

Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice, and this Agreement shall thereafter be of no further force and effect. If this Agreement is so terminated, the Commission may take such action as it deems appropriate, including, but not limited to, an action pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). Termination of this Agreement shall in no way operate to terminate the Consent Order that Nestlé has entered into in this matter.

7. This Agreement shall not be binding until approved by the Commission.

#### **Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission has accepted for public comment from Nestlé Food Company ("Nestlé"), an agreement containing a consent order to divest certain assets. The agreement is designed to remedy any anticompetitive effect stemming from Nestlé's acquisition of most of the assets of Allen Products Company, Inc., d/b/a ALPO PetFoods, and its subsidiaries ("Alpo"), a wholly-owned subsidiary of Grand Metropolitan Incorporated ("Grand Metropolitan"). Nestlé is an indirect subsidiary of and controlled by Nestlé S.A.

The agreement has been placed on the public record for 60 days for reception of comments from interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and comments received, and will decide whether it should withdraw from the agreement or make final the order contained in the agreement.

The Commission's draft complaint charges that on or about September 16, 1994, Nestlé and its parent Nestlé S.A. agreed to acquire certain assets of Alpo, a wholly-owned subsidiary of Grand Metropolitan, for \$510 million. The Commission has reason to believe that the acquisition, as well as the agreement to enter into the acquisition, may have anticompetitive effects and be in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

According to the draft complaint, Nestlé and Alpo are direct competitors in the United States market for the manufacture and production of canned cat food. According to the draft complaint, the market is highly concentrated and entry is difficult or unlikely. Nestlé acquisition of Alpo may reduce competition in the United States canned cat food market by eliminating

the direct competition between Nestlé and Alpo, by increasing the likelihood that Nestlé will become a dominant firm, and by increasing the likelihood of collusive behavior among the few remaining significant competitors. Consequently, the acquisition may lead to higher prices for purchasers of canned cat food.

The agreement containing consent order attempts to remedy the Commission's competitive concerns about the acquisition. Under the terms of the proposed order, Nestlé must divest its canned cat food manufacturing facility located in Fort Dodge, Iowa, within twelve months, to a purchaser approved by the Commission. The assets to be divested included: (1) All rights to the real property, buildings, machinery, fixtures, equipment, furniture, tools, supplies and spare parts; (2) all warranties and technical information concerning the equipment; and (3) at the option of the purchaser, all supply contracts that Nestlé has the absolute right to assign. A separate asset maintenance agreement requires the respondent to maintain the assets that are to be divested in a marketable and viable condition pending divestiture.

If Nestlé fails to complete the divestiture within the twelve months, the Commission may appoint a trustee to divest the facility. In addition, at the option of the purchaser, the trustee is empowered to grant the purchaser a non-exclusive license to use any and all of Alpo's wholly-owned private label formulations for the manufacture of canned cat food. The license may extend up to five years.

For ten years, the agreement containing consent order also requires Nestlé to obtain Commission approval before acquiring either stock in another company engaged in, or assets used in, the manufacture or production of canned cat food in the United States.

By accepting the 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 and facilitate public comment concerning the consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or in any way to modify their terms.

**Donald S. Clark,**  
*Secretary.*

[FR Doc. 95-2307 Filed 1-30-95; 8:45 am]

BILLING CODE 6750-01-M

[File No. 932 3343]

#### **Ninzu, Inc., et al.; Proposed Consent Agreement With Analysis To Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, the Maryland-based marketers to possess and rely upon competent and reliable scientific substantiating evidence to support any performance, benefits, efficacy, or safety claims they make for any weight loss or weight control product or program or any acupressure device they market in the future.

**DATES:** Comments must be received on or before April 3, 1995.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Brian Dahl, FTC/S-4002, Washington, DC 20580. (202) 326-3182.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

#### **United States of America Before Federal Trade Commission**

In the matter of Ninzu, Inc., Davish Merchandising, Inc., Order By Phone, Inc., corporations, and Michael B. Metzger, individually and as an officer and director of said corporations, File No. 932 3343.

#### **Agreement containing Consent Order to Cease and Desist**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/

b/a Auricle Clip, Inc., corporations; and Michael B. Metzger, individually and as an officer and director of said corporations, hereinafter sometimes referred to as proposed respondents, and it now is appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It Is Hereby Agreed by and between Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., by their duly authorized officer; and Michael B. Metzger, individually and as an officer and director of said corporations, and counsel for the Federal Trade Commission that:

1. Proposed respondent Ninzu, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Proposed respondent Davish Merchandising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Proposed respondent Order By Phone, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Proposed respondent Michael B. Metzger is an officer and director of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations. He resides at 12135 Heneson Garth, Owings Mills, Maryland.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint.

3. Proposed respondents waive:  
(a) Any further procedural steps;  
(b) The requirement that the

Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the

Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. The agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of complaint.

6. The agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

## Order

For the purposes of this Order:

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by personal qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. "Acupressure device" shall mean any product, program, or service that is intended to function by means of the principles of acupressure.

## I

It Is Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Ninzu, Auricle Clip, B-Trim or any other acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that

A. Such product causes significant weight loss;

B. Such product causes significant weight loss without the need to diet or exercise;

C. Such product controls appetite, eliminates a person's craving for food, or causes weight loss without the user feeling hungry; or

D. Such product is scientifically proven to cause significant weight loss and control appetite.

## II

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection

with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy, or safety of such product, program, or device unless such representation is true and unless, at the time of making such representation, respondent possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### III

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 C.F.R. § 255.0(b) of the product, program, or device represents the typical of ordinary experience of members of the public who use the product, program, or device unless this is the case.

### IV

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

### V

It Is Further Ordered that for five (5) years after the last date of dissemination of any representation covered by this Order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

### VI

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc. shall:

A. Within thirty (30) days after service of this Order, provide a copy of this Order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order; and

B. For a period of five (5) years from the date of issuance of this Order, provide a copy of this Order to each of respondents' future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

### VII

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order by Phone, Inc. d/b/a Auricle Clip, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, including but not limited to dissolution, assignment, or

sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this Order.

### VIII

It Is Further Ordered that respondent, Michael B. Metzger, shall, for a period of five (5) years from the date of issuance of this Order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

### IX

It Is Further Ordered that respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order by Phone, Inc. d/b/a Auricle Clip, Inc., corporations, and Michael B. Metzger, individually and as an officer and director of said corporations, shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

### Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from proposed respondents Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc. d/b/a Auricle Clip, Inc., and Michael B. Metzger.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns advertising related to the sale of an acupuncture device, marketed under the names Ninzu, Auricle Clip, and B-Trim, which

clips onto the ear. The Commission's Complaint charges that proposed respondents Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc. d/b/a Auricle Clip, Inc., and Michael B. Metzger falsely represented that: (1) The Ninzu, the Auricle Clip, and the B-Trim cause significant weight loss; (2) the Ninzu causes significant weight loss without the need to diet or exercise; (3) the Auricle Clip causes significant weight loss without the need to diet; (4) the Ninzu controls appetite and eliminates a person's craving for food; (5) the Auricle Clip controls appetite; and (6) the B-Trim reduces the user's craving for food and causes weight loss without the user feeling hungry.

The Complaint also alleges that proposed respondents falsely and misleadingly represented that they possessed and relied upon a reasonable basis when they made those claims. The Complaint further alleges that proposed respondents falsely represented that the Ninzu and Auricle Clip are scientifically proven to cause significant weight loss and control appetite. Finally, the Complaint alleges that proposed respondents falsely represented that testimonials from consumers appearing in advertisements for the Ninzu reflect the typical or ordinary experience of members of the public who have used the Ninzu.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent the proposed respondents from engaging in similar acts in the future.

Part I of the proposed order prohibits proposed respondents from representing that the Ninzu, Auricle Clip, B-Trim, or any other acupressure device: (1) Causes significant weight loss; (2) causes significant weight loss without the need to diet or exercise; (3) controls appetite, eliminates a person's craving for food, or causes weight loss without the user feeling hungry; or (4) is scientifically proven to cause significant weight loss and control appetite. The order defines "acupressure device" as "any product, program, or service that is intended to function by means of the principles of acupressure." Part II requires proposed respondents to possess competent and reliable scientific evidence before making representations regarding the performance, benefits, efficacy, or safety of any weight-loss or weight-control product or program or any acupressure device. Part III prohibits proposed respondents from falsely claiming that endorsements or testimonials for any weight-loss or weight-control product or program or any acupressure device

represent the typical or ordinary experience of members of the public who use the product, program, or device. Part IV prohibits proposed respondents from misrepresenting the results of tests or studies for any weight-loss or weight-control product or program or any acupressure device.

Part V requires proposed respondents to maintain, for five (5) years, all materials that support, contradict, qualify, or call into question any representations they make which are covered by the proposed order. Part VI requires proposed respondents Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., and Order By Phone, Inc. d/b/a Auricle Clip, Inc. to distribute a copy of the order to current and future principals, officers, directors, and managers, as well as to any employees having sales, advertising, or policy responsibility with respect to the subject matter of the order. Under Part VII of the proposed order, proposed respondents Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., and Order By Phone, Inc. d/b/a Auricle Clip, Inc. shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures that may affect compliance with the order's obligations. Part VIII requires that proposed respondent Metzger, for a period of five (5) years, notify the Commission of any change in his business or employment. Part IX obliges proposed respondents to file compliance reports with the Commission.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 95-2308 Filed 1-30-95; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Announcement 522]

#### State and Community-Based Childhood Lead Poisoning Prevention Program and Surveillance of Elevated Blood Lead Levels in Children, Notice of Availability of Funds for Fiscal Year 1995

##### Introduction

The Centers for Disease Control and Prevention (CDC) announces the availability of funds in fiscal year (FY) 1995 for new and competing continuation State and community-based childhood lead poisoning prevention programs, and to build statewide capacity to conduct surveillance of elevated blood lead levels in children.

State and community-based programs must (1) assure that children in communities with demonstrated high-risk for lead poisoning are screened, (2) identify those children with elevated blood lead levels, (3) identify possible sources of lead exposure, (4) monitor medical and environmental management of lead poisoned children, (5) provide information on childhood lead poisoning and its prevention and management to the public, health professionals, and policy- and decision-makers, (6) encourage and support community-based programs directed to the goal of eliminating childhood lead poisoning, and (7) build capacity for conducting surveillance of elevated blood lead (PbB) levels in children.

Surveillance grants are to develop and implement complete surveillance systems for blood lead levels in children to ensure appropriate targeting of interventions and track progress in the elimination of childhood lead poisoning.

Applicants may apply for either a prevention program grant or a surveillance grant. Applicants applying for prevention grant funds must address surveillance issues in their application.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to the priority area of Environmental Health. (To order a copy of Healthy People 2000, see the section **WHERE TO OBTAIN ADDITIONAL INFORMATION.**)