie* violation of Section 10 of the Act.
- 6.2. The 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. Therefore, *prima facie* violations under the Act in terms of the findings of this enquiry report warrant initiation of proceedings against M/s Engro Foods Limited under Section 30 of the Act.

(Marryum Pervaiz)  
Joint Director  
Enquiry Officer

(Faiz-ur-Rehman)  
Deputy Director  
Enquiry Officer

(Fatima Shah)  
Assistant Director  
Enquiry Officer