

Complaint

IN THE MATTER OF

NESTLE HOLDINGS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4028; File No. 0110083**Complaint, December 10, 2001--Decision, February 4, 2002*

This consent order addresses the merger of Respondent Nestle Holdings, Inc. (“Nestle”) – the largest food corporation in the world, which sells its pet food products in the United States through its Friskies division – and Respondent Ralston Purina Company (“Ralston”), the world’s leading producer of dry dog and dry and soft-moist cat foods. The order, among other things, requires the respondents to divest all rights, titles, and interests in and to all assets relating to the Meow Mix and Alley Cat brands of dry cat food to J.W. Childs Equity Partners II, L.P., a Boston-based investment firm that owns the Hartz Mountain Corporation (“Hartz”), a leading manufacturer and distributor of pet supplies in the United States. The order also requires the respondents to grant a patent license to Childs for the coating applied to Meow Mix products – covering both current Meow Mix products and any pet product Childs chooses to manufacture in the future – and to provide Childs with technical assistance and a supply of Meow Mix and Alley Cat products for a period of up to two years from the date of the divestiture. In addition, the order requires Childs, for five years, to secure Commission approval before selling all or substantially all of the United States assets acquired in the divestiture. An accompanying Asset Maintenance Order requires the respondents to maintain certain assets pending divestiture.

Participants

For the Commission: *Jill M. Frumin, Anthony Low Joseph, Erika Lee, Jeff Dahnke, Evelyn J. Boynton, Amy Swift, Catharine M. Moscatelli, Roberta S. Baruch, Phillip L. Broyles, Elizabeth A. Schneirov, Hajime Hadeishi and Michael G. Vita.*

For the Respondents: *Roxanne E. Henry, Howrey Simon Arnold & White, LLP.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nestle Holdings, Inc. ("Nestle"), and Ralston Purina Company ("Ralston") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be implemented, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent Nestle

1. Respondent Nestle Holdings, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 383 Main Avenue, Norwalk, Connecticut 06851. Nestle Holdings, Inc., is a subsidiary of, and controlled by, Nestle S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.
2. Respondent Nestle is, at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of dry cat food products to customers located throughout the United States.
3. Respondent Nestle and its affiliates, in 2000, had total worldwide sales of all products of approximately \$81.4 billion Swiss francs and United States sales of all products of approximately \$ 7.8 billion. Respondent Nestle and its affiliates, in 2000, had total worldwide sales of all dry cat food products of approximately \$ 600 million, and United States

Complaint

sales of all dry cat food products of approximately \$ 200 million.

4. Respondent Nestle is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Respondent Ralston

5. Respondent Ralston is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.
6. Respondent Ralston is, at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of dry cat food products to customers located throughout the United States.
7. Respondent Ralston, in 2000, had total worldwide sales of all products of approximately \$ 3 billion, and United States sales of all products of approximately \$ 2.36 billion Respondent Ralston, in 2000, had total worldwide sales of all dry cat food products of approximately \$ 752 million, and United States sales of all dry cat food products of approximately \$ 617 million.
8. Respondent Ralston is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Complaint

III. The Proposed Acquisition

9. On or about January 15, 2001, Respondents Nestle and Ralston executed an agreement for Nestle to acquire Ralston. The value of the proposed acquisition is approximately \$10.3 billion.

IV. Trade and Commerce

10. Dry cat food products consist of a mixture of meat, fish, and grains. Dry cat food products are formulated and produced to be consumed by cats, rather than dogs, who are attracted to different flavors and product attributes. Dry cat food products are sold in paper bags or plastic containers. Wet cat food products are sold in cans, which must be refrigerated after they are opened. Wet cat food products have a much stronger odor, which is unattractive to humans.
11. Total United States sales (at retail) of all dry cat food products are approximately \$ 2.2 billion. The parties sell dry cat food products through different retail channels of distribution, including supermarkets, mass merchants, club stores, and pet specialty stores.

V. The Relevant Product Market

12. The relevant product market in which it is appropriate to assess the effects of the proposed acquisition is the sale of dry cat food products, distributed through the channels of distribution described in paragraph 11 above.

VI. The Relevant Geographic Market

13. The relevant geographic market in which it is appropriate to assess the effects of the proposed acquisition is the United States.

Complaint

VII. Concentration

14. The relevant market is moderately concentrated and the proposed acquisition, if consummated, will substantially increase that concentration, as follows.
 - (a) In the dry cat food products market, Nestle has approximately a 11.22% share across all channels. Ralston has approximately a 33.59% share across all channels.
 - (b) After the acquisition, Respondents will have a market share of approximately 44.81% of the dry cat food market identified in paragraphs 12 and 13 above.
 - (c) Across all channels, the acquisition raises the HHI from 1675 to 2429, an increase of 754 points.

VIII. Conditions of Entry

15. Entry into the relevant market would not be timely, likely, or sufficient to prevent the anti-competitive effects in the relevant market.

IX. Violations Charged

16. Nestle and Ralston compete in the sale of dry cat food in the United States.
17. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition in the sale of dry cat food in the United States in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, in the following ways, among others:
 - (a) by eliminating direct competition in the sale of dry cat food between Nestle and Ralston; and

Complaint

(b) by increasing the likelihood that the combination of Nestle and Ralston will unilaterally exercise market power;

each of which increases the likelihood that prices will be higher with the acquisition than they would be absent the acquisition.

18. The Agreement entered into between Respondents Nestle and Ralston for Nestle to acquire Ralston constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of December, 2001 issues its Complaint against Respondents Nestle and Ralston.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Nestle Holdings, Inc. of certain voting securities of Respondent Ralston Purina Company, and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Nestle Holdings, Inc., is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its office and principal place of business located at 383 Main Avenue, Norwalk, CT 06851. Nestle Holdings, Inc. is a subsidiary of and controlled by Nestle S.A., a corporation organized, existing, and doing business under, and by virtue of, the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.

2. Respondent Ralston Purina Company, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Missouri, with its office and principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.

3. J.W. Childs Associates, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 111 Huntington Avenue, 29th Floor, Boston, Massachusetts 02199.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Nestle” means Nestle Holdings, Inc., its parent Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Decision and Order

- B. “Nestle S.A.” means Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Ralston Purina” means Ralston Purina Company, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Ralston Purina, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Childs” means J.W. Childs Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Childs, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger between Nestle and Ralston Purina, dated January 15, 2001, pursuant to which Nestle agreed to acquire certain voting securities of Ralston Purina.
- G. “Acquisition Date” means the date of consummation of the Acquisition.
- H. “Administrative Services” means provision of administrative services, including but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services.
- I. “Alley Cat Product” means the Alley Cat brand of dry cat food products.

Decision and Order

- J. “Childs Acquisition Agreement” means the Asset Purchase Agreement (including all related agreements, schedules, exhibits, and appendices) among Nestle Holdings, Inc., Ralston Purina Company and J.W. Childs Equity Partners II, L.P., dated October 17, 2001, as amended.
- K. “Coating Patent” means the U.S. and foreign patents and patent applications identified in Appendix A of this Order.
- L. “Consent Agreement” means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.
- M. "Cost" means (i) if in connection with Paragraph II.F. of this Order: (x) the cost of manufacturing an item, including the actual cost of raw materials (which includes packaging), direct labor, and reasonably allocated factory overhead; and (y) in the case of a Force Majeure Event as defined in Paragraph 19 of the Childs Co-Pack Agreement, reasonable out of pocket costs incurred for actual contracted services, provided that such costs shall not exceed the out of pocket costs incurred in connection with any alternative supply arrangements for Respondents' dry cat food products produced at the facility affected by the Force Majeure Event calculated on a non-discriminatory pro rata basis, and provided further that in making any alternative supply arrangements, Respondents shall not discriminate in any manner against Ralston Acquirer's products or in favor of the dry cat food products retained by Respondents after this Order goes into effect; or (ii) if in connection with Paragraphs II.G. and II.H. of this order, the cost of direct material, labor, and out of pocket expenses used to provide the relevant service.
- N. “Divestiture Trustee” means the Divestiture Trustee appointed pursuant to Paragraph V of this Order.
- O. “Intellectual Property” means, without limitation, (i) all trade names, registered and unregistered trademarks,

Decision and Order

service marks and applications, domain names, trade dress, all copyrights, copyright registrations and applications, in both published works and unpublished works, and goodwill associated with each of them; (ii) all patents, patent applications, and inventions and discoveries that may be patentable, and goodwill associated with each of them; and (iii) all know-how, trade secrets, confidential information, software, technical information, data, processes and inventions, formulae, recipes, methods, and product and packaging specifications, and goodwill associated with each of them; provided, however that Intellectual Property shall not include customer lists or supplier lists.

- P. “International Assets” means any right, title, and interest that Respondents may have, at the time the International Trademarks are divested, in, to, and under the International Trademarks.
- Q. “International Trademarks” means any and all trademarks, service marks, trademark and service mark registrations and pending trademark and service mark registrations that relate exclusively to the Meow Mix Product or Alley Cat Product outside of the United States and Canada.
- R. “Manufacturing Information” means know-how and procedures used in the manufacture of the Meow Mix Product and the Alley Cat Product in the United States or Canada as of the date the Ralston Assets are divested.
- S. “Meow Mix Product” means the Meow Mix brand of dry cat food products (which does not include cat treats), including the brand extension Meow Mix Seafood Middles.
- T. “Monitor” means the Monitor appointed pursuant to Paragraph IV of this Order.
- U. “Non-Public Ralston Acquirer Information” means any propriety information of the Ralston Acquirer relating to the Ralston Assets or the Ralston Business obtained by

Decision and Order

Respondents in the course of fulfilling the obligations required by Paragraphs II.F., II.G., and II.H. of this Order.

- V. “Order to Maintain Assets” means the Order to Maintain Assets issued by the Commission in this matter.
- W. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- X. “Ralston Acquirer” means the Person that acquires the Ralston Assets pursuant to this Order.
- Y. “Ralston Acquisition Agreement” means either the Childs Acquisition Agreement or the acquisition agreement described in Paragraph II.C.2. of this Order.
- Z. “Ralston Assets” means all of Respondents’ right, title, and interest in and to all assets, tangible or intangible, relating to the operation of the Ralston Business, including, but not limited to:
 - 1. All inventories and supplies held by, or under the control of Respondents;
 - 2. All Intellectual Property owned by or licensed to Respondents;
 - 3. Copies of all customer lists and supplier lists;
 - 4. All rights of Respondents under any contract;
 - 5. All governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Respondents, to the extent transferable;
 - 6. All rights of Respondents under any warranty and guarantee, express or implied; and

Decision and Order

7. Copies of all relevant portions of books, records, and files held by, or under the control of, Respondents (subject to Respondents' rights to maintain attorney client privilege).

Provided, however, that the Ralston Assets shall not include (i) any assets of the kind described in Sections 1.02(b)(i) through (vii), (ix), (x), and (xii) of the Childs Acquisition Agreement, (ii) except for copies or portions thereof reasonably requested by the Ralston Acquirer for the purpose of operating the Ralston Business in a viable and competitive manner, any assets of the kind described in Section 1.02(b)(xi) of the Childs Acquisition Agreement, (iii) any real property (together with appurtenances, licenses and permits) owned, leased, or otherwise held by Respondents, (iv) any personal property (including rights under any contract) owned, leased, or otherwise held by Respondents that does not relate exclusively to operation of the Ralston Business, and (v) any Intellectual Property that does not relate exclusively to operation of the Ralston Business.

- AA. "Ralston Business" means Respondent Ralston's business of researching, developing, manufacturing, distributing, marketing, and selling Meow Mix Product and Alley Cat Product, in any market anywhere in the United States and Canada, prior to the Acquisition Date.
- BB. "Respondents" means Nestle and Ralston Purina, individually and collectively.
- CC. "Technical Assistance" means providing (i) expert advice, assistance, and training with respect to the Manufacturing Information, and (ii) access to Manufacturing Information.

Decision and Order

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest:
1. The Ralston Assets, absolutely and in good faith, to Childs pursuant to the Childs Acquisition Agreement, no later than twenty days from the date the Commission accepts the Consent Agreement for public comment or January 31, 2002, whichever is later.
 2. The International Assets, absolutely and in good faith, to Childs pursuant to the Childs Acquisition Agreement, no later than 180 days from the date the Ralston Assets are divested pursuant to Paragraph II.A.1. of this Order.
- B. The Childs Acquisition Agreement is incorporated by reference and made a part of this Order as Confidential Appendix B. Respondents shall comply with all terms of the Childs Acquisition Agreement, and any breach by Respondents of any term of the Childs Acquisition Agreement shall constitute a violation of this Order. In the event any term of the Childs Acquisition Agreement contradicts any other terms of this Order, such other terms of this Order shall govern Respondents' obligations under this Order and the Childs Acquisition Agreement.
- C. If, at the time the Commission determines to make this Order final, the Commission determines that Childs is not acceptable as the Ralston Acquirer or that the Childs Acquisition Agreement is not an acceptable manner of divestiture, and so notifies Respondents, Respondents shall immediately terminate or rescind the Childs Acquisition Agreement and divest the Ralston Assets and International Assets:
1. At no minimum price, absolutely and in good faith, to another Person that receives the prior approval of the

Decision and Order

Commission, no later than 180 days from the date this Order becomes final;

2. In a manner that receives the prior approval of the Commission, including, but not limited to, entering into, and performing, an acquisition agreement (subject to Commission approval) with the Person that acquires the Ralston Assets and International Assets pursuant to Paragraph II.C.1. of this Order; and
 3. Respondents shall comply with all terms of the acquisition agreement described in Paragraph II.C.2. of this Order, and any breach by Respondents of any term of such acquisition agreement shall constitute a violation of this Order. In the event the acquisition agreement varies from or contradicts any other terms of this Order, the terms of this Order shall govern Respondents' obligations under this Order.
- D. No later than the date Respondents divest the Ralston Assets, Respondents shall grant a perpetual, non-exclusive, transferable, fully paid up, license to the Ralston Acquirer to use the Coating Patent (except in Spain, Italy, and Greece) (1) in the development, manufacture, marketing, distribution, or sale of any product manufactured by or for the Ralston Acquirer (or its successor) and sold for its account ("Ralston Acquirer Products"), and (2) in the manufacture by the Ralston Acquirer (or its successor) of any pet food products for any third parties. Neither Respondents nor Ralston Acquirer shall have the right to sublicense or license the Coating Patent except (i) for use in the development, manufacture, marketing, distribution, or sale of products manufactured by or for Respondents (in the case of Respondents) or the Ralston Acquirer Products (in the case of the Ralston Acquirer), and (ii) to the acquirer of any brand divested (whether by license for any period of time or sale) by Respondents if such divestiture relates to product that, at the time of such divestiture, uses the Coating Patent.

Decision and Order

- E. Respondents shall use their best efforts (1) to fully identify any registrations of the International Trademarks held by Respondents prior to divesting the International Assets to the Ralston Acquirer, and (2) to assist and cooperate with the Ralston Acquirer to obtain all governmental approvals, consents, licenses, permits, waivers, or other authorizations described in Paragraph I.Z., which are not transferable from Respondents to the Ralston Acquirer.
- F. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets, Respondents shall provide a supply of Meow Mix Product and Alley Cat Product to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.
- G. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets:
 - 1. Respondents shall provide Technical Assistance to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.
 - 2. In connection with the Technical Assistance required by Paragraph II.G.1. of this Order, Respondents shall allow the Ralston Acquirer reasonable and timely access to Respondents' manufacturing facilities for the purpose of inspecting manufacturing operations relating to the production of Meow Mix Product and Alley Cat Product.
- H. Upon the request of the Ralston Acquirer, for a period up to 6 months from the date Respondents divest the Ralston Assets, Respondents shall provide Administrative Services to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.

Decision and Order

- I. Respondents shall enter into one or more agreements, subject to Commission approval, with the Ralston Acquirer incorporating the terms of Paragraphs II.F., II.G., and II.H. of this Order:
 1. Any such agreement shall not require the Ralston Acquirer to pay compensation for the goods and services required by Paragraphs II.F., II.G., and II.H. of this Order that exceeds the Cost of providing such goods and services.
 2. Any such agreement incorporating the terms of Paragraph II.F. of this Order shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement.
 3. Any such agreement incorporating the terms of Paragraphs II.G. and II.H. of this Order shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement to an amount less than the damages that the Ralston Acquirer would recover in a breach of contract action (as opposed to an indemnity claim) based on such breach.
 4. Any such agreement shall not allow Respondents to terminate such agreement for a material breach of the agreement by the Ralston Acquirer in the absence of a final order of a court of competent jurisdiction, regardless of whether such order is appealable.
- J. The purpose of the divestiture of the Ralston Assets is to ensure the continued use of the assets in the same business in which the Ralston Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

Decision and Order

III.

IT IS FURTHER ORDERED that:

- A. Except in the course of performing their obligations under the Ralston Acquisition Agreement or this Order, Respondents shall not provide, disclose or otherwise make available any Non-Public Ralston Acquirer Information to any Person and shall not use any Non-Public Ralston Acquirer Information for any reason or purpose,
- B. Respondents shall disclose Non-Public Ralston Acquirer Information only to those Persons who require such information for the purposes permitted under Paragraph III.A., and only such part of the Non-Public Ralston Acquirer Information that is so required.
- C. Respondents shall enforce the terms of this Paragraph III as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph III, including all actions that Respondents would take to protect their own trade secrets and proprietary information.
- D. The requirements of this Paragraph III do not apply to that part of the Non-Public Ralston Acquirer Information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

Decision and Order

IV.**IT IS FURTHER ORDERED** that:

- A. Angele Thompson (“Monitor”) is hereby appointed to monitor Respondents’ compliance with Paragraphs II and III of this Order and Paragraphs II through IV of the Order to Maintain Assets:
- B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent’s compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.
 - 2. Within ten days after it signs the Consent Agreement, Respondent shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent’s compliance with the terms of this Order in a manner consistent with the purposes of this Order. The Monitor shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor.
 - 3. The Monitor’s power and duties under this Paragraph IV shall terminate three business days after the Monitor has completed his or her final report pursuant to Paragraph IV.B.8.(ii), or at such other time as directed by the Commission.
 - 4. The Monitor shall have full and complete access to Respondents’ books, records, documents, personnel,

Decision and Order

facilities and technical information relating to compliance with this Order and Order to Maintain Assets, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and Order to Maintain Assets.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or wilful misconduct. For purposes of this Paragraph IV.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph IV.B.5. of this Order.
7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor. The Commission shall select a substitute Monitor subject to the consent of Respondent, which consent shall not be unreasonably withheld. If

Decision and Order

Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten days after notice by the staff of the Commission to Respondent (by delivery receipt acknowledged, to Respondents' counsel of record) of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement required by Paragraph IV.B.2 of this Order within ten days after the Commission appoints a substitute Monitor. The substitute Monitor shall serve according to the terms and conditions of this Paragraph IV.

8. The Monitor shall report in writing to the Commission (i) every sixty days from the date this Order becomes final, (ii) no later than thirty days from the date Respondents have completed all obligations required by Paragraph II of this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order and the Order to Maintain Assets.

- C. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith any of the Ralston Assets within the time and manner required by Paragraph II of this Order, the Commission may at any time appoint one or more Persons as Divestiture Trustee to divest such assets in the manner provided in this Paragraph V.

Decision and Order

- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph V shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph V, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures and may be the same Person as the Monitor appointed pursuant to Paragraph IV of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten business days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effect the divestiture for which he or she has been appointed pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.

Decision and Order

3. Within ten days after appointment of the Divestiture Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture for which he or she has been appointed.
4. The Divestiture Trustee shall have twelve months from the date the Commission approves the agreement described in Paragraph V.C.3. of this Order to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed Divestiture Trustee, by the court; provided, however, the Commission may extend this period only two times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as such Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestiture

Decision and Order

shall be made only to an acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished only in a manner that receives the prior approval of the Commission; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five business days of receiving written notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's divesting the assets.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and

Decision and Order

other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph V.C.8., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.C.7. of this Order.

9. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph V for appointment of the initial Divestiture Trustee.
 10. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.
 11. The Divestiture Trustee shall report in writing to the Commission every sixty days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
- D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.

IT IS FURTHER ORDERED that if Childs acquires the Ralston Assets pursuant to Paragraph II.A. of this Order:

- A. Childs shall not, for a period of five (5) years from the date this Order becomes final, sell or otherwise convey, directly or indirectly, all or substantially all of the Ralston Assets (excluding transactions in the ordinary course of business, such as sales of inventory to customers) to any Person without prior approval of the Commission and only in a

Decision and Order

manner that receives the prior approval of the Commission; provided, however, that:

1. Notwithstanding anything in this Paragraph VI, Childs shall not sell or otherwise convey, directly or indirectly, for use with dry cat food in the United States, any Meow Mix Product or Alley Cat Product or related trademarks except to a Person that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, and
 2. The obligations of this Paragraph VI shall not apply to a sale or conveyance of the Ralston Assets through a public placement of shares in which Childs retains 25% or more of the equity or other interest of the Person owning or operating the Ralston Assets, and no other Person owns, directly or indirectly, a greater percentage than Childs.
- B. Because Childs' plans include the possibility of reselling the Ralston Assets, the purpose of this Paragraph VI is to ensure the continued use of the assets in the same business in which the Ralston Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

VII.

IT IS FURTHER ORDERED that Respondents and Childs shall provide a copy of this Order to each of Respondents' and Childs' respective officers, employees, or agents having managerial responsibility for any obligations under Paragraphs II, III, IV, and VI of this Order, no later than ten days from the date this Order becomes final.

Decision and Order

VIII.**IT IS FURTHER ORDERED** that:

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order and the Order to Maintain Assets:
1. No later than sixty days from the date this Order becomes final and every sixty days thereafter (measured from the due date of the first report) until one year from the date this Order becomes final (for a total of six reports during the first year).
 2. No later than ninety days from the due date of Respondents' sixth report as required by Paragraph VIII.A.1. of this Order, and every ninety days thereafter (measured from the due date of the seventh report) until two years from the date this Order becomes final (for a total of ten reports during the first two years).
 3. No later than one year from the due date of Respondents' tenth report as required by Paragraph VIII.A.2. of this Order, and annually thereafter for the next seven years, on the anniversary of the date this Order becomes final.

Provided, however, that Respondents shall also file the report required by this Paragraph VIII.A. at any other time as the Commission may require.

- B. If, at the time this Order becomes final, Respondents have not completed all of the obligations required by Paragraph II.A. of this Order, Respondents shall comply with Paragraph VIII.A. of this Order by filing a verified written report no later than thirty days from the date this Order becomes final, every thirty days thereafter (measured from the due date of the first report) until Respondents have complied with the obligation required by Paragraph II.A. of this Order. Thereafter, Respondents shall

Decision and Order

assume the reporting schedule set forth in Paragraph VIII.A. of this Order and file subsequent reports in accordance therewith.

- C. Respondents shall include in their compliance reports a full description of the efforts being made to comply with Paragraph II.A. (or Paragraph II.C., if applicable), of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

IX.

IT IS FURTHER ORDERED that Respondents, Nestle S.A., or Childs, respectively, shall notify the Commission at least thirty days prior to any proposed change in the corporate Respondents, Nestle S.A., or Childs, as applicable, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondents, Nestle S.A., and Childs shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the

Decision and Order

possession or under the control of Respondents, Nestle S.A., or Childs relating to any matter contained in this Order; and

- B. Upon five days' notice to Respondents, Nestle S.A., or Childs and without restraint or interference from them, to interview their officers, directors, or employees, who may have counsel present, regarding any such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 4, 2012.

By the Commission, Chairman Muris recused.

Decision and Order

Confidential Appendix A

[Redacted From Public Record Version]

Decision and Order

Confidential Appendix B

[Purchase agreement]

[Redacted From Public Record Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Nestle Holdings, Inc., of certain voting securities of Respondent Ralston Purina Company and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Nestle Holdings, Inc., is a corporation organized, existing and doing business under and by virtue of the

Order

laws of Delaware, with its office and principal place of business located at 383 Main Avenue, Norwalk, CT 06851. Nestle Holdings, Inc. is a subsidiary of and controlled by Nestle S.A., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestle 55, CH-1800 Vevey, Switzerland.

2. Respondent Ralston Purina Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at Checkerboard Square, St. Louis, Missouri 63164.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER**I.**

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. “Nestle” means Nestle Holdings, Inc., its parent Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Nestle S.A.” means Nestle S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Nestle S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order

- C. “Ralston Purina” means Ralston Purina Company, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Ralston Purina, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger between Nestle and Ralston Purina, dated January 15, 2001, pursuant to which Nestle agreed to acquire certain voting securities of Ralston Purina.
- F. “Acquisition Date” means the date of consummation of the Acquisition.
- G. “Administrative Services” means provision of administrative services, including but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services.
- H. “Alley Cat Product” means the Alley Cat brand of dry cat food products.
- I. “Childs Acquisition Agreement” means the Asset Purchase Agreement (including all related agreements, schedules, exhibits, and appendices) among Nestle Holdings, Inc., Ralston Purina Company and J.W. Childs Equity Partners II, L.P., dated October 17, 2001, as amended.
- J. “Coating Patent” means the U.S. and foreign patents and patent applications identified in Appendix A of this Order to Maintain Assets.
- K. “Consent Agreement” means the Agreement Containing Consent Orders executed by Respondents and the Commission in this matter.

Order

- L. "Cost" means (i) if in connection with Paragraph III.C. of this Order to Maintain Assets: (x) the cost of manufacturing an item, including the actual cost of raw materials (which includes packaging), direct labor, and reasonably allocated factory overhead; and (y) in the case of a Force Majeure Event as defined in Paragraph 19 of the Childs Co-Pack Agreement, reasonable out of pocket costs incurred for actual contracted services, provided that such costs shall not exceed the out of pocket costs incurred in connection with any alternative supply arrangements for Respondents' dry cat food products produced at the facility affected by the Force Majeure Event calculated on a non-discriminatory pro rata basis, and provided further that in making any alternative supply arrangements, Respondents shall not discriminate in any manner against Ralston Acquirer's products or in favor of the dry cat food products retained by Respondents after this Order to Maintain Assets goes into effect; or (ii) if in connection with Paragraphs III.D. and III.E. of this Order to Maintain Assets, the cost of direct material, labor, and out of pocket expenses used to provide the relevant service.
- M. "Decision and Order" means the Decision and Order issued by the Commission in this matter.
- N. "Intellectual Property" means, without limitation, (i) all trade names, registered and unregistered trademarks, service marks and applications, domain names, trade dress, all copyrights, copyright registrations and applications, in both published works and unpublished works, and goodwill associated with each of them; (ii) all patents, patent applications, and inventions and discoveries that may be patentable, and goodwill associated with each of them; and (iii) all know-how, trade secrets, confidential information, software, technical information, data, processes and inventions, formulae, recipes, methods, and product and packaging specifications, and goodwill associated with each of them; provided, however that Intellectual Property shall not include customer lists or supplier lists.

Order

- O. “International Assets” means any right, title, and interest that Respondents’ may have, at the time the International Trademarks are divested, in, to, and under the International Trademarks.
- P. “International Trademarks” means any and all trademarks, service marks, trademark and service mark registrations and pending trademark and service mark registrations that relate exclusively to the Meow Mix Product or Alley Cat Product outside of the United States and Canada.
- Q. “Manufacturing Information” means know-how and procedures used in the manufacture of the Meow Mix Product and the Alley Cat Product in the United States or Canada as of the date the Ralston Assets are divested.
- R. “Meow Mix Marketing Plan” means the F’02 Meow Mix Marketing Plan described in the Ralston Acquisition Agreement.
- S. “Meow Mix Product” means the Meow Mix brand of dry cat food products (which does not include cat treats), including the brand extension Meow Mix Seafood Middles.
- T. “Monitor” means the Monitor appointed pursuant to Paragraph V of this Order to Maintain Assets.
- U. “Non-Public Ralston Acquirer Information” means any propriety information of the Ralston Acquirer relating to the Ralston Assets or the Ralston Business obtained by Respondents in the course of fulfilling the obligations required by Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets.
- V. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

Order

- W. “Ralston Acquirer” means the Person that acquires the Ralston Assets pursuant to this Order to Maintain Assets.
- X. “Ralston Acquisition Agreement” means either the Childs Acquisition Agreement or the acquisition agreement described in Paragraph II.C.2. of the Decision and Order.
- Y. “Ralston Assets” means all of Respondents’ right, title, and interest in and to all assets, tangible or intangible, relating to the operation of the Ralston Business, including, but not limited to:
1. All inventories and supplies held by, or under the control of Respondents;
 2. All Intellectual Property owned by or licensed to Respondents;
 3. Copies of all customer lists and supplier lists;
 4. All rights of Respondents under any contract;
 5. All governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Respondents, to the extent transferable;
 6. All rights of Respondents under any warranty and guarantee, express or implied; and
 7. Copies of all relevant portions of books, records, and files held by, or under the control of, Respondents (subject to Respondents’ rights to maintain attorney client privilege).

Provided, however, that the Ralston Assets shall not include (i) any assets of the kind described in Sections 1.02(b)(i) through (vii), (ix), (x), and (xii) of the Childs Acquisition Agreement, (ii) except for copies or portions thereof reasonably requested by the Ralston Acquirer for the purpose of operating the Ralston Business in a viable and competitive manner, any

Order

assets of the kind described in Section 1.02(b)(xi) of the Childs Acquisition Agreement, (iii) any real property (together with appurtenances, licenses and permits) owned, leased, or otherwise held by Respondents, (iv) any personal property (including rights under any contract) owned, leased, or otherwise held by Respondents that does not relate exclusively to operation of the Ralston Business, and (v) any Intellectual Property that does not relate exclusively to operation of the Ralston Business.

- Z. “Ralston Business” means Respondent Ralston’s business of researching, developing, manufacturing, distributing, marketing, and selling Meow Mix Product and Alley Cat Product, in any market anywhere in the United States and Canada, prior to the Acquisition Date.
- AA. “Respondents” means Nestle and Ralston Purina, individually and collectively.
- BB. “Technical Assistance” means providing (i) expert advice, assistance, and training with respect to the Manufacturing Information, and (ii) access to Manufacturing Information.

II.

IT IS FURTHER ORDERED that:

- A. Between the date Respondents sign the Consent Agreement and the date Respondents divest the Ralston Assets pursuant to Paragraph II.A. of the Decision and Order, Respondents shall maintain the viability, competitiveness, and marketability of the Ralston Assets and Ralston Business:
 - 1. Respondents shall prevent the destruction, wasting, deterioration, disposition, or impairment of any of the Ralston Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

Order

2. Respondents shall use their best efforts to maintain and increase sales in the ordinary course of the Ralston Business, and shall maintain at levels set forth in the Meow Mix Marketing Plan, all advertising and promotion, sales, technical assistance, marketing and merchandising support for the Ralston Business.
 3. Respondents shall use their best efforts to maintain the relations and good will with suppliers, customers, landlords, creditors, agents, and others having business relationships with the Ralston Business.
 4. Respondents shall not, except in the ordinary course of business or as part of a divestiture approved by the Commission pursuant to the Decision and Order, remove, sell, lease, assign, transfer, license, pledge for collateral or otherwise dispose of the Ralston Assets.
 5. Respondents shall not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, or marketability of the Ralston Assets would be diminished or the divestiture of the Ralston Assets would be jeopardized.
- B. Between the date Respondents sign the Consent Agreement and the date that is 180 days after the date the Ralston Assets are divested, Respondents shall not take any affirmative actions to convey to any Person other than the Ralston Acquirer any right, title, or interest that Respondents may have, as of the date the Respondents sign the Consent Agreement, in, to and under the International Trademarks.
- C. The Childs Acquisition Agreement is incorporated by reference and made a part of this Order to Maintain Assets as Confidential Appendix B. Respondents shall comply with all terms of the Childs Acquisition Agreement, and any breach by Respondents of any term of the Childs Acquisition Agreement shall constitute a violation of this Order to Maintain Assets. In the event any term of the Childs Acquisition Agreement

Order

contradicts any other terms of this Order to Maintain Assets, such other terms of this Order to Maintain Assets shall govern Respondents' obligations under this Order to Maintain Assets and the Childs Acquisition Agreement.

- D. The purpose of this Order to Maintain Assets is (i) to preserve the Ralston Assets and the Ralston Business as a viable, competitive, and ongoing business and (ii) to prevent interim harm to competition.

III.

IT IS FURTHER ORDERED that:

- A. No later than the date Respondents divest the Ralston Assets, Respondents shall grant a perpetual, non-exclusive, transferable, fully paid up, license to the Ralston Acquirer to use the Coating Patent (except in Spain, Italy, and Greece) (1) in the development, manufacture, marketing, distribution, or sale of any product manufactured by or for the Ralston Acquirer (or its successor) and sold for its account ("Ralston Acquirer Products"), and (2) in the manufacture by the Ralston Acquirer (or its successor) of any pet food products for any third parties. Neither Respondents nor Ralston Acquirer shall have the right to sublicense or license the Coating Patent except (i) for use in the development, manufacture, marketing, distribution, or sale of products manufactured by or for Respondents (in the case of Respondents) or the Ralston Acquirer Products (in the case of the Ralston Acquirer), and (ii) to the acquirer of any brand divested (whether by license for any period of time or sale) by Respondents if such divestiture relates to product that, at the time of such divestiture, uses the Coating Patent.
- B. Respondents shall use their best efforts (1) to fully identify any registrations of the International Trademarks held by Respondents prior to divesting the International Assets to the Ralston Acquirer, and (2) to assist and cooperate with the

Order

Ralston Acquirer to obtain all governmental approvals, consents, licenses, permits, waivers, or other authorizations described in Paragraph I.Y., which are not transferable from Respondents to the Ralston Acquirer.

- C. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets, Respondents shall provide a supply of Meow Mix Product and Alley Cat Product to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.
- D. Upon the request of the Ralston Acquirer, for a period up to 24 months from the date Respondents divest the Ralston Assets:
 - 1. Respondents shall provide Technical Assistance to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.
 - 2. In connection with the Technical Assistance required by Paragraph III.D.1. of this Order to Maintain Assets, Respondents shall allow the Ralston Acquirer reasonable and timely access to Respondents' manufacturing facilities for the purpose of inspecting manufacturing operations relating to the production of Meow Mix Product and Alley Cat Product.
- E. Upon the request of the Ralston Acquirer, for a period up to 6 months from the date Respondents divest the Ralston Assets, Respondents shall provide Administrative Services to the Ralston Acquirer sufficient to enable the Ralston Acquirer to operate the Ralston Business in a viable and competitive manner.
- F. Respondents shall enter into one or more agreements, subject to Commission approval, with the Ralston Acquirer

Order

incorporating the terms of Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets:

1. Any such agreement shall not require the Ralston Acquirer to pay compensation for the goods and services required by Paragraphs III.C., III.D., and III.E. of this Order to Maintain Assets that exceeds the Cost of providing such goods and services.
2. Any such agreement incorporating the terms of Paragraph III.C. of this Order to Maintain Assets shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement.
3. Any such agreement incorporating the terms of Paragraphs III.D. and III.E. of this Order to Maintain Assets shall not limit the damages (such as indirect and consequential damages) to which Ralston Acquirer would be entitled to receive in the event of Respondents' breach of the agreement to an amount less than the damages that the Ralston Acquirer would recover in a breach of contract action (as opposed to an indemnity claim) based on such breach.
4. Any such agreement shall not allow Respondents to terminate such agreement for a material breach of the agreement by the Ralston Acquirer in the absence of a final order of a court of competent jurisdiction, regardless of whether such order is appealable.

IV.

IT IS FURTHER ORDERED that:

- A. Except in the course of performing their obligations under the Ralston Acquisition Agreement or this Order to Maintain Assets, Respondents shall not provide, disclose or otherwise make available any Non-Public Ralston Acquirer

Order

Information to any Person and shall not use any Non-Public Ralston Acquirer Information for any reason or purpose,

- B. Respondents shall disclose Non-Public Ralston Acquirer Information only to those Persons who require such information for the purposes permitted under Paragraph IV.A. of this Order to Maintain Assets, and only such part of the Non-Public Ralston Acquirer Information that is so required.
- C. Respondents shall enforce the terms of this Paragraph IV as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV, including all actions that Respondents would take to protect their own trade secrets and proprietary information.
- D. The requirements of this Paragraph IV do not apply to that part of the Non-Public Ralston Acquirer Information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

V.

IT IS FURTHER ORDERED that:

- A. Angele Thompson (“Monitor”) is hereby appointed to monitor Respondents’ compliance with Paragraphs II through IV of this Order to Maintain Assets and Paragraphs II and III of the Decision and Order:
- B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

Order

1. The Monitor shall have the power and authority to monitor Respondent's compliance with the terms of this Order to Maintain Assets and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order to Maintain Assets and in a manner consistent with the purposes of this Order to Maintain Assets.
2. Within ten days after it signs the Consent Agreement, Respondent shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of this Order to Maintain Assets in a manner consistent with the purposes of this Order to Maintain Assets. The Monitor shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor.
3. The Monitor's power and duties under this Paragraph V shall terminate three business days after the Monitor has completed his or her final report pursuant to Paragraph V.B.8.(ii), or at such other time as directed by the Commission.
4. The Monitor shall have full and complete access to Respondents' books, records, documents, personnel, facilities and technical information relating to compliance with this Order to Maintain Assets and the Decision and Order, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order to Maintain Assets and the Decision and Order.
5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and

Order

customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or wilful misconduct. For purposes of this Paragraph V.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph V.B.5. of this Order to Maintain Assets.
7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor. The Commission shall select a substitute Monitor subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten days after notice by the staff of the Commission to Respondent (by delivery receipt acknowledged, to Respondents' counsel of record) of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement required by Paragraph V.B.2 of this Order to Maintain Assets within ten days after the Commission appoints a substitute Monitor.

Order

The substitute Monitor shall serve according to the terms and conditions of this Paragraph V.

8. The Monitor shall report in writing to the Commission (i) every thirty days from the date this Order to Maintain Assets becomes final, (ii) no later than thirty days from the date Respondents have completed all obligations required by Paragraphs II and III of this Order to Maintain Assets, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order to Maintain Assets and the Decision and Order.
- C. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets.

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to Maintain Assets to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through IV of this Order to Maintain Assets, no later than ten days after Respondents sign the Consent Agreement.

VII.

IT IS FURTHER ORDERED that:

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the Decision and Order, no later than thirty days from the date this Order to Maintain Assets becomes final and every thirty days thereafter (measured from the due date of the first report) until the obligations required by Paragraphs II through VI of this Order to Maintain Assets have been

Order

completed or the Decision and Order becomes final,
whichever is earlier.

- B. Respondents shall include in their compliance reports a full description of the efforts being made to comply with Paragraph II.A. (or Paragraph II.C., if applicable) of the Decision and Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

VIII.

IT IS FURTHER ORDERED that Respondents and Nestle S.A. shall notify the Commission at least thirty days prior to any proposed change in the corporate Respondents or Nestle S.A. such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Decision and Order and this Order to Maintain Assets.

IX.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with the Decision and Order and this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondents and Nestle S.A. shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the

Order

possession or under the control of Respondents or Nestle S.A. relating to any matter contained in the Decision and Order and this Order to Maintain Assets; and

- B. Upon five days' notice to Respondents or Nestle S.A. and without restraint or interference from them, to interview their officers, directors, or employees, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of three business days from the date (i) the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34, (ii) Respondents complete their obligations required by this Order to Maintain Assets, or (iii) the Decision and Order becomes final.

By the Commission, Chairman Muris not participating.

Order

Confidential Appendix A

[Redacted From Public Record Version]

Order

Confidential Appendix B

[Purchase agreement]

[Redacted From Public Record Version]

Analysis

Analysis of Proposed Consent Order to Aid Public Comment**I. Introduction**

The Federal Trade Commission (“Commission”) has issued a complaint (“Complaint”) alleging that the proposed merger of Nestle Holdings, Inc. (“Nestle”), and Ralston Purina Company (“Ralston”) (collectively “Proposed Respondents”) would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and has entered into an agreement containing consent orders (“Agreement Containing Consent Orders”) pursuant to which Respondents agree to be bound by a proposed consent order that requires divestiture of certain assets (“Proposed Consent Order”) and an order that requires Proposed Respondents to maintain certain assets pending divestiture (“Asset Maintenance Order”). The Proposed Order remedies the likely anticompetitive effects arising from Proposed Respondents’ proposed merger, as alleged in the Complaint. The Asset Maintenance Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Nestle Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. This subsidiary of Nestle S.A. is the U.S. corporation that will be purchasing all of the outstanding Ralston shares. Nestle SA, the largest food corporation in the world, manufactures, distributes, and sells dairy products, soluble coffee, roast and ground coffee, mineral water, beverages, breakfast cereals, coffee creamers, infant foods and dietetic products, culinary products (seasonings, canned foods, pasta, sauces, etc.), frozen foods, ice cream, refrigerated products (*e.g.*, yogurt, desserts, pasta, sauces), chocolate, food services, ophthalmological products, cosmetics, and pet foods. Nestle sells its pet food products in the U.S. through its Friskies division, including Alpo, Come ‘N Get It, Mighty Dog, Friskies, Fancy Feast, Jim Dandy, and Chef’s Blend. Nestle had worldwide sales

Analysis

of approximately 81.4 billion Swiss francs and United States sales of approximately \$7.8 billion for all products in 2000.

Ralston is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Ralston is the world's leading producer of dry dog and dry and soft-moist cat foods. The brands that Ralston manufactures, distributes, and sells include Dog Chow, Puppy Chow, Cat Chow, Kitten Chow, Purina Special Care, Meow Mix, Purina O.N.E., Purina Pro Plan, Fit & Trim, Clinical Nutrition Management, Alley Cat, Deli-Cat, Thrive, Tender Vittles, Happy Cat, Chuck Wagon Stampede, and Main Stay. Ralston had worldwide sales of approximately \$3 billion and United States sales of approximately \$2.36 billion for all products for fiscal year 2000.

Pursuant to a merger agreement dated January 15, 2001, Nestle agreed to purchase all of Ralston's outstanding shares of common stock in a transaction valued at \$ 10.3 billion. Nestle intends to call the merged entity Nestle Purina Pet Care.

III. The Complaint

The complaint alleges that the market in which to analyze the competitive effects of the proposed transaction is the sale of dry cat food in the United States. Wet and dry cat foods constitute separate product markets. Wet cat food differs from dry cat food in production, ingredients, appearance, packaging, aroma, price, and convenience. Ralston's share of the dry cat food market across all channels of distribution is approximately 34%. Nestle has a market share of approximately 11% of the dry cat food market across all channels of distribution. The dry cat food market in the United States is moderately concentrated. The merger of Nestle and Ralston would substantially increase concentration in this market, raising the HHI level to more than 2400, an increase of more than 750 points. Entry would not be timely, likely, or sufficient to prevent anti-competitive effects in the relevant market.

Analysis

The Complaint alleges that the merger of Nestle and Ralston would substantially lessen competition in the dry cat food market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others: (a) by eliminating direct competition in the sale of dry cat food between Nestle and Ralston; and (b) by increasing the likelihood that the combination of Nestle and Ralston will unilaterally exercise market power; each of which increases the likelihood that prices will be higher with the acquisition than they would be absent the acquisition.

The Proposed Consent Order requires Proposed Respondents to divest the Meow Mix and Alley Cat brands of dry cat food to an up-front buyer, J.W. Childs Equity Partners II, L.P. (“Childs”), no later than 20 days after the Commission accepts the Proposed Consent Agreement for public comment or January 31, 2002, whichever is later, to remedy the Commission’s concerns. Childs is a Boston- based investment firm founded in 1995. Structured as a limited partnership, Childs has total committed capital of \$982 million. The Commission is satisfied that Childs’ acquisition of the divested assets will restore the competition lost as a result of the proposed merger of Nestle and Ralston. Childs has a past history of successfully developing the business of consumer products companies. The designated CEO of the businesses that will produce and sell the brands to be divested has expertise in manufacturing dry pet foods. Childs also owns the Hartz Mountain Corporation (“Hartz”), a leading manufacturer and distributor of pet supplies in the United States. Hartz sells its pet supplies and treats in the same retail outlets as the brands to be divested.

Analysis

IV. Terms of the Proposed Order

The Proposed Order resolves the Commission's antitrust concerns with the merger as discussed below.

A. Divestiture Provisions

Paragraph II.A. of the Proposed Order requires Proposed Respondents to divest to Childs all of Proposed Respondents' rights, titles, and interests in and to all assets relating to the Meow Mix and Alley Cat brands. The Meow Mix brand includes the original Meow Mix product and Meow Mix Seafood Middles. Specifically, Proposed Respondents must divest all interests in the research, development, manufacture, distribution, marketing, and sales of the Meow Mix and Alley Cat brands of dry cat food products anywhere in the United States and Canada. Proposed Respondents also must divest any and all trademarks, service marks, trademark and service mark registrations, and pending trademark and service mark registrations that relate exclusively to the Meow Mix or Alley Cat brand of dry cat food products outside of the United States and Canada. Proposed Respondents must further divest all inventories and supplies held by, or under their control; all intellectual property owned by or licensed to Proposed Respondents; copies of all customer lists and supplier lists; all rights of Proposed Respondents under any contract; all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by Proposed Respondents, to the extent transferable; all rights of Proposed Respondents under any warranty and guarantee, express or implied; and copies of all relevant portions of books, records, and files held by, or under the control of, Proposed Respondents.

Paragraph II.C. further provides that if the Commission determines that Childs is not an acceptable purchaser of the assets to be divested, Proposed Respondents shall immediately terminate or rescind the sale of the assets to be divested to Childs and divest these assets at no minimum price to another purchaser that receives the prior approval of the Commission no later than 180 days from the date that this Proposed Order becomes final.

Analysis

Paragraph II.D. of the Proposed Order requires that Proposed Respondents grant a patent license to Childs for the coating applied to Meow Mix products. The license covers current Meow Mix products as well as any pet product Childs chooses to manufacture in the future. Paragraph II.F. of the Proposed Order requires Proposed Respondents to provide Childs with a supply of Meow Mix and Alley Cat products for a period of up to two years from the date of the divestiture. Paragraph II.G. requires Proposed Respondents to provide technical assistance to Childs, as needed, for a period of up to two years from the date of divestiture, which includes expert advice, assistance, and training relating to the manufacture of the Meow Mix and Alley Cat brands.

Paragraph VI of the Proposed Order requires Childs, for a period of 5 years, to obtain the Commission's approval before selling all or substantially all of the United States assets acquired in the divestiture. The Commission does not routinely require acquirers of divested assets to obtain approval before subsequent sales. In cases, however, where the proposed acquirer's current plans indicate that there is a high probability that the assets will be resold, possibly within two-five years, it is appropriate for the Commission to include such a provision. *C.f., e.g.,* the Commission's final order in Albertson's, Inc., Docket No. C-3986.

B. Monitor Trustee Provisions

Paragraph IV of the Proposed Order appoints a Monitor Trustee to monitor compliance with the terms of the Order. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relates to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from

Analysis

taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

C. Other Terms

Paragraphs V and VII - X of the Proposed Consent Order detail certain general provisions. Paragraph V authorizes the Commission appoint a divestiture trustee in the event Nestle fails to divest the assets as required by the Proposed Consent Order. Paragraph VII requires Respondents to provide a copy of the Proposed Consent Order to each of their officers, employees, and agents with managerial responsibilities for any obligation under the Proposed Order. Paragraph VIII requires Proposed Respondents to provide the Commission with periodic reports of compliance with the Proposed Consent Order. Paragraph IX provides for notification to the Commission in the event of any changes in the corporate Proposed Respondents. Paragraph X requires Proposed Respondents to grant access to any authorized Commission representative for the purpose of determining or securing compliance with the Proposed Consent Order. Paragraph XI terminates the Proposed Consent Order after ten years from the date the Proposed Consent Order becomes final.

V. Opportunity for Public Comment

The Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter as well as the Asset Maintenance Order. Comments received during this thirty day comment period will become part of the public record. After thirty days, the Commission will again review the Proposed Consent Order and the comments received

Analysis

and will decide whether it should withdraw from the Proposed Consent Order or make final the agreement's Proposed Consent Order.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Statement

Statement of Commissioner Sheila F. Anthony

The Commission has now issued a final order in this case to resolve complaint allegations that the acquisition would lessen competition in the U.S. dry cat food market. To avert this harm to consumers of dry cat food, the parties agreed to divest Ralston's Meow Mix and Alley Cat brands to J.W. Childs, a private equity investment firm. While I concurred in the Commission's decision to accept this settlement, I write separately to express my concerns about some aspects of the divestiture.

The assets to be divested consist of two proven cat food brands and little else. Standing alone, these brands do not constitute a complete, ongoing business. Rather, J.W. Childs will have to create a new competitor largely from whole cloth. In order to turn the divested assets into a viable business entity, J.W. Childs will need to develop, among other things, its own research and development program, manufacturing facilities, distribution system, and sales and marketing operations. Such a prospect is daunting even when the purchaser is a participant in the same or a closely related business – which is why divestitures of stand-alone businesses present the most successful formula for restoring competition.¹

The risk to consumers is further heightened where, as here, the proposed purchaser is a financial buyer. When compared to dedicated industry participants, investment firms may have quite different incentives and goals in operating a business. For example, a financial buyer's business plan often involves selling the acquired business within a relatively short period of time.

In the end, I am convinced that this is a rather unique situation and that consumers will be adequately protected by the relief set forth in the Commission's order. Manufacturing and distribution

¹ See, e.g., Federal Trade Commission Bureau of Competition Staff, *A Study of the Commission's Divestiture Process* (1999).

Statement

in this industry segment is routinely and economically contracted out through “co-packing” arrangements. Moreover, this particular financial buyer, J.W. Childs, is financially strong, has a proven track record of good management and growth of acquired firms, and has some experience in the pet industry with its Hartz Mountain line of pet care products. These factors led me to conclude that J.W. Childs is very likely to restore lost competition and preserve choices for dry cat food consumers.

I wish to make it clear, however, that I remain skeptical of divestiture plans that require a purchaser to take brands alone, then build a competitive company from scratch. In addition, I will closely examine divestiture proposals where the buyer is a financial company. In most cases, I would prefer to see divested assets go to a company with a stronger likelihood of operating the business for the long term.

Statement

**Concurring Statement of
Commissioner Mozelle W. Thompson**

The Commission has voted to grant final approval to a Consent Order that remedies competitive concerns in the dry cat food market stemming from Nestle S.A.'s ("Nestle") proposed acquisition of Ralston Purina Co. ("Ralston"). Pursuant to the Consent Agreement and Order, Ralston would divest its top-selling Meow Mix brand and its Alley Cat brand to investment firm J.W. Childs Equity Partners II, L.P. ("Childs"), owners of the Hartz Mountain line of specialty pet care products. For me, this decision was difficult because the continued competitiveness of these brands is so important to consumers.

As always, the key issue facing the Commission in its analysis of a proposed remedy is whether or not the remedy will restore competition that would be lost as a result of the proposed merger. This is at its essence a factual inquiry, involving consideration of a multitude of factors, including the extent of the prospective buyer's industry know-how, its financial viability, its future marketing plans, and its capacity to research, develop, and make innovations to the relevant products.

Our analysis here was made all the more difficult in that we were presented with a buyer that does not have a record of experience in the market in question, therefore, historical indicia of market competitiveness were not available for the Commission's review. As such, the Commission undertook an extraordinarily rigorous analysis of Childs and its ability to be competitive with the assets in question. Ultimately, my primary reservation was not about Childs' ability to be competitive in the dry cat food marketplace, but rather that Childs, as a financial buyer, might in the near term re-sell the assets in question to a buyer who will operate the business poorly or not at all, thus defeating the purpose of the Commission's Order.

These concerns are addressed in Section VI of the Order, which provides that Childs will not sell the acquired assets within five years of the date of the Order without prior approval of the

Statement

Commission. While generally I am cautious about including lengthy oversight provisions in such orders, it is appropriate in this case because these provisions ensure that in the event of a resale by Childs, the Commission will be able to assure that the prospective buyer is committed to enhancing the assets in question, thus maintaining the integrity of the Commission's Order.

Statement

Concurring Statement of Commissioner Orson Swindle

The Commission has issued a final order to resolve complaint allegations that Nestle S.A.'s ("Nestle") acquisition of Ralston Purina Co. ("Ralston") may substantially lessen competition in the market for the sale of dry cat food in the United States. To remedy these competitive concerns, Ralston has agreed to divest its Meow Mix and Alley Cat brands to J.W. Childs Equity Partners II, L.P. ("J.W. Childs"), an investment firm that owns the Hartz line of pet care products. Because the divestiture to J.W. Childs is likely to replace the competition in the market for dry cat food that otherwise would have been lost due to the Nestle/Ralston merger, I have voted to issue the final order.

One provision in the final order is unusual and may raise concerns. Paragraph VI requires J.W. Childs, for a period of five years, to obtain Commission approval before selling all or substantially all of the assets acquired in the divestiture. The Analysis to Aid Public Comment explained that the Commission does not routinely impose such prior approval requirements but that it is appropriate to do so "where the proposed acquirer's current plans indicate that there is a high probability that the assets will be resold, possibly within two-five years." The purpose of the prior approval requirement is to make certain that whoever buys the resold assets from J.W. Childs would be a sufficient competitor to remedy the lessening of competition from the Nestle/Ralston transaction alleged in the complaint. *See* Paragraph VI.F. of the Order.

I agree that J.W. Childs warranted a hard look as a prospective buyer because it might resell the divested assets in the near future. It is possible that this close scrutiny would go for naught if J.W. Childs were promptly to resell the assets to a less qualified buyer. On the other hand, this risk is always present -- even had the assets remained in Ralston's hands. I think that our approval of J.W. Childs as the buyer means that we have determined that, in spite of any possible resale plans, the company will develop and employ the assets as vigorously as Ralston would have done. Once we have made this determination, I question the need for

Statement

imposing a prior approval requirement on J.W. Childs that we would not have imposed on a buyer that was less likely to resell the assets.

I also think that the prior approval requirement may require the Commission to make a difficult determination. For example, assume that J.W. Childs seeks prior approval to resell the assets four years after the Nestle/Ralston merger was consummated. The Commission presumably will have to determine whether the prospective buyer of the resold assets will compete as effectively as Ralston would have competed in the absence of the Nestle/Ralston merger. Given the passage of four years since the merger and the dynamic nature of markets, it may be difficult for the Commission to make this determination with a high degree of confidence.

Complaint

IN THE MATTER OF

TRU-VANTAGE INTERNATIONAL, L.L.C.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-4034; File No. 0023210

Complaint, February 5, 2002--Decision, February 5, 2002

This consent order addresses advertising and promotional practices used by Respondent Tru-Vantage International, L.L.C., an infomercial producer, in connection with the sale of Snorenz, a dietary supplement consisting of oils and vitamins that is sprayed on the back of the throat of persons who snore. The order, among other things, requires the respondent to possess competent and reliable scientific evidence to substantiate representations that Snorenz – or any other food, drug, or dietary supplement – reduces or eliminates snoring or the sound of snoring, or eliminates, reduces or mitigates the symptoms of sleep apnea. The order also requires the respondent – whenever it represents that certain products are effective in reducing or eliminating snoring or the sounds of snoring – to affirmatively disclose a warning statement about sleep apnea and the need for physician consultation. In addition, the order requires the respondent to possess and rely upon adequate substantiation to support any representation about the benefits, performance, efficacy, or safety of Snorenz or any other product, service or program. The order also prohibits the respondent from making false claims about scientific support for any product, service, or program. In addition, the order requires the respondent – if it uses any consumer endorsement or testimonial to promote a product, service or program – either to possess competent and reliable scientific evidence that the testimonial represents the typical or ordinary experience of users, or to affirmatively disclose that the testimonial is not typical. The order also requires the respondent to affirmatively disclose any material connection between itself and any endorser, or between an endorser and the marketer.

Participants

For the Commission: *Lemuel W. Dowdy, Walter C. Gross,
James Reilly Dolan, Elaine D. Kolish, and Randi M. Boorstein..*

For the Respondent: *David J. Bradford and Theresa A.
Chmara, Jenner & Block, and Craig B. Sherman, Sherman Law
Offices.*