

**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 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.

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.

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.

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 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 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.