

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

_____)
In the matter of)
)
Nestle Holdings, Inc.,) Docket No. C- 4028
a corporation, and)
)
Ralston Purina Company,)
a corporation.)
_____)

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 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.
- 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, representa-

tives, 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.
- 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.
- 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.
- 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 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.
 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 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 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 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 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:
 - 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 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. 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:

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

- E. 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:

- F. 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 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
- G. 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.

Benjamin I. Berman
Acting Secretary

SEAL

ISSUED: December 10, 2001

ATTACHMENTS:

Separate Statement of Commissioner Anthony
Concurring Statement of Commissioner Thompson
Concurring Statement of Commissioner Swindle

Confidential Appendix A

[Redacted From Public Record Version]

Confidential Appendix B

[Purchase Agreement]

[Redacted From Public Record Version]