

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

In the Matter of)
)
)
NOVARTIS AG) **Docket C-4498**
)
a corporation;)

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed joint venture between Respondent Novartis AG (“Novartis” or “Respondent”) and GlaxoSmithKline PLC (“GSK”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent and GSK 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent 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 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, CH 4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.
2. GSK is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, with its headquarters address located at 980 Great West Road, Brentford Middlesex TW8 9GS, England.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Novartis” or “Respondent” means: Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG (including, without limitation, Novartis Consumer Health, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “GSK” means: GlaxoSmithKline plc, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by GlaxoSmithKline plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the:
 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

- E. “Habitrol Business” means the Business of Respondent within the Geographic Territory specified in the Decision and Order related to Habitrol to the extent that such Business is owned, controlled, or managed by Respondent and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondent.
- F. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order
- G. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

- A. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Habitrol Business, to minimize any risk of loss of competitive potential for such Habitrol Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Habitrol Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the Habitrol Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Habitrol Business.
- B. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall maintain the operations of the Habitrol Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such Business) and/or as may be necessary to preserve the full economic marketability, viability, and competitiveness of the Habitrol Business and shall use its best efforts to preserve the existing relationships with the following: manufacturers; suppliers; vendors and distributors; High Volume Accounts; end-use customers; Agencies; employees; and others having business relations with the Habitrol Business. Respondent’s responsibilities shall include, but are not limited to, the following:
 - 1. providing the Habitrol Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Habitrol Business;

2. continuing, at least at their scheduled pace, any additional expenditures the Habitrol Business authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
3. providing such resources as may be necessary to respond to competition against Habitrol and/or to prevent any diminution in sales of Habitrol during and after the Acquisition process and prior to the complete transfer and delivery of the related Habitrol Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of Habitrol at the High Volume Accounts;
5. making available for use by the Habitrol Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such Business;
6. providing such support services to the Habitrol Business as were being provided to such Business by Respondent as of the date the Consent Agreement was signed by Respondent;
7. developing and implementing a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of Habitrol by the Acquirer is not delayed or impaired by the Respondent for the purposes of ensuring an orderly marketing and distribution transition to the Acquirer;
8. designating employees of Respondent knowledgeable about the marketing, distribution and sale related to Habitrol who will be responsible for communicating directly with the Acquirer, and the Interim Monitor (if one has been appointed), for the purposes of assisting in the transfer of Habitrol;
9. maintaining and managing inventory levels of Habitrol in consideration of the marketing and distribution transition to the Acquirer;
10. continuing to market, distribute and sell Habitrol until such time as agreed upon with the Acquirer for the Acquirer to assume these functions, including, continuing, at their scheduled pace, any meetings with customers of the Habitrol Business (such as, meetings to review planograms or displays, discuss marketing strategies, product promotions or product purchases);
11. allowing the Acquirer to access at reasonable business hours to all Confidential Business Information related to Habitrol and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related

to Habitrol that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;

12. providing the Acquirer with a listing of inventory levels (week of supply) for each customer (*i.e.*, retailer, group purchasing organization, wholesaler or distributor) in a timely manner;
13. providing the Acquirer with anticipated reorder dates for each customer in a timely manner; and
14. establishing projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.

C. Until Respondent fully transfers and delivers the Habitrol Assets to an Acquirer, Respondent shall maintain a work force that is (i) at least as large (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with Habitrol for the last fiscal year.

D. Pending divestiture of the Habitrol Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to the Acquirer under the terms of any related Remedial Agreement; or
 - c. applicable Law;
2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);
3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information to the employees associated with the Business related to the GSK Smoking Cessation Products; and

4. institute procedures and requirements to ensure that the above-described employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- E. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.
- F. Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondent shall provide a copy of the notification to the relevant Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.
- G. Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.
- H. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Habitrol Business within the Geographic Territory through its full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Habitrol Business within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Habitrol Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously comply with all of the obligations and perform all of the responsibilities as required by the Orders and the Remedial Agreements.

- B. The Commission shall select the Interim 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 a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Interim Monitor shall serve until the date of completion by the Respondent of the divestiture of all Habitrol Assets in a manner that fully satisfies the requirements of the Orders;

provided, however, that, the Interim Monitor's service shall not exceed five (5) years from the Order Date unless the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

- F. The Interim 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 Interim 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 Interim Monitor's duties and responsibilities.
- G. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations 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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondent shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by each Acquirer with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.
- I. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondent has fully complied with this Order to Maintain Assets and the Paragraphs that are enumerated in Paragraph VII.B. of the related Decision and Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondent shall submit at the same time a copy of its report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by the Respondent to the Acquirer; and
- B. a detailed description of the timing for the completion of such obligations.

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VII of the Decision and Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of the Respondent;
- B. any proposed acquisition, merger or consolidation of the Respondent; or
- C. any other change in the Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

- A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the divestiture of all of the Habitrol Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: November 26, 2014