of Endorsements and Testimonials in Advertising'' 16 C.F.R. 255.2 (a). Under the proposed order, Formu-3 may satisfy the requirements of the first disclosure concerning generally expected success by accurately disclosing those facts in the following format: ''Form-You-3 Weight Loss Centers clients lose an average of ______ pounds over an average ______ - week treatment period.''

Finally, the proposed order (Part I.L.) generally prohibits Formu-3 from misrepresenting the performance or efficacy of any weight loss program.

Rate of Weight Loss

The Commission's complaint further alleges that Formu-3 failed to possess a reasonable basis for claims it made concerning the rate of weight loss for participants in its program and that the rate of weight loss claims it made were false.

The proposed consent order addresses these practices (Part I.F.) by prohibiting Formu-3 from representing that participants in its program will lose weight at an average or typical rate or speed unless Formu-3 possesses and relies upon competent and reliable scientific evidence substantiating the representation.

Projection of Weight Loss

The Commission's complaint also alleges that Formu-3 failed to possess a reasonable basis for its claim, made during initial sales presentations, that consumers will typically reach their desired weight-loss goals within the time frame computed by Formu-3 personnel.

To address this practice, the proposed order (Part I.G.) prohibits Formu-3 from representing that prospective participants will reach a specified weight within a specified period of time, unless proposed respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

Price

The Commission's complaint against Forum-3 also alleges that Formu-3 failed to disclose adequately to consumers the total price of the diet program.

The proposed consent order seeks to address the practice in two ways. First, Part I.I. of the proposed order prohibits Formu-3 from advertising a daily, weekly or monthly price for its program unless it also discloses: (1) the number of days, weeks or months participants will be required to pay the advertised price; or (2) the total cost of the weight loss program. Second, Part I.L. of the order prohibits Formu-3 from misrepresenting the price of the program in any way.

Monitoring Practices

According to the complaint, Formu-3 provides its customers with diet protocols that require customers to come in to one of proposed respondents' centers three times per week for monitoring of their progress, including weighing-in. In the course of regularly ascertaining weight loss progress, respondents, in some instances, are presented with weight loss results indicating that customers are losing weight significantly in excess of their projected goals, which is an indication that they may not be consuming all of the food prescribed by their diet protocol. According to the complaint, such conduct could, if not corrected promptly, result in health complications. In light of this monitoring practice, the Commission's complaint alleges that Formu-3 has failed to disclose to consumers who are losing weight significantly in excess of their projected goals that failing to follow the diet protocol and consume all of the food prescribed could result in health complications.

The proposed consent order seeks to address the alleged monitoring misrepresentation cited in the accompanying complaint in two ways. First, the order (Part I.H.) requires Formu-3 to disclose in writing to all participants when they enter the program, that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications. Second, the proposed order (Part I.L.) generally prohibits any misrepresentation concerning the safety of any weight loss program.

Certified Counselors

The Commission's complaint also charges that Formu-3 falsely claimed counselors employed in its diet centers are certified by an objective evaluation process in the treatment of obesity.

The order seeks to address this practice by prohibiting Formu-3 from misrepresenting the competence, training or expertise of any of its employees or employees of its franchisees. (Part I.J.)

Benefits of Food Products

The complaint alleges that Formu-3 misrepresented the benefits to dieters of the food products it sells. To remedy this practice, the order (Part I.K.) prohibits respondents from misrepresenting the existence or amount of calories, fat or any other nutrient or ingredient in any food product, or the benefits of any such product.

Parts II. and III. of the order allow respondents to make claims about food products and drugs that are specifically permitted in labeling by regulations of the Food and Drug Administration or the Department of Agriculture pursuant to statutes administered by those agencies.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended 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. 95–2306 Filed 1–30–95; 8:45 am]

BILLING CODE 6750–01–M

[File No. 941 0124]

Nestle Food Company; 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 allow, among other things, Nestle, a California-based manufacturer, to complete its planned acquisition of Alpo PetFoods, but would require that it divest the Fort Dodge, Iowa, manufacturing plant within twelve months. The consent agreement also would require Nestle to obtain prior Commission approval of the divestiture and if not completed on time, would permit the Commission to appoint a trustee to complete the transaction. In addition, the consent agreement would require Nestle, for ten years, to obtain Commission approval before acquiring stock in any entity engaged in, or assets used for, manufacturing canned cat food in the United States.

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: Ronald Rowe or Stephen Riddell, FTC/S–2105, Washington, DC 20580. (202) 326–2610 or 326–2721.

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)).

In the matter of Nestle Food Company, a corporation, File No. 941–0124.

Agreement Containing Consent Order

The Federal Trade Commission (''Commission''), having initiated and investigation of the proposed acquisition by Nestlé Food Company (''Nestlé''), a direct wholly-owned subsidiary of Nestlé Holdings, Inc., a wholly-owned subsidiary of Nestlé S.A., of certain 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''), and it now appearing Nestlé, hereinafter referred to as proposed respondent, and Nestlé S.A. are willing to enter into an Agreement Containing Consent Order (''Agreement'') to divest certain assets, to cease and desist from making certain acquisitions, and providing for other relief:

It Is Hereby Agreed By And Between Nestlé and Nestlé S.A. by their duly authorized officers and attorneys, and counsel for the Commission that:

1. Proposed respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 800 North Brand Boulevard, Glendale, California 91203.

2. Nestlé S.A. is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, Ch-1800 Vevey, Switzerland.

3. Nestlé and Nestlé S.A. admit all the jurisdictional facts set forth in the draft of Complaint.

4. Nestlé and Nestlé S.A. 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;

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

(d) Any claim under the Equal Access to Justice Act.

5. 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 with respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Agreement and so notify the proposed respondent, 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.

6. This Agreement is for settlement purposes only and does not constitute an admission by Nestlé or Nestlé S.A. that the law has been violated as alleged in the draft of Complaint, or that the facts as alleged in the draft Complaint, other than jurisdictional facts, are true.

7. This 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 Section 2.34 of the Commission's Rules, the Commission may, without further notice to Nestlé S.A., (1) issue its Complaint corresponding in form and substance to the draft of Complaint and its Decision containing the following Order to divest and to cease and desist in disposition of the proceeding, and (2) make information public with respect thereto. When so entered, the Order 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 United States Postal Service of the Complaint and decision containing the agreed-to Order to Nestlé's address as stated in this Agreement shall constitute service. Nestlé waives any right it may 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 the Agreement may be used to vary or contradict the terms of the Order.

8. Nestlé and Nestlé S.A. have read the proposed Complaint and Order contemplated hereby. Nestlé understands that once the Order has been issued, it will be required to file one or more compliance reports showing that they have fully complied with the Order. Nestlé and Nestlé S.A. 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

I.

As used in this Order, the following definitions shall apply:

A. ''Respondent'' or ''Nestlé'' means Nestlé Food Company, its parent Nestlé S.A., predecessors, subsidiaries, divisions, and affiliates and groups controlled by Nestlé Food Company, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. ''Nestlé S.A.'' means Nestlé S.A., its predecessors, subsidiaries, divisions, and affiliates and groups controlled by Nestlé S.A., their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. ''Alpo'' means Allen Products Company, Inc., its predecessors, subsidiaries, divisions, and affiliates and groups controlled by Allen Products Company, Inc., their directors, officers, employees, agents, and representatives, and their successors and assigns.

D. ''Acquisition'' means the acquisition by Nestlé from Alpo of certain assets of Alpo, as described in an Asset Purchase Agreement dated September 16, 1994.

E. ''Commission'' means the Federal Trade Commission.

F. The ''assets to be divested'' or ''Fort Dodge Plant'' means the following assets used in the manufacture of canned pet food, which assets are located at 2400 5th Avenue South, Fort Dodge, Iowa 50501:

a. All buildings, machinery, fixtures, equipment, vehicles, storage facilities, furniture, tools, supplies, spare parts and other tangible personal property;

b. All rights, title and interest in and to real property, together with appurtenances, licenses, and permits;

c. All rights under warranties and guarantees for equipment, express or implied;

d. All on site quality control equipment, including all supplies and technical information and drawings concerning the equipment; and

e. At the option of the Acquirer, to the extent such can be assigned to the Acquirer without third party consent, all rights, title, and interests in and to the contracts entered into in the ordinary course of business with suppliers, personal property lessors and licensors, pertaining solely to the operation of the Fort Dodge Plant.

Provided, however, that excluded from the assets to be divested are: (i) Meat chunk sizer equipment that is proprietary to Nestlé and/or Nestlé S.A., and (ii) all inventory of finished goods, work in progress, raw materials and supplies used only in the production of finished goods.

G. ''Fort Dodge Plant Employees'' means all Nestlé employees based at the Fort Dodge Plant location as of the date of divestiture.

H. ''Optional Assets'' means any or all of Alpo's recipes for private label canned pet food that may be licensed without the consent of any third party and that were in existence as of September 16, 1994.

II

It Is Further Ordered that:

A. Nestlé shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Fort Dodge Plant.

B. Nestlé shall divest the Fort Dodge Plant only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Fort Dodge Plant is to ensure the continued use of the Fort Dodge Plant in the manufacture and production of canned cat food and to remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the Fort Dodge Plant, Nestlé shall take such actions as are reasonably necessary to maintain the viability and marketability of the assets to be divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any assets that are subject to divestiture pursuant to this Order except for ordinary wear and tear.

D. Nestlé shall comply with all the terms of the Asset Maintenance Agreement attached to this Order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as Nestlé has divested all of the assets to be divested.

E. Nestlé shall facilitate and not interfere with the Acquirer's hiring of any Fort Dodge Plant Employees as may desire to undertake such employment.

III

It Is Further Ordered that:

A. If Nestlé has not divested, absolutely and in good faith and with the Commission's prior approval, the Fort Dodge Plant within twelve (12) months of the date this Order becomes final, the Commission may appoint a trustee to divest the assets to be divested. The trustee shall also have the authority, with the prior approval of the Commission, to license the Optional Assets on a non-exclusive basis to the Acquirer for a period not to exceed five (5) years from the date of the divestiture of the Fort Dodge Plant. In the event the Commission or the Attorney General brings an action pursuant to section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, Nestlé shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court-appointed trustee, pursuant to section 5(*1*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Nestlé or Nestlé S.A. to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Nestlé shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Nestlé, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisition and divestitures of manufacturing facilities. If Nestlé has not opposed, in writing, the selection of any proposed trustee within ten (10) days after its receipt of notice by the staff of the Commission to Nestlé of the identity of any proposed trustee, Nestlé shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Fort Dodge Plant and have the authority to grant to the Acquirer a non-exclusive license of Optional Assets, as described in Paragraph III.A.; for a period not to exceed five (5) years from the date of the divestiture of the Fort Dodge Plant, to facilitate the divestiture.

3. Within ten (10) days after appointment of the trustee, Nestlé shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers reasonably necessary to permit the trustee to effect the divestiture required by this Order, and, if appropriate, the license of Optional Assets.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.(3) 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 trustee has submitted a plan of divestiture or believes that the divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or by the court in the case of a court-appointed trustee; provided, however, the Commission may only extend the divestiture period two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records (to the extent not prohibited by law) and facilities related to the Fort Dodge Plant, the Optional Assets, or to any other relevant information, as the trustee may request. Nestlé shall develop such financial or other information as such trustee may request and shall cooperate with any request of the trustee. Nestlé and Nestlé S.A. shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the Fort Dodge Plant or the license of the Optional Assets. Any delays in divestiture caused by Nestlé or Nestlé S.A. shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or by the court for a court-appointed trustee.

6. The 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, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in Paragraph II of this order; provided, however, if the 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 trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Nestlé, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Nestlé, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary, and at reasonable fees, to carry out the trustee's

duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Nestlé, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the Fort Dodge Plant.

8. Nestlé shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee'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 liabilities, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

11. The trustee shall have no obligation or authority to operate or maintain the Fort Dodge Plant.

12. The trustee shall report in writing to Nestlé and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IV

It Is Further Ordered that, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Nestlé has fully complied with the provisions of Paragraph II or III of this order, Nestlé shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Nestlé shall include in its compliance reports, among other things that are required from time to time, a full description of all efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identities of all parties contacted. Nestlé also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

V

It Is Further Ordered that, for a period of ten (10) years from the date this Order becomes final, Nestlé and Nestlé S.A. shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in manufacturing or producing canned cat food in the United States; or

2. acquire any assets which are located in the United States and which are used, or previously used (and still suitable for use) in the manufacture or production of canned cat food from any other manufacturer or producer of canned cat food in the United States.

Provided, however, that this Paragraph V. shall not apply to the acquisition of products or services in the ordinary course of business.

It is Further Ordered that, one year from the date this Order becomes final, annually for nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Nestlé shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with Paragraph V. this Order.

VII

It Is Further Ordered that, for the purpose of determining or securing compliance with this Order and subject to any legally recognized privilege or restriction, Nestlé and Nestlé S.A. shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and designate for copying all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Nestlé relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Nestlé or Nestlé S.A., and without restraint or interference from them, to interview their officers or employees, who may have counsel present, regarding such matters.

VIII

It Is Further Ordered that, Nestlé and Nestlé S.A. shall notify the Commission at least thirty (30) days prior to any proposed change in Nestlé or Nestlé S.A. such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of domestic subsidiaries or any other change that may affect compliance obligations arising out of this Order.

Appendix I—United States of America Before The Federal Trade Commission

In the matter of Nestle Food Company, a corporation, File No. 941–0124.

Asset Maintenance Agreement

This Asset Maintenance Agreement (''Agreement'') is by and between Nestlé Food Company (''Nestlé''), a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal executive offices located at 800 North Brand Boulevard, Glendale, California 91203, and the Federal Trade Commission (''Commission''), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. § 41, et seq. (collectively, the ''Parties'').

Premises

Whereas, on September 16, 1994, Nestlé entered into an Agreement to acquire certain assets (hereinafter ''Acquisition'') from Allen Products Company, Inc., d/b/a ALPO PetFoods and its subsidiaries (''Alpo''); and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order (''Consent Order''), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the Fort Dodge Plant, as defined in Paragraph I.F. of the Consent Order, and the Optional Assets, as defined in Paragraph I.H. of the Consent Order, during the period prior to the Commission's issuance of its Decision and Order (after the 60-day comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be a less than effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Fort Dodge Plant and, if appropriate, the license of the Optional Assets and to preserve the Commission's right to seek to have the Fort Dodge Plant continue as a viable concern; and

Whereas, the purpose of this Agreement is to:

A. Preserve the Fort Dodge Plant as a viable, ongoing concern engaged in canned cat food manufacture in which it is presently engaged until divestiture is achieved; and

B. Maintain and make certain improvements to the Fort Dodge Plant to ensure it can be effectively divested as a viable independent facility engaged in the manufacture and production of canned cat food; and

C. Preserve the Optional Assets pending the divestiture of the Fort Dodge Plant or, if required under the Consent Order, the license of the Optional Assets; and

D. Preserve a remedy for any anticompetitive effects of the Acquisition; and

Whereas, Nestlé's entering into this Agreement shall in no way be construed as an admission by Nestlé that the Acquisition is illegal or anticompetitive; and

Whereas, Nestlé understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, Therefore, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from Nestlé with respect to the Acquisition (except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event that the divestiture required in Paragraph II of the Consent Order is not accomplished, to appoint a trustee to seek divestiture of the Fort Dodge Plant and, if required, the license of the Optional Assets), the Parties agree as follows:

1. Nestlé agrees to execute and be bound by the Consent Order. Nestlé and the Commission further agree that each term defined in the Consent Order shall have the same meaning in this Agreement.

2. Nestlé agrees that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 2.a. and 2.b., it will comply with the provisions of Paragraph 3. of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules; or

b. The time that the divestiture required by the Consent Order is completed.

3. Nestlé shall maintain and preserve the viability and marketability of the Fort Dodge Plant and the Optional Assets on the following terms and conditions:

a. Nestlé shall continue to provide the Fort Dodge Plant with such support services as provided by Nestlé prior to the Acquisition.

b. Nestlé shall take all necessary steps to ensure that the Fort Dodge Plant is staffed with sufficient employees to maintain the viability and marketability of the Fort Dodge Plant.

c. Nestlé shall take all necessary steps to maintain the production capability of the Fort Dodge Plant in a condition at least equal to that existing as of the date of this Agreement (''Current Condition''). Nestlé shall continue to make all expenditures necessary to maintain the Fort Dodge Plant in its Current Condition. Nestlé shall maintain the Fort Dodge Plant in accordance with Nestlé usual standards of plant maintenance.

d. Nestlé shall complete all capital improvements in the Fort Dodge Plant that were initiated prior to the date of this Agreement.

e. Nestlé shall take all necessary steps to ensure that the Fort Dodge Plant is furnished with all the equipment, machine parts and other assets necessary to produce canned pet food in can sizes in the range of: (1) Five (5) to six (6) ounces; and (ii) thirteen (13) to fourteen (14) ounces; and that such equipment, machine parts and other assets are in good working order.

f. Nestlé shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets or property of the Fort Dodge Plant, except that Nestlé may sell or otherwise dispose of manufactured products in the ordinary course of business, and may replace and sell or dispose of assets or property in the course of fulfilling its maintenance and capital improvements obligations set forth above, and may sell the assets or property of the Fort Dodge Plant pursuant to Paragraph II of the Consent Order.

g. Nestlé shall refrain from mortgaging or pledging the assets of the Fort Dodge Plant or the Optional Assets pursuant to any loan transaction.

h. Nestlé shall maintain hazard insurance on the Fort Dodge Plant in the same manner as prior to this Agreement to provide for the facility's replacement.

i. Nestlé shall maintain separate cost books and records for the Fort Dodge Plant, and, upon request, shall make some available to the Commission. All such books, records and statements shall be kept in a manner consistent with Nestlé standard accounting practices. Nestlé shall provide the Commission with copies of all agreements entered into by Nestlé with third parties relating to any of the Optional Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel Nestlé to divest itself of the Fort Dodge Plant or to license any Optional Assets, or to seek any other injunctive or equitable relief, Nestlé shall not raise any objection based on the expiration of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the fact that the Commission has permitted the Acquisition. Nestlé also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Nestlé made to its principal office, Nestlé shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Nestlé and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Nestlé relating to compliance with this Agreement;

b. Upon five (5) days' notice to Nestlé and without restraint or interference from it, to interview officers or employees of Nestlé, who may have counsel present, regarding any such matters.

6. In the event the Commission has not finally issued the Consent Order within one hundred twenty (120) days of its publication in the **Federal Register**, Nestlé may, at its option, terminate this Agreement by delivering written notice of termination to the

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.

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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/